OXFORD

Journal of European Competition Law & Practice, 2025, 1–10
https://doi.org/10.1093/jeclap/lpaf020
Article

The European Commission's draft guidelines on exclusionary abuses: a law and economics critique and recommendations

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Key Points

- We welcome the prospect of Guidelines on Article 102 TFEU and endorse the stated aims of the Draft Guidelines (ie enhancing legal certainty, helping undertakings to self-assess, and guiding the National Courts and National Competition Authorities).
- From an economics perspective, we also welcome the possible use of rebuttable presumptions for certain practices, but not for others (eg tying). Further, the approach of the Draft Guidelines to presumptions seems to imply a reversal of the burden of proof, which the EU Courts might arguably not accept.
- The Draft Guidelines move away from an economic, effects-based approach and do not fully acknowledge or embrace the modern legal approach of the EU Courts to Article 102 TFEU and lack clarity in many respects. Consequently, the Draft Guidelines offer limited guidance.
- The Draft Guidelines can be improved by: connecting the concept of 'competition on the merits' to harm to consumers; incorporating central concepts such as 'theory of harm'; paying more than mere lip service to the 'as efficient competitor' *principle*; introducing safe harbours; and offering clarifications on the scope of certain presumptions and their rebuttal.

1. Introduction

The prohibition of an abuse of a dominant position found in Article 102 TFEU is a central tenet of EU competition law. In contrast to all other major aspects of EU competition law, such as Article 101 TFEU on anticompetitive multilateral conduct and merger control, Article 102 TFEU has so far operated with no Guidelines from the European Commission (EC). In 2009, the EC adopted a 'Guidance Paper' setting out the EC's enforcement priorities in relation to exclusionary abuses, to provide 'greater clarity and predictability' regarding the 'general framework of analysis' employed by the EC in determining whether it should pursue a given case and to help undertakings to better assess whether their conduct may result in an intervention by the EC.[1]

The Guidance Paper was the culmination of a 'reform' of the EC's approach to Article 102 TFEU and followed a period of extensive debate on, in particular, whether that approach should entail an economic, effects-based approach, in contrast to the EC's and the European Courts' historically formalistic approach.[2]

The Guidance Paper was received with different degrees of welcome in the competition community and in any case, its application in the EC's decisional practice has not followed the

[1] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, para 2.

[2] The relevant documents in this 'reform' include the Economic Advisory Group on Competition Policy (EAGCP) Report 'An Economic Approach to Article 82' (2005) and European Commission 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (2005). The 'reform' entailed a discussion of whether the 'more economic approach' should govern the application of Article 102 TFEU. We do not use the term 'more economic approach' in this piece due to the numerous different uses and connotations of that term in the literature.

Received: November 19, 2024. **Revised:** February 12, 2025. **Accepted:** February 12, 2025

enthusiasm with which the 'reform' was pursued.[3] Against the background of the limited use of the Guidance Paper and its economic principles in the decisional practice by the EC, the Court of Justice of the European Union (CJEU) instilled an economic, effects-based approach to the application of Article 102 TFEU by its case law over the last decade. Thus, the 'reform' of the approach to Article 102 TFEU ultimately came not from the EC but from the CJEU, through seminal rulings such as *Intel I*, *Unilever*, *SEN*, and others, which arguably demonstrate a more economically informed, effects-based approach, moving away from the traditional, formalistic approach.[4] This modern case law of the CJEU, often resulting in cases lost by the EC, clearly has implications for the development of the law on abuse of a dominant position. It is, thus, welcome that the EC has decided to adopt 'Guidelines' on exclusionary abuses given those significant judicial developments.

The Draft Guidelines (DGs) published by the EC in August 2024 aim to enhance legal certainty, help firms to self-assess, and guide National Competition Authorities (NCAs) and National Courts.[5] In contrast to the Guidance Paper, which was 'not intended to constitute a statement of the law',[6] the Guidelines have the ambition to 'codify the case law'[7] and are not occupied with the setting of enforcement priorities. In addition to this ambition, importantly, the Guidelines arise out of a perception that the move towards an effects-based approach involves a 'heightened substantive legal standard' accorded to Article 102 TFEU, which 'may inadvertently lead to undesirable outcomes' such as false negatives by setting the bar for intervention too high.[8] Thus, the EC declares its intention to adopt a 'workable and effects-based approach' to Article 102 TFEU, which has already been reflected in changes made to the Guidance Paper at the time of announcing the Guidelines and which will arguably be reflected in the forthcoming Guidelines.[9]

In this contribution, we examine, from a law and economics perspective, whether the Guidelines are likely to achieve their aims as currently drafted. We discuss the conformity of the DGs with the case law that the Guidelines purport to codify as well as with an economic, effects-based approach to Article 102 TFEU.

This article contains two sections. In Section 2, after a brief summary of the DGs, we offer a critique of the DGs, focusing on the points where our views differ from the EC's document, and identify areas for improvement. In Section 3, we offer some recommendations that the EC might want to consider when revising the Guidelines. Section 4 concludes.

2. Critique of DGs and areas for improvement

A. *Brief summary of the DGs*

After an introduction spanning the purpose, scope, and structure of the DGs, the DGs first provide principles and methods for identifying dominance (Section 2), and then offer general principles to determine if conduct by a dominant undertaking is abusive (Section 3), before a discussion of certain specific categories of potentially abusive conduct (Section 4) and objective justifications (Section 5).[10]

According to the DGs, a conduct by a dominant firm consists in an exclusionary abuse if it satisfies a two-limbed test: (i) it departs from competition on the merits and (ii) it is capable of producing exclusionary effects.[11]

The DGs identify three different categories of conduct:

(i) The first category consists of practices for which the Courts have not specified a legal test. This category includes, among others, 'self-preferencing', access restrictions, and rebates other than 'exclusivity rebates'. The list is obviously not exhaustive: new practices may appear on which the Courts or the EC have not pronounced themselves.

(ii) The second category refers to conduct which is 'generally recognized as having a high potential to produce exclusionary effects'.[12] This category includes: (a) exclusive dealing, (b) rebates conditional on the buyer's purchasing most or all of its needs from the dominant firm, (c) predatory pricing, (d) margin squeeze in case of negative spread,[13] and (v) 'certain forms' of tying.

(iii) The third category consists of the so-called 'naked restrictions', defined as 'certain types of conduct by a dominant undertaking that have no economic interest for that undertaking, other than that of restricting competition'.[14] This category includes paying buyers for not launching products based on inputs used by a supplier competing with the dominant firm or destroying infrastructure used by rivals.[15] We conjecture

[3] For different perspectives on the Guidance Paper, see eg P Akman, 'The European Commission's Guidance on Article 102 TFEU: From *Inferno* to *Paradiso*?' (2010) 73 Modern Law Review 605 and L Lovdahl Gormsen 'Why the European Commission's Enforcement Priorities on Article 82 EC Should be Withdrawn' (2010) 31 ECLR 45. On the limited use of Guidance Paper in the EC's decisional practice, see eg B Wardhaugh, *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition* (Hart 2020) 109-111.

[4] Case C-413/14 P *Intel Corp v European Commission*, ECLI:EU:C:2017:632 (*Intel I*); Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2023:33; Case C-377/20 *Servizio Elettrico Nazionale SpA* and others *v Autorità Garante della Concorrenza e del Mercato and others*, ECLI:EU:C:2022:379 (*SEN*). For a discussion of the evolution of the case law on exclusionary abuses, see P Akman, 'A Critical Inquiry into "Abuse" in EU Competition Law' (2024) 44 Oxford Journal of Legal Studies 405. Akman argues that the case law is in a 'hybrid' era in that although effects-based analysis has been incorporated into the analysis of 'abuse' by the CJEU, some concepts from the formalistic era still remain in the case law; see Akman, ibid, 429–432.

[5] European Commission, 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' 2024 (Draft Guidelines) para 8.

[6] Guidance Paper (n 1) para 3.

[7] See European Commission, Call for Evidence for An Initiative—Guidelines on Exclusionary Abuse by Dominant Undertakings, Ref. Ares (2023)2189183, 27/3/2023.

[8] L McCallum and others, 'A Dynamic and Workable Effects-Based Approach to Abuse of Dominance', European Commission, Competition Policy Brief No 1/2023, March 2023, 4.

[9] The changes to the Guidance Paper notably involved changing the definition of the central notion of 'anticompetitive foreclosure' through the insertion of a reference to an 'effective competitive structure' as the central component of competitive harm; see Commission, 'Communication from the Commission—Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'. (26 March 2023); https://competition-policy.ec.europa.eu/document/3c8af31c-1bf0-467a-b4a7-a69da6e722bb_en and in particular see Amended Guidance Paper para 19. As discussed below, the DGs do not even contain a central notion of 'anticompetitive foreclosure' in the sense of 'foreclosure leading to consumer harm' as adopted in the original Guidance Paper (see Guidance Paper (n 1) Section III.B heading).

[10] The DGs cover only exclusionary conduct, although they note that the sections concerning dominance and objective justification are also relevant to the assessment of exploitative conduct; DGs (n 5) para 11.

[11] DGs (n 5) para 45.

[12] DGs (n 5) para 60(b).

[13] A dominant firm fails the margin squeeze test (ie there is a margin squeeze) if the sales price, p, minus the cost of access charged to a downstream rival, w, is insufficient to cover the cost of supplying the downstream product, c. In other words, if $p\text{-}w < c$. In Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83 the Court defined $p\text{-}w$ as the spread. If $p\text{-}w < 0$, then the test is obviously failed without the need to estimate c. From the economic point of view, it is unclear why $p\text{-}w < 0$ deserves a different treatment than $p\text{-}w < c$, apart from possibly suggesting the outcome of the test is more robust and less uncertain because if the 'spread' $p\text{-}w$ is *already negative*, there is no need to estimate or measure the cost of production, c.

[14] DGs (n 5) para 60(c).

[15] DGS (n 5) para 60(c).

that it may also include various forms of boycotting rivals or—in extreme cases—threats.

The DGs operate on the presumption that naked restrictions and practices belonging to the second category, which meet the conditions of a 'specific legal test' (whereby the CJEU has developed an analytical framework for assessing the conduct), depart from competition on the merits,[16] the first limb of the abuse test as they define it. In relation to conduct which does *not* presumptively fall outside competition on the merits, in assessing the first limb, the EC will consider factors such as whether the dominant undertaking prevents consumer choice; misleads administrative bodies or misuses regulations to hinder entrants; infringes laws other than competition law, thereby degrading competition-relevant factors (think of violating privacy laws, thus reducing the quality of the service for the users); discriminates in favour of its services over rivals' (this obviously refers to 'self-preferencing'); unjustifiably terminates a business relationship; or, adopts a conduct which an as efficient competitor could not adopt, such as leveraging the dominant position in another market.[17]

The second limb of the test of abuse consists of identifying whether the conduct at issue is capable of producing exclusionary effects. Here the DGs introduce **presumptions**, which are likely to affect both the legal burden of proof and the evidentiary burden, as discussed below,[18] and which would involve different degrees of effects' analysis and evidence on the part of the EC:

(i) For the first category of conduct, the full burden of proof would rest upon the EC, which needs to show that the practice is 'at least capable of producing exclusionary effects'.[19] The elements, which may be relevant to the assessment of a conduct's capability to produce exclusionary effects include: the position of the dominant undertaking; the conditions on the relevant market (eg economies of scale and scope, network effects); the position of competitors; the extent of the allegedly abusive conduct; the position of customers or input suppliers; evidence of an exclusionary strategy; and evidence relating to actual market developments.[20]

(ii) 'Rebuttable presumptions' are established for the second category of practices, whereby exclusionary effects are presumed, subject to rebuttal by the dominant undertaking of the probative value of the presumption in the specific circumstances at hand.[21]

(iii) Naked restrictions 'are by their very nature capable of restricting competition'.[22] For such practices, a rebuttal will be exceptional.[23]

Where the EC establishes that the practice departs from competition on the merits and has the capability to produce exclusionary effects, be it through presumptions or an actual analysis, the dominant undertaking can defend its practice by proving an objective justification (ie an objective necessity or efficiencies that neutralise or outweigh the anticompetitive effects of the conduct).[24] This defence operates as the third limb of the test of abuse, but with the burden of proof resting on the dominant undertaking.[25] To be clear, an objective justification does not involve the rebuttal of the DGs' presumptions, but only becomes relevant as a 'defence' when both limbs of the test are met (either through the operation of presumptions which were not successfully rebutted or an actual analysis and determination of competition *off* the merits and capability to produce exclusionary effects by the EC).

B. *Guidance value and margin of discretion*

We share the stated objectives of the DGs and welcome the possibility that by adopting Guidelines the EC may be able to speed up enforcement of Article 102 TFEU cases through enhanced clarity of the approach. However, as they currently stand, the DGs reserve a large margin of discretion to the EC. Two examples of this wide margin of discretion include allowing the EC the possibility to consider as dominant also firms with small market shares and the absence of safe harbours for dominant firms which engage in above-cost pricing.[26] Further, there is little predictability on how the EC intends to exercise that discretion. One reason for which there is little predictability is that the first limb of the abuse test used by the DGs—'departure from competition on the merits'—is based on a concept which is susceptible to different interpretations and contains little or no operational value, as discussed below.[27] Similarly, as discussed below,[28] it is unclear what the assessment framework is for practices that are subject to a 'specific legal test'. This is because practices that are subject to a 'specific legal test' are presumed to fail both limbs of the abuse test in the DGs,[29] which begs the question of why the 'conditions' of establishing abuse regarding these practices are elaborated on separately in a different section in the DGs (Section 4.2). The lack of clarity is aggravated by the fact that the DGs' presumption of 'capability to produce exclusionary effects' applies to all practices subject to a 'specific legal test' but one.[30] This lack of clarity regarding the relation between presumptions and the application of specific legal tests to certain forms of conduct diminishes the guidance value of the DGs. As discussed below,[31] it is also unclear how the various presumptions in the DGs can be rebutted in practice. Finally, the selective reading of the case law of the CJEU as displayed by the DGs regarding critical aspects of the assessment of 'abuse' means that the Guidelines may not enhance legal certainty or help undertakings to self-assess the legality of their conduct.

It is important to reiterate here that the Guidelines seek to 'codify' the case law. However, the role of creating jurisprudence on Article 102 TFEU is obviously outside of the remit of the EC, that role being exercised by the CJEU. Given this important legal fact, as well as the fact that the case law on Article 102 TFEU is accessible to the public (and any legal advisors), the most valuable potential contribution of Guidelines by the EC is their provision of 'guidance' to the 'users' of the law, rather than their 'codification' of the law. The Guidelines could provide 'guidance' by both explaining how the EC may apply the law in certain aspects (eg requirements for proving efficiencies) in its

16 See DGs (n 5) paras 47 and 54.
17 DGs (n 5) para 55.
18 See text around nn 54 and 86 below.
19 DGs (n 5) paras 61 and 60(a).
20 DGs (n 5) para 70.
21 DGs (n 5) para 60(b).
22 DGs (n 5) para 60(c).
23 See DGs (n 5) para 60(c).
24 DGs (n 5) para 48.
25 For a proposal to adopt an approach to abuse where efficiencies are considered as an element of establishing abuse rather than as a defence, see P Akman, *The Concept of Abuse in EU Competition Law* (Hart 2012) 316–319.
26 See DGs (n 5) n 41 and para 57.
27 See text to n 33 below.
28 See text after n 52 below.
29 See DGs (n 5) para 47.
30 DGs (n 5) para 60(b) list all practices in Section 4.2 except for refusal to supply as being subject to the presumption to lead to exclusionary effects. See also text around n 52 below.
31 See text after n 53.

own practice and influencing the future direction of the law (eg by indicating how the EC would enforce the law against novel practices), subject to adoption by the CJEU. Regrettably, as currently drafted, the DGs offer very limited 'guidance' and do not increase legal certainty. In Section 3, we make some suggestions that might help increase predictability.

C. *Definition and test of abuse*

The DGs' definition of abuse is consistent with *some* recent case law of the EU Courts.[32] However, we make the following observations.

First, the concept of 'competition on the merits' is inherently vague and subject to different interpretations, even by the Courts themselves.[33] The DGs do not eliminate any uncertainty about how to interpret the concept beyond providing a few examples of factors that might be taken into account to establish that conduct departs from competition on the merits.

The DGs do provide an explanation of 'competition on the merits', which associates it with consumer welfare (broadly conceived):

> The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality, and a wider choice of new or improved goods and services.[34]

Similarly, the DGs state that a dominant firm can argue as an objective justification[35] that 'its conduct amounts to competition on the merits because in the specific case, the actual or potential exclusionary effects produced by the conduct are counterbalanced or outweighed by advantages in terms of efficiencies that benefit consumers'.[36] However, the DGs do not seem to employ a consumer welfare standard to assess whether a conduct departs from competition on the merits in the first place.

We submit that if the DGs stressed and endorsed this understanding of 'competition on the merits' throughout, by making it explicit that conduct departing from the merits is one that has anticompetitive effects, that is it harms (directly or indirectly) consumers, then the two-limbed test for abusive conduct would be clearer, and the first limb of the test would be given operational value.

Second, and related to the previous comment, establishing that departure from competition on the merits amounts to having *anticompetitive* effects—namely, effects that (directly or indirectly) harm consumers—would be in line with the case law. As a matter of fact, the Courts make it explicit that Article 102 TFEU is concerned with preventing conduct to the detriment of consumers and that exclusionary effects should be understood as those ultimately causing direct or indirect detrimental effects on consumers (whether intermediary or final).[37] Indeed, the case law uses the concept of 'competition on the merits' as a component of the overarching exercise of the demonstration of exclusionary effects of conduct.[38] Thus, the interpretation of 'competition on the merits' (limb 1) as a *qualifier* for which types of exclusionary effects (limb 2) are *anticompetitive* has clear support from the case law.

D. *The As Efficient Competitor principle and as efficient competitor test*

The case law has repeatedly resorted to the 'As Efficient Competitor' (AEC) principle as one of the criteria for establishing abuse of dominance,[39] by defining an abusive practice as '[any] practice that a hypothetical competitor—which, although it is as efficient, does not occupy a dominant position on the market in question—is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position'.[40]

We note that the AEC *principle* is consistent with the economic literature which shows that an asymmetry between the incumbent firm and the potential entrant (or smaller existing rival) is necessary for a conduct to lead to anticompetitive exclusion.[41] Such asymmetry may consist in an incumbency advantage, in a first-mover advantage, or in the control of an essential input, infrastructure, or complementary product.

It is important to understand to what extent the AEC principle can be operationalised, and the answer depends on the type of conduct at issue.

The economic literature shows that for some categories of practices, such as predatory pricing, margin squeeze, and relatively simple conditional rebate schemes (ie those that do not reference rivals), by taking advantage of the above-mentioned asymmetries, the dominant firm can exclude a rival, but such exclusion entails a profit sacrifice. For administrability reasons, profit sacrifice can be proxied by the actual losses incurred by the dominant firm.[42] In such cases, therefore, we submit that a price–cost test (AEC *test*) is informative about the existence of an abuse and can be used to make the AEC principle operational.

[32] See eg *SEN* (n 4) para 61. However, note that in that same paragraph, the order of the test is inverted. Establishing first if the practice is capable of exclusionary effects and second if it harms consumers (and therefore constitutes competition *off* the merits) would make sense from an economic and a logical point of view. Only after having established that the conduct can exclude competitors would one want to assess if it is anticompetitive. Further, it is not clear from EU-level case law that the CJEU has intended 'competition on the merits' to operate as a standalone, *operational* component of abuse.

[33] For instance, within the very same judgment, *SEN* (n 4), a conduct departing from competition on the merits is defined respectively through (i) a no-economic sense test, (ii) an As Efficient Competitor principle, and (iii) a detrimental effect on consumers, as the following quotes show: (i) 'Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position' (at para 77, referring to predation); (ii) 'a practice that a hypothetical competitor—which, although it is as efficient, does not occupy a dominant position on the market in question—is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position' (at para 78, referring also to non-pricing conduct); and (iii) 'it must be stressed that the concept of competition on the merits covers, in principle, a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services' (at para 85). See Ibáñez Colomo calling the notion an 'irritant' in the (modern) case law; P Ibáñez Colomo, 'Competition on the Merits' (2024) 61 Common Market Law Review 387, 394–396.

[34] DGs (n 5) para 51 (footnotes omitted).

[35] Note that the DGs (n 5) define 'objective justification' to include both 'objective necessity defences' and 'efficiency defences' (para 167).

[36] DGs (n 5) para 58.

[37] See eg *SEN* (n 4) paras 44–47, 64, 73, 85; Case C-333/21 *European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)*, ECLI:EU:C:2023:1011, paras 124 and 131.

[38] See the use of the word '[t]hus' in *SEN* (n 4) para 61: '… the **characterisation** of an exclusionary practice as abusive **depends on the exclusionary effects** that that practice is or was capable of producing. **Thus**, in order to establish that an exclusionary practice is abusive, a competition authority must show that, first, that practice was capable, when implemented, of producing such an exclusionary effect,… and, second, that practice relied on the use of means other than those which come within the scope of competition on the merits' (emphasis added).

[39] See eg *SEN* (n 4) para 82.

[40] *SEN* (n 4) para 78.

[41] On the economics of exclusionary abuses, see generally C Fumagalli, M Motta and C Calcagno *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (Cambridge University Press 2018).

[42] See eg Fumagalli, Motta and Calcagno (n 41) at Section 1.4.3.

The test, though, does not try to estimate the profitability of a hypothetical firm, but consists in assessing the discrepancy between prices and costs and hence the profitability, of the *actual* dominant firm itself. Moreover, with these practices, we submit that the Commission should consider above-cost pricing as a safe harbour, thereby respecting the AEC *principle* and providing legal certainty to dominant firms.

As a matter of economics, we note that there might be anticompetitive effects also from excluding less efficient competitors.[43] However, pursuing dominant firms which set above-cost pricing entails a high risk of dampening competition and of making type-I errors (ie of finding a false positive). Furthermore, a rule which establishes that above-cost pricing is lawful provides legal certainty to a dominant firm, whereas a rule which requires second-guessing rivals' costs, or which prices would be allowed by the EC, would create uncertainty. Hence, we disagree with the statement in the DGs that prices above cost might be abusive.[44]

For other categories of practices, it is unclear how to translate the AEC principle into practice. In the case of exclusive dealing, for instance, the exploitation of its first-mover advantage allows the dominant firm to exclude in the absence of any profit sacrifice. Similarly, in the case of exclusivity rebates, when the asymmetry between the dominant firm and the rival is pronounced, exclusion does not involve profit sacrifice.[45] In such cases, we submit that the price–cost test is not informative about abuse and cannot be used to make the AEC principle operational. The same applies to other non-price practices, such as tying or refusal to supply, where we are not aware of any sensible test based on observables that could operationalise the AEC principle.

E. *Presumptions*

One of the main traits of the DGs is that they establish presumptions for certain practices and categorise practices by virtue of the presumptions they are subject to regarding their 'capability to produce exclusionary effects' (limb 2). Presumptions are utilised to allocate the 'evidentiary burden' between the EC and the dominant undertaking. The base line regarding the proof of 'capability to produce exclusionary effects' is that the EC has to 'demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects'.[46] Outside the base line, the DGs institute a presumption of 'capability to produce exclusionary effects' for conduct that the DGs regard as having 'a high potential to produce exclusionary effects'[47] and 'naked restrictions'.[48] The former category covers a large portion of the practices that have been found to constitute abuse in the decisional practice and includes some (but not all) of the practices for which the CJEU has developed 'specific legal tests'. For these two types of conduct, the evidentiary burden is on the dominant undertaking to rebut the 'probative value of the presumption' that the practice fails the 'capability to produce exclusionary effects' limb of the test.[49] The DGs also institute a presumption regarding 'departure from competition on the merits' (limb 1): the practices for which there exist 'specific legal tests' and 'naked restrictions' are presumed to depart from 'competition on the merits' and be 'capable of producing exclusionary effects'.[50]

We are generally sympathetic to the establishment of well-crafted rebuttable presumptions. In particular, this might (i) help to speed up and streamline abuse of dominance cases, which are notoriously long and (ii) provide incentives for dominant firms, which typically hold the evidence, to disclose the data and documents necessary to assess the case—thereby reducing the asymmetric information problem suffered by the competition agencies.

However, in relation to the presumptions in the DGs, we note that:

(i) Some presumptions are not grounded in economics. In particular, tying is a practice through which innovations take place and might offer beneficial effects on consumers by reducing their transaction costs.

(ii) Presumptions of 'capability to produce exclusionary effects' are not established by the case law [save for pricing below Average Variable Cost (AVC)] based on our reading of the case law.[51] It is, therefore, unclear on what *legal* basis some practices have been categorised as having a high potential to produce exclusionary effects (or as naked restrictions) and others not. This ambiguity also creates a disjoint between the discussion of the second limb of the test of abuse in the DGs and the later discussion of practices 'subject to specific legal tests' since the scope of these two sections of the DGs does not overlap fully.[52] Moreover, the use of the phrase

[43] In the recent economic literature on exclusionary practices, it is often assumed for simplicity that products are homogeneous, competition is in prices and the rival is more efficient than the dominant incumbent so that it is clear that, if it occurs, foreclosure is anticompetitive. But when products are differentiated and/or competition is in quantities, even foreclosure of a less efficient (or slightly lower-quality) firm may be anticompetitive. This does not necessarily contradict the fact that 'competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers' (*SEN* (n 4) para 73) In other words, the foreclosure of less efficient competitors might, or might not, be anticompetitive.

[44] DGs (n 5) at paras 57 and 144(b)(ii).

[45] See Section III in C Fumagalli and M Motta, 'Economic Principle for the Enforcement of Abuse of Dominance Provisions' (2024) 20 Journal of Competition Law and Economics 85. See also C Fumagalli and M Motta, 'On the use of price-cost tests in loyalty discounts and exclusive dealing arrangements: Which implications from economic theory should be drawn?' (2017) 81 Antitrust Law Journal 537.

[46] DGs (n 5) para 60(a). Note that when discussing the capability of the conduct to produce exclusionary effects, in relation to the use of counterfactuals, ibid, para 67 states that '[i]t is sufficient to establish ***a plausible*** outcome amongst various possible outcomes' (emphasis added). This may be justified if adopting a *balance of harms approach*: if the likely harm of the conduct is very high, and this might well be the case with an entrenched dominant position, even a small probability of anticompetitive exclusion can be enough to justify intervention. Still, given that they do not refer to a *sufficiently plausible* outcome, or to *the most plausible* outcome, but just a plausible one, it is legitimate to wonder what the standard of proof should be for establishing the capability to produce exclusionary effects and for disproving such capability. See also text to n 70 below in relation to the case law on causation and counterfactual analysis.

[47] DGs (n 5) para 60(b). For the list of practices, see the above text to n 12.

[48] For naked restrictions, it is only 'in very exceptional circumstances' that the presumption can be rebutted; see DGs (n 5) para 60(c).

[49] See DGs (n 5) para 60(b).

[50] DGs (n 5) paras 47, 54.

[51] See DGs (n 5) n 131, which remarks that 'the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as "presumptions"' although the 'Union Courts have not always made explicit use of the term "presumption" for each one of these practices'. This footnote is provided with *no* reference to any case law of the CJEU—in other words, there is no reference to a judgment that institutes a presumption regarding the evidentiary burden of demonstrating 'capability to produce exclusionary effects'. We are not aware of any such presumptions in the case law ourselves outside the scope of predatory pricing where the price is below AVC, as held by the Court of Justice in *AKZO*; see Case C-62/86 *AKZO Chemie BV v EC Commission*, ECLI:EU:C:1991:286, para 71. Besides predatory pricing, the main type of abuse for which the treatment came close to a presumption of anticompetitive effects was exclusivity rebates, and it was precisely this type of conduct for which the Court of Justice 'clarified' its jurisprudence to instil an effects-based approach in *Intel I*; see *Intel I* (n 4) para 138. Our interpretation of *Intel I* is that this ruling 'clarifies' the substantive law under Article 102 in relation to the requirement of exclusionary effects for a finding of abuse and does not merely make a procedural point of law regarding the allocation of the evidentiary burden between the EC and the dominant undertaking (which appears to be the interpretation suggested by DGs (n 5) 60(b) second para).

[52] Although the DGs (n 5) state at para 47 that practices that meet the conditions set out in a specific legal test are 'deemed to be liable to be abusive' because they fail both limbs of the test, refusal to supply is subject to a specific legal test (paras 96–106) but is not mentioned as a practice subject to the

'presumption' creates confusion between the requirement to apply a legal test involving various legal and economic elements to determine whether a practice is abusive and the possibility to use a presumption (in the true sense) as a shortcut to identify abuse without assessing various legal and economic elements (ie a finding that 'if conduct is practice X, then abuse'). Indeed, it is unclear what the relation is between the presumptions established under Section 3.3 of the DGs for various practices and the application of the 'specific legal tests' for the same practices discussed under Section 4.2 of the DGs. Namely, it is ambiguous what the role and value of the presumptions (specific legal tests) are when there are already specific legal tests (presumptions) for the same practices and how these two features of the DGs are supposed to operate alongside one another. Finally, the use of presumptions to demonstrate 'capability to produce exclusionary effects' is likely inconsistent with the requirement of the case law that the demonstration of the conduct's actual or potential effect of restricting competition 'must be made, in all cases, in the light of all the relevant factual circumstances'.[53]

(iii) It is unclear that the presumptions established by the EC really are *rebuttable* presumptions. The standard of proof for rebutting the presumption of capability to produce exclusionary effects is not found in the DGs. If the standard of proof is so high that in practice it can never be met, then the presumptions will, in effect, be irrebuttable. Although the DGs make reference to the rebuttal evidence's being 'insufficient to call into question the presumption' or having 'insufficient probative value' or referring to merely 'theoretical assumptions' for how the presumption cannot be rebutted, none of these suffice to set a standard of proof for how the presumption *can* be rebutted. Indeed, the DGs suggest that rebuttal will be subject to a rather high standard of proof since the EC's 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'.[54]

(iv) The establishment of presumptions represents a *de facto* reversal of the burden of proving anticompetitive effects, and we wonder whether the Courts will accept the legality of this approach.[55] We submit that emphasising the extent to which certain presumptions are justified on economic grounds might help the Commission's case.

(v) The DGs institute a presumption that conduct which is 'subject to a specific legal test' falls outside the scope of competition on the merits,[56] but does not provide the possibility to rebut this presumption. The same goes for 'naked restrictions'.[57]

F. *Case law, effects-based approach and the as efficient competitor principle*

Unlike the Guidance Paper,[58] whose content was driven by economic principles, not least because its main motivation was to adopt an effects-based approach to the enforcement of Article 102, the DGs represent a more legalistic perspective. This reflects the ambition of the Commission to adopt Guidelines that 'codify the case law'.[59]

We find that aspects of the DGs make use of the case law in a selective manner. This selective reading is most obvious in relation to the case law from *Intel I* onwards.[60] In its modern case law, the CJEU has endorsed an effects-based approach to Article 102.[61] The fact that the case law has adopted an effects-based approach was readily acknowledged in the documents announcing the Guidelines.[62] In contrast, the DGs do not embrace aspects of the case law that are effects-orientated and either overemphasise the operational value of certain concepts (eg 'competition on the merits') from the formalistic era of the case law or disregard statements from the case law that evidence an effects-based approach. We provide some examples of the latter here.

Beyond a small number of instances, the DGs do not refer to 'as efficient' competitors in their reference to 'competitors' when referring to exclusionary effects.[63] This systematic omission stands in contrast to the position in the case law, which has on several occasions in the last decade held that Article 102 TFEU prohibits practices that have exclusionary effects on competitors as efficient as the dominant undertaking.[64] Although we note that the exclusion of less efficient competitors can under certain circumstances also constitute anticompetitive foreclosure, the Court of Justice has on numerous occasions expressed the position that '[c]ompetition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality, or innovation'.[65] Thus, the AEC *principle*, namely the notion that not every exclusion of every competitor is anticompetitive, has been instrumental in the case law's adoption of an effects-based approach. In the DGs, the AEC principle has been translated into one factor among many that can demonstrate that a practice falls

presumption in para 60(b). Likewise, tying is subject to a specific legal test (paras 84–95), but only 'certain' unspecified forms of tying are subject to the presumption in para 60(b). Finally, margin squeeze is subject to a specific legal test (paras 121–136), but only 'margin squeeze in the presence of negative spreads' is subject to the presumption in para 60(b).

53 See most recently Case C-240/22, P *EU Commission v Intel Corporation Inc*, ECLI:EU:C:2024: 915 (*Intel II*) para 179.

54 DGs (n 5) para 60(b).

55 Further, and more importantly, depending on how high the standard of proof is for the rebuttal, the presumptions can entail *de facto* shifting the burden of proving the (absence of) infringement to the dominant undertaking, which the Commission cannot do given Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1, Article 2 and fundamental principles of law such as the presumption of innocence. See also text around n 85 below.

56 DGs (n 5) para 53.

57 DGs (n 5) para 54.

58 Guidance Paper (n 1).

59 See European Commission, Call for Evidence for An Initiative—Guidelines on Exclusionary Abuse by Dominant Undertakings, Ref. Ares (2023)2189183, 27/3/2023.

60 *Intel I* (n 4).

61 For a discussion, see Akman (n 4) 416–429.

62 See eg Call for Evidence (n 59); Communication from the Commission (n 9).

63 See eg DGs (n 5) paras 6, 45, 62, 70(c), 73. For selective reading of the case law, see eg DGs (n 5) para 45 referring to *European Superleague Company* (n 37) paras 129–131, which explicitly refer to the exclusion of as efficient competitors. See also eg DGs (n 5) para 69 referring to *Unilever* (n 4) para 52, which explicitly refers to the capability to exclude as efficient competitors. See likewise DGs (n 5) n 325, noting that the capacity to produce exclusionary effects needs to be assessed in relation to 'actual or potential competitors' rather than a hypothetical as efficient competitor, which contradicts the CJEU case law such as *SEN* holding that: '[t]he relevance of the material or rational impossibility for a hypothetical competitor, which is as efficient but not in a dominant position, to imitate the practice in question, in order to determine whether that practice is based on means that come within the scope of competition on the merits, is clear from the case-law on practices both related and unrelated to prices'; *SEN* (n 4) para 79.

64 See eg Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172 (*Post Danmark I*) para 25; *Unilever* (n 4) para. 37; *European Superleague Company* (n 37) para 129. See also *Intel II* (n 53) paras 176, 177.

65 *Post Danmark I* (n 64) para. 22. See also Case 280/08 P *Deutsche Telekom v Commission* EU:C:2010:603 (*Deutsche Telekom I*) para 177; *Intel I* (n 4) para 133. We acknowledge that the DGs (n 5) express this sentiment at para 51, but this concept is not carried through the document to represent the overall approach of the DGs.

within or outside 'competition on the merits' (limb 1).[66] Through the systematic omission of the references to as efficient competitors, the DGs adopt a stance that appears to seek to change the approach to assessing an abuse, as established by the CJEU, in order to adopt a more form-based approach. Although the Guidelines could depart from the case law,[67] their likelihood of being endorsed by the CJEU will be lower if they adopt a significantly different approach to abuse without replacing the CJEU approach with a more coherent and robust approach (eg one endorsing clear theories of harm based on sound economics). This discrepancy between the DGs and the case law also diminishes the potential of the Guidelines to provide legal certainty to undertakings.

In fact, even in relation to the evidentiary burden, which has been given a central role in the DGs by way of presumptions, the Court of Justice has emphasised the relevance of as efficient competitors in holding that:

> where a competition authority suspects that an undertaking has infringed Article 102 TFEU …, and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market.[68]

The DGs omit any reference to as efficient competitors in the second limb of the test of abuse even though that second limb appears to be an expression of this precise holding of the Court of Justice. This omission implies that the DGs do not accurately represent the case law, which they seek to codify, and this again creates uncertainty. Given the fact that the description of 'exclusionary effects' in the DGs[69] does not incorporate the above-mentioned position of the Court that 'competition on the merits' may, by definition, lead to the exclusion of less efficient rivals, if the Guidelines do not provide further clarity on the operation of the second limb, the approach of the Guidelines can lead to a stance that every type of exclusion is considered anticompetitive.

It is noteworthy that after the publication of the DGs, the CJEU has delivered judgments which contradict or challenge some of the positions taken by the EC in the DGs. For example, *Google Shopping* confirms that the causal link between the conduct at issue and its effects 'is one of the essential constituent elements of an infringement of competition law which it is for the Commission to prove' and in that context, the relevant counterfactual is one that is 'appropriate',[70] which challenges the approach of the DGs to the counterfactual analysis.[71] Further, *Intel II* states that the demonstration that a conduct has actual or potential restrictive effects on competition 'must be made, in all cases, in the light of all the relevant factual circumstances' on the basis of 'specific, tangible points of analysis and evidence' casts some doubt on the validity of the approach adopted in limb 2 of the test of abuse in the DGs, which relies heavily on presumptions and a shift in the evidentiary burden for establishing exclusionary effects.[72] *Intel II* also holds that the capability of loyalty rebates to foreclose a competitor as efficient as the dominant undertaking 'must be assessed, as a general rule, using the AEC test' and that the outcome of this test indicates whether the practice falls within the scope of competition on the merits.[73] This pronouncement appears not to be in line with the position adopted by the DGs on the presumptions for exclusivity rebates, but on this point, we respectfully disagree with the Court's position from an economics perspective: in the case of exclusive dealing or exclusivity rebates, the dominant firm can exclude without necessarily sacrificing profits, hence a price–cost test does not help to establish whether there is an abuse.[74] Nevertheless, in the interests of legal certainty, it would be desirable for the revised Guidelines to recognise this difference and clearly explain why economic arguments suggest a different approach.

It should be noted that the case law of the CJEU itself is in a state of evolution and certainly mixes an effects-based approach with more formalistic concepts.[75] We, therefore, fully appreciate the difficulty of trying to codify the case law at this point in time. However, this difficulty should not translate into an unbalanced or partial representation of the case law in relation to the relevance of effects and, in particular, of the as efficient competitor principle. Such a partial expression of the case law without an alternative, robust framework which can lead to a change in the future course of the case law cannot provide legal certainty or help undertakings to self-assess the legality of their conduct. Furthermore, in the decentralised enforcement regime of the EU, such an approach can also jeopardise the uniform application of the law where National Courts and NCAs adopt the interpretation of the case law presented in the Guidelines, which can over time lead to inconsistent applications of Article 102 TFEU (ie some following the CJEU case law and some following the EC interpretation).[76] Such an outcome can *reduce* legal certainty and threaten the coherence of the law.

G. *Economics in the DGs*

The effective enforcement of the abuse of dominance provisions also requires a robust understanding of economic principles and the enforcement approach should be supported by economic principles. We find that the DGs are thin on the economics front despite the case law's increasing adoption of economic principles. In particular:

(i) The DGs never mention the need to spell out a theory of harm, namely a compelling narrative which, by building on the facts of the case, clarifies what the dominant firm aims to achieve with the practice at hand and why the conduct is likely to result in anticompetitive effects. We believe, instead, that proposing a solid theory of harm is the key factor in

[66] DGs (n 5) para 55(f).

[67] There is debate in the literature on whether Guidelines can depart from case law. See Akman (n 3) 627, arguing that they can, but that they would need to be ultimately endorsed by the CJEU to give their approach judicial recognition.

[68] *Unilever* (n 4) para 52.

[69] See DGs (n 5) para 6.

[70] Case C-48/22 P *Google and Alphabet v Commission (Shopping)*, ECLI:EU:C:2024:726, paras 224 and 245, respectively.

[71] See DGs (n 5) paras 65–67 on causation and counterfactual.

[72] *Intel II* (n 53) para 179. See also Case T-334/19 *Google and Alphabet v Commission* (*Google AdSense for Search*), ECLI:EU:T:2024:634, para 109. *Intel II* (n 53) also repeatedly refers to the relevance of the AEC principle; see eg paras 176, 181.

[73] *Intel II* (n 53) para 181.

[74] See eg Fumagalli and Motta (2024) (n 45); Fumagalli and Motta (2017) (n 45).

[75] See the discussion in Akman (n 4) 429–432.

[76] Further, under Regulation 1 (n 55) Article 16, National Courts and NCAs must not take decisions running counter to a decision adopted by the Commission. These entities can, thus, find themselves in a position whereby they adopt a decision/ruling, which they perceive to be in conflict with the CJEU interpretation of the law, in order to comply with their duties under Regulation 1. Although National Courts have the ability to stay the proceedings and seek guidance from the Court of Justice on the interpretation of EU law (Article 267 TFEU), NCAs do not have such an option.

the assessment of allegedly abusive practices and in the adoption of an effects-based approach.[77]

(ii) The DGs do not—but should—refer to economic principles and theories to underpin their proposed approach. For instance, economics gives support to the presumptions regarding exclusive dealing and rebates that reference rivals, and explains why the price–cost test is informative about the abusive use of some practices (ie predation, margin squeeze, rebates which do not reference rivals) but not of others (ie exclusive dealing and exclusivity rebates).[78]

(iii) The economic literature has identified several instances in which a dominant firm has an incentive to engage in vertical foreclosure. In general, such theories focus on cases where a vertically integrated firm has the monopoly of the input (which amounts to assuming that the input is *indispensable*). But this assumption is made for simplicity, and there exist models assuming the existence of an alternative (even if possibly inferior) input provider. Therefore, from an economic perspective, the input at issue should be a crucial but not indispensable asset within the *Bronner* meaning, as indispensability is not a necessary condition for a dominant firm to engage in vertical foreclosure which has anticompetitive effects.[79] This principle applies equally to outright refusal to supply, access restrictions (including constructive refusal to supply), margin squeeze and even 'self-preferencing'. Treating practices which have similar effects in a different manner, as the DGs currently do, contradicts the adoption of an effects-based approach.[80]

3. Recommendations for improvement

In this section, we build upon the critique provided in Section 2 to identify which specific interventions would, in our opinion, improve the DGs. We note as an overarching recommendation that the Guidelines should clarify how the EC will use its wide discretion (which it seeks to reserve to itself in the Guidelines regarding the assessment of abuse) in particular aspects of the operation of its approach (eg assessment of the evidence for rebutting a presumption; assessing which types of tying are presumptively anticompetitive; assessment of dominance; definition of abuse; etc).

A. *Competition on the merits*

Our main recommendation is to define a practice that departs from competition on the merits as one that ultimately adversely affects (directly or indirectly) intermediary or final consumers. This definition is already mentioned in the DGs,[81] but it should be stressed throughout, and Section 3.2 should refer explicitly to this definition for the purposes of assessing conduct.

In addition to providing operational value to the concept, adopting consumer harm as the litmus test for 'competition on the merits' would help to ensure legal certainty, since firms, authorities and judges will know that the concept is related to the objective of consumer welfare (broadly conceived). This approach would also bring the test in line with the well-known notion of anticompetitive foreclosure.[82]

Furthermore, by making it explicit that effects on consumers are central in the first limb of the test, there will be no need to explain in the second limb that exclusionary effects should be intended as effects that are ultimately detrimental to consumers.

Alternatively, should the EC not want to clarify that competition on the merits is to be assessed with reference to the consumer welfare standard, then the second limb of the test should make it explicit that it refers to the capability of producing exclusionary effects to the detriment of consumers—as in the case law discussed above.

B. *Formulating theories of harm is crucial*

The DGs never explicitly recognise the role of theories of harm when investigating a case. This is inconsistent with the adoption of an effects-based approach. A well-defined and clearly articulated theory of harm is essential in the assessment of abusive practices, as it directly pertains to evaluating whether a particular conduct is capable of excluding competitors to the detriment of consumers. We, therefore, recommend that the DGs put emphasis on the articulation of a theory of harm in every case to ensure a more coherent and comprehensive assessment framework moving forward.[83]

C. *As efficient competitor principle*

In light of the importance of the AEC principle in the case law, we believe that the revised Guidelines should pay more than mere lip service to this notion. In particular, the principle should be fully endorsed for pricing conduct (from predation to non-exclusivity rebates), where price–cost tests should be dispositive. As a consequence, the revised Guidelines should accept that price above Long Run Average Incremental Cost (LRAIC) or Average Total Costs (ATC), is legal, thereby providing a safe harbour to dominant firms. The same goes for the margin squeeze test.

As for non-pricing conduct, the operational relevance of the AEC principle is doubtful, and the revised Guidelines could

[77] The Commission was unsuccessful before the EU Courts in its most recent exclusivity cases (*Intel I* (n 4); Case T-235/18 *Qualcomm v Commission*, ECLI:EU:T:2022:358; Case T-604/18 *Google and Alphabet v Commission (Google Android)*, ECLI:EU:T:2022:541; *Google AdSense for Search* (n 72). In none of these cases, did it spell out a clear theory of harm. We submit that this would have helped to avoid the Courts' findings that the Commission did not take into account all the circumstances of the case. In many cases, even a relatively small coverage might have anticompetitive effects if the exclusivities aim at crucial buyers or concern products which are likely to be the key in the near future. Moreover, even a (relatively) short duration or the possibility of unilaterally terminating an exclusive contract is irrelevant if a customer cannot switch all of its needs to a rival. However, the Commission should spell out its theory of harm and explain why the facts of the case (in this example, relatively small coverage or duration) are consistent with it.

[78] See Fumagalli and Motta (2024) (n 45) Section III.A, which reviews well-established economic research showing that exclusive dealing contracts and market share discounts with a large requirement have a strong anticompetitive potential in situations in which the rival needs to achieve efficient scale to operate profitably, in which the goal of the dominant firm is to manipulate the buyer-rival relationship and extract rents from rivals and to generate a demand-boosting effect and raise prices. Sections III.B and III.C discuss to what extent economics rationalises the use of a price–cost test. We note that the EU Courts often use terms 'fidelity', 'loyalty' and 'exclusivity' interchangeably in the context of rebates. See eg *Intel II* (n 52) paras 38, 178, 180, and 308. For our purposes, 'exclusivity' rebates are rebates which are contingent on the buyer's **effectively** purchasing most or all of its needs from the same supplier. This objective can be achieved in different ways, eg by asking the buyer to buy at least, say, 70%–80% of what she bought in the *previous* year, or by making a quantity discount which is targeted so that the quantity threshold accounts for most of the likely purchases. We posit that the economic and legal treatment of all rebates with the same effects should be uniform.

[79] See Fumagalli and Motta, (2024) (n 45) Section IV.A. Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG and others*, ECLI:EU:C:1998:569.

[80] Admittedly, the degree of freedom of the EC with respect to the treatment of vertical practices is limited by case law which explicitly requires to show the indispensability of the input (in the sense of *Bronner* (n 79)) in cases of outright refusal to deal, but not in cases (including margin squeeze and 'self-preferencing') where the dominant firm has already given (partial) access to the input. However, for all the latter practices at least, to the extent that they achieve the same effects a consistent treatment should be proposed.

[81] DGs (n 5) para 51.

[82] The concept of 'anticompetitive foreclosure' in the original version of the Guidance Paper was one of its strengths in relation to the effects-based approach. See Guidance Paper (original version) (n 1) para 19.

[83] See also the discussion at Section 2.G above.

explain that for, say, exclusive dealing or tying, this principle does not translate into an operational test. For these practices, the Guidelines can provide guidance and advance legal certainty by specifying what type of test the EC may choose to use in determining abuse. Further, the Guidelines should, in any case, acknowledge the relevance of the principle in the case law as an indicator of the effects-based approach and explain clearly when and how the EC intends to depart from that case law regarding the relevance of the principle, if that is indeed the intention.

D. *Presumptions, standard of proof, and theory of harm*

As mentioned above, the establishment of presumptions and the effective reversal of the burden of proof foreseen in some cases by the DGs run counter to the case law. We therefore submit that—even where the Guidelines state that certain conduct is deemed to be abusive—the Commission should, at the start of an investigation, formulate a theory of harm and verify the necessary conditions for the conduct to be capable of producing anticompetitive effects. For instance, in case of exclusive contracts or exclusivity rebates, the EC should not just limit itself to checking that the dominant firm is, indeed, using exclusivity clauses, but also analyse the coverage, length, and contractual conditions of the clauses and verify whether they fit the theory of harm.[84]

The Guidelines should clarify the relationship between the operations of the presumptions in Section 3.3 regarding 'capability to produce exclusionary effects' in the context of conduct which is subject to a 'specific legal test' as elaborated on in Section 4.2. Without this clarification, the analytical framework for abuse in the Guidelines will remain uncertain.

E. *Justifications and rebuttal*

At the moment, although probably unintentional, the DGs do not state that all of the presumptions can be rebutted in practice. The Guidelines should clarify that all of the presumptions are rebuttable and what the standard of proof is for the rebuttal of the presumptions.[85] This is crucial because if the standard is so high that it can virtually never be met in practice, then the presumptions will be effectively *irrebuttable*. Adopting *de facto* irrebuttable presumptions which can lead to a finding of abuse can entail imposing the *burden* of proof on the investigated undertaking to prove the *absence* of abuse, which the EC cannot do.[86] Such irrebuttable presumptions can also violate fundamental rights recognised by the EU system and the presumption of innocence.[87] The Guidelines would, thus, benefit from providing examples of the types of evidence, which the dominant undertaking can put forward in order to rebut the presumptions.

The DGs should clarify that rebuttal is available for conduct which is 'subject to a specific legal test' or which constitutes 'naked restrictions' not only regarding the 'capability to produce exclusionary effects' (limb 2), but also for the 'departure from competition on the merits' (limb 1).

The Guidelines should also contain more guidance (including through examples) on which type of efficiency defences and objective justifications the EC would be ready to accept as a defence of conduct that fails both limbs of the test of abuse. The EC's use of its discretion in the assessment of such evidence where the DGs note that the 'probative value of a presumption' will be relevant should be clarified.[88]

F. *Presumptions should be grounded in sound economics*

Whereas certain well-constructed rebuttable presumptions may be justified, for instance, with respect to exclusive dealing and exclusivity rebates, this is not the case for all practices of a dominant undertaking, which are currently subjected to a presumption in the DGs. For example, *tying* is likely to have significant procompetitive effects in many situations. Accordingly, we submit that tying—independently of the type and circumstances—does not belong to the category of conduct which 'is deemed to be liable to be abusive'. Indeed, in line with economics, the case law (and the EC's decisional practice) support(s) an effects-based approach to tying as demonstrated by, eg *Microsoft* and *Google Android*, neither of which adopted or endorsed a presumption-driven approach.[89]

Should the EC decide instead to keep certain forms of tying in the category of conduct which is presumed to be abusive, the Guidelines should clearly explain—also through examples and actual cases—what differentiates tying which falls in the category of conduct liable to be abusive, and that which does not.

Similarly, we find it difficult to understand why margin squeeze might fall in different categories depending on whether the so-called 'spread' is negative ($p\text{-}w < 0$) or positive but without allowing to recover costs ($p\text{-}w < c$).[90] In both cases, the margin squeeze test is failed by the dominant firm, and therefore it should be treated in the same way. We note that, if the price–cost test is failed in case of predation (or rebates other than 'exclusivity' rebates), the conduct is considered to be liable to be abusive.[91] It would therefore be difficult to see why the failure of the margin squeeze test should be treated differently.

G. *Safe harbours*

The DGs go as low as 10 per cent market share for instituting a safe harbour for dominance and even at that, do so cautiously.[92] We note that the case authority provided in support of this position does not actually support such a specifically low market share safe harbour.[93] We recommend that the DGs institute a safe harbour for dominance in line with sound economics. It is hard to find an example of a firm which might be reasonably found to be dominant in a correctly-defined relevant market with such a small market share. Energy markets are sometimes characterised by companies which might have some pivotal plants allowing them to exercise considerable market power despite relatively small market shares. However, firstly they would certainly need

84 For example, a relatively small coverage might still be exclusionary if it denies rivals access to buyers that—for scale, learning, and/or reputation—are crucial.

85 Note that when discussing the capability of the conduct to produce exclusionary effects, the DGs (n 5) adopt a very low standard of proof for the EC itself in relation to, eg the assessment of the counterfactual; see n 46.

86 Regulation 1/2003 (n 55) Article 2.

87 See eg P Whelan, *Parental Liability in EU Competition Law* (Oxford University Press 2023) 490.

88 See eg DGs (n 5) para 60(b). See in the same vein, ibid, para 60(c).

89 See Case T-201/04 *Microsoft Corp v Commission of the European Communities*, ECLI:EU:T:2007:289, paras 867 and 868 and *Google Android* (n 77) paras 291, 295. Indeed, in both cases, the Commission itself carried out an assessment of *actual* effects; see *Microsoft*, ibid, paras 1031–1058 and *Google Android*, ibid, para 295.

90 See n 13 above.

91 See Section 2.D above.

92 See DGs (n 5) n 41: '[m]arket shares below 10 per cent exclude the existence of a dominant market position save in exceptional circumstances' (references omitted).

93 The DGs refer to Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, ECLI:EU:C:1986:399, paras 85 and 86 in support of the position that 'market shares below 10 per cent' are the relevant threshold for a safe harbour; see DGs (n 5) n 41. However, the cited paragraphs in *Metro* simply find that 10 per cent market share (which was the market share on the facts) is *insufficient*—save in exceptional circumstances—for a finding of dominance. The cited paragraphs do not indicate anything about what the *upper* boundary of such a safe harbour might or should be.

more than such a small fraction of capacity, and secondly, it might be more useful to specify that this (or similar cases) is what the EC has in mind when thinking of possible dominance with less than 50 per cent market share. Finally, the DGs' approach is to be contrasted with the Guidance Paper where the EC had indicated that market shares below 40 per cent are unlikely to indicate dominance.[94]

We also submit that price above ATC or LRAIC should be considered a safe harbour. This would reduce the risk of dampening competition and would provide legal certainty to a dominant firm, which can self-assess the lawfulness of its pricing conduct (whereas a rule which is based on unknown rivals' costs, or which requires second-guessing the above-cost price level allowed by the EC would create uncertainty).

H. *An effects-based approach?*

In the documentation that announced its intention to issue guidelines on exclusionary abuses, the EC remarked that it was committed to an effects-based enforcement of Article 102.[95] We note that not only the wording 'effects-based' does not appear in the DGs, but also, and more importantly, that the DGs seem to espouse a form-based approach.

A case in point is the DGs' treatment of vertical foreclosure, which might consist of formally different practices which might have similar effects. Refusal to deal, margin squeeze, tying of vertically related products or services, 'self-preferencing'[96] and other 'access restrictions' are all practices that a vertically integrated firm might use to partially or fully exclude a downstream competitor. Yet, they end up being treated in different ways in the DGs. In particular, according to the DGs, for some forms of tying and for margin squeeze with negative spread both limbs of the test are ticked.[97] For other forms of tying and margin squeeze with positive spread ($p\text{-}w < c$) and for refusal to deal, only the first limb ('departure from competition on the merits') is ticked, but the EC is to demonstrate exclusionary effects.[98] For 'self-preferencing' and the remaining vertical foreclosure practices ('access restrictions'),[99] neither limb is presumed to be satisfied, and the EC is to assess whether they amount to competition on the merits and are capable of producing exclusionary effects.[100]

Such a different treatment for practices which might be (to a greater or smaller extent) substitutable, is puzzling, and certainly inconsistent with an effects-based approach. We recommend that the revised Guidelines adopt an effects-based approach whereby practices with similar effects are treated in the same way in their assessment as potentially abusive conduct.

4. Conclusion

This article has offered a critique of the DGs on exclusionary abuse with a view to making recommendations, which can improve the prospective Guidelines from a law and economics perspective. The article has identified several instances where the DGs do not embrace an effects-based approach, despite their expressed motivation to that effect,[101] as well as numerous important aspects of the DGs, which depart from the CJEU case law. The case law on the prohibition of an abuse of a dominant position can certainly evolve further in the future. However, the wider the gap between the expressions of the case law as it stands in the Guidelines and the *actual* state of the case law, the less likely that the CJEU will adopt any new approach proposed by the EC. Such discrepancy will also directly reduce the potential of the Guidelines to provide legal certainty to undertakings and guidance to National Courts and NCAs, and can jeopardise the uniform application of EU law in the context of decentralised enforcement. Against that background, this article has made several recommendations, which can both bring the Guidelines into greater conformity with the case law and with sound economics. Most notably, the article recommended that the Guidelines adopt an understanding of 'competition on the merits', which links that concept explicitly with consumer harm, in order to adopt the robust concept of 'anticompetitive foreclosure'. It also put forward the importance of adopting a theory of harm grounded in economics in every case and adopting an effects-based approach whereby practices with similar effects are assessed in a similar manner irrespective of their form. For the Guidelines to provide any guidance and certainty to dominant firms, adoption of safe harbours and clarifications as to the operation and rebuttal of various presumptions are also important aspects of the DGs, which can be improved. Where the EC wishes to adopt a different approach to that of the case law, then the EC should explain why it intends to do so and what alternative, robust approach it seeks to adopt. All in all, although we laud the ambition of the EC to adopt Guidelines on the prohibition of exclusionary abuse, we find that there is much room for improvement in the DGs for them to be able to achieve their stipulated objectives.

94 Guidance Paper (n 1) para 14.

95 See McCallum and others (n 8).

96 We note that 'self-preferencing' is a grammatically incorrect phrase in the English language and submit that the Guidelines should use the correct term ('self-favouring') for the sake of linguistic clarity and sense.

97 DGs (n 5) paras 47, 60(b), 95 and 128.

98 DGs (n 5) paras 47, 95, 99(b), 122(c).

99 Access restrictions seem to be defined as vertical foreclosure *minus* outright refusal to supply *minus* margin squeeze. This is a new and unclear definition. The lack of clarity regarding 'access restrictions' is aggravated by the fact that the DGs provide an example of a 'refusal to supply' practice when illustrating what access restrictions may entail (DGs (n 5) paras 166(a) and 166(d)) after indicating that access restrictions are *not* refusal to supply cases (ibid para 163).

100 DGs (n 5) paras 160 and 164.

101 See McCallum and others (n 8).

Journal of European Competition Law & Practice, 2025, 1–10
https://doi.org/10.1093/jeclap/lpaf020
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