

# The draft Article 102 Guidelines: How a biased reading of the case law delivered an unfortunate attempt to roll back the effects-based approach of the Union Courts

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## Introduction

Over the summer, the Commission published its long-awaited draft Article 102 Guidelines ('draft GL') for comments.<sup>2</sup> The stated intention of the Commission is to base the Guidelines on the case law of the Union Courts (§9). The stated goals of the Guidelines are to allow a vigorous and effective application of Article 102, but also to ensure that Article 102 is applied in a predictable and transparent manner to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU, and to give guidance to national courts and national competition authorities in their application of Article 102 (§4 and 8).

## A sometimes selective and biased reading of the case law

While the stated intention of the Commission is to base its future GL on the case law of the Union Courts, the text does not live up to that promise:

- The draft GL define abuse by referring to exclusionary effects (see for instance the definition in §6), without linking the effects to harm to consumers, whereas the case law, from *Post Danmark I*<sup>3</sup> and *II*<sup>4</sup> to *European Superleague*<sup>5</sup>, makes the important distinction between exclusionary effects and exclusionary effects that harm consumers (anti-competitive foreclosure). Instead of following the case law, the Commission seems intent on going back from 'protecting competition' to 'protecting competitors'.

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<sup>1</sup> The opinions expressed are strictly personal. While I previously worked for the European Commission, nothing in this article represents the views of the European Commission, DG COMP or any other institution, entity, person, etc. I have no interests to declare except my own interest, as a European consumer, in a coherent and effective EU competition policy. All errors and omissions are mine.

<sup>2</sup> 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*; found at [https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines\\_en](https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en)

<sup>3</sup> Judgment of the Court of Justice of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, §24: *Article 82 EC applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition.* (underlining added).

<sup>4</sup> Judgment of the Court of Justice of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, §67 and 69: *It follows that only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article 82 EC. ... Such an assessment seeks to determine whether the conduct of the dominant undertaking produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests.* (referring to *Post Danmark I*).

<sup>5</sup> Judgment of the Court of Justice of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, §129-131.

- A similar remark can be made about the draft GL practically ignoring the requirement of the case law to apply the As Efficient Competitor principle (AEC principle) when establishing abuse of a dominant position. In various judgments since *Post Denmark I* the Union Courts do not only emphasise that Article 102 is not there *to ensure that competitors less efficient than the dominant undertaking should remain on the market* and that *competition on the merits may lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, output, choice, quality or innovation*, but also that *consequently, in order to find, in a given case, that conduct must be categorised as ‘abuse of a dominant position’, it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market or markets concerned or by hindering their growth on those markets.*<sup>6</sup> Whatever one may think about the usefulness and practicality to apply the AEC principle to all types of conduct and not just pricing conduct, it is crystal clear that the Union Courts expect EU competition policy to protect competition in the interest of consumers and not to protect competitors.
- The draft GL show a selective reading of the case law by only using ‘capability to have exclusionary effects’ and avoiding using the words ‘likely exclusionary effects’, while the case law, from *Post Denmark I* and *II* to *European Superleague*, uses interchangeably ‘having likely or actual exclusionary effects’, ‘actual or potential exclusionary effects’ and ‘capability to have exclusionary effects’. As if the Commission hopes that by avoiding certain wording the standard of proof (degree of probability) for showing negative effects can somehow be lowered. Throughout the draft GL, it seems that any increase in the probability of exclusionary effects is considered to be sufficient to show capability to exclude. The only and notable exception is in §169 of the draft GL, where the Commission describes the conditions for a successful efficiency defence as follows: ... *that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and on the interests of consumers in the affected markets.* As if the Commission suddenly realised that a balancing of negative and positive effects would normally require the same degree of probability to be applied for both types of effects and that indeed a standard of ‘more likely than not’ – through a balancing of probabilities or balancing of harms - is the correct standard of proof, which should in that case be made explicit throughout the text.<sup>7</sup>
- In §60 the Commission pushes beyond the rebuttable presumption from the *Intel* judgment.<sup>8</sup> In that judgment the Court of Justice has merely clarified the order in which

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<sup>6</sup> Judgment of the Court of Justice of 24 October 2024, *Commission v Intel*, C-240/22 P, ECLI:EU:C:2024:915, §175-176, underlining added, referring to *European Superleague* (§126, 127 and 129) and referring indirectly to, amongst others, *Post Denmark I*, *Intel* (see footnote 8) and *Servizio Elettrico Nazionale* (see footnote 12).

<sup>7</sup> That the case law requires as a minimum the ‘more likely than not’ standard may be inferred, for instance, from §42 of *Unilever Italia*, judgment of the Court of Justice of 19 January 2023, Case C-680/20, ECLI:EU:C:2023:33, where the Court stated that a demonstration that a certain conduct is abusive ... *must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice.* (underlining added)

<sup>8</sup> Judgment of the Court of Justice of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632.

authority and dominant firm need to bring forward evidence to show anti-competitive effects. It does not reduce the standard of proof to show anti-competitive effects. However, the Commission suggests, in an unclear sentence, that (even) where the dominant firm is able to rebut the presumption, the evidentiary burden for the Commission to show abuse should still somehow be reduced: *Even in the scenario set out in (ii), the evidentiary assessment must give due weight to the probative value of a presumption, 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.*

- In §62 of the draft GL it is suggested that, in order to show that a conduct is capable of having exclusionary effects, *it is sufficient to show that the conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors.* This unclear phrasing is much wider in scope than what the General Court stated in §363 of its *Lundbeck* judgment, to which the Commission refers: *Accordingly, by concluding the agreements at issue, the applicants exchanged that uncertainty for the certainty that the generic undertakings would not enter the market, by means of significant reverse payments (recital 604 of the contested decision), thus eliminating all competition, even potential, on the market, during the term of those agreements.*<sup>9</sup>
- In the next sentence in §62, the Commission seems to say that actual effects and the actual conduct of competitors cannot negate or put doubt on ‘shown’ capability to have exclusionary effects: *Moreover, where it is established that a conduct is objectively capable of restricting competition, this cannot be called into question by the actual reaction of third parties.* The Commission refers here to §360 of the *AstraZeneca* judgment.<sup>10</sup> However, in that paragraph the General Court speaks of conduct which is *objectively of such a nature as to restrict competition*, i.e. of what are also called naked restrictions/by object conduct. This obviously does not imply that in general (certain) facts and effects can be disregarded when showing capability to have exclusionary effects. As stated by the Union Courts, time and time again, *the demonstration that conduct has the actual or potential effect of restricting competition, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must be made, in all cases, in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market or markets in question or the functioning of competition on that market or those markets.*<sup>11</sup>
- Something similar is found in §70 c) of the draft GL: *While the position of competitors is relevant in the assessment, the finding of capability to produce exclusionary effects cannot be called into question by the actions that competitors may have taken – or could have taken – to limit the effects of the conduct of the dominant undertaking.* This a very broad interpretation of §102 of *Servizio Elettrico Nazionale*<sup>12</sup>, where the Court of Justice

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<sup>9</sup> Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, EU:T:2016:449, paragraph 363.

<sup>10</sup> Judgment of the General Court of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 360.

<sup>11</sup> Judgment of the Court of Justice of 24 October 2024, *Commission v Intel* (see footnote 6), § 179 and case law referred there, underlining added.

<sup>12</sup> Judgment of the Court of Justice of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379.

made this point in relation to a situation where the possible reactions of competitors could never fully counter but could at most limit the harmful consequences of SEN's conduct.

- In section 4.2.1 of the draft GL (relating to exclusive dealing), the Commission suggests that the Union Courts have treated *incentive schemes that are conditional on a customer or a supplier purchasing or selling all or most of their requirements from/to the dominant undertaking* in the same way as an *obligation to purchase or sell all or most of a customer or a supplier's requirements from/to the dominant undertaking*. Specifically, the Commission implies that a price-cost test/the as efficient competitor test has no role to play in assessing the capability to exclude of, for instance, loyalty rebates. This goes directly against what the Court of Justice has recently said about the assessment of all forms of pricing conduct in §79-80 *Servizio Elettrico Nazionale*, one of the judgments which the Commission otherwise refers to most often. In its judgment the Court of Justice says that for pricing conduct, ... *which includes loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the 'as-efficient competitor' test, which seeks specifically to assess whether such a competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position*. Most recently the Court of Justice has again confirmed this position in §181 of *Commission v Intel: The capability of such rebates to foreclose a competitor as efficient as the dominant undertaking, .... , must be assessed, as a general rule, using the AEC test*.<sup>13</sup>
- More in general, while the case law since *Post Danmark I* consistently refers to the central role of the AEC test when assessing pricing conduct (see for instance *European Superleague* and *Servizio Elettrico Nazionale*), the draft GL seem to intentionally downplay and sometimes deny the AEC test's obviously important role in finding an abuse. This appears most clearly in the assessment of conditional rebates (section 4.3.1, §145). First it is said that *[T]he fact that even a hypothetical as-efficient competitor would be unable to compensate the loss of the rebates as demonstrated by means of a price-cost test can be a consideration for finding capability to have exclusionary effects*. However, the text continues by saying that ... *the fact that a hypothetical as-efficient competitor would be able to compensate the loss of the rebates is not necessarily a relevant factor showing that the rebates scheme is incapable of producing exclusionary effects. This is because the conduct's capability to have exclusionary effects needs to be assessed in relation to the existing actual or potential competitors of the dominant firm, rather than in relation to hypothetical competitors*. This again implies protecting competitors instead of competition. If competitors happen to be less efficient, the AEC test has no role or meaning anymore? Instead of discarding the soft safe harbour for pricing above cost, which would go against the central role of the AEC principle and test in the case law and would be unfortunate from a legal certainty point of view, future GL should describe clearly in which specific situations pricing above cost may be addressed as abusive. One such scenario could be based on *Post Danmark II*, where the Court of Justice observed that because of *Post Danmark's* legal monopoly over part of the market, it was very difficult, if not impossible, for entrants to become as efficient. Even in such specific scenarios applying a price-cost test may still be useful: if the price is only

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<sup>13</sup> Judgment of the Court of Justice of 24 October 2024, *Commission v Intel* (see footnote 6).

marginally above cost, it is more likely that the rebate scheme is responsible, in combination with the deprivation of economies of scale, for anti-competitively foreclosing competitors, whereas such a conclusion may not be justified where the effective price is well above cost, in particular if the economies of scale are modest.

- In §95 of the draft GL, the Commission states that *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 presumed*. This leaves unclear when this rebuttable presumption kicks in. Referring only to older case law, the ‘explanation’ is the following vague sentence in a footnote: *This is notably the case in situations where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects*.
- In §112 of the draft GL, the Commission extends the *Intel* rebuttable presumption to all scenarios of predation, whereas the predation-related case law only applies the presumption for pricing below average variable cost/average avoidable cost (AVC/AAC).

### **A confusing and superfluous two-step test**

One could of course argue that there is no need for Commission guidelines to diligently or meticulously follow the case law. In particular where the case law may be unclear or not very coherent, Commission guidelines may play an important role by describing and proposing a more coherent policy. This is what the 2008 Article 102 Guidance Paper<sup>14</sup> did. It provided a systematic effects-based approach, based on mainstream theories of harm, at a time when the more form-based approach still prevalent in the Article 102 case law became increasingly out of sync with the effects-based approach introduced earlier under Article 101 and for mergers. Offering a coherent policy made it not only attractive for firms and authorities, but also led to the 2008 Guidance Paper’s success with the Union Courts.

However, the draft GL move away from the 2008 Guidance Paper. Economic logic and theories of harm seem no longer relevant for establishing an abuse. Instead in §45 of the draft GL, the Commission introduces a conceptual distinction between finding that conduct is not competition on the merits and establishing the conduct’s capability to have exclusionary effects. Based on that distinction, it states that it is generally necessary to apply a two-step test to find an abuse. Hence, finding an abuse would require both a finding that the conduct departs from competition on the merits and that the conduct is capable of having exclusionary effects.

It is certainly true that in the case law support for this proposed two-step test can be found. The Commission refers, in particular, to §103 of *Servizio Elettrico Nazionale*, where the Court indeed states that the conduct of a dominant firm ... *may be characterised as ‘abusive’ for the purposes of that provision if it is capable of producing an exclusionary effect and if it is based on the use of means other than those which come within the scope of competition on the merits*. That these two conditions are cumulative is not only clear from the conjunction ‘and’ but also from what follows in §103 (*Where those two conditions are fulfilled ....*).

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<sup>14</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

The question is, however, why the Commission stresses and builds on this two-step test? It is certainly true that in most of the case law, including in more and less recent Grand Chamber judgments such as *Post Danmark I* and *European Superleague*, the Court of Justice has generally used wording like ‘the use of means other than those which come within the scope of competition on the merits’ in conjunction with wording such as ‘conduct which hinders competition and is likely or capable to have anti-competitive effects’. However, this does not necessarily indicate that an explicit two-step test is required. Effectively, in a long line of case law since *Post Danmark I*, the focus has shifted and, as referred to earlier, is on whether the conduct hinders competition/has actual or likely exclusionary effects to the detriment of consumers.

On the basis of the case law, it is therefore equally possible, as others - including me - have argued before, that the focus of finding an abuse should be on establishing likely or actual exclusionary effects and should not require an additional and independent finding that the conduct departs from competition on the merits.<sup>15</sup> Why not picking up on the elements in the case law which suggest that conduct that harms consumers is by definition departing from competition on the merits? If we all agree, in accordance with the case law, that the ultimate goal of EU competition law is to protect consumers, it is justified to conclude that as soon as the conduct of a dominant firm is likely to have exclusionary effects to the detriment of consumers in the relevant market(s), the conduct automatically departs from competition on the merits. Otherwise, consumer harm could be excused by defining the conduct as being competition on the merits.

However as said, the Commission in the draft GL stresses the relevance of a conceptual distinction between finding that conduct departs from competition on the merits and establishing the conduct’s capability to have exclusionary effects, and advocates a two-step test to find an abuse. This gives the impression that the Commission considers that it is not only theoretically possible but also practically relevant to distinguish four scenarios (see the diagram below): (1) conduct that is competition on the merits and that is not capable of having exclusionary effects, (2) conduct that is not competition on the merits but that is not capable of having exclusionary effects, (3) conduct that is competition on the merits but that is capable of having exclusionary effects, and (4) conduct that is not competition on the merits and that is capable of having exclusionary effects.

	Conduct that is competition on the merits	Conduct departing from competition on the merits
Conduct not capable of having exclusionary effects	1	2
Conduct capable of having exclusionary effects	3	4

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<sup>15</sup> See, for instance, opinion of Advocate General Rantos, delivered on 9 December 2021, in case *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2021:998, §61. As for me, Luc Peepkorn, *Conditional pricing and the AEC test: A happy marriage or an awkward couple?*, Concurrences No. 2-2019, §8.

It is clear that conduct falling in cell 1 is not abusive while conduct falling in cell 4 is abusive unless it can be justified based on objective necessity or efficiencies. To focus the concept of abuse on cell 4 is in line with the case law, as described above, which effectively treats conduct departing from competition on the merits and capability to have exclusionary effects as two sides of the same coin.

However, the Commission, by stressing the conceptual distinction and advocating a two-step test to find an abuse, must consider that in practice also cells 2 and 3 are important. If not, if all relevant conduct falls either in cell 1 or cell 4, stressing the distinction and introducing the two-step test is at best superfluous and in practice also confusing. So, does the Commission in the draft GL describe types of conduct which it considers to fall in the two remaining cells 2 and 3?

In the draft GL no description is found of conduct that would fall in either cell 2 or 3. Not in section 3, which presents general principles for determining whether conduct by a dominant undertaking is liable to be abusive and where the distinction and two-step test are put forward, nor in section 4, which sets out principles for determining whether specific types of conduct are liable to be abusive.

The parts of section 3 that attempt to describe what is and what is not competition on the merits (most of section 3.1 and the whole of section 3.2) contain little analysis and basically list examples from the case law. This text, while acknowledging that competition on the merits and absence of negative effects are (often) two sides of the same coin, is at best superfluous but more often also confusing. For instance, in §49, the draft GL state that ... *the fact that an undertaking is in a dominant position does not disqualify it from protecting its own commercial interests, if they are attacked*. However, this already unclear description of competition on the merits is immediately curtailed by saying that the dominant firm ... *may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to strengthen its dominant position or to abuse it*. In other words, protecting its own interests is no longer competition on the merits if it objectively results in helping the dominant firm to strengthen its dominance or capability to produce exclusionary effects.<sup>16</sup>

### **Some concluding remarks**

As mentioned in the introduction, one of the stated goals of the Guidelines is to allow a vigorous and effective application of Article 102. However, introducing two cumulative conditions will logically make it harder to establish an abuse than if only one of the conditions (showing capability to have exclusionary effects) were sufficient. A two-step test will not strengthen the enforcement of Article 102. In particular, conduct in cell 3, i.e. conduct which is competition on the merits but which is nonetheless capable of having exclusionary effects, i.e. conduct which produces an actual or likely exclusionary effect to the detriment of competition and consumers, would not be abusive. It would not be abusive, as it is competition on the merits, as the draft GL seem to say in §50 (...*the Union Courts have established that only conduct that deviates from*

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<sup>16</sup> For more examples of confusion, see Luc Peeperkorn, *The Draft Article 102 Guidelines: A Somewhat Confused Attempt to Partly Roll Back the Effects-based Approach of the Union Courts*, <https://competitionlawblog.kluwercompetitionlaw.com/2024/09/04/the-draft-article-102-guidelines-a-somewhat-confused-attempt-to-partly-roll-back-the-effects-based-approach-of-the-union-courts/>

*competition on the merits can constitute an exclusionary abuse within the meaning of Article 102 TFEU – referring to Servizio Elettrico Nazionale §103).*

Another stated goal of the Guidelines is to ensure that Article 102 is applied in a predictable and transparent manner to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU. In view of the lack of conceptual clarity and confusion about what is competition on the merits, the two-step test will neither enhance legal certainty nor help undertakings in their self-assessment.

The draft GL give the impression that the Commission hopes that once a particular conduct can be described as deviating from competition on the merits, this will somehow reduce the evidentiary burden of showing capability or likelihood of having exclusionary effects. It seems therefore that the draft GL are mainly an attempt to partly roll back the effects-based approach introduced by the 2008 Guidance Paper and which has subsequently been followed by the Union Courts in a series of judgments beginning with *Post Danmark I* and *Intel*.

It would be better for the Commission, also in view of the stated goals, to accept in its future GL what the Union Courts have said consistently since *Post Danmark I*, namely that establishing an abuse is in essence about establishing actual or likely anti-competitive effects, i.e. exclusionary effects that harm consumers, no more, no less.

While it is certainly possible to issue Article 102 Guidelines based on the case law that allow for vigorous and effective enforcement, as well as ensuring that Article 102 is applied in a predictable and transparent manner, enhancing legal certainty and helping undertakings self-assess whether their conduct constitutes an exclusionary abuse, the current draft GL are, to put it mildly, not there yet.