

FEEDBACK ON THE EUROPEAN COMMISSION'S DRAFT GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS

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Thank you for the opportunity to comment on the draft guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings. In this contribution I would like to (1) make a few general remarks on the draft guidelines, (2) highlight key points in which the draft guidelines depart from the approach of the Guidance on Article 102, and (3) comment on these changes.

I. GENERAL REMARKS

There are many positives about the draft guidelines. They are mostly clear and provide an intellectually coherent framework for assessing exclusionary abuses. They define key concepts and provide useful examples to illustrate the former. They also provide detailed guidance on how the Commission intends to apply these rules in the digital economy, and it is to be hoped that the horizontal and non-horizontal merger guidelines will soon be updated accordingly.

It is also positive that the problematic Guidance on Article 102¹ will soon be replaced by genuine interpretative guidelines. The Guidance was issued at the height of the more economic approach to bring the Commission's approach to Article 102 into line with the changes it had previously made to its interpretation of Article 101 and merger control. Rather than reinterpret Article 102 in the same way, however, the Commission formally merely issued revised enforcement priorities, most likely because an outright reinterpretation would have been incompatible with the approach of the European Court of Justice at the time. This resulted in a decade and a half of legal uncertainty.

De facto, the revised enforcement priorities aimed to achieve the same result as the guidelines on Article 101 and merger control. They spelled out a more economic approach to assessing exclusionary conduct. Following the advice of the EAGCP,² the Guidance adopted a consumer-welfare-focused and effects-based approach, in which the Commission essentially committed to not pursuing any conduct unless it could prove in an in-depth economic assessment of the individual circumstances of the case that the conduct restricted competition to such a degree that a detrimental effect on economic consumer welfare, measured in terms of price, output, quality or innovation, could be expected. It further introduced specific economic tools, e.g., the AEC test, for assessing whether such effects were likely to occur in the case of price-based conduct. By committing to the effects-based approach, the Guidance implicitly rejected many of the legal presumptions previously used for inferring both the position of dominance and the effects of certain types of conduct by dominant players. In 2008, the Court of Justice, on the other hand, had still relied on these presumptions and deemed harm to the structure of competition sufficient without requiring additional evidence of consumer harm.

As section 2 of this contribution argues, the draft guidelines from August 2024 retract or at least significantly rein in many of the principles introduced by the Guidance. The question arises, however, whether this scaled-back approach is compatible with the current case law. Even though the Guidance was formally entitled "Communication on enforcement priorities", defendants were quick to invoke them in court as if they were interpretative principles, holding

¹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C45/7 ('Guidance' in the following).

² European Advisory Group on Competition Policy (EAGCP), *An Economic Approach to Article 82* (July 2005).

the Commissions to increasingly complex legal tests and high evidentiary burdens. And over the past few years, despite its initial reluctance, the European Court of Justice has ended up integrating certain of these principles in its interpretation of Article 102. This point is addressed in section 3.

II. POINTS ON WHICH THE DRAFT GUIDELINES DEPART FROM THE ORIGINAL GUIDANCE PAPER

a. The legal objective

The draft guidelines define the legal objectives of EU competition law more broadly than the original Guidance from 2008 and other soft law instruments of the time.

In the first decade of the 21st century, the Commission's guidelines on Article 101 and the merger guidelines embraced the neo-classical consumer welfare aim, which had been guiding US antitrust law since the 1980s. They introduced the then novel premise that the ultimate legal objective of the EU competition rules should be to enhance consumer welfare, defined and measured in terms of price, output, quality and innovation,³ to the exclusion of all other public policy aims. This focus on economic consumer welfare was mirrored in Guidance Paper's enforcement priorities, according to which the Commission intended to focus on those types of conduct that were most harmful to consumers in terms of price, quality, choice and innovation.⁴

The draft guidelines on Article 102 take a more open-ended approach. They now define the aims of EU competition law as protecting "effective competition", defined as genuine and undistorted competition. While recognising that effective competition drives market players to deliver the best outcomes for consumers in terms of choice, quality, innovation and price, they also emphasise other benefits of competition, including opportunities for innovative players including SMEs and start-ups to operate on a level playing field with other players, sustainable development and enabling strong and diversified supply chains.⁵ This broader approach could already be observed in the revised Market Definition Notice from February 2024, which stresses that competition policy contributes to the twin green and digital transitions and the resilience of the single market by preventing excessive dependency,⁶ and the Commission's guidelines on horizontal cooperation agreements from July 2023, which also refer to sustainability goals throughout.⁷

The draft guidelines' broader objective is reflected in the (re)interpretation of the following key legal principles.

b. The concept of dominance

In line with the broader legal objective, the draft guidelines' concept of dominance is also less welfare-focused than that of the Guidance from 2008. The original Guidance had implicitly reinterpreted the concept of dominance as referring to market power, i.e., the ability to reduce economic consumer welfare by increasing prices, or reducing output, quality choice or innovation. While the relevant section reiterated the European Court of Justice's standard

³ See e.g., Guidelines on Article 81(3), OJ [2004] C101/97, para 13; Horizontal merger guidelines, OJ [2004] C 31/5, para 8; Non-horizontal merger guidelines, OJ [2008] C 265/6, para 10.

⁴ Guidance, para 4.

⁵ Draft guidelines, para 1.

⁶ European Commission, Notice on the definition of the relevant market for the purposes of Union competition law, OJ [2024] C/2024/1645, para 3.

⁷ Horizontal cooperation guidelines, OJ [2023] C259/1, paras 3, 516.

definition of dominance in its opening statements, the section was entitled “market power”⁸ and the Guidance explicitly stated that dominance entailed that the undertaking enjoyed substantial market power over a period of time.⁹ Again, this was perfectly in line with the other soft law instruments of the time, which had already read a consumer harm requirement and market power analysis both into Article 101 and the EU Merger Regulation.¹⁰

The draft guidelines’ approach is less absolute. The term “market power” has disappeared from the general principles, which rely primarily on the Court’s long-standing *United Brands* formula from 1978, which is much broader than the ability to reduce consumer welfare in economic terms. It defines dominance as an undertaking’s ability to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers.¹¹

The assessment factors primarily remain the same, i.e., structural factors, barriers to entry and countervailing buyer power. However, it is striking that the draft guidelines reintroduce the Court’s structural presumption from the 1970s and 1980s, according to which “very large” market shares,¹² subsequently defined as 50% or more,¹³ are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position.¹⁴ This former legal presumption, no doubt deemed too formalistic and blunt at the time, had not even figured in the 2008 Guidance.

Unlike the Guidance, finally, the draft guidelines elaborate on the concept of collective dominance — a theoretical construct the European Commission does not appear to have relied on under Article 102 since the introduction of the more economic approach. Again, a collective market share of more than 50% is, in the absence of evidence to the contrary, deemed a strong indication of the existence of a collective dominant position.¹⁵

c. The ‘general’ legal test

The draft guidelines introduce a new general test for assessing whether exclusionary conduct should qualify as abusive. The 2008 Guidance had proposed a (then novel) test in line with the exclusive consumer welfare aim on which the Guidance was based: exclusionary conduct was deemed illegal if it was likely to result in “anti-competitive foreclosure”, i.e., foreclosure of competitors that resulted in a situation in which the dominant undertaking could profitably increase prices or reduce other parameters of consumer welfare. This entailed a 2-step test: (1) proving the likely foreclosure effect (defined as hampering or eliminating actual or potential competitors’ effective access to supplies or markets), and (2) proving that such foreclosure resulted in consumer harm.¹⁶

The draft guidelines now propose a different 2-step test. Exclusionary conduct should be deemed abusive if it (1) departs from competition on the merits and (2) is capable of having exclusionary effects.¹⁷ In other words, it introduces the concept of competition on the merits and eliminates the need to prove the effects on consumer welfare.

⁸ Guidance, paras 9-15.

⁹ Guidance, para 10.

¹⁰ Guidelines on the application of Article 81(3), paras 17-25; horizontal merger guidelines, para 22, non-horizontal merger guidelines, para 10.

¹¹ Case 27/76 *United Brands*, EU:C:1978:22, para 65.

¹² Case 85/76 *Hoffmann-La Roche v Commission*, EU:C:1979:36, para 41.

¹³ C-62/86 *Akzo v Commission*, EU:C:1991:286, para 60.

¹⁴ Draft guidelines, para 26.

¹⁵ Draft guidelines, FN 74.

¹⁶ Guidance, paras 19-22.

¹⁷ Draft guidelines, para 45.

Moreover, specifically for price-based exclusionary conduct, such as rebates, the original Guidance had stated that the Commission would normally only intervene in cases where the conduct was capable of excluding a competitor as efficient as the dominant undertaking. To determine whether this was the case, it proposed to carry out a quantitative AEC test which essentially consisted in assessing whether the price allowed the dominant undertaking to cover the cost of providing the product.

The draft guidelines somewhat downgrade the role of the AEC test. For conduct that is not subject to any of the specific tests developed in the case law, they consider the question whether a hypothetical AEC could not survive the conduct one of several (non-cumulative) factors that could indicate that the conduct departs from competition on the merits.¹⁸ They explicitly state that assessing whether conduct is capable of having exclusionary effects does not generally require showing that the affected actual or potential competitors are as efficient as the dominant undertaking.¹⁹ Specifically for margin squeeze cases, however, the draft guidelines propose to carry out a price-cost comparison, as required by the current case law.²⁰ In the case of conditional non-exclusivity rebates, however, there is now merely a commitment to assessing whether it is appropriate to carry out such a test depending on the circumstances of the case.²¹

d. The use of legal presumptions for inferring anticompetitive effects

The Guidance on Article 102 had implicitly rejected the use of legal presumptions for inferring the investigated conduct's anticompetitive effects in all but the most exceptional of cases.²² Instead, the Commission committed itself to proving the conduct's effects (both on competition and consumer welfare) on the basis of qualitative and where possible quantitative evidence²³ in each single case.

The draft guidelines (re)introduce legal presumptions for certain types of conduct. They distinguish between three categories of conduct:²⁴

- (1) Naked restrictions that have no economic interest for the dominant undertaking other than that of restricting competition.²⁵ These types of restrictions will be deemed to restrict competition by their very nature, and the dominant undertaking will only be able to prove in very exceptional cases that its conduct was not capable of having exclusionary effects in view of the specific circumstances of the case. Objective justifications and efficiency defences are possible in theory, but unlikely to succeed in practice.

¹⁸ Draft guidelines, para 55, (f).

¹⁹ Draft guidelines, para 73.

²⁰ Draft guidelines, paras 122, 130.

²¹ Draft guidelines, para 143.

²² Para 22 of the 2008 Guidance had stated that there could be circumstances in which it would not be necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question was likely to result in consumer harm, namely if it appeared that the conduct could only raise obstacles to competition and created no efficiencies.

²³ Guidance, para 19.

²⁴ Draft guidelines, para 60.

²⁵ In particular, payments conditional on customers postponing or cancelling the launch of products that are based on (?) products offered by the dominant undertaking's competitors; the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors; or the dominant undertaking actively dismantling an infrastructure used by a competitor.

- (2) Conduct that, while not qualifying as a naked restriction, is generally recognised as having a high potential to produce exclusionary effects,²⁶ and which will therefore also be presumed to lead to exclusionary effects as long as the Commission has established the conduct and its departure from competition on the merits. A dominant undertaking may seek to rebut the presumption by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects. The Commission will then examine whether the presumption is rebutted based on the arguments and supporting evidence submitted by the dominant undertaking during the administrative procedure. The capability to produce exclusionary effects is established if the Commission: (i) shows that the arguments and supporting evidence submitted by the dominant undertaking are insufficient to call into question the presumption, or (ii) if it provides evidentiary elements demonstrating the capability of the conduct to have exclusionary effects.
- (3) All other conduct, for which the Commission must establish that it is capable of foreclosing competition.

e. Evidentiary standard

The draft guidelines address the issue of the legal standard expected by Article 102 for proving the conduct's anticompetitive effects in detail.²⁷ The original Guidance had not explicitly engaged with the issue, but its explanations relating to the concept of anticompetitive foreclosure and the Commission's intention to intervene only against conduct that was most harmful to consumers,²⁸ could easily have been read as containing a commitment to proving the investigated conduct's actual effects.

The draft guidelines now make very clear that Article 102 does not require evidence of actual anticompetitive effects, and that an undertaking can be found guilty of abusive conduct even if it is established that there were no actual anti-competitive effects.²⁹ In line with established case law, the draft guidelines define the relevant standard as that of "capability" or capacity to exclude. While they state that this requires more than a merely hypothetical effect,³⁰ they do not clearly define the concept of "capability". A definition would be helpful, though. In *Post Danmark II*, the Court of Justice explicitly defined "capability" as meaning "likely"³¹—the same standard the Commission uses in an effects-based analysis under Article 101(1).³² Likely, especially if interpreted as meaning "more likely than not", appears to be a reasonable standard.

f. Conclusions

In sum, the draft guidelines propose several changes to the Commission's practice—some seemingly minor, others much less so. The draft guidelines do not commit to an ultimate reason for protecting effective competition. They no longer require direct evidence of consumer harm in addition to the restriction of competition. And they introduce (more or less) rebuttable presumptions of illegality for certain types of conduct. Taken together, these changes curtail two of the principles that were central to the original Guidance: the exclusive consumer welfare aim and the effects-based approach. While these are important changes, they cannot be

²⁶ Exclusivity arrangements, predatory pricing, margin squeeze in the presence of negative spreads, and certain forms of tying.

²⁷ Draft guidelines, paras 61-75.

²⁸ Guidance, paras 5, 19.

²⁹ Draft guidelines, para 64.

³⁰ Draft guidelines, para 61.

³¹ C-23/14 *Post Danmark*, ECLI:EU:C:2015:651, para 67.

³² See e.g., Guidelines on Article 101(3), paras 16-18.

described as a return to the 1970s and 1980s. Most of the legal presumptions proposed in the guidelines are now rebuttable, which was not the case prior to the more economic approach.

III. DISCUSSION

a. Underlying rationale

What explains these changes? The draft guidelines are silent on this point. To an objective onlooker, two explanations come to mind.

The revised approach may be attempting to correct unwelcome practical implications of the approach that the Commission introduced in 2008. The effects-based approach was supposed to guarantee more accuracy, and reduce the likelihood of false positives and negatives inherent in the former legal presumptions. The commitment to establishing the actual effects, however, in combination with the concept of anticompetitive foreclosure and the ambition to proving these effects both on the basis of qualitative and quantitative analyses, necessarily increased enforcement cost and time.³³ The commitment to carrying out more accurate analyses paradoxically also made the Commission's decisions more vulnerable to judicial review. The *Intel* saga is a case in point. It was the first 'state of the art' decision that integrated the Guidance Paper's principles, including an AEC test. It resulted in 15 years of litigation and the part of the decision that was based on the 'more economic' assessment being struck down.³⁴

While minimising error cost is an important policy objective, it needs to be reconciled with the aim of effective enforcement. Rules must not become so complex that they can no longer be enforced in a timely and cost-efficient manner. Rebuttable presumptions of foreclosure effects for specific types of conduct particularly likely to result in foreclosure does not seem like an unreasonable solution, as long the presumptions really remain rebuttable in practice.

The more open-ended legal objective proposed by the draft guidelines may also be an indication that the Commission is questioning the normative value of an exclusive consumer welfare aim, which is currently being debated on both sides of the Atlantic.

The following explores whether the changes proposed in the draft guidelines are compatible with the current case law. It does not attempt to speculate about the likely effects of these rules on competition and economic welfare. Economists are also better placed to judge whether the categories of conduct for which the draft guidelines establish a rebuttable presumption of foreclosure effects really have a sufficiently "high potential to produce exclusionary effects" to warrant such a presumption.

b. Compatibility with the case law

The Court's case law has evolved since 2008. After a few years of reluctance, the European Court of Justice started to embrace certain of the Guidance Paper's propositions, including the effects-based approach and the premise that the EU competition rules are not meant to ensure that less efficient competitors remain in the market. This raises the question whether the draft guidelines' plans to curtail these principles are compatible with the current case law. The

³³ Schweitzer and de Ridder, 'How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses', (2024) 15 *European Journal of Competition Law & Practice* 222.

³⁴ Decision of 13 May 2009 in Case AT.37990—*Intel*; C-240/22 P *Commission v Intel*, ECLI:EU:C:2024:915.

overall conclusion is that most of the changes can be reconciled with the case law, including the Article 102 judgements that were issued after the publication of the draft guidelines.³⁵

1. The legal objective

The wider legal objective proposed in the draft guidelines appears compatible with the Court's understanding of the purpose of Article 102 and the other competition rules. According to a long-standing formula, reiterated as recently as September 2024, the Court defines the purpose of Article 102 as preventing "competition from being restricted to the detriment of the public interest, individual undertakings and consumers".³⁶ This definition includes consumer welfare, but does not designate it as the exclusive reason for protecting competition.

2. The concept of dominance

The draft guidelines' definition of dominance is essentially a more concise version of the Court's standard formula from the 1970s,³⁷ according to which dominance refers to a position of economic strength which enables the undertaking to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. The General Court used it as recently as September 2024.³⁸ While this is much broader (and arguably vaguer) than the concept of market power used in the Guidance, it is not incompatible with the case law.

3. The 'general' legal test

The draft guidelines eliminate the concept of anticompetitive foreclosure. Unlike the Guidance from 2008, they do not require the Commission to prove that the foreclosure effects will also result in tangible consumer harm. Rather, foreclosure is deemed sufficient if it is the result of conduct other than competition on the merits. While this is a significant change in approach, it cannot be faulted under the existing case law. The Court has, to date, not required evidence of direct consumer harm in the case of exclusionary conduct. Rather, according to longstanding case law, it takes the view that Article 102 sanctions the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition.³⁹

The draft guidelines' 'demotion' of the AEC test is more challenging. The new general test does not explicitly state that Article 102 requires proving the exclusion of an AEC in every single case. Instead, the guidelines consider the question whether a hypothetical AEC would be unable to survive the conduct one of several possible indicators that the conduct does not qualify as competition on the merits. In recent years, however, the Court has repeatedly integrated references to AECs in its judgements, albeit in varying formulas. Unsurprisingly, defendants now regularly argue that the Commission is legally required to prove in every case that the investigated conduct is capable of excluding AECs. Despite this being one of the most controversial issues of the day, and defendants invoking the AEC test and principle in case after case, the Court's position remains remarkably unclear and open to interpretation on this point.

³⁵ In particular, Cases C-240/22 P *Commission v Intel*, ECLI:EU:C:2024:915; C-48/22 P *Google Shopping*, ECLI:EU:C:2024:726 and T-334/19 *Google AdSense for Search*, ECLI:EU:T:2024:634.

³⁶ C-48/22 P *Google Shopping*, ECLI:EU:C:2024:72, para 87; likewise: C-333/21 *European Superleague Company*, EU:C:2023:1011, para 124 and T-334/19 *Google AdSense for Search*, ECLI:EU:T:2024:634, para 103.

³⁷ Case 85/76 *Hoffmann-La Roche v Commission*, EU:C:1979:36, para 38.

³⁸ T-671/19 *Qualcomm*, ECLI:EU:T:2024:626, para 303.

³⁹ C-48/22 P *Google Shopping*, ECLI:EU:C:2024:72, para 87.

In *Google Shopping* and *Superleague*, for example, the Court stated the following:

“In order to find, in a given case, that conduct must be categorised as ‘abuse of a dominant position’ within the meaning of Article 102 TFEU, 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, although the latter may be either the dominated markets or related or neighbouring markets, where that conduct is liable to produce its actual or potential effects.”⁴⁰

In other cases, such as *SEN* and *Intel*, it held that Article 102 prohibits dominant undertakings:

“from engaging in practices, including pricing practices, which have an exclusionary effect on competitors considered to be *as efficient* as the dominant undertaking itself, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits”.⁴¹

This indeed raises the question, whether the Court now takes the view that Article 102 only prohibits exclusionary conduct that is capable of excluding an AEC. In my view, the case law cannot be interpreted as establishing such a general principle. The rulings in *SEN* and *Intel* establish that conduct, which is capable of excluding AECs, amounts to an abuse insofar as it departs from competition on the merits. That does not mean, however, that only conduct that an AEC could not survive may be abusive.

The Court specified in *Google Shopping* and *Superleague* that

“in addition, conduct may be categorised as ‘abuse of a dominant position’ not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market or markets concerned, but also where it has been proven to have the actual or potential effect— or even the object— of impeding *potentially competing undertakings at an earlier stage*, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, *from even entering that or those market(s) and, in so doing, preventing the growth of competition therein* to the detriment of consumers, by limiting production, product or alternative service development or innovation.”⁴²

This part of the ruling does not require evidence that the conduct was capable of excluding a potential entrant as efficient as the dominant undertaking. In markets that are subject to significant scale and network effects, a potential or even actual entrant cannot be expected to be as efficient as the dominant undertaking which already has a significant scale. The Court recognised this in *Post Danmark II* already.⁴³ While the case dealt with the postal sector, this argument is now particularly relevant in the digital platform economy.

⁴⁰ C-48/22 P *Google Shopping*, ECLI:EU:C:2024:72, para 165; C-333/21 *European Superleague Company*, EU:C:2023:1011, para 129 (emphasis added).

⁴¹ C-240/22 P *Commission v Intel*, ECLI:EU:C:2024:915, para 177; C-377/20 *Servizio Elettrico Nazionale*, EU:C:2022:379, para 76.

⁴² C-48/22 P *Google Shopping*, ECLI:EU:C:2024:72, para 167; C-333/21 *European Superleague Company*, EU:C:2023:1011, para 131 (emphasis added).

⁴³ C-23/14 *Post Danmark*, ECLI:EU:C:2015:651, para 60.

In *Google Shopping*, the Court moreover explicitly stated it “does not follow from the case law” that any finding of infringement under Article 102 is subject to proof that the conduct concerned is capable of excluding an AEC.⁴⁴

In sum, while conduct capable of excluding a hypothetical AEC should be deemed abusive unless justified, Article 102 does not only prohibit conduct capable of excluding AECs.

Insofar the proposed general test according to which the conduct’s capacity to foreclose an AEC is a relevant, but not the only, factor for determining whether the exclusionary effect should be considered anticompetitive does not seem incompatible with the Court’s approach, given that the Commission commits to assessing whether the use of such a test is appropriate in the individual case for conditional rebates, and proposes to carry out a price-cost-test for margin squeezes. And while the Court may not (yet) have explicitly referred to the AEC principle as a factor for determining whether the conduct amounts to competition on the merits, it is a logical way of fitting the concept into the revised intellectual framework.

4. The reintroduction of legal presumptions

The reintroduction of legal presumptions for inferring the foreclosure effects of certain types of conduct is another far-reaching change. The draft guidelines stipulate legal presumptions for two types of categories: naked restrictions, for which the presumption of illegality can only be rebutted in “very exceptional cases”, and other conduct that is generally recognised as having a high potential to produce exclusionary effects, in which case the undertaking can rebut the probative value of the presumption by showing that the conduct is not capable of having anticompetitive effects in the individual case.

It must be observed that in recent years, the European Court of Justice has increasingly stressed the need to assess the anticompetitive effects of business conduct under Article 102 (and 101) in light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s), and to prove its capacity to exclude on the basis of specific, tangible points of analysis and evidence.⁴⁵ It has also not hesitated to annul decisions that did not meet these standards.⁴⁶

However, it is also possible to conclude from recent cases that the European Court of Justice recognises the concept of naked restrictions that have the object of restricting competition, in which case it is not necessary to prove the capacity to foreclose, but it is possible to infer the anticompetitive effects.⁴⁷

Likewise, regarding the ‘middle’ category of conduct, for which a rebuttable presumption is supposed to apply, it cannot be disputed that the case law cited in the draft guidelines (even though some of it is relatively old)⁴⁸ established legal presumptions of foreclosure effects for these types of conduct. It makes sense to apply the “clarification” established in *Intel* and

⁴⁴ C-48/22 P *Google Shopping*, ECLI:EU:C:2024:72, para 264.

⁴⁵ C-48/22 P *Google Shopping*, ECLI:EU:C:2024:72, para 166; C-333/21 *European Superleague Company*, EU:C:2023:1011, para 130.

⁴⁶ See most recently T-286/09 RENV *Intel v Commission*, ECLI:EU:T:2022:19.

⁴⁷ C-333/21 *European Superleague Company*, EU:C:2023:1011, paras 131 (“object” of impeding competitors), 148 (“by their very nature”), 185. In *Intel*, the General Court agreed that the Commission did not have to prove the effects of the agreements’ “naked” restrictions (T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, paras 206, 210; and T-286/09 RENV *Intel v Commission*, ECLI:EU:T:2022:19, paras 90-93).

⁴⁸ In particular the case law on tying, where the last judgements reviewing decisions relying on a presumption dates from the 1990s (T-30/89 *Hilti v Commission* and T-83/91 *Tetra Pak v Commission*). The appeal in *Google Android* (C-738/22 P) might shed some light on the continuing existence of such a presumption.

*Unilever Italia*⁴⁹ to these presumptions in analogy, and offer the undertaking a chance to rebut the presumption.

IV. CONCLUSION

In sum, the draft guidelines propose significant changes to the Commission’s approach for assessing exclusionary conduct under Article 102. They roll back some of the commitments made at the height of the more economic approach in the mid-2010s, and thereby reduce the evidentiary burden for enforcers. Nonetheless, they do not amount to a return to the highly formalistic practice of the 1970s and 1980s. While they reintroduce a number of legal presumptions, these are (and should be) rebuttable. Overall, it seems possible to reconcile the proposed changes with the existing case law, including the Court’s (manifold but vague) pronouncements on the role of the AEC test and principle in Article 102 assessments. I would, however, recommend defining the concept of “capability” or capacity to foreclose more precisely, e.g., as meaning “likely” to foreclose in line with the standard applied in effects analyses under Article 101(1).

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⁴⁹ Case C-413/14 P – *Intel*, ECLI:EU:C:2017:632, paras 138, 139 and C-680/20 *Unilever Italia*, ECLI:EU:C:2023:33, paras 51 et seq.