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Making Article 102 TFEU Future-Proof – The Way Ahead

**Comments on the European Commission's 2024 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"**

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On the authors

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Summary of our position

The European Commission's enforcement of Article 102 TFEU faces challenges due to the imbroglia of the effects-based approach and a rapidly evolving business environment. Guidelines for enforcement must ensure to make enforcement meaningful and manageable without giving up legal certainty and a sound economic basis. The Guidelines need to be consistent with the evolving jurisprudence. Yet, the Commission should also move beyond a pure alignment to set the frame for a future-proof enforcement.

We welcome many of the aspects of the Draft Guidelines. In particular, we welcome that the Commission relies on the concept of competition on the merits and that it establishes certain presumptions. We see the Draft as sufficiently flexible to incorporate future developments, but also as sufficiently predictable for practice.

Based on this, we propose a few refinements:

- In restating the goals of Article 102 TFEU, more emphasis should be placed on the role of consumers as independent market actors ("consumer citizens"), innovation and sustainability.
- The concept of competition on the merits should be distinguished as the first step in the assessment of an abuse from the capability of a conduct to produce exclusionary effects as a second step. Competition on the merits should be embraced as a normative, value-oriented concept.
- The categories and levels of presumptions should be clarified, welcoming a more open system in the form of a scale.
- More guidance should be given on digital cases where the application of Article 102 TFEU will remain important and should be extended. Guidance should in particular take account of ecosystems and AI.
- The guidance should also include exploitative abuse, not least with regard to sustainability.
- Greater European coherence should be fostered by improved access to national developments.

I. General position and criteria

We welcome that the Draft reflects a stronger desire for reform concerning the effects-based approach. This finding relates especially to the cascade system of evidentiary burden for the capability of a conduct to produce exclusionary effects (section 3.3). The Commission distances itself to a certain extent from the effects-based analysis (in the second and third category). This will create less uncertainties stemming from lengthy disputes over economic opinions. Enforcement may become more manageable and efficient due to an underlying cost-benefit-analysis of proceedings. The new approach has the potential to shorten the duration of proceedings (which is essential) and still preserve a sufficient level of predictability.

Moreover, we support the adoption of a two-step analysis of an abuse by assessing firstly whether that conduct departs from competition on the merits (section 3.2) and secondly whether it is capable to produce exclusionary effects (section 3.3). This endorses the approach by the jurisprudence that has become particularly clear in the last years (e.g. in *SEN*¹). The use of the concept of competition on the merits as a first step of the analysis (finally) provides an overarching standard for assessing conduct under Article 102 TFEU.²

According to our institutional understanding of the role of the Commission we submit that the Guidelines may go beyond summarising the jurisprudence of the Court of Justice. Some alignment with the Court's jurisprudence is necessary to assure the uniform application of the law and to respect the monopoly of interpretation (Article 19 TEU, Article 267 TFEU). Yet, it can be derived from Article 4(3) TEU and Article 17(1) TEU that the Commission, in the context of monitoring primary law, has the task of explaining decisions of the CJEU and their effects.³ An explanation can go beyond the limited scope of the decision which directly only effects the parties concerned. It is the Commission's task to draw conclusions from specific cases that can be applied as general rules.⁴ Especially in competition policy, the Commission does not limit itself to the neutral reproduction and explanation of court decisions.⁵ We therefore encourage the Commission to be bolder in determining policy and interpreting Article 102 TFEU. The Court's recent statements on Article 102 TFEU in cases such as *SEN* invite a bold restatement of the law by the Commission.

¹ ECJ, Case C-377/20, ECLI:EU:C:2022:379, para 61 – *SEN*.

² *Rohner*, Leitlinien zu Art. 102 AEUV – Das Schicksal des more economic approach, *Wirtschaft und Wettbewerb* 2023, 527, 529.

³ *Akman*, The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?, *The Modern Law Review* 2010, 605, 625.

⁴ *Rohner*, Art. 102 AEUV und die Rolle der Ökonomie, 2023, pp. 272 ff.

⁵ Cf. *Hofmann*, Negotiated and non-negotiated administrative rule-making: The example of EC competition policy, *Common Market Law Review* 2006, 153, 162 ff.

For our submission, we have three specific criteria that we see as important, partly as “lessons learned” from the enforcement experiences after the 2009 enforcement priorities: We expect that the Guidelines contribute to curbing the excesses of power, integrate a cost-benefit analysis for proceedings and are resilient vis-à-vis future developments.

Curb excesses of power: Article 102 TFEU is a key provision for European law. It reflects a rich theoretical history going back to *Adam Smith*, according to which market power poses risks for the efficient allocation of scarce resources, but also for society as a whole. From this, the European Court of Justice has derived a “special responsibility” of dominant companies.⁶ The concentration of power is currently under renewed scrutiny in public, and the independence of market actors seems more restrained than before. The cumbersome enforcement of Article 102 TFEU in the past years may have led to a weakening of competition, “history’s greatest and most ingenious instrument of disempowerment” (as *Franz Böhm* once put it)⁷. The transformative challenges for businesses, such as digitalisation and sustainability, can only be met with (not without) strong competition.

Cost-benefit analysis: Cases must be manageable. The resources put into cases must come to a positive end, otherwise costs and benefits of enforcement are out of balance. The long duration and the modest outcome of cases in the past show the need for reform. We welcome the Commission’s efforts to ease the burden on both enforcers and parties. While it is necessary to show some effects, tests must always be seen in the cost-benefit-framework. Where the cost of proving effects becomes too high – making a reasonable outcome nearly impossible – the tests are flawed. Tests and evidence must contribute properly on substance. We welcome that the Commission uses appropriate categories, reduces the burden of proof and relies on more normative concepts such as “competition on the merits” without completely losing touch with economics.

Resilience: The guidelines must be adaptable to new, unprecedented challenges in a rapidly changing environment, particularly in the digital sector. In other words, they must be resilient and flexible enough for new, unprecedented problems. New business models might emerge that have new economic patterns or unprecedented consequences – as we learned the hard way in the digital sphere. New developments may come from new priorities (e.g. regarding sustainability), new insights from research (e.g. new economic theories) or innovation (e.g. involving AI). We therefore welcome flexible standards to accommodate future developments in business models as well as in normative or economic developments.

⁶ ECJ, Case C-307/18, ECLI:EU:C:2020:52, para 153 – *Generics (UK) and Others* (with further references).

⁷ *Böhm* in: Institut für ausländisches und internationales Wirtschaftsrecht (ed.), *Kartelle und Monopole im modernen Recht*, 1961, pp. 1, 22.

II. Specific recommendations

1. The goals of Article 102 TFEU

We welcome that the Commission embraces a broader notion of the goals of Article 102 TFEU and does not stick to a narrow consumer welfare approach (paras 1 and 5). We encourage the Commission to put greater emphasis on these goals and draw consequences from their inclusion in the guidelines. The role of competition for innovation, for empowering consumers and also for the sustainability agenda seems particularly noteworthy.

Firstly, regarding consumer welfare, we welcome that the Commission in its 2024 Draft Guidelines has mostly abandoned the use of the too narrow understanding of “consumer welfare”.⁸ The consumer welfare standard does not present a workable standard or criterion for effective enforcement. This has been demonstrated in the case law, where the consumer welfare standard, despite being mentioned several times in the 2008 Guidance (paras 18, 30, 86), has not been consistently applied or examined and has lost its importance.⁹ Rather than a (narrow) consumer-welfare test, recent jurisprudence has highlighted that Article 102 is more about: the “maintenance of the degree of competition existing in the market or the growth of that competition” (*SEN*, para 44; *Meta*, para 47; *European Superleague*, para 131) and preventing “practices that may harm consumers by undermining an effective structure of competition” (*TeliaSonera*, para 24; *SEN*, para 44) and (ultimately) “competition on the merits” (e.g. *SEN*, para 45) – all of which ultimately protect the *well-being* of the consumer (e.g. *SEN*, para 46)¹⁰ or enable her to exercise her rights as an independent market actor.

The Commission still refers to consumer welfare in para 5 – with the wording “welfare of consumers” as the protected value of the prohibition of abuse of a dominant position.¹¹ For the sake of consistency, this use of the term “welfare of consumers” should be abandoned.

Instead of treating consumers as passive recipients of goods and services, consumers should be seen – and for this sake explicitly called and treated – as independent market actors and citizens (“consumer citizens”).¹² The principle of autonomy – protected by Article 38 of the

⁸ See already *Podszun/Rohner*, Making Article 102 TFEU Future-Proof – Learnings from the Past, 2023, pp. 7 f.

⁹ See for an analysis of the case law *Podszun/Rohner*, Making Article 102 TFEU Future-Proof – Learnings from the Past, 2023, pp. 6 ff.; *Rohner*, Leitlinien zu Art. 102 AEUV – Das Schicksal des more economic approach, *Wirtschaft und Wettbewerb* 2023, 527, 528; *Rohner*, Art. 102 AEUV und die Rolle der Ökonomie, 2023, pp. 70, 102 f.

¹⁰ See *Podszun/Rohner*, Making Article 102 TFEU Future-Proof – Learnings from the Past, 2023, pp. 7 f.

¹¹ “Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers, including practices that may harm consumers by undermining an effective structure of competition” (para 5).

¹² *Kirk*, Consumer Autonomy and the Charter of Fundamental Rights, *Journal of European Consumer and Market Law* 2024, 170 ff.

Charter of Fundamental Rights, translating also into economic law and recognised with regard to the field of competition law in cases such as *Suiker Unie* (1975)¹³ – applies to all market actors and consequently includes consumers.¹⁴ A better terminology would therefore be “consumer well-being” as a broader term that is also reflected in the jurisprudence (e.g. *SEN*, para 46) or “consumer citizens”, according to which the players on the market – including consumers – have choice, have the power to take decisions and determine their economic fate themselves as independent market actors.¹⁵

Proposed change

We propose to change the text of para 1 to the following:

*The Union rules on competition pursue the protection of genuine, undistorted competition (“effective competition”) in the internal market. They ensure that markets remain open and dynamic. Open markets create new opportunities for market entry of innovative players including small and medium-sized enterprises (“SMEs”) and start-ups to operate on a level playing field with other players. Dynamic markets spur **intra**-market innovation and ensure an efficient allocation of resources. Open and dynamic markets **thus grant market actors economic independence**, driving them to deliver the best products in terms of choice, quality, at the lowest prices for consumers, while contributing to sustainable development and enabling strong and diversified supply chains, all of which contributes to the Union’s resilience and long-term prosperity.*

Secondly, innovation – as highlighted in the *Draghi* report (“closing the innovation gap with the US and China”, pp. 2, 19 ff.) – is needed in the EU. Article 102 TFEU can play a crucial role in effectively protecting and fostering an environment that is pro-innovative. We encourage the Commission to give innovation a central place in the Guidelines and not tie it to a narrow understanding of consumer welfare. Opening markets through Article 102 TFEU by shattering the power of dominant companies is important for newcomers and innovators. Issues such as the blocking of disruptive innovation, the exclusion of potential technical progress, the lack of innovativeness due to entrenched market power, or the refusal to open markets need to be in focus.

Innovation analysis requires a dynamic analytic framework: Whereas “classic” consumer welfare parameters like price, quality, quantity and variety of goods and services allow for a

¹³ ECJ, Case 40/73, ECLI:EU:C:1975:174, paras 173 f. – *Suiker Unie*; for further references cf. *Podszun*, Digital Ecosystems, Decision-Making, Competition and Consumers – On the Value of Autonomy for Competition, 2019, SSRN: <https://ssrn.com/abstract=3420692>, p. 22.

¹⁴ *Kirk*, Consumer Autonomy and the Charter of Fundamental Rights, *Journal of European Consumer and Market Law*, 2024, 170, 171.

¹⁵ Cf. *Drexler*, Wirtschaftliche Selbstbestimmung des Verbrauchers, 1998, passim; *Podszun*, Der Verbraucher als Marktakteur: Kartellrecht und Datenschutz in der “Facebook”-Entscheidung des BGH, *Gewerblicher Rechtsschutz und Urheberrecht* 2020, 1268, 1273.

static economic analysis of markets, innovation differs by its procedural nature and inherent element of uncertainty.¹⁶ It therefore cannot be subject to the same analysis, but requires a dynamic approach that focuses on market structure and the distribution of innovation resources, such as R&D investments¹⁷, strategic goods, intellectual property rights, knowledge resources as well as access to data and capabilities for data analytics¹⁸, establishing the preconditions for dynamic markets as intended in para 1.

Because of the disruptive potential of radical innovation, dominant companies have an incentive to suppress market dynamism that threatens their position.¹⁹ Hence, Article 102 TFEU is pivotal for its protection, which should be reflected in the Guidelines. While the CJEU, limited to the cases brought to it and the arguments presented by the parties, is yet to formulate a coherent and complete theory of innovation, especially regarding disruptive innovation²⁰, we encourage the Commission to put forward its own understanding of innovation, providing guidance for future cases.

Proposed change

We propose to change the text of para 5 to the following:

*Pursuant to the Union Courts' case law, Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm **price, choice or quality of the product or service to the detriment of consumers or innovation**, including practices that may harm consumers by undermining an effective structure of competition.*

Thirdly, sustainability is included in the objectives listed in para 1. This is consistent with the United Nation's Sustainable Development Goals, the European Green Deal and the growing awareness that business actors are key to achieving sustainability goals. It is legitimate, as horizontal clauses in the Treaty, fundamental rights from the Charter and other legislation make it difficult to argue that competition can only pursue seemingly 'pure' economic objectives.²¹ However, this should also lead to more concrete measures in terms of priorities, case assessment and legal tests.

One example could be the inclusion of environmental law in para 55, where a dominant undertaking's violation of other areas of law can be seen as a factor indicating that the

¹⁶ Andree, Innovationswettbewerb in der Fusionskontrolle, 2023, pp. 40 ff.

¹⁷ GC, Case T-168/01, ECLI:EU:T:2006:265, para 275 – *GlaxoSmithKline Services v Commission*; Schrepel, A systematic content analysis of innovation in European competition law, European Journal of Law and Economics 2024, 17.

¹⁸ See Kerber in: Gerard/De Rivery/Meyring, Dynamic Markets, Dynamic Competition and Dynamic Enforcement, 2018, pp. 50 ff.

¹⁹ Cf. Shapiro in: Lerner/Stern, The Rate and Direction of Inventive Activity Revisited, 2012, p. 366.

²⁰ Schrepel, A systematic content analysis of innovation in European competition law, European Journal of Law and Economics 2024, 26, 28.

²¹ Cf. Podszun, Das Leitbild des wertgebundenen Wettbewerbs, Wirtschaft und Wettbewerb 2024, 507.

undertaking is not competing on the merits. This is within the scope of the Guidelines, as the Commission would show the implications of the Court's decision in *Meta Platforms and Others* when applied not only to data protection law.

Proposed change

We propose to integrate sustainability better throughout the Guidelines. Just as an example for this approach, the text of para 55 lit. c could be changed to the following:

Para 55 lit. c): *whether the dominant undertaking violates rules in other areas of law (for instance **among others**, data protection law or **environmental law**) and thereby affects a relevant parameter of competition, such as price, choice, quality or innovation;*

2. Competition on the merits

We welcome the Commission's approach in the Draft Guidelines (paras 47 and 49 to 58) as an opportunity to include the concept of competition on the merits as a manageable principle for the assessment of conduct under Article 102 TFEU. Competition on the merits as an open concept is a crucial element in making enforcement more resilient and able to encompass new challenges. The use of competition on the merits as part of a two-step test reflects the jurisprudence (paras 14, 45; for jurisprudence see e.g. *SEN*).

The Draft Guidelines correctly state that it is the performance of the companies that matters, and the indicators of that performance can include, among other things, price, choice, quality or innovation (para 51). It also correctly identifies the criteria drawn from case law that are relevant for the assessment, such as restricting consumer choice and breaching rules in other areas of law (e.g., data protection law) (para 55). We also welcome the proposal of a flexible scale (para 46).

However, we believe that the Commission should elaborate further on the general principles of competition on the merits (paras 49 to 55).

It is reflected in the Union's case law that competition on the merits is not about the effects of a conduct, but about the performance of an undertaking (see e.g. in *Michelin I*).²² This implies two underlying features: Firstly, the same conduct with the same effects, e.g. lower prices that lead to the exit of competitors from the market, can be legal or illegal, depending on whether the use of means by the undertaking, i.e. its performance, is considered to be legitimate.²³ Secondly, a pre-definition of the results of competition is not compatible with the idea of

²² ECJ, Case C-322/81, ECLI:EU:C:1983:313, para. 70 – *Michelin I*.

²³ Cf. as one of the first cases the German case *Benrather Tankstelle*, RGZ 134, 342 f.; *Nipperdey*, Wettbewerb und Existenzvernichtung, 1930, pp. 3 ff., 16, 20.

competition.²⁴ Free competition means that the market (or the customer) decides what is the best performance.²⁵ This argues against a pre-emptive, one-sided commitment to a certain type of effects, e.g. low prices. These two aspects prompt an assessment of legitimacy on this first stage of assessing conduct – it is an assessment separated from the analysis of effects and it requires a value judgment.²⁶ Value judgments are typical for laws, and in particular for general clauses. It would be unusual to tie the interpretation of a rule such as Article 102 TFEU to a (allegedly neutral) economic assessment.

At a closer look, Union's case law gives hints and guidance to this assessment: The dominant position (see e.g. *Unilever*)²⁷, the protection of own commercial interests (see e.g. *Generics (UK) and Others*)²⁸, such as through treating one's own products or services more favourably than those of its competitors (*Google Shopping*),²⁹ and a causal departure of competitors from the market (*Post Danmark* and *Intel*)³⁰, i.e. exclusionary effects, are not unlawful as such (see e.g. *Google Shopping*)³¹. But behaviour based on this becomes unlawful, when the behaviour is not based on competition on the merits (*AstraZeneca*, *Post Danmark I* and *Intel*).³²

The improvement of competitive parameters (such as price, quality or choice) can be an indicator whether conduct is competition on the merits or not.³³ In the Guidelines, the Commission should move further and establish a scheme for the assessment. A scheme that we consider adequate, would be "a sliding scale". According to a set of indicators (or "factors" as put in the Draft Guidelines) it is possible to judge how close a conduct comes to the economic notion of competition on the merits. This in turn should have an influence on the extent of the effects analysis.

Further indicators can help making this test more workable and predictable. However, it is inherent in any generalised legal test that it remains to some extent inconclusive and leaves a degree of uncertainty. This is not entirely satisfactory, but Article 102 has always been a provision for complicated and novel cases. It is not a provision for the mass of transactions.

²⁴ Cf. *Sosnitza* in: Münchener Kommentar zum Lauterkeitsrecht, 2020, I., para 20.

²⁵ *Osterrieth/Schönig* in: Fezer/Büscher/Obergfell, Lauterkeitsrecht: UWG, 2016, para 112; *Vanberg*, Privatrechtsgesellschaft und ökonomische Theorie, 2007, pp. 14, 15.

²⁶ Cf. *Drewes/Rohner*, Competition on the merits – A new role for an old concept for Article 102 TFEU (forthcoming).

²⁷ ECJ, Case C-680/20, ECLI:EU:C:2023:33, para 3 – *Unilever*.

²⁸ ECJ, Case C-307/18, ECLI:EU:C:2020:52, paras 87, 90, 149, 152 – *Generics (UK) and Others*.

²⁹ GC, Case T-612/17, ECLI:EU:T:2021:763, para 186 – *Google Shopping*.

³⁰ ECJ, Case C-209/10, ECLI:EU:C:2012:172, para 22 – *Post Danmark I*; GC, Case T-286/09, ECLI:EU:T:2014:547, para 133 – *Intel v Commission*.

³¹ ECJ, Case C-48/22 P, ECLI:EU:C:2024:726, para 164 – *Google Shopping*; GC, Case T-612/17, ECLI:EU:T:2021:763, paras 157, 195 f. – *Google Shopping*.

³² ECJ, Case C-457/10 P, ECLI:EU:C:2012:770, para 75 – *AstraZeneca v Commission*; Case C-209/10, ECLI:EU:C:2012:172, paras 21, 22, 25 – *Post Danmark I*; Case T-286/09, ECLI:EU:T:2014:547, paras 134, 136 – *Intel v Commission*.

³³ ECJ, Case C-377/20, ECLI:EU:C:2022:379, para 85 – *SEN*.

The Guidelines can help to provide starting points for this assessment. The two-step test works this way: Firstly, conduct is placed – with the help of indicators – on the scale of conduct that is completely in line with competition on the merits and completely non-meritorious (naked restriction). This determines presumptions and the level of evidentiary burdens. Secondly, economic effects are used to take the final assessment. The Commission could particularly give more guidance on the indicators.

In some instances, the Draft Guidelines seem to conflate the two steps of the two-step test when it is proposed to use certain legal tests to assess whether a practice is or is not competition on the merits (para 47). In these cases where a specialised test is in place or proposed to evaluate the conduct, there is no mention of competition on the merits.

This can be seen with the example of refusal to supply (paras 96 et seq.): The conditions of the special test for refusal to supply are:

“a) the input is indispensable for the undertaking requesting access to compete with the dominant undertaking in a downstream market; and 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” (para 99).

This, however, implies an effects analysis in both prongs of the test (a and b). There is no mentioning of a competition on the merits-test.

Proposed change

We propose to include a new para 53 with the following text:

Competition on the merits involves a value judgment based on several factors that can be derived from the case law. The value judgment has to be made on a case-by-case basis. This only determines how close or how far removed a certain behaviour is from the economic ideal of competition on the merits. This in turn may influence whether a more detailed or a more cursory effects analysis needs to be carried out.

To guide the value judgment more emphasis could be placed on spelling out indicators.

We propose to leave out references to specific legal tests, when dealing with competition on the merits to separate the effects analysis from the analysis of competition on merits (e.g. in paras 47, 53 and 56).

We also suggest deleting the word “normal” from the definition of competition on the merits (para 51). Normality is not a yardstick for competition.

3. Balancing form and effects

The Draft Guidelines introduce three different categories that differ in terms of the standard of proof and the necessity of an effects analysis (paras 59 et seqq.). Conduct falling into the second and third category no longer requires the same level of effects analysis as conduct in the first category. This shift increases legal certainty while also addressing manageability, resource efficiency and effective enforcement.

An over-reliance on the effects-based approach – whilst avoiding type 1 errors (false positives) – has proven to be inefficient due to too long procedures that led to underenforcement (danger of false negatives) and created legal uncertainty.³⁴ A too formalistic approach on the other hand risks over-inclusion of market practices (false positives).

Enforcement operates in between those two extremes. In the last years, it had moved too close to the effects-based approach and to the associated drawbacks. Now, the 2024 Draft Guidelines and the set of three categories strike a better balance between the two extremes of the scale. Yet, this system could be even more flexible to account for the differing risk of type 1 and type 2 errors and enforcements costs.

Placing conduct into specific categories may be too formalistic. It tends to rely on a typology of cases that is now possibly outdated. We would welcome a more open system in the form of a scale. Conduct where there is no economic interest could be placed at the bottom end of the scale (as a naked restriction – no proof of capability to have negative effects necessary) while conduct that is a pure exercise of competition on the merits is on the high end of the scale (no finding of abuse). To accurately position conduct on this scale, the factors mentioned in para 70, and other lists of factors must be systematically analysed and assessed. Also, the risks of under- or over-enforcement could be assessed and help to place the conduct on this scale. The lower the risk of false positives, the lower the conduct can be placed on the scale. The further down the scale, the less evidence has to be adduced by the competition agency for the capability to produce negative effects if it wants to intervene. The higher up the scale, the more evidence is needed if the agency still thinks the conduct is abusive. This system

³⁴ See on the analysis of the case law *Podszun/Rohner*, Making Article 102 TFEU Future-Proof – Learnings from the Past, 2023, pp. 9 ff.; *Rohner*, Leitlinien zu Art. 102 AEUV – Das Schicksal des more economic approach, *Wirtschaft und Wettbewerb* 2023, 527, 530; *Budzinski* in: *Drexl/Kerber/Podszun*, Competition policy and the economic approach, 2011, pp. 111, 122 f.

could be implemented via a set of presumptions³⁵, flexible standards of proof³⁶ and a cost-benefit-analysis before looking at evidence.

Proposed change

We propose to change the text of para 60 to the following:

*In particular, the following categories of conduct can be identified. **These are not conclusive. Instead, they represent different points on a sliding scale of varying degree of competition on the merits and therefore potential of abuse.***

Furthermore, we propose to incorporate into the Guidelines the following:

Before opening a case and throughout the process of case handling, the Commission undertakes cost-benefit analyses, including the risk of over- and under-enforcement and too long duration of proceedings.

4. Digital markets and digital regulation

We suggest adding a chapter to the Guidelines on the enforcement of Article 102 TFEU in digital markets and the relationship with the Digital Markets Act (DMA).

Article 102 TFEU and the DMA

The 2024 Draft Guidelines include surprisingly few references to digital markets and their specific challenges. Despite the creation of a new, specific regulatory framework for digital markets, especially with the DMA that was meant to address deficits of antitrust enforcement,³⁷ the application of Article 102 TFEU remains very relevant. The Commission has acknowledged this in the revised Market Definition Notice in which it provides specific guidance on characteristics of digital markets such as multi-sided platforms and digital ecosystems.³⁸ Not addressing the digital sphere more prominently creates a vacuum and risks the impression that Article 102 TFEU will not continue to play an important role in competition law enforcement against dominant digital undertakings.

In our view, abuse cases involving digital giants will likely continue to play a crucial role.³⁹ Article 102 TFEU procedures will have beneficial effects on the application of the DMA, as

³⁵ Schweitzer/De Ridder, How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses, *Journal of European Competition Law & Practice* 2024, 222, 236.

³⁶ Rohner, Art. 102 AEUV und die Rolle der Ökonomie, 2023, pp. 308 ff.

³⁷ Commission Staff Working Document, Impact Assessment Report, Annex 5.6., 15.12.2020.

³⁸ Commission Notice on the definition of the relevant market for the purpose of Union competition law (C/2024/1645), sections 4.4 and 4.5.

³⁹ See on the relationship between Article 102 TFEU and DMA and relevance of Article 102 TFEU-procedure *de Streel/Crémer/Heidhues/Dinielli/Kimmelman/Monti/Podszun/Schnitzer/Scott Morton*, *Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust*, 2022.

procedures can be an essential tool for gap-cases and might even act as an “incubator” or signal for amendments that should be made to the DMA.

Characteristics of digital markets and abuse cases

The 2024 Draft Guidelines mention characteristics of digital markets only in a few instances (see e.g., paras 30, 31 (barriers to entry), para 70 (conditions on the relevant market), para 94 (tying and bundling)). In a stand-alone chapter on digital cases, the Commission could set out a framework for this particularly relevant and difficult task. The framework should set out the characteristics of exclusion in the digital sphere. It should include specific notes on abusive conduct that is amplified by network effects, data access or ecosystem connections. Examples of exclusion include denying or degrading interoperability, self-preferencing, refusal to grant access to data or infrastructure, tying and bundling practices or the cross-subsidization across ecosystems.⁴⁰

In many instances, digital gatekeepers have gained rule-setting power.⁴¹ Their economic strength allows them to define the economic playing field, set the rules, enforce the rules and increase dependency of users. This questions the very basic ideas of competition on the merits, namely a competition “on the basis of the transactions of commercial operators”, i.e. trading partners meeting at eye level.⁴² The Commission should make it clear in the Guidelines that this is a massive restriction of the independence of market actors who no longer participate freely in competition.

Ecosystems

We also encourage the Commission to provide specific guidance on the significance of the ecosystems. Ecosystems, connecting markets, present a specific challenge for traditional ideas of dominance in narrowly defined markets. Digital ecosystems have investigated in a

⁴⁰ Cf. *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, Gutachten für den Deutschen Juristentag 2020/2022, pp. F77 ff.

⁴¹ Cf. *Schweitzer*, Digitale Plattformen als private Gesetzgeber: Ein Perspektivwechsel für die europäische “Plattform-Regulierung”, Zeitschrift für Europäisches Privatrecht 2019, 1.

⁴² *Fumagalli* and *Motta* have argued: “If a dominant firm is protected by network effects, scale economies, switching costs or the like, this is not a situation where there exists competition on the merits, but this does not imply that there is an abuse. (...) To sum up, we do not find an economic underpinning of the concept of ‘competition on the merits.’” (Note on the Enforcement of Art. 102 TFEU, available at https://competition-policy.ec.europa.eu/system/files/2023-12/eagcp_plenary_20231026_session1-3_fumagalli_motta_note_on_102.pdf). Both sentences may be correct. The point is that competition on the merits is not an economic concept. Legal rules such as Article 102 TFEU are not the embodiment of pure economics. Economics come in at the second stage of effects analysis.

number of competition law cases, in particular in the area of Merger Control.⁴³ However, a proper definition for digital ecosystems is notoriously absent.⁴⁴

To this extent, it would be helpful to clarify the efficiencies and harms associated with three types of ecosystems:

- the ecosystem of actors (e.g. the ecosystem of sellers, advertisers, and users surrounding a marketplace platform);
- the multi-product ecosystem (e.g. the Google or Apple ecosystem) and
- the contextual ecosystem (e.g. the mobile ecosystem).⁴⁵

Providing definitional clarity allows for the multi-directional or multi-level assessment proposed by the Court in *Google Android*. It allows for the development of clearer theories of harm. In digital markets, where the presence of digital ecosystems are the norm, competitive harms tend to permeate across a number of markets.⁴⁶ For instance, both the *Google Shopping* and *Google Android* case relate – in principle – to the primary market of horizontal search. *Google Android* relates to leveraging from the upstream OS to the search market, while *Shopping* studies leveraging from the search market into downstream markets. These cases, due to the restrictions of market definition and the dominance standard, have been assessed separately. An ecosystem perspective, however, shows that these harms are intrinsically related, and shows how leveraging upstream (Android to horizontal search) relates to the harms that are exhibited downstream (foreclosure in the comparison-shopping services markets).⁴⁷

Remedies

Remedies in abuse cases are per se difficult to design. This is particularly true for digital cases. Some of the remedies in recent years were seen as not particularly helpful. We see it as unfortunate that the Guidelines do not cover this aspect of abuse cases. The design of remedies is closely linked to the substantive theories of harm. By way of illustration: If ecosystems were looked at in the Guidelines, this may help to map how primary and secondary markets are related to one another. It becomes visible how harms permeate throughout the

⁴³ E.g. European Commission, 17.12.2020, Case M.9660 – *Google/Fitbit*; M.10615 and 25.9.2023, Case M.10615 – *Booking Holdings/Etraveli Group*.

⁴⁴ *Van den Boom*, Incumbent or Challenger: Assessing Ecosystem Competition in the DMA, *Journal of Competition Law & Economics* (forthcoming).

⁴⁵ Cf. *Jacobides/Lianos*, Ecosystems and competition law in theory and practice, *Industrial and Corporate Change*, 2021; *Hornung*, The Ecosystem Concept, the DMA, and Section 19a GWB, *Journal of Antitrust Enforcement*, 2023.

⁴⁶ *Heidhues/Köster/Köszegi*, *A Theory of Digital Ecosystems*, 2024.

⁴⁷ *Cooper/Van den Boom/Arnao*, Considerations for effective search competition remedies, Knight-Georgetown Institute Working Paper (forthcoming); for a more general analysis of theories of harm related to ecosystem power see *Van den Boom*, *Regulating Competition in the Digital Network Industry – A Proposal for Progressive Ecosystem Regulation*, 2023.

value chains. This makes it easier to find a remedy that takes the ecosystem dimension into account instead of sticking to one singular market. A holistic view on the sources and impacts of competitive harms may help to develop suitable and effective remedies.

Artificial Intelligence

We recommend that the Commission should give special consideration to the relevance of Article 102 TFEU for artificial intelligence (AI). AI may act as a disruptive technology that spurs innovation, but it also has the potential for an amplified abuse. The Enforcement Priorities in 2008 ignored the issue of digital platforms and lost their relevance when cases such as the Google cases came up. Acknowledging that significant cases with relatively new phenomena like AI may be just around the corner will avoid this mistake.

The ecosystem perspective may help to capture potential harms in developing or emerging markets that exhibit high risks for competition. Potential issues in the field of AI include access to clouds and data, interoperability, leveraging and the facilitation of abusive practices through the use of AI in other markets. Again, relying on AI markets as the primary market and mapping the surrounding ecosystem, as well as potential issues in the secondary markets, may help to develop clear theories of harm or potential means of exclusion across a number of related markets. A minimum would be to reflect the 2024-G7 Digital Competition Communiqué in the Guidelines.⁴⁸

Proposed change

We propose to add a new chapter “4. Digital markets and digital regulation”, covering

- The relationship of Article 102 TFEU cases to the DMA,
- The specific dangers of digital markets,
- Specific issues such as interoperability and access to data,
- The acceptance of an ecosystem theory of harm,
- A framework for looking into AI-related competition concerns.

⁴⁸ G7, Digital Competition Communiqué 2024, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2024/G7_Summit_2024_Digital_Competition_Communique.html.

5. Exploitative abuses

It is – in our view – a missed opportunity that the Guidelines only cover exclusionary conduct, thereby upholding an artificial distinction of different types of abuse and losing some of the bigger picture of enforcement against unilateral conduct.⁴⁹

Exploitative abuses are highly relevant, but possibly underenforced. The need for considering this form of abuse is shown by e.g. the excessive pricing issues in the pharmaceutical sector, national cases on excessive pricing in the energy sector, cases on the EU level on exploitative conditions, e.g. of collecting societies, the *Meta* case (originating from a national case in Germany on exploitative conditions) or the Dutch authority's case against Apple on unfair conditions concerning payment methods for dating apps (2022) as well as the Commission's case against Apple's music streaming app practices. In the latter, the relation between exclusionary and exploitative abuses was disputed and required the Commission to take a stand. Some of these cases have informed DMA obligations that prohibit anti-steering and cross-use of data which demonstrates both significance and typification of these cases. By including priorities on the enforcement against exploitative abuses, the Commission would take its relevance into account and ensure a coherent application.

Exploitative abuses may be particularly relevant when considering how competition law can contribute to the achievement of the Sustainable Development Goals. Unsustainable behaviour that fosters inequality can be exploitative. Similar to overcharging, it could be considered exploitative if a dominant undertaking only offers purchase prices that are so low that they do not cover at least the cost of production or allow the seller to make a profit.⁵⁰ This is even reflected in the wording of Article 102 lit. a) TFEU ("unreasonable purchase or selling prices"). As already discussed, the *Meta* case can be seen as a form of exploitative abuse and extended to environmental regulations and the exploitation of public goods.⁵¹

In a further reaching interpretation, one may also consider the exploitation of negative external effects as an abuse of dominance that harms the development of sustainable competition and represents a clear case of market failure. At present, the Guidelines do not look at the potential of abuse in cases tackling such market distorting behaviour. There are opportunities where the Commission could foster sustainability with clear-cut competition cases (not stretching

⁴⁹ Cf. *Monti/de Streel*, *Exploitative Abuses: The Scope and the Limits of Article 102 TFEU*, 2023, available at SSRN: <https://ssrn.com/abstract=4630871>.

⁵⁰ *Holmes*, *Climate change, sustainability and competition law*, *Journal of Antitrust Enforcement*, 2020, 354, 384 ff.

⁵¹ *Haucap/Rösner/Podszun/Rohner*, *Competition and Sustainability*, 2024, pp. 127 f.

the limits of Article 102 TFEU).⁵² Regarding the sustainability transformation that is on-going, this should be considered more explicitly in the Guidelines.

Proposed change

We propose to add a new subchapter “3.4. Analytical framework for exploitative abuses”.

6. National developments and NCAs

The Commission mentions that the purpose of the Guidelines is also to provide guidance to national competition authorities for their application of Article 102 TFEU (para 8).⁵³ We consider this an important (declaratory) point, as the effective and coherent enforcement of Article 102 TFEU significantly depends on the enforcement by the national competition authorities (also due to Article 267 TFEU).⁵⁴ It should be pointed out in the Guidelines that national courts (in private enforcement) can also consider the Guidelines. The standards set in proceedings involving competition agencies and in private enforcement should not deviate too strongly from one another. Private enforcement of Article 102 TFEU must remain possible, as it is crucial to ensure the effectiveness of the law. It would be problematic if the Commission would lead cases with a sophistication that can under no circumstances be replicated by courts or national agencies.⁵⁵

Going beyond that, we suggest to make national developments (in law and cases) relating to competition rules on unilateral conduct better accessible on the European level. This would enable a learning experience for everyone dealing with competition law. Within the internal market, competitive markets are not only safeguarded by a coherent application and enforcement of Article 102 TFEU, but are complemented by a net of national competition laws and cases. This complementary function of national competition law and enforcement against abusive unilateral conduct plays an important role to identify gap cases and to foster evolution of competition law in changing markets. Sections 19a and 20 of the German Act against Restraints of Competition are important examples of such complementary national competition law for digital platform cases and beyond.⁵⁶

⁵² *Haucap/Rösner/Podszun/Rohner*, Competition and Sustainability, 2024, pp. 116 ff.

⁵³ “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.” (para 8).

⁵⁴ See concerning the high degree of informal binding of national competition authorities in practice BKartA, Hintergrundpapier 2023, pp. 5 f.; *Bechtold*, Leitlinien der Kommission und Rechtssicherheit – am Beispiel der neuen Horizontal-Leitlinien, Gewerblicher Rechtsschutz und Urheberrecht 2012, 107, 107 f.

⁵⁵ *Podszun*, Towards a manageable concept of abuse of dominance in the EU, Concurrences 2023, Art. N°112966.

⁵⁶ *Käseberg/Gappa* in *Podszun*, DMA Commentary, 2024, Art. 1 DMA, paras 28 ff.

Against this background, we encourage the Commission to acknowledge the role of national competition rules on unilateral conduct. We explicitly do not advocate integrating national cases into the ECN framework since we believe that this is neither within the competences, nor helpful for the learning processes in the EU. Yet, making available for a European audience – in courts, in agencies, in academia – what happens throughout the EU would be very helpful. A concrete step could be the provision of a database for national laws and cases in English to enhance awareness and understanding of national developments that might be inspiring on the EU level.

Proposed change

We propose to highlight the relevance of national laws and cases for the development of competition law on unilateral conduct.

We propose the introduction of an EU database, making such developments better accessible.