

From: Pablo Solano Díaz

To: Directorate-General for Competition, European Commission

Date: 31 October 2024

Subject: Reply to public consultation on the European Commission's draft guidelines on exclusionary abuses of dominance

To whom it may concern,

By way of introduction, my name is Pablo Solano Díaz, and I am a competition lawyer and scholar with experience in law firms in Spain and the UK, as well as serving as an in-house advisor for multinational IT companies. I hold a master's degree in European Law and Economic Analysis (LLM) from the College of Europe (Bruges, Belgium) and a master's degree in European Studies from the University of Seville (Spain), along with other specialised certificates in competition law. I regularly lecture on competition and EU law at several Spanish universities, and I am currently pursuing my PhD on abuse of dominance at the Autonomous University of Madrid (Spain). Additionally, I am an editor for *EU Law Live* and *Kluwer's World Competition* and a regular contributor to several European scientific reviews, as well as to my own blog (www.competitionactually.com). Please note that all opinions expressed in this letter are in my private capacity and do not represent any entity that I advise, have advised, or with which I collaborate.

This background underscores my interest in contributing to the scientific development of competition law and, in particular, abuse of dominance, towards which I believe the Draft Guidelines¹ constitute an enormous step forward. Specifically, the topic of my PhD research coincides with this objective, and I believe I can contribute meaningfully to the ambitious endeavour that the European Commission has undertaken with the scientific community. With this aim, I submit below within the set deadline, my contribution to the public consultation on the Draft Guidelines. This contribution contains the broader context in which abuse of dominance should be considered according to my research (Section 1), the analytical framework (test and standard of proof) for exclusionary abuses that results from it (Section 2), and the suggested changes to the Draft Guidelines in this light, which will be the minimum necessary and respect the current content to the greatest extent possible, as it already provides a solid foundation (Section 3).

I am confident that the model advocated below will be of considerable interest to the European Commission, as it provides a workable analytical tool to address exclusionary abuses that, among other advantages, is aligned with case law and allows *per se* abuses to be reconciled with the 'more economic' approach, making enforcement more expedient, airtight and predictable.

I remain at your disposal to discuss or provide any clarifications on the above.

Thank you very much in advance.

Yours faithfully,

Pablo Solano Díaz

¹ Communication from the Commission—Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings.

1. Broader context

The case law of the Court of Justice of the European Union (CJEU) on the application of antitrust rules, and in particular Article 102 of the Treaty on the Functioning of the European Union (TFEU), has been at a critical juncture over the past four years. As examples, last September saw the adoption of an Advocate General's Opinion, a judgment of the Court of Justice (and another in October), and two judgments of the General Court addressing crucial aspects of the application of that provision. In addition, competition rules, and Article 102 TFEU in particular, are undergoing an existential crisis regarding their purpose, specifically whether they can be used to pursue non-market objectives such as fairness, sustainability, or the democratic functioning of society itself. It has therefore become essential to provide a coherent explanation of the seemingly erratic doctrine and jurisprudence on Article 102 TFEU and to distil them into a redefinition of this rule, based on economic and comparative reflection on its objectives, in order to build a legally and economically sound analytical framework for its future application. Against this background, the aim of my research is to unify the analytical framework for the application of Article 102 TFEU to both exclusionary and exploitative abuses and to align it with that of the prohibition of agreements and concerted practices in Article 101 TFEU, as well as with the logic of merger control. This also requires delimiting it from adjacent regulatory rules, notably the Digital Markets Act² (DMA).

The redefinition of Article 102 TFEU forms part of the broader debate on the objectives of competition law, which has remained unresolved for decades and has recently been reinvigorated by proposals to extend it to non-market values such as fairness. The starting point is the dominant legal and economic doctrine in Europe and the United States, which posits that the intervention of competition authorities must be justified by a market failure—specifically, a sub-optimal outcome in terms of (total) welfare resulting from a lack of (allocative) efficiency in the functioning of the market.³ From this perspective, the specific market failure consisting of excessive market power justifies the application of Article 102 TFEU once it has been consummated—through the sanctioning of an exclusionary or exploitative abuse—or of the merger control rules to prevent it before it is consummated. However, such intervention by competition authorities would only be justified to the extent necessary to correct the market failure. Based on this market failure logic, the relative efficiency of the dominant undertaking vis-à-vis its competitors can be postulated as a workable criterion for determining the appropriate level of intervention by competition authorities in applying Article 102 TFEU.

In fact, the relative efficiency criterion strikes the right balance between the economic freedom and incentives of the dominant undertaking and the general interest in a market-based metric (welfare, the competitive process, or a competitive market structure – see below).⁴ It achieves this by requiring competition authorities to determine, firstly, whether the objective logic of the dominant undertaking's conduct is to foreclose equally efficient competitors,⁵

² Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on fair and contestable markets in the digital sector, OJ L 265, 12.10.2022, p. 1–66.

³ Iacovides M and Stylianou K, 'The goals of EU competition law: a comprehensive empirical investigation' (2022) 42(4) Legal studies 620, 625–626. See also Hovenkamp H, 'The Slogans and Goals of Antitrust Law' (2022)(22–33) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121866>.

⁴ This balancing exercise underlying the application of Article 102 TFEU is illustrated by the essential facilities doctrine, as insightfully put by Advocate General Jacobs in Opinion of 28 May 1998, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs*, C-7/97, EU:C:1998:264, paragraphs 56–58 and 62–64, commented on by Advocate General Saugmandsgaard Øe in Opinion of 9 September 2020, *Deutsche Telekom AG and Slovak Telekom a.s. v European Commission*, C-152/19 P and C-165/19 P, EU:C:2020:678 paras 66–79.

⁵ References to *equally efficient competitors* in this paper include both equally or more efficient competitors and those which, absent the dominant undertaking's exclusionary conduct, could reach the necessary scale to be equally or more efficient and to become a competitive constraint in the future. This is expressly mentioned in judgment of

capable of imposing a sufficient competitive constraint on the dominant undertaking that forces it to behave efficiently if they are protected from artificial foreclosure. In such cases, competition authorities should limit themselves to preventing equally efficient competitors from being artificially foreclosed by the dominant undertaking (by building an exclusionary abuse case). This is the least interventionist and therefore the most proportionate method of ensuring an overall market metric (through market mechanisms).⁶

If there are no equally efficient competitors that can force the dominant undertaking to behave efficiently, competition authorities would be justified in building an exploitative abuse case. This would enable enforcement to replace absent equally efficient competitors by acting directly on the dominant undertaking's market decisions, thereby forcing a market outcome equivalent to the one that equally efficient competitors would have imposed (*e.g.*, by prohibiting certain price levels of the dominant undertaking or forcing it to offer certain conditions or to innovate). This logic is compatible at the *ex-ante* level with that of merger control, where the single legal test ('significant impediment to effective competition') is satisfied on the basis of either an exclusionary theory of harm, if the resulting entity is expected to engage in artificial conduct capable of foreclosing equally efficient competitors, or an exploitative theory, if it is expected that after the merger there will be no such competitors to prevent the resulting entity from offering inferior prices, quality, innovation, or variety.

Although the relative efficiency criterion originates from the dominant doctrinal paradigm according to which competition law aims to safeguard (total) welfare, it is compatible with the primary alternative theory, which views the competitive process as a good in itself, leading to the natural selection of operators offering better price, quality, innovation, or choice.⁷ This is because the relative efficiency criterion operates by protecting only those competitors at least as efficient as the dominant firm that can discipline its behaviour, not the less efficient ones, whose disappearance is positive in terms of both welfare and the competitive process.⁸ Actually, as a matter of presumption of innocence, the foreclosure of less efficient competitors cannot be causally linked to the conduct of the dominant undertaking but rather to their own inefficiency.⁹ Naturally, the competitive pressure from less efficient competitors can be considered as part of '*all the relevant factual circumstances*', for instance, to rule out the capability of foreclosure by allowing the defendant dominant undertaking to rebut the possibility of its materialising in actual exclusionary effects, following the approach in *Intel*.¹⁰

Moreover, the relative efficiency criterion is also in line with the traditional view of competition law as a guarantor of a competitive market structure. This structuralist approach has lost some of its weight in recent decades, but it still holds constitutional value in the European Union through the notion of *restriction*, which is the common legal content of Articles 101 and 102 TFEU. Specifically, the compatibility between the criterion of relative efficiency and the structuralist vision of competition law is ensured by equating the legal

10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, EU:C:2024:726, paragraph 165.

⁶ Jordi Gual, Anne Perrot, Michele Polo, Patrick Rey, Klaus Schmidt and Rune Stenbacka, *An economic approach to article 82* (1 April 2006), 10–11.

⁷ Albæk S, 'Consumer Welfare in EU Competition Policy' in Heide-Jørgensen, Caroline and others (ed), *Aims and Values in Competition Law* (1. ed. edn, DJØF Publ 2013), 70–75; Andriychuk O, 'Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process' (2010) 6(3) *European competition journal* 575, 579–580, 589–590.

⁸ Judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, EU:C:2024:726, paragraph 164.

⁹ Ibáñez Colomo P, 'Competition on the merits' (2024) 61(2) *Common market law review* 387, 399–402.

¹⁰ Judgment of 6 September 2017, *Intel Corporation Inc. v European Commission*, C-413/14 P, EU:C:2017:632, paragraphs 138–141; judgment of 24 October 2024, *European Commission v Intel Corporation Inc.*, C-240/22 P, EU:C:2024:915, paragraphs 179–180.

concept of *restriction* to the economic concept of market failure through the notion of *special responsibility*.¹¹ Indeed, the notion of *restriction* is legally articulated in Article 102 TFEU by attributing to the dominant undertaking a qualified status, consisting of a special responsibility not to weaken the competitive structure of the market more than it already is due to its dominant position. Artificially foreclosing equally efficient competitors would lead to both a *restriction* and a consummated market failure, as well as a disruption of the proper functioning of the competitive process and a further weakening of the competitive market structure. Additionally, the compatibility of the relative efficiency criterion with the consideration of less efficient competitors among all the relevant factual circumstances reconciles the competitive process standard with the structuralist view, wherein even less efficient competitors contribute to a competitive structure that constrains the market power of the dominant undertaking.

Finally, accommodating the criterion of relative efficiency with the structuralist concept of restriction enables the analytical framework for the application of Article 102 TFEU to be reconciled with that of Article 101 TFEU. In the case of agreements and concerted practices, to establish a restriction, competition authorities must verify, based on the *nature* (i.e., the objective aims in light of the *content* and *context*, assimilable to the notion of object)¹² and the *effects* of the practice, that the *plausible* objective logic of the practice is to impact competition parameters negatively (to the detriment of welfare, the competitive process, or the competitive structure, depending on the paradigm considered). Similarly, establishing an abuse requires discerning the *plausible* objective logic of the dominant undertaking's conduct through the *nature* (i.e., competition off the merits) and *effects* (i.e., capability of foreclosure), with the difference that the wording of Article 102 TFEU does not make *nature* (or *object*) and *effect* mutually exclusive methods of objectively linking the practice to a *restriction*.¹³ Therefore, both *nature* and *effects* (or competition off the merits and capability of foreclosure) need to be proven to some extent. Relative efficiency is the criterion to determine the extent to which one or the other (or neither or both) is to be proven, as will be explained below, which is not a matter of presumption or reversal of the burden of proof, as clarified by *Intel RENV*,¹⁴ but of the 'quality of evidence' required to meet the single standard of *plausibility* subject to rebuttal as in merger control.¹⁵

2. Analytical framework for exclusionary abuses

In the broader context of the complete reformulation of the analytical framework for the application of Article 102 TFEU, relative efficiency provides the basis for unifying the seemingly different legal tests and standards of proof defined in the CJEU case law on exclusionary abuses. Recent case law confirms that the legal test of exclusionary abuse of dominance consists of two cumulative elements that are indissociably interrelated in a single test of potential anticompetitive effects:¹⁶ artificial conduct (competition off the merits—

¹¹ Pablo Solano Díaz, A hopeful Reading of Android Auto and Google Shopping. Content, Context and equally efficient Competitors: Google and Alphabet (C-48/22 P) (*EU Law Live*, 12 September 2024) <<https://eulawlive.com/op-ed-a-hopeful-reading-of-android-auto-and-google-shopping-content-context-and-equally-efficient-competitors-google-and-alphabet-c-48-22-p/>>.

¹² Judgment of 27 June 2024, *European Commission v Servier SAS and Others*, C-176/19 P, EU:C:2024:549, paragraphs 107-108; judgment of 27 June 2024, *European Commission v KRKA*, C-151/19 P, EU:C:2024:546, paragraphs 74-75; judgment of 29 July 2024, *Banco BPN/BIC Português SA and Others v Autoridade da Concorrência*, C-298/22, EU:C:2024:638, paragraphs 52-56.

¹³ Castillo de la Torre F and Gippini Fournier E, *Evidence, proof and judicial review in EU competition law* (Second edition edn, Edward Elgar Publishing 2024), para 1.055.

¹⁴ Judgment of 24 October 2024, *European Commission v Intel Corporation Inc.*, C-240/22 P, EU:C:2024:915, paragraphs 328-332.

¹⁵ Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd.*, C-376/20 P, EU:C:2023:561, paragraphs 63-89.

¹⁶ Opinion of 9 December 2021, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato*, C-377/20, EU:C:2024:726, paragraph 48.

anticompetitive nature) with exclusionary capacity (capability of foreclosure—potential anticompetitive effect).¹⁷ It also follows from this case law that the key to assessing both the artificiality of the conduct and its potential foreclosure effect is the ability of equally efficient competitors to match or offset the advantage gained by the dominant undertaking.¹⁸ From this perspective, the different types of exclusionary abuses (*e.g.*, predatory pricing, loyalty rebates, tying or bundling) are subject to the same test and standard of proof, differing only in the factual situation (the *content* and *context* in the terminology of Article 101 TFEU)¹⁹, which requires a different quality of evidence to establish the restrictive logic (the objective purposes in the terminology of Article 101 TFEU) of the conduct based on one or the other element (or neither or both) to that standard.

Thus, a single test and standard can be defined: competition authorities are required to prove the *plausibility* [standard of proof] that the objective logic (*objective aims* given the *content* and *context*, or all the relevant factual circumstances in abuse terminology²⁰) of the dominant undertaking's conduct is to derive an advantage that equally efficient competitors, merely because they are not dominant, (i) cannot match by engaging in the same conduct [competition on the merits part of the test]; and (ii) cannot offset by other means to avoid their potential foreclosure [potential foreclosure effect part of the test].²¹ This addresses concerns that a standard of proof based on *plausibility* may constitute an unjustified reversal of the burden of proof. Indeed, far from entailing a presumption in favour of competition authorities, it is solely a matter of the intensity of the proof required to establish abuse in cases where the Article 101-like cursory analysis of the *context* and *content* (or *all the relevant factual circumstances*) renders the competition on the merits or the capability of foreclosure so clear that a complex effects analysis (*e.g.*, based on the as-efficient competitor test or the counterfactual) is unnecessary. In such cases, leaving it to the defendant dominant undertaking to offer an alternative explanation, such as disproving the capability of foreclosure or presenting an objective justification,²² strikes a fairer enforcement balance as it would only need to build one alternative assessment which competition authorities are compelled to analyse in detail, while competition authorities would otherwise need to consider a virtually unlimited number of scenarios.²³

¹⁷ Judgment 30 January 2020, *Generics UK & Others*, C-307/18, EU:C:2020:52, paragraphs 152–154.

¹⁸ Solano Díaz P 'Quantum Antitrust – A Unified Exclusionary Abuse Theory' (2024) 55(4) IIC 557, 560–563 <<https://link.springer.com/article/10.1007/s40319-024-01454-8>>.

¹⁹ The transfer of this logic from Article 101 TFEU to Article 102 TFEU, in Opinion of 5 September 2024, *Alphabet Inc. and Others v Autorità Garante della Concorrenza e del Mercato*, C-233/23, EU:C:2024:694, paragraphs 45–46, judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, EU:C:2024:726, paragraph 167, and, particularly, judgment of 24 October 2024, *European Commission v Intel Corporation Inc.*, C-240/22 P, EU:C:2024:915, paragraph 179, is explained in Solano Díaz, *supra* n 11.

²⁰ See judgment of 24 October 2024, *European Commission v Intel Corporation Inc.*, C-240/22 P, EU:C:2024:915, paragraph 179, where '*all the relevant factual circumstances*' are described as '*the conduct itself, the market or markets in question or the functioning of competition on that market or those markets,*' that is, the *content* and *context* of the conduct in Article 101 TFEU terminology.

²¹ Solano Díaz, *supra* n 18, 560–563.

²² Judgment of 6 September 2017, *Intel Corporation Inc. v European Commission*, C-413/14 P, EU:C:2017:632, paragraphs 138–141.

²³ This is illustrated by judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, EU:C:2024:726, paragraphs 226–232, where the counterfactual is linked to the possibility for the dominant undertaking to break the causal link by providing an alternative explanation to the restrictive logic that can be assumed with a variable depth of analysis depending on how clear the inability of equally efficient competitors to match or offset the advantage is, while for competition authorities this would be an excessively complex exercise.

This unified test and standard has several significant advantages:²⁴

- (i) historically, such an analytical framework is consistent with the case law on Article 102 TFEU as a whole, allowing it to be explained and systematised²⁵;
- (ii) teleologically, the relative efficiency criterion aligns well with the preliminary cursory analysis of the *content* and *context* of the dominant undertaking's conduct,²⁶ granting competition authorities some margin of discretion and subjectivity, while double-checking the result based on equally efficient competitors who are unable to match or offset the advantage gained by the dominant undertaking avoids arbitrariness and facilitates judicial review;
- (iii) this objectifying logic, stemming from the analysis of agreements and concerted practices under Article 101 TFEU, makes it possible to maintain the balance guaranteed by the essential facilities doctrine—*i.e.*, only when the dominant undertaking's refusal to deal can *prima facie* be considered a legitimate decision given its content (*e.g.*, the absence of active conduct of positive discrimination) and its context (*e.g.*, the absence of a regulatory obligation or a prior decision to contract or the private development of the resource being procured), as in the case of agreements and concerted practices without an anticompetitive object, would the restrictive logic of the conduct be subject to a full (efficiency-based) analysis of effects (*i.e.*, the exceptional circumstances from the essential facilities doctrine²⁷) regardless of competition on the merits;
- (iv) systematically, the objectifying character of the relative efficiency test, equating the analytical framework of Article 102 TFEU with that of Article 101 TFEU, not only permits the inclusion of the essential facilities theory in the former but also reconciles *per se* rules with the more economic approach, placing all the seemingly different legal tests on a continuum depending on the intensity of the analysis of the *nature* and *effects* required to meet the single *plausibility subject to rebuttal* standard;
- (v) causally, the legal awkwardness in traditionally requiring a causal link only between the dominant position and the effects of the dominant undertaking's conduct²⁸ can be resolved through relative efficiency—*i.e.*, for dominance to prevent equally efficient competitors from offsetting the advantage that the dominant undertaking derives from its conduct, thus requiring a causal link between the potential foreclosure effect and dominance, it must also prevent them from matching that advantage, extending the causal link requirement to the artificiality of the conduct²⁹;

²⁴ Solano Díaz, *supra* n 18, 563–572.

²⁵ Milestones of this case law are judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 91; judgment of 14 October 2010, *Deutsche Telekom AG v European Commission*, C-280/08 P, paragraphs 177, 178 and 182; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 43; judgment 30 January 2020, *Generics UK & Others*, C-307/18, EU:C:2020:52, paragraphs 152–155; judgment of 25 March 2021, *Slovak Telekom a.s. v European Commission*, C-165/19 P, EU:C:2021:239; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraph 61; judgment of 19 January 2023, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, C-680/20, EU:C:2023:33, paragraphs 48–49; Opinion of 5 September 2024, *Alphabet Inc. and Others v Autorità Garante della Concorrenza e del Mercato*, C-233/23, EU:C:2024:694, paragraphs 45–46; and judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, EU:C:2024:726, paragraph 167.

²⁶ Solano Díaz, *supra* n 11.

²⁷ Judgment of 26 November 1998, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs*, C-7/97, EU:C:1998:569, paragraph 41.

²⁸ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 91.

²⁹ judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, EU:C:2024:726, paragraph 228.

- (vi) from a behavioural economics perspective, the relative efficiency test bridges the gap between legal analysis and economic reality—*i.e.*, if the dominant undertaking's equally efficient competitors, who logically cannot be outperformed by the dominant undertaking on their merits given their equal efficiency, could either match or offset the dominant undertaking's advantage, the decision to engage in such conduct would not make anticompetitive sense.

In conclusion, the apparent disparate standards in case law can be unified into *plausibility subject to rebuttal*, in line with case law, based on the relative efficiency criterion. This enables all abuses to be placed on a continuum, allowing both *per se* rules (where effects analysis is cursory) and the more economic approach (which requires complete effects analysis in every case) to coexist, depending on the clarity with which the factual circumstances show that equally efficient competitors cannot match or offset the advantage derived by the dominant undertaking and, therefore, that this is the objective logic of the conduct. This continuum also allows for the various tests in case law (e.g., predatory pricing, exclusivity payments, tying and bundling of sales, margin squeeze) to be rearranged in a quadrant according to whether the first part of the test (*i.e.*, artificial conduct, not based on the merits), the second part (*i.e.*, potential foreclosure effect), both or neither can be assumed to a greater extent.³⁰

- (i) Cases where both elements can be assumed without exhaustive analysis include companies holding exclusive or special rights or regulatory powers, using these to extend their dominant position to related markets.³¹ Such companies would bear a qualified special responsibility to ensure a level playing field for their rivals, subject to their regulatory power. Similarly, predatory pricing below variable cost falls into this category, as there is no plausible alternative explanation other than foreclosure.
- (ii) Cases where only artificiality can be presumed include exclusivity payments targeted at competitors' customers. In these cases, the clearly anti-competitive object allows even for a reversal of the effects test under the *Intel* case law.³²
- (iii) Cases where the foreclosure effect is evident, while the artificiality of the conduct is less certain, are illustrated by self-preferencing.³³ Here, the analysis focuses on whether the *content* and *context* of the conduct prevent it from being considered *prima facie* legitimate.
- (iv) Cases where neither element can be presumed are prominently exemplified by a *prima facie* legitimate refusal to deal, where the *content* and *context* indicate competition on the merits. In such scenarios, the conduct is subject to a full effects-based analysis under the exceptional circumstances defined in the essential facilities doctrine.

3. Proposed changes to the Draft Guidelines

The table below implements the analytical framework described above into the minimum necessary changes to the Draft Guidelines, which already provide a good basis, with the aim of respecting the enforcement policy approach taken by the European Commission while making it airtight, more expedient and case-law-proof.

³⁰ Solano Díaz, *supra* n 18, 582–591.

³¹ For example, judgment of 17 July 2014, *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*, C-553/12 P, EU:C:2014:2083; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011.

³² For example, judgment of 15 June 2022, *Qualcomm, Inc. v European Commission*, T-235/18, EU:T:2022:358.

³³ For example, judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, EU:C:2024:726.

Insert	Suggested changes in red
Para 6	<p>In particular, dominant undertakings can harm consumers by hindering, through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition through the at least potential foreclosure of competitors that are, or can grow to be, at least as efficient as the dominant undertaking¹¹. Dominant undertakings can also harm consumers by availing of the absence of such as-efficient competitors to directly exploit customers. Such—The former behaviour, if not objectively justified, is hereinafter referred to as “exclusionary abuse” and its effects are hereinafter referred to as “exclusionary effects”. Those effects refer to any hindrance to actual or potential competitors’ ability or incentive to exercise a competitive constraint on the dominant undertaking¹², such as the full-fledged exclusion or marginalisation of competitors, an increase in barriers to entry or expansion¹³, the hampering or elimination of effective access to markets or to parts thereof¹⁴ or the imposition of constraints on the potential growth of competitors¹⁵.</p>
Fn 11	<p>Judgment of 13 February 1979, <i>Hoffmann-La Roche v Commission</i>, 85/76, EU:C:1979:36, paragraph 91; judgment of 17 February 2011, <i>TeliaSonera Sverige</i>, C-52/09, EU:C:2011:83, paragraph 27; judgment 19 April 2012, <i>Tomra & Others v. Commission</i>, C-549/10, EU:C:2012:221, paragraph 17; judgment 30 January 2020, <i>Generics UK & Others</i>, C-307/18, EU:C:2020:52, paragraph 148; judgment of 25 March 2021, <i>Deutsche Telekom v Commission</i>, Case C-152/19 P, EU:C:2021:238, paragraphs 41 and 42; judgment of 12 May 2022, <i>Servizio Elettrico Nazionale</i>, C-377/20, EU:C:2022:379, paragraphs 44 and 68; judgment of 4 July 2023, <i>Meta Platforms and Others (General terms of use of a social network)</i>, C-252/21, EU:C:2023:537, paragraph 47; judgment of 21 December 2023, <i>European Superleague Company</i>, C-333/21, EU:C:2023:1011, paragraph 131; judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i>, C-48/22 P, EU:C:2024:726, paragraph 167.</p>
Fn 17	<p>For the avoidance of doubt, the same conduct by a dominant undertaking may have both exclusionary and exploitative effects. It depends on whether at least as-efficient competitors are present or can grow in the market to place a competitive constraint on the dominant undertaking that forces it to compete on the merits through market mechanisms unless they are potentially foreclosed by means others than those governing normal competition (exclusionary effects), or whether there are not as-efficient competitors and thus the dominant undertaking can avail of their absence to extract surplus from customers thus justifying direct enforcement on their behaviour to replace such competitive constraint (exploitative effects).</p>
Para 14	<p>In order to assess whether an undertaking has infringed Article 102 TFEU, the following steps are required. First, as a general rule, it is necessary to define the relevant product and geographic market (or markets)²³. The Market Definition Notice provides guidance on the rules, criteria and evidence that the Commission uses when defining markets²⁴. Second, it is necessary to assess whether the undertaking concerned holds a dominant position in the relevant market(s). Third, it is necessary to assess whether the conduct of the dominant undertaking is liable to be abusive, namely whether it departs from competition on the merits and it is capable of having exclusionary effects by actually or potentially excluding competing undertakings that are as efficient as the dominant undertaking from the market or markets concerned or preventing their growth therein²⁵. Fourth, it may be necessary to assess whether the conduct is objectively justified, including on the basis of efficiencies.</p>
Fn 25	<p>Judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i>, C-48/22 P, EU:C:2024:726, paragraphs 164-167. In these Guidelines, the expressions “liable to be abusive” or “liable to constitute an exclusionary abuse” refer to conduct that departs from competition on the merits and it is capable of having exclusionary effects, irrespective of whether the conduct may be deemed, in a later step in the analysis, to be objectively justified or not.</p>

Para 44	Dominant undertakings have a special responsibility not to engage in conduct that impairs effective competition ⁹⁸ . This applies whether dominant undertakings engage in such conduct directly or through the actions of third parties ⁹⁹ . Since the concept of abuse is an objective one, it is generally not necessary to show that an undertaking had the intent to impair effective competition in order to establish an abuse of a dominant position ¹⁰⁰ . On the contrary, in consistency the case law on Article 101 TFEU, it needs to be ascertained whether the plausible objective logic of the conduct of the dominant undertaking is restrictive and thus breaches its special responsibility by, firstly, considering the content and context, or “all the relevant factual circumstances”¹⁰¹, to rule out a <i>prima facie</i> legitimate business decision by the dominant undertaking¹⁰², and, secondly, confirming the restrictive objective logic by establishing whether the dominant undertaking derives an advantage that hypothetical as-efficient competitors cannot replicate, and hence deviates from competition on the merits, and that they cannot offset by other means, and hence is capable of foreclosing them¹⁰³.
New fn 101	Judgment of 6 September 2017, <i>Intel Corporation Inc. v European Commission</i> , C-413/14 P, EU:C:2017:632, paragraph 109; judgment of 24 October 2024, <i>European Commission v Intel Corporation Inc.</i> , C-240/22 P, EU:C:2024:915, paragraph 179.
New fn 102	Judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i> , C-48/22 P, EU:C:2024:726, paragraphs 102-114; in consistency with the case law on Article 101 TFEU in judgment of 27 June 2024, <i>European Commission v Servier SAS and Others</i> , C-176/19 P, EU:C:2024:549, paragraphs 107-108; judgment of 27 June 2024, <i>European Commission v KRKA</i> , C-151/19 P, EU:C:2024:546, paragraphs 74-75; judgment of 29 July 2024, <i>Banco BPN/BIC Português SA and Others v Autoridade da Concorrência</i> , C-298/22, EU:C:2024:638, paragraphs 52-56.
New fn 103	Both elements are part of a single assessment of the potential exclusionary effect, which would not support a finding of abuse either if the behaviour did not depart from competition the merits because hypothetical as-efficient competitors could obtain, by engaging in a similar behaviour, a comparable advantage to that obtained by the dominant undertaking or if hypothetical as-efficient competitors were able to offset that advantage by other means and thus in practice the behaviour of the dominant undertaking is not capable of foreclosure. See, for all, judgment of 12 May 2022, <i>Servizio Elettrico Nazionale and Others</i> , C-377/20, EU:C:2022:379, paragraphs 91 and 101-103; judgment of 24 October 2024, <i>European Commission v Intel Corporation Inc.</i> , C-48/22 P, EU:C:2024:915, paragraph 181.
Para 45	Therefore, to determine whether conduct by dominant undertakings is liable to constitutes an exclusionary abuse, it is generally necessary to establish whether the conduct departs from competition on the merits (see section 3.2 below) and whether the conduct is capable of having exclusionary effects (see section 3.3 below)¹⁰⁴⁺¹⁰⁴. This two elements need to be proven to a single requisite legal standard based on plausibility that makes the foreclosure of hypothetical as-efficient competitors that cannot obtain a comparable advantage by engaging in a similar conduct to that of the dominant undertaking or offset it by other means the plausible objective logic of the conduct subject to rebuttal by the dominant undertaking disproving the capability of foreclosure or providing justifications based on objective necessity and efficiencies (see section 5 below). The quality of the evidence required to meet that requisite legal standard varies depending on the factual circumstances underlying the specific types of conduct in section 4 below or any other conduct fulfilling the general legal test.¹⁰⁵
Fn 105	Judgment of 13 July 2023, <i>European Commission v CK Telecoms UK Investments Ltd.</i> , C-376/20 P, EU:C:2023:561, paragraphs 76-77.
Para 52	On the other hand, the Union courts have highlighted that a dominant undertaking’s intention to compete on the merits, even if established, is not sufficient to prove the absence of an abuse ¹⁰¹⁺¹¹⁴ . Moreover, a dominant undertaking may have to refrain from engaging in certain practices that are unobjectionable for undertakings that do not hold a dominant position. The mere circumstance that the conduct is also implemented by non-dominant undertakings in the market is not sufficient to exclude that it departs from competition on the merits ¹¹⁴⁺¹¹⁵ , unless hypothetical as-efficient competitors are capable of reproducing the conduct of the undertaking in a dominant position¹¹⁵.

New fn 115	Judgment of 24 October 2024, <i>European Commission v Intel Corporation Inc.</i> , C-240/22 P, EU:C:2024:915, paragraph 181. The fact that competition on the merits is identified with hypothetical as-efficient competitors' capability of reproducing the conduct of the dominant undertaking does not mean that the as-efficient competitor test is the only way of assessing such capability. In fact, sometimes the impossibility of replicating the conduct regardless of whether competitors are as efficient or not is so obvious in light of all the relevant factual circumstances that it can be assumed under the substantive legal standard of plausibility (see paragraph 44), but the defendant dominant undertaking can always use it to demonstrate such capability.
Para 54	In reality, as mentioned in paragraph 47 above, all the specific legal tests are an expression of the application of the general legal test that aims to verify whether the plausible objective logic of the conduct of the dominant undertaking is deriving an advantage that hypothetical as-efficient competitors cannot replicate by engaging in the same conduct, and thus deviates from the merits, or offset by other means, and thus is capable of foreclosing them. The plausibility legal standard entails that sometimes the restrictive objective logic can be assumed, because the Likewise, conduct that holds no economic interest for a dominant undertaking, except that of restricting competition (so-called naked restrictions, see paragraph 60(c) below), and can thus be is also deemed as falling outside the scope of competition on the merits ¹¹⁷¹²² , subject to rebuttal by disproving the other element related to the capability of foreclosure ¹²³ .
New fn 124	Judgment of 6 September 2017, <i>Intel Corporation Inc. v European Commission</i> , C-413/14 P, EU:C:2017:632, paragraph 138–141; judgment of 24 October 2024, <i>European Commission v Intel Corporation Inc.</i> , C-240/22 P, EU:C:2024:915, paragraph 328–332.
Para 55	As regards other conduct for which the objective logic cannot be assumed restrictive, it needs to be shown that the conduct departs from competition on the merits by assessing whether hypothetical as-efficient competitors can obtain a comparable advantage by engaging in a similar conduct to that of the dominant undertaking based on the specific circumstances of the case. The Union Courts have held that the following factors are relevant for this assessment ¹¹⁸¹²⁴ : [...].
Para 57	Conduct that at first sight does not depart from competition on the merits (e.g. pricing above average total costs ("ATC")) and therefore does not normally infringe Article 102 TFEU may, in specific circumstances, be found to depart from competition on the merits, if it is plausible that hypothetical as-efficient competitors cannot obtain a comparable advantage by engaging in a similar conduct to that of the dominant undertaking, based on an analysis of all legal and factual elements, notably: (i) market dynamics; (ii) the extent of the dominant position; and (iii) the specific features of the conduct at stake.
Para 59	The Union Courts have established rules regarding the evidentiary burden to show that a conduct is capable of producing exclusionary effects, which depend on the type of conduct, the likelihood that it will result in exclusionary effects and the relevant circumstances. These rules determine the quality of the evidence necessary to meet the legal standard of plausibility subject to rebuttal by the dominant undertaking demonstrating that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects ¹³⁵ , in the same manner as the plausible deviation from competition on the merits is subject to rebuttal based on objective justification including efficiencies, as established in paragraph 45.
New fn 135	Judgment of 24 October 2024, <i>European Commission v Intel Corporation Inc.</i> , C-240/22 P, EU:C:2024:915, paragraph 330. It is in the context of this rebuttal that tools such as the as-efficient competitor test and the counterfactual analysis play an important role without entailing a reversal of the burden of proof because the dominant undertaking would only have to provide one alternative scenario while for the Commission it could entail an arbitrary or even impossible exercise, see judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i> , C-48/22 P, EU:C:2024:726, paragraphs 228–231.

Para 60(b)	<p>Conduct that is presumed can be plausibly assumed to lead to exclusionary effects: certain types of conduct are generally recognised as having a high potential to produce exclusionary effects. Accordingly, the legal standard of plausibility subject to rebuttal is met by assuming they are subject to a presumption concerning their capability of producing exclusionary effects¹⁴³¹³⁷. As discussed further in section 4.2, this presumption applies to: (i) exclusive supply or purchasing agreements¹⁴³²¹³⁸; (ii) rebates conditional upon exclusivity¹⁴³³¹³⁹; (iii) predatory pricing¹⁴³⁴¹⁴⁰; (iv) margin squeeze in the presence of negative spreads¹⁴³⁵¹⁴¹; and (v) certain forms of tying¹⁴³⁶¹⁴². Once the factual existence of the relevant conduct is established, if need be under the conditions established in the specific legal test, its exclusionary effects can be presumed assumed subject to rebuttal without reversing the burden of proof.</p> <p>A dominant undertaking can seek to rebut the probative value of the presumption-plausibility in the specific circumstances at hand by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects¹⁴³⁷¹⁴³. There may be different ways to show that the conduct is not capable of having exclusionary effects, depending on the circumstances at hand. The undertaking may, for instance, attempt to overturn the presumption-plausibility by submitting evidence showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption-plausibility is based, to the point of rendering any potential effect purely hypothetical.</p> <p>The submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission's examination obligation, meaning that the Commission will examine whether the presumption-plausibility is rebutted based on the arguments and supporting evidence submitted by the dominant undertaking during that procedure.</p> <p>The capability to produce exclusionary effects is established if the Commission either:</p> <ul style="list-style-type: none"> (i) shows that the arguments and supporting evidence submitted by the dominant undertaking are insufficient to call into question the presumption-plausibility, for instance due to the insufficient probative value of the evidence or the fact that the arguments refer to theoretical assumptions rather than the actual competitive reality of the market¹⁴³⁸¹⁴⁴; or (ii) provides evidentiary elements demonstrating the capability of the conduct to have exclusionary effects. The scope and nature of the analysis will necessarily depend on the scope and nature of the arguments and evidence submitted by the dominant undertaking. <p>Even in the scenario set out in (ii), the evidentiary assessment must give due weight to the probative value of a presumption-plausibility, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects, as part of the overall assessment of the body of evidence in the light of all the relevant legal and economic circumstances.</p> <p>A dominant undertaking may also seek to show that the conduct is justified on the basis of an objective justification. The fact that the conduct has a high potential to lead to exclusionary effects must be given due weight in the balancing exercise to be carried out in this context (see section 5 below).</p>
Para 61	<p>Under To meet the legal standard that is applicable of plausibility in cases where the evidentiary burden cannot be initially discharged on the basis of paragraphs 60(b) and (c) above, the Commission needs to demonstrate that a conduct is at least capable of producing exclusionary effects¹⁴⁴³¹⁴⁹. While the effects in question must be more than hypothetical¹⁴⁴⁴¹⁵⁰, establishing that a conduct is liable to be abusive does not require proof that the conduct at issue has produced actual exclusionary effects¹⁴⁴⁵¹⁵¹.</p>
Para 62	<p>The assessment of whether a conduct is capable of having exclusionary effects is based on the facts and circumstances existing at the time when the conduct was implemented¹⁴⁴⁶¹⁵². In this regard, it is sufficient to show that the conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors that existed were or could have become as efficient at the time of the conduct's implementation because it was plausible that they could not have replicated or offset the advantage that the dominant undertaking derived therefrom¹⁴⁴⁷¹⁵³. Moreover, where it is established that a conduct is objectively capable of restricting competition¹⁴⁴⁸¹⁵⁴, this cannot be called into question by the actual reaction of third parties¹⁴⁴⁹¹⁵⁵, although the competitive pressure exerted by even less efficient competitors can be considered as part of all the relevant factual circumstances, in particular, in the rebuttal of such capability¹⁴⁵⁰¹⁵⁶.</p>

New ft 156	Judgment of 6 October 2015, <i>Post Danmark A/S contra Konkurrencerådet</i> , C-23/14, EU:C:2015:651, paragraph 60.
Para 65	The actual or potential exclusionary effects identified in the analysis need to be attributable to the conduct at issue ¹⁵⁴¹⁶¹ . However, the conduct does not need to be the sole cause of those exclusionary effects ¹⁵⁵¹⁶² . It is sufficient The legal standard based on plausibility only requires to establish that the conduct contributes to increasing the likelihood of the exclusionary effects materialising on the market ¹⁵⁶¹⁶³ . However, if the exclusionary effects only affect less efficient competitors, the presumption of innocence requires that such effects are causally linked to their own inefficiency instead of the conduct of the dominant undertaking. ¹⁶⁴
New ft 164	Judgment of 21 December 2023, <i>European Superleague Company</i> , C-333/21, EU:C:2023:1011, paragraphs 126–127; judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i> , C-48/22 P, EU:C:2024:726, paragraph 164.
Para 67	In certain cases, it may be appropriate to use as a basis for the comparison an alternative hypothetical scenario where the conduct would be absent and where certain likely developments in the market are also taken into account ¹⁵⁸¹⁶⁶ . Given the difficulty to develop credible assumptions, it is not necessary to account for all possible changes and combinations of outcomes and circumstances that could have arisen absent the conduct. It is sufficient to establish a plausible outcome amongst various possible outcomes ¹⁵⁹¹⁶⁷ . In any event, such comparison may not be required in particular where the conduct of the undertaking has made it very difficult or impossible to ascertain the objective causes of observed market developments ¹⁶⁰¹⁶⁸ . In those cases, the dominant undertaking will be able to rebut the plausibility of the possible outcome by proposing an alternative outcome through counterfactual analysis ¹⁶⁹ .
New fn 168	Judgment of 12 May 2022, <i>Servizio Elettrico Nazionale and Others</i> , Case C-377/20, EU:C:2022:379, paragraphs 98-99. See also, judgment of 14 September 2022, T-604/18, <i>Google and Alphabet v Commission (Google Android)</i>, EU:T:2022:541, paragraph 893, where the General Court considered that carrying out a counterfactual “to evaluate the hypothetical consequences that might have been observed, in the absence of the [...] abuse” may not be needed where effects have been proven by using different tools and evidence judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i> , C-48/22 P, EU:C:2024:726, paragraphs 227–231.
New fn 169	In judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i> , C-48/22 P, EU:C:2024:726, paragraphs 227–231, the Court clarifies that not imposing on the Commission an obligation to consider all hypothetical alternative scenarios, which would be “an arbitrary or even impossible exercise”, is not a reversal of the burden of proof if the dominant undertaking “may put forward a counterfactual analysis in order to challenge the Commission’s assessment of the potential or actual effects of the conduct concerned”.
Para 68	Conduct may take place and produce exclusionary effects on the dominated market(s) or on non-dominated markets ¹⁶¹¹⁷⁰ . However, the substantive legal standard to prove the exclusionary effects of a conduct based on plausibility subject to rebuttal is the same irrespective of whether the effects take place in the dominated market or in a market different from, but related to, the dominated market ¹⁶²¹⁷¹ . At the same time, when assessing effects in a dominated market, the fact that in such a market competition is already weakened due to the very presence of the dominant undertaking can be taken into account among all the relevant factual circumstances.
Para 73	The assessment of whether a conduct is capable of having exclusionary effects also does not requires showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking could be foreclosed because they cannot replicate or offset the advantage that the dominant undertaking derives from such conduct ¹⁷⁹¹⁸⁸ . However, the actual or potential foreclosure of less efficient competitors can evidence the plausibility that hypothetical as-efficient competitors cannot replicate or offset the advantage that the dominant undertaking derives from its conduct even if the latter are not immediately and actually affected by such conduct. ¹⁸⁹
New fn 188	Judgment of 10 November 2021, <i>Google and Alphabet v Commission (Google Shopping)</i>, T-612/17, EU:T:2021:763, paragraphs 540-541 Judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i> , C-48/22 P, EU:C:2024:726, paragraphs 164–165.

New fn 189	Judgment of 6 October 2015, <i>Post Danmark A/S contra Konkurrencerådet</i> , C-23/14, EU:C:2015:651, paragraph 60.
Para 74	Moreover, the assessment of whether a conduct is capable of having exclusionary effects does not require proof that the conduct is enabled by the dominant position ¹⁸⁰¹⁹⁰ . On the contrary, the causal link between the dominant position and the exclusionary effects is ensured by the fact that the exclusionary effects are established if hypothetical as-efficient competitors cannot offset the advantage that the dominant undertaking derives from its conduct and, given that they are as efficient, this can only be due to their not holding a dominant position.
Para 82	Exclusive dealing by a dominant firm has a high potential to produce exclusionary effects as it is likely to deprive or restrict the customer's or seller's choice of possible sources of supply or demand ¹⁹¹²⁰¹ . As such, exclusive dealing is presumed -assumed to be capable of having exclusionary effects if all the relevant factual circumstances confirm the plausibility of hypothetical as-efficient competitors not being able to replicate or offset the advantage that the dominant undertaking derives from such conduct (see paragraph 60(b) above) ¹⁹²²⁰² .
New fn 202	Judgment of 13 February 1979, <i>Hoffmann-La Roche v Commission</i> , C-85/76, EU:C:1979:36, paragraphs 89-90; judgment of 6 September 2017, <i>Intel v Commission</i> , C-413/14 P, EU:C:2017:632, paragraph 137; judgment of 26 January 2022, <i>Intel Corp. v Commission</i> , T-286/09 RENV, EU:T:2022:19, paragraph 124; judgment of 19 January 2023, <i>Unilever Italia Mkt Operations</i> , C-680/20, EU:C:2023:33, paragraph 46; judgment of 24 October 2024, <i>European Commission v Intel Corporation Inc.</i> , C-240/22 P, EU:C:2024:915, paragraphs 179–180.
Para 89	Tying is liable to be abusive where the following conditions are met because in that case the relevant factual circumstances confirm the plausibility of hypothetical as-efficient competitors not being able to replicate or offset the advantage that the dominant undertaking derives from such conduct ²⁰⁸²¹⁸ : [...].
Para 95	The depth of the analysis required to show that the tying is capable of having exclusionary effects depends on all the relevant factual specific -circumstances of the case. In certain circumstances, it may be possible to conclude that, due to the specific characteristics of the markets and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be assumed-presumed ^{243 233} [...].
Para 96	A refusal to supply refers to situations where a dominant undertaking has the possibility of making the legitimate decision to refuse to give access to certain-developed-an input ²³⁶ exclusively or mainly for its own use and, when such requested-access is requested by a party (typically, an actual or potential competitor), refuses to give access ²³⁷²⁴⁶ . Whether the dominant undertaking has the possibility of making the legitimate decision to refuse to give access must be determined in light of all the relevant factual circumstances, including the content of the refusal, for instance, whether it is a complex conduct that needs to be assessed in its entirety ²⁴⁷ , and its context, for instance, whether the dominant undertaking has developed the input exclusively or mainly for its own use ²⁴⁸ , whether it has not already made the decision to give access and then refuses or limits access without an objective justification ²⁴⁹ or offers degraded access ²⁵⁰ , or whether there is no regulatory obligation to give access ²⁵¹ . These cases are elaborated in paragraph 166.
New fn 247	Judgment of 10 September 2024, <i>Google LLC and Alphabet Inc. v European Commission</i> , C-48/22 P, EU:C:2024:726, paragraphs 98–103.
New fn 248	Judgment of 25 March 2021, <i>Slovak Telekom v Commission</i> , C-165/19 P, EU:C:2021:239, paragraph 46; judgment of 25 March 2021, <i>Deutsche Telekom AG v European Commission</i> , C-152/19 P, EU:C:2021:238, paragraph 46; judgment of 12 January 2023, <i>Lietuvos geležinkiai AB v European Commission</i> , C-42/21 P, paragraph 75.
New fn 249	Judgment of 6 March 1974, <i>Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities</i> , 6 and 7-73, EU:C:1974:18, paragraph 24; judgment of 16 September 2008, <i>Sot. Léllos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton</i> , C-468/06 to C-478/06, EU:C:2008:504, paragraph 49.
New fn 250	Judgment of 25 March 2021, <i>Slovak Telekom v Commission</i> , C-165/19 P, EU:C:2021:239, paragraph 50.

New fn 251	Judgment of 25 March 2021, <i>Slovak Telekom v Commission</i> , C-165/19 P, EU:C:2021:239, paragraph 58; judgment of 25 March 2021, <i>Deutsche Telekom AG v European Commission</i> , C-152/19 P, EU:C:2021:238, paragraph 58.
Para 106	A refusal can limit the technical development on the market if, for instance, it prevents the requesting undertaking from producing new products that are not offered by the dominant undertaking and for which there is a potential consumer demand (limitation of production or markets) ²⁵⁴²⁶⁵ , even if such goods or services are in competition with those of the dominant undertaking. In other words, in these circumstances, the undertaking which requested the licence should not limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right ²⁵²²⁶⁶ . This requirement for a new product is an additional guarantee to limit the impingement on freedom of contract and the right to property of the dominant undertaking in those cases where only a hypothetical market for the input can be identified to those cases where there is a general interest in competitors to develop competing inputs.
Para 111(a)	If prices are below AVC or AAC, the pricing conduct can be considered predatory as, in applying such prices, a dominant undertaking is presumed assumed to pursue no economic objective other than eliminating its competitors because regardless of whether they are as efficient it is plausible that they cannot replicate or offset the advantage that the dominant undertaking derives from such conduct ²⁶⁰²⁷⁴ .
Para 112	In particular, P -predatory pricing has a high potential to produce exclusionary effects and is therefore presumed assumed to do so (see paragraph 60(b) above) ²⁶⁷²⁸¹ . If the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess that evidence ²⁶⁸²⁸² .
Para 128	In addition, in circumstances where the price-cost test indicates a negative spread, the margin squeeze has a high potential to produce exclusionary effects and those effects can be presumed assumed because it is plausible that competitors cannot replicate or offset the advantage that the dominant undertaking derives from such conduct regardless of whether they are as efficient (see paragraph 60(b)) ²⁹⁶³¹⁰ . If the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess that evidence ²⁹⁷³¹¹ .
Para 160	To establish whether self-preferencing is liable to be abusive, it is necessary to assess whether granting preferential treatment to the dominant undertaking's own products departs from competition on the merits and whether it is capable of producing exclusionary effects by assessing whether it is plausible that hypothetical as-efficient competitors cannot replicate or offset the advantage that the dominant undertaking derives from that conduct ³³⁵³⁴⁹ , which can be assumed subject to rebuttal in light of the following factual circumstances.
Para 163	"Access restrictions" refer to the imposition by a dominant undertaking of restrictions on access to an input that are different from a refusal to supply in the sense that the dominant undertaking is found not to have the possibility of making the legitimate decision to refuse to give access to certain input in light of all the relevant factual circumstances, including the content and the context of the refusal as explained in paragraph 96. ³⁴⁰³⁵⁴ .
New fn 354	See the notion of "refusal to supply" for the purpose of these Guidelines, set out in section 4.2.3, which refers to situations where a dominant undertaking has developed an input exclusively or mainly for its own use is found to have the possibility of making the legitimate decision to refuse to give access to the input.
Para 167	Conduct that is liable to be abusive may escape the prohibition of Article 102 TFEU where the dominant undertaking can demonstrate to the requisite standard, which is the plausibility of an alternative explanation to deriving an advantage that hypothetical as-efficient competitors cannot replicate or offset , that such conduct is objectively justified. To be objectively justified, the alternative explanation for the conduct must be objectively necessary for a legitimate aim (so-called "objective necessity- defence ") or to produce efficiencies that counterbalance, or even outweigh, the negative effect of the conduct on competition (so-called "efficiency defence") ³⁴⁹³⁶³ .

Para 168	<p>An o Objective necessity defence must be based on evidence that the behaviour of the dominant undertaking was objectively necessary to achieve a certain legitimate aim³⁵⁰³⁶⁴. The objective necessity legitimate aim may stem from be legitimate commercial considerations, for example, the protection of the dominant undertaking against unfair competition³⁵⁴³⁶⁵, or the placing of orders by the customer that are out of the ordinary³⁵²³⁶⁶ or if the customer's conduct is inconsistent with fair trade practices³⁵³³⁶⁷. It may also stem from technical justifications, for example linked to maintaining or improving the performance of the dominant undertaking's product³⁵⁴³⁶⁸. While the arguments supporting an objective necessity defence may also relate, for instance, to public health, safety or other public interest considerations³⁵⁵³⁶⁹, the Union Courts have confirmed that it is not the dominant undertaking's task to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or as inferior in quality to its own products³⁵⁶³⁷⁰, nor more generally to enforce other undertakings' compliance with the law³⁵⁷³⁷¹. An objective necessity defence will be accepted only if the actual or potential exclusionary effects resulting from the conduct are plausibly proportionate to the alleged necessary aim³⁵⁸³⁷² which is the requisite standard imposed by presumption of innocence. The proportionality condition is not met where the same aim could be achieved through means that are less restrictive of competition³⁵⁹³⁷³.</p>
New fn 373	<p>Judgment of 19 January 2023, <i>Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato</i>, C-680/20, EU:C:2023:33, para 42 Ibid.</p>

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