

Competition *policy brief*

A dynamic and workable effects-based approach to abuse of dominance

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I. Introduction

Over the years, the European Union ("EU") rules on competition have been instrumental in protecting the competitive process within the EU's internal market.¹ The effective enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") ensures that consumers benefit from the best products and services in terms of price, choice, quality and innovation. As recognised in the Commission Communication "A competition policy fit for new challenges", "*vigorous competition enforcement has served European consumers and customers – citizens and businesses – by empowering them to make choices in the market place and benefit from innovative products and services at affordable prices*".²

The enforcement of competition rules also contributes to achieving objectives that go beyond consumer welfare, at least when the latter is defined strictly in economic terms. As stated by Executive Vice President Vestager: "*By basing our policy intent and action on principles that stem directly from the Treaties, EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy*".³ The case law has also confirmed that competition law can achieve broader objectives, as ensuring consumer choice is a means to ultimately guarantee plurality in a democratic society.⁴

It is therefore of the utmost importance that the Union's competition rules are applied vigorously and effectively. This is all

the more necessary in times of economic hardship, and in the presence of a growing body of evidence of market concentration in various industries.⁵

In particular, the enforcement of Article 102 TFEU, which prohibits abuses of dominant position, has been instrumental in disciplining the conduct of dominant undertakings, which have a special responsibility "*not to allow [their] behaviour to impair genuine, undistorted competition on the internal market*".⁶

The Commission's approach to the enforcement of Article 102 TFEU in the area of exclusionary conduct⁷ has evolved over time. In 2008, the Commission adopted its Guidance on enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant firms (hereafter the "Guidance on enforcement priorities").⁸ This document set out the Commission's enforcement priorities with regard to exclusionary

In a nutshell

The Commission is committed to an effects-based enforcement of Article 102 TFEU, which fully takes into account the dynamic nature of competition and constitutes a workable basis for vigorous enforcement. On 27 March 2023, the Commission adopted a package of two initiatives, namely a Call for Evidence launching the process to adopt guidelines on exclusionary abuses of dominance and a Communication amending its 2008 Guidance on enforcement priorities. This Policy Brief explains the background to these initiatives.

¹ Competition law is one of the components for the achievement of the internal market, which "*includes a system ensuring that competition is not distorted*" (see Protocol 27 to the Treaty on the European Union).

² See Commission Communication "A competition policy fit for new challenges", COM(2021)713, p.1.

³ EVP Margrethe Vestager, 'A Principles Based approach to Competition Policy' (Keynote at the Competition Law Tuesdays, 22 October 2022).

⁴ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, Case T-604/18, EU:T:2022:541, paragraph 1028 ("Case T-604/18 - Google Android").

⁵ See, among others Gábor Koltay, Szabolcs Lorincz, Tommaso Valletti, "Concentration and Competition: Evidence from Europe and Implications for Policy"; Gábor Koltay, Szabolcs Lorincz, "Industry concentration and competition policy"; Pauline Affeldt, Tomaso Duso, Klaus Gugler, Joanna Piechucka, "Market Concentration in Europe: Evidence from Antitrust Markets"; Bajgar et al., "Industry concentration in Europe and North America"; Ufuk Akcigit, Wenjie Chen, Federico J. Díez, Romain Duval, Philipp Engler, Jiayue Fan, Chiara Maggi, Marina M. Tavares, Daniel Schwarz, Ippei Shibata, and Carolina Villegas-Sánchez, IMF Staff Discussion Note, "Riding Corporate Market Power: Emerging Policy Issues" March 2021, pp. 9-19.

⁶ Judgment of 6 September 2017, *Intel v Commission*, Case C-413/14 P, EU:C:2017:632, paragraph 135 ("Case C-413/14 P - Intel") and case law cited.

⁷ This policy brief focusses only on the application of Article 102 TFEU to exclusionary behaviour and is not therefore related to the application of abuse of dominance rules to exploitative conduct.

⁸ 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*, OJ C 45, 24.2.2009, p. 7.

abuses of dominance.⁹ It contributed to moving away from a formalistic approach to enforcing Article 102 TFEU, where cases were prioritized based on *per se* criteria, to an effects-based approach where priorities are set taking into account the potential effects of the given conduct, through the analysis of market dynamics, in line with mainstream economic thinking.¹⁰

The Guidance on enforcement priorities was not intended to, and did not, constitute a statement of the law. It did not provide an interpretation of the notion of abuse of a dominant position, but merely set out the Commission's approach as to the choice of cases that it intended to pursue as a matter of priority.¹¹

Since the adoption of the Guidance on enforcement priorities, there have been significant developments in the case law of the Court of Justice and the General Court ("Union Courts").¹² The effects-based approach promoted by the Commission is clearly reflected in these developments and is now firmly enshrined in the Union Courts' case law.¹³ Moreover, the case law has clarified the meaning and scope of several concepts that were included in the Guidance on enforcement priorities.

The global and European economies have also undergone significant changes, with increasing evidence of market concentration at macro-economic level and a growing importance of digital markets and services, in both economic and societal terms.¹⁴ In such fast-moving markets, often featuring strong network effects and "winner-takes-all" dynamics, it is paramount to ensure an effective and swift enforcement of Article 102 TFEU to intervene before tipping occurs and entrenched market positions are created.¹⁵

The Commission's enforcement priorities have progressively evolved thanks to the experience gained through the Commission's enforcement practice, which took into account of the developments above. Pursuant to the principle of good administration, on 27 March 2023 the Commission adopted a Communication amending the Guidance on enforcement priorities

("Amending Communication"),¹⁶ which revises parts of the Guidance on enforcement priorities that no longer reflect the Commission's approach in determining whether to pursue as a matter of priority certain cases of exclusionary conduct.¹⁷

On the same date, the Commission published a Call for Evidence, announcing an initiative aiming at reflecting the Article 102 TFEU case law on exclusionary conduct in new guidelines. In light of the large number of Union Court judgments dealing with exclusionary conduct and the breadth of the experience gained by the Commission in the enforcement of Article 102 TFEU, the Commission considers that, at this stage, it is appropriate to launch this process so as to take stock of the current state of the law, with a view to ultimately withdrawing the Guidance on enforcement priorities upon adoption of the guidelines.

This Policy Brief explains the background to these initiatives, with a focus on the changes introduced by the Amending Communication, pending the process leading to the adoption of the new guidelines on exclusionary conduct.

II. The effects-based approach in Article 102 cases

A number of important judgments in recent years have confirmed and endorsed the main elements of an effects-based approach to exclusionary conduct by dominant undertakings.¹⁸

Notably, the Union Courts have clarified that, for a finding of abuse, it must be established that a practice by a dominant undertaking "*produces, at least potentially, an anti-competitive effect*".¹⁹

As regards the degree of probability of anticompetitive effects that is required to trigger intervention, the Guidance on enforcement priorities generally referred to a finding of "likely" effects.²⁰ Since then, the Union Courts have used several terms to qualify the threshold that is relevant for a finding of abuse and referred to "capable" or "potential", "probable" and "likely" effects, or to conduct that has the "capability" or that "tends" to

⁹ Judgment of 6 October 2015, *Post Danmark*, Case C-23/14, EU:C:2015:651, paragraph 52 ("Case C-23/14 - *Post Danmark II*").

¹⁰ See press release of 3 December 2008, Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings, IP/08/1877.

¹¹ *Ibid.*

¹² Since the adoption of the Guidance on enforcement priorities, the Commission has adopted 27 decisions based on Article 102 TFEU relating to exclusionary conduct, and the Union courts have issued 32 judgments.

¹³ See Section II of this Policy Brief.

¹⁴ See Commission Communication "A competition policy fit for new challenges", COM(2021)713, p.2, 11 and 12.

¹⁵ See, in that regard, the Special Advisers' Report, "Competition Policy for the digital era" (2019), available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>, pages 2-3: "A consequence of these characteristics is the presence of strong 'economies of scope', which favour the development of ecosystems and give incumbents a strong competitive advantage. Indeed, experience shows that large incumbent digital players are very difficult to dislodge, although there is little empirical evidence of the efficiency cost of this difficulty. From a competition policy point of view, there is also a reasonable concern that dominant digital firms have strong incentives to engage in anti-competitive behaviour. All these factors heavily influence the forms that competition takes in the digital economy; they require vigorous competition policy enforcement and justify adjustments to the way competition law is applied".

¹⁶ See Communication from the Commission, Amendments to the Commission Communication - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conducts by dominant undertakings.

¹⁷ Amending Communication, paragraph 8.

¹⁸ See for example Judgment of 14 October 2010, *Deutsche Telekom v Commission*, Case C-280/08 P, EU:C:2010:603 ("Case C-280/08 P - *Deutsche Telekom*"); Judgment of 17 February 2011, *TeliaSonera Sverige*, Case C-52/09, EU:C:2011:83 ("Case C-52/09 - *TeliaSonera*"); Judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, Case C-295/12 P, EU:C:2014:2062 ("Case C-295/12 P - *Telefónica*"); ; judgment of 27 March 2012, *Post Danmark*, Case C-209/10, EU:C:2012:172 ("Case C-209/10 - *Post Danmark I*"); Case C-23/14 - *Post Danmark II*; Case C-413/14 P - *Intel*; Judgment of 25 March 2021, *Slovak Telekom v Commission*, Case C-165/19 P, EU:C:2021:239 ("Case C-165/19 P - *Slovak Telekom*"); judgment of 19 January 2023, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, Case C-680/20, EU:C:2023:33 ("Case C-680/20 - *Unilever*").

¹⁹ Case C-52/09 - *TeliaSonera*, paragraph 77. The Union courts have also confirmed that certain conduct by a dominant undertaking may amount to naked restrictions, for which an effects analysis is not required, in line with paragraph 22 of the Guidance on enforcement priorities.

²⁰ Guidance on enforcement priorities, paragraph 20. However, in paragraph 23, when discussing price-based exclusionary conducts, the Guidance on enforcement priorities refers to a conduct "capable of hampering competition".

harm competition.²¹ Despite this varied terminology, the applicable legal standard endorsed by the Union Courts and applied by the Commission must be understood as being one and the same.²² The wording that appears to be the most suitable to capture such standard is that of “potential effects”, given that this term allows for sufficient differentiation between this type of effects on the one hand and merely hypothetical or actual effects on the other. The case law of the Union Courts has further articulated what this standard requires in practice for establishing an abuse.

First, the assessment of potential effects should not be understood as setting the bar to a simplistic or formalistic standard. In fact, while the Union Courts refer to “potential” effects”, they have clarified that the finding of such effects is not a purely abstract exercise. Rather, the Commission must show that anticompetitive effects are more than merely “hypothetical”.²³

Second, while requiring more than “hypothetical effects”, the case law clearly indicates that the Commission is generally not required to identify actual anticompetitive effects of a conduct to prove the existence of an abuse. The Union Courts have indeed stated that a practice must have an anti-competitive effect on the market, *“but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-*

competitive effect which may potentially exclude competitors”.²⁴ In this respect, the Union Courts have also emphasized that if a dominant undertaking actually implements a practice, *“the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU”*.²⁵ It is only if the practice does not produce any form of effects on the market, that it escapes Article 102 TFEU.²⁶

Finally, the case law has indicated that the Commission's assessment of a conduct of a dominant undertaking must take into account all relevant facts and circumstances.²⁷ This is consistent with the requirement that the assessment should not be carried out formalistically or *in abstracto*. For instance, in *Intel*, the Grand Chamber of the Court of Justice indicated that in order to establish the capacity of exclusivity rebates to restrict competition, the Commission must analyse a set of relevant factors, with regard to the specific circumstances of each case.²⁸ More recently, in *Google Shopping*, the General Court reiterated that, to find an abuse under Article 102 TFEU, the Commission has to take into account *“all the relevant circumstances”*, including the arguments made by the dominant undertaking disputing the conduct's capability to have anti-competitive effects.²⁹

²¹ Case T-612/17, *Google Shopping*, paragraph 438 (*“unless it is demonstrated that there is an anticompetitive effect, or at the very least a potential anticompetitive effect”*); Case C-165/19 P - *Slovak Telekom*, paragraph 109 (*“capable of producing exclusionary effects”*); judgment of 18 November 2020, *Lietuvos geležinkiai v Commission*, Case T-814/17, EU:T:2020:545, paragraph 80 (*“Case T-814/17 - Lithuanian Railways”*) (*“tends to restrict competition or, in other words, that the conduct is capable of having that effect”*); judgment of 27 March 2012, *Post Danmark*, paragraph 44 (*“actual or likely”*); Case C-52/09 - *TeliaSonera*, paragraph 77 (*“practice produces, at least potentially, an anti-competitive effect”*); judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, Case T-336/07, EU:T:2012:172, paragraph 268 (*“Case T-336/07 - Telefónica”*) (*“tends to restrict competition or, in other words, that the conduct is capable of having, or likely to have, that effect”*); Case C-23/14 - *Post Danmark II*, (paragraph 31: *“capable”*; paragraph 66: *“may potentially exclude competitors”*; paragraph 67: *“conduct is likely to have an anticompetitive effect”*; paragraph 68: *“capable of restricting competition”*; paragraph 74: *“probable”*).

²² To that effect, the Union Courts appear to refer to the different terms “interchangeably”, as noted by Advocate General Kokott in the Opinion of 23 February 2006, *British Airways v Commission*, Case C-95/04 P, EU:C:2006:133, paragraph 76, noting the issue as *“a purely semantic distinction”*. See to that effect Case T-814/17 - *Lithuanian Railways*, paragraph 80 (*“tends to restrict competition or, in other words, that the conduct is capable of having that effect”*); Case T-336/07 - *Telefónica*, paragraph 268 (*“tends to restrict competition or, in other words, that the conduct is capable of having, or likely to have, that effect”*). The issue was also discussed prior to the adoption of the Guidance on enforcement priorities (judgment of 17 September 2007, *Microsoft v Commission*, Case T-201/04, EU:T:2007:289, paragraph 561, where the General Court found that Microsoft's argument on the standard applied by the Commission was *“purely one of terminology and is wholly irrelevant. The expressions ‘risk of elimination of competition’ and ‘likely to eliminate competition’ are used without distinction by the Community judicature to reflect the same idea”*).

²³ Case C-23/14 - *Post Danmark II*, paragraph 65; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, Case C-377/20, EU:C:2022:379, paragraph 98 (*“Case C-377/20 - SEN”*); Case C-680/20, *Unilever*, paragraph 42.

²⁴ Case C-52/09 - *TeliaSonera*, paragraph 64; see also Case C-23/14 - *Post Danmark II*, paragraph 66; Case T-336/07 - *Telefónica*, paragraph 268; Case C-377/20 - *SEN*, paragraph 53; Case C-680/20 - *Unilever*, paragraph 41.

²⁵ Case C-52/09 - *TeliaSonera*, paragraph 65; Case T-336/07 - *Telefónica*, paragraph 272; Case C-280/08 P - *Deutsche Telekom*, paragraph 253; and Case C-377/20 - *SEN*, paragraph 53. Most recently, in *Google Shopping*, the General Court held that *“the Commission was not required to identify actual exclusionary effects on the grounds that Google was allegedly not dominant on the national markets for comparison shopping services, that its conduct was part of improvements in its services for the benefit of consumers and online sellers and that that conduct had lasted for many years. Such a requirement of the Commission would be contrary to the principle, confirmed by the Courts of the European Union, that the categorisation of a practice as abuse within the meaning of Article 102 TFEU cannot be altered because the practice at issue has ultimately not achieved the desired result”* (Case T-612/17 - *Google Shopping*, paragraph 442).

²⁶ Case T-612/17 - *Google Shopping* paragraph 438: *“[I]n the absence of any effect on the competitive situation of competitors, an exclusionary practice cannot be classified as abusive vis-à-vis those competitors”*. See also Case C-280/08 P - *Deutsche Telekom*, paragraph 254; and Case C-52/09 - *TeliaSonera*, paragraphs 65 to 66.

²⁷ Judgment of 30 January 2020, *Generics (UK) and Others*, Case C-307/18, EU:C:2020:52, paragraph 154 (*“Case C-307/18 - Generics (UK)”*); Case T-336/07 - *Telefónica*, paragraph 175; Case C-280/08 P - *Deutsche Telekom*, paragraph 175; Case C-52/09 - *TeliaSonera*, paragraph 28; and judgment of 15 June 2022, *Qualcomm v Commission*, Case T-235/18, EU:T:2022:358, paragraphs 396 to 398; Case C-165/19 P - *Slovak Telekom*, paragraph 42.

²⁸ Case C-413/14 P - *Intel*, paragraph 139.

²⁹ Case T-612/17 - *Google Shopping*, paragraphs 439 to 441. See also Case C-377/20 - *SEN*, paragraphs 54 to 56, notably stating that if a dominant undertaking submits that a conduct, based on market developments, did not produce effects, that information can constitute evidence of a conduct's lack of capability, but *“that evidence must, however, be supplemented, by the undertaking concerned, by items of evidence intended to show that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects”*; Case C-680/20 - *Unilever*, paragraph 62.

III. The evolution of the Commission's Article 102 enforcement priorities

The move towards an effects-based enforcement of Article 102 TFEU raises the question of whether the heightened substantive legal standard that the Union Courts have accorded to it may inadvertently lead to undesirable outcomes. While a form-based approach may carry the risk of capturing false positives, an overly rigid implementation of the effects-based approach could set the bar for intervention at a level that would render enforcement against practices that restrict competition unduly burdensome or even impossible,³⁰ with serious negative consequences for consumers, the EU economy and society at large.

The Union Courts have sought to tackle this risk in a number of judgments, by providing clarifications on certain important concepts that are relevant for the enforcement of Article 102 TFEU. For instance, in the *Google Shopping*³¹ and *Google Android*³² cases, the General Court ruled that the Commission had already established the existence of an abuse to the requisite legal standard, without there being any need to carry out a speculative assessment of the hypothetical events that might have taken place absent the abuse.

As the case law develops and markets evolve, the Commission continues refining its enforcement practice and adapting its priorities with a view to promoting a dynamic and workable effects-based approach to Article 102 TFEU. Against this background, the following sections discuss the different areas where the Amending Communication has revised the Guidance on enforcement priorities, with the objective of providing stakeholders with increased transparency on the Commission's priority setting.³³

A. The notion of “anticompetitive foreclosure”

The Guidance on enforcement priorities stated that “[t]he Commission will normally intervene under Article [102] where [...] the allegedly abusive conduct is likely to lead to anti-competitive foreclosure”.³⁴

Anticompetitive foreclosure³⁵ was defined as “a situation where effective access of actual or potential competitors to supplies or

markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers” (emphasis added).³⁶ The Guidance on enforcement priorities further specified that “the expression ‘increase prices’ includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers”.³⁷

Taking into account the experience gained through the Commission's enforcement practice and the clarifications provided by the case law of the Union Courts, the notion of “effective access of actual or potential competitors to supplies or markets” should be interpreted in a manner that takes into account the different types of exclusionary conduct that a dominant undertaking can implement. In particular, such notion should be understood as not only referring to conduct that can result in the full exclusion or marginalisation of actual or potential competition, but also to conduct that “has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”,³⁸ in other words, conduct that weakens an effective competitive structure even without necessarily producing the full exclusion or marginalization of competitors. This is in line with recent judgments, which confirmed that the relevant test to be applied to establish an abuse is indeed whether the conduct at stake adversely impacts an effective competitive structure.³⁹

Furthermore, the Guidance on enforcement priorities included a reference to the dominant undertaking being able to *profitably* increase prices (or *profitably* influence output, innovation, or the variety of goods and services) as a result of the conduct. In its decision-making practice the Commission has not generally considered the profitability of the dominant undertaking as a necessary condition when determining its enforcement priorities. At the same time, the Union Courts have not considered the profitability of the dominant undertaking as a condition for a finding of potential anticompetitive effects.⁴⁰

The reference to “profitably” in the Guidance on enforcement priorities prior to its amendment needs to be read as a reference to a general framework for assessment to set the Commission's enforcement priorities rather than a requirement to show the profitability of a conduct. This is because, first, such requirement would be paradoxical, given that the abusive conduct does not need to be successful, i.e. to have actual anti-competitive effects, to be found unlawful under Article 102 TFEU. Second, while, as a matter of principle, exclusionary conduct may indeed have the aim or final result of the dominant undertaking earning additional rents through increased prices, mandating evidence of increased profitability would lead to the introduction of a significant degree of speculation in the competitive analysis. Third, the need for the

³⁰ That would include, for instance, requiring a nexus of full causality between the conduct and the anticompetitive effects or requiring a finding of actual effects to show an abuse.

³¹ Case T-612/17 - *Google Shopping*, paragraphs 376 to 378.

³² Case T-604/18 - *Google Android*, paragraphs 892 to 893.

³³ For the avoidance of doubt, the Amending Communication has a merely declaratory function. Enforcement priorities are by their very nature bound to evolve on the basis of developments in market dynamics and the case law of the Union Courts. For this reason, the adoption of the Amending Communication is without prejudice to further changes in the Commission's enforcement priorities that may be triggered by potential developments in these areas.

³⁴ See paragraph 20 of the Guidance on enforcement priorities.

³⁵ When the Union Courts have used the term “anticompetitive foreclosure”, they have generally done so as a synonymous of anticompetitive effects. See Case T-604/18 - *Google Android*, paragraphs 299 and 643; in the same judgment the term “exclusionary effects” is used (paragraph 281). Similar terms have been used in other judgments to refer to exclusionary anticompetitive effects, such as “potential exclusionary or restrictive effects on competition” (Case T-

612/17 - *Google Shopping*, paragraph 540) or just “restricting competition” (Case C-307/18 - *Generics (UK)*, paragraph 154).

³⁶ See paragraph 19 of the Guidance on enforcement priorities.

³⁷ See paragraph 11 of the Guidance on enforcement priorities.

³⁸ Case C-377/20 - *SEN*, paragraphs 44 and 68.

³⁹ Case C-680/20 - *Unilever*, paragraph 36; see also Case C-377/20 - *SEN*, paragraph 44.

⁴⁰ See, for instance, Case T-604/18 - *Google Android*, paragraph 281 (emphasis added).

Commission to show that abusive conduct results in profitable gains has already been dismissed by the Court of Justice in response to arguments by the parties, for instance in the area of predatory pricing.⁴¹

In light of the above and for the sake of further clarity, paragraph 1 of the Annex to the Amending Communication clarified that it is not appropriate to use the element of profitability of the dominant undertaking's conduct in order to determine the Commission's enforcement priorities, i.e. to pursue cases as a matter of priority only where the dominant undertaking can *profitably* maintain supra-competitive prices or *profitably* influence other parameters of competition, such as production, innovation, variety or quality of goods or services. Therefore, the Annex to the Amending Communication replaced paragraph 19, second sentence of the Guidance on enforcement priorities, with the following text: "In this document the term 'anti-competitive foreclosure' is used to describe a situation where the conduct of the dominant undertaking *adversely impacts an effective competitive structure, thus allowing the dominant undertaking to negatively influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services*" (emphasis added).

B. The relevance of as-efficient competitors

As regards pricing abuses, the Guidance on enforcement priorities stated that the Commission would normally only intervene if a given conduct was capable of harming as-efficient competitors. In essence, this means that the Guidance on enforcement priorities made use of the notion of foreclosure of as-efficient competitors from a cost perspective as a proxy to identify anticompetitive effects warranting intervention.⁴²

The Guidance on enforcement priorities, however, also recognised the possibility that competition from not-(yet)-as efficient competitors may play a role in the context of pricing abuses.⁴³

The Commission's enforcement experience shows that, while using the notion of foreclosure of as-efficient competitors may be conceptually justified as a general proxy for intervention in pricing abuses, it is important to avoid an unduly strict and dogmatic application of such a standard.

In particular, in markets where barriers to entry and expansion are significant, such as in the presence of economies of scale or network effects that lead to the emergence of dominant firms, market challengers may not be expected to be able to achieve the same or even a similar cost structure as the incumbent. However, such competitors could still be successful in satisfying specific consumer needs. For instance, in certain digital markets, competitors may offer features that are particularly attractive to a specific group of customers. This may allow them to gain a foothold in the market, with the prospect of scaling up volumes and potentially increasing their efficiency at a later stage.⁴⁴

In these markets, abusive conduct by dominant undertakings typically seeks to deprive possible challengers of any realistic prospect of expansion or even long-term survival. Mandating evidence of foreclosure of as-efficient competitors in these scenarios would likely lead to under-enforcement. Enforcement action should instead take into account the dynamic nature of competition and be aimed at protecting the competitive process, with a view to allowing entry and expansion. While competitors may have no prospect of becoming as-efficient as the dominant firm in current market circumstances, they may well become serious challengers for all or a significant portion of the dominant firms' customers in the future.

The relevance of the notion of foreclosure of as-efficient competitors has been discussed in the case-law following the adoption of the Guidance on enforcement priorities. In particular, the Union Courts held that competition on the merits may, by definition, lead to the market exit 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.⁴⁵ Therefore, the Union Courts clarified that it is not the purpose of Article 102 TFEU to "seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market".⁴⁶

At the same time, the Union Courts acknowledged that dominant undertakings remain bound by a special responsibility not to allow their conduct to impair "genuine, undistorted competition".⁴⁷ The Union Courts have also recognised first, that the notion of "as-efficient" has to be interpreted in a broad sense,⁴⁸ and second, that, in certain instances, genuine competition may also come from undertakings that are less efficient than the dominant firm. Thus, the competitive constraint that those competitors exert may also warrant protection under Article 102 TFEU. That may be the case in particular in markets where the emergence of as-efficient competitors may not be possible because of the "structure of the market"⁴⁹ or where the relevant market is protected by significant barriers.⁵⁰

Therefore, taking into account the experience gained through the Commission's enforcement practice and the clarifications provided by the case law of the Union Courts, it is not appropriate, as regards price-based exclusionary conduct of a dominant undertaking, to pursue as a matter of priority only conduct that may lead to the market exit or the marginalisation of competitors that are as efficient as the dominant undertaking in terms of their cost structure. Accordingly, paragraph 2 of the Annex to the Amending Communication replaced the text of the Guidance on enforcement priorities, paragraph 23, last sentence,

in the future as a competitive threat on the incumbent's position on the overall market or part of it.

⁴⁵ Case C-377/20, *SEN*, paragraph 45; Case C-413/14 P *Intel*, paragraphs 133-134; Case C-209/10 - *Post Danmark I*, paragraph 22.

⁴⁶ Case C-209/10 - *Post Danmark I*, paragraph 21; see also Case C-377/20 - *SEN*, paragraph 73; Case C-680/20 - *Unilever*, paragraph 37.

⁴⁷ See Case C-209/10 - *Post Danmark I*, paragraph 23; Case C-413/14 P - *Intel*, paragraph 135; Case C-377/20 - *SEN*, paragraphs 73 to 74 and Case C-680/20 - *Unilever*, paragraph 38.

⁴⁸ That is to say, efficiency is a concept that can go beyond price/cost considerations and thus extend to whether the rival undertaking's goods are attractive to consumers from the point of view of, among other things, price, choice, quality or innovation. Case C-413/14 P - *Intel*, paragraph 134.

⁴⁹ Case C-23/14 - *Post Danmark II*, paragraphs 59 to 60.

⁵⁰ Case C-680/20 - *Unilever*, paragraph 57.

⁴¹ See Judgment of 2 April 2009, *France Télécom v Commission*, Case C-202/07 P, EU:C:2009:214 paragraphs 110 to 113.

⁴² Guidance on enforcement priorities, paragraph 23.

⁴³ Guidance on enforcement priorities, paragraph 24.

⁴⁴ Importantly, the entrant may remain less efficient than the incumbent in the short and medium term. However, the fact that the entrant offers a differentiated product may still imply that it may enjoy a distinct and specific demand and that it can constitute a credible competitive force in the market. Such competitive force could develop

with the following: “With a view to preventing anti-competitive foreclosure, the Commission will *generally* intervene where the conduct concerned has already been or is capable of hampering competition from competitors that are considered to be as efficient as the dominant undertaking”. (emphasis added) Moreover, it inserted at the end of footnote 1 of paragraph 23 the following text: “*The Court of Justice has recognised that the notion of an “as efficient” competitor refers to efficiency and attractiveness to consumers from the point of view of, among other things, price, choice, quality or innovation, see judgment of 6 September 2017, Intel Corp. v Commission, C-413/14 P, EU:C:2017:632, paragraph 134, and judgment of 19 January 2023, Unilever Italia Mkt. Operations, C-680/20, EU:C:2023:33, paragraph 37*”. Finally, it replaced the text of paragraph 24, first sentence, with the following: “*At the same time, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure*”, and included therein relevant references to the case law mentioned above. (emphasis added)

C. The use of a price-cost as-efficient competitor (AEC) test

The price-cost as-efficient competitor (“AEC”) test refers to various quantitative tests, which have the common aim of assessing the ability of a conduct to produce anti-competitive effects by reference to a hypothetical competitor that is as efficient as the dominant undertaking.⁵¹ In essence, an AEC test requires an analysis of the price level charged by the dominant undertaking and a comparison with its costs, with the aim of assessing whether a hypothetical as-efficient competitor could profitably compete against a potentially abusive pricing practice by the dominant firm.

The use of an AEC test was referred to in the Guidance on enforcement priorities’ section on pricing abuses. At the same time, the Guidance on enforcement priorities did not spell out in which specific situations an AEC test would be applied to identify the cases to pursue as a matter of priority. Notably, the Guidance on enforcement priorities merely stated that “[i]n order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by [price-based exclusionary conduct], the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing”.⁵²

The Union Courts have in the meantime clarified that the application of an AEC test is not legally required to prove an abuse and provided useful clarifications as regards the situations in which it can be appropriate or not.

Notably, the Court of Justice has made clear that the use of an AEC test is warranted in predatory pricing and margin squeeze cases.⁵³ This is in line with the Commission’s practice and reflects the fact that in these types of abuse, it is the price that is

charged *in itself* that may be liable to be abusive, rather than the conditions associated to such price. An AEC test in these cases represents a reliable way to assess whether the conduct at stake is abusive, provided it is applied in a way that takes into account the specific characteristics of the relevant products and markets.⁵⁴

As regards other practices and notably rebates, the Union Courts have stated in several cases that the use of an AEC test is possible but not required to prove an abuse. The AEC test has been defined as “optional”,⁵⁵ “one tool amongst others”,⁵⁶ or “only one of several factors”⁵⁷ that may be considered in order to establish, by means of qualitative or quantitative evidence, the existence of an abusive rebate scheme.

Against this background, the suitability of an AEC test in rebate cases should be assessed on the basis of the type of rebates at stake, by distinguishing between retroactive rebates conditional on a customer purchasing all or most of its requirements from the dominant firm (“exclusivity rebates”) and other (non-exclusivity) rebate schemes.

First, as regards non-exclusivity rebates, the use of an AEC test may be appropriate to prove anticompetitive effects, depending on the circumstances on each specific case, keeping in mind the “difficulties inherent in the drawing up of an AEC test”,⁵⁸ and that the appropriateness of such test needs to be assessed in light of factors such as the type of conduct at stake,⁵⁹ the availability of data and the possibility to establish sufficiently reliable parameters to run the test (which is by nature based on economic inferences, assumptions and approximations).⁶⁰

⁵⁴ As regards the type of costs to be taken into account for the purposes of an AEC test, paragraph 26 of the Guidance on enforcement priorities explains that the cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC). AAC only includes fixed costs if incurred during the period under examination, while LRAIC also includes product specific fixed costs made before the period in which allegedly abusive conduct took place. The use of AAC may not be appropriate as a benchmark in industries which feature significant fixed costs as it is not plausible that fixed costs made before the period of the abuse would not need to be at least in part recovered.

⁵⁵ Case C-680/20 - *Unilever*, paragraph 62.

⁵⁶ Case C-23/14 - *Post Danmark II*, paragraph 61.

⁵⁷ See Case T-604/18 - *Google Android*, paragraph 643.

⁵⁸ Case T-604/18 - *Google Android*, paragraph 1003.

⁵⁹ For example, an AEC test may not be appropriate in situations where rebates are granted in conjunction with non-price advantages, as the quantitative nature of the AEC test may not be capable of capturing the overall price and non-price loyalty-inducing effect of the scheme (see Case C-680/20 - *Unilever*, paragraph 57, the Court of Justice stated: “A test of that nature may be inappropriate in particular in the case of certain non-pricing practices[...] moreover, that method takes into consideration only price”).

⁶⁰ For example, calculating the contestable share may be a particularly challenging exercise. The contestable share is a specific element of the test in rebates cases and small modulations in its size are liable to have a decisive effect on the outcome of the AEC test. Yet, it may be very difficult if not impossible to establish such a share with absolute precision in practice *inter alia* due to the inevitable uncertainties surrounding customers’ procurement choices and the multitude of factors influencing them. The allocation of fixed costs may also be a particularly challenging exercise, especially when it comes to multi-product companies.

⁵¹ See Case C-680/20 - *Unilever*, paragraph 56.

⁵² Guidance on enforcement priorities, paragraph 25.

⁵³ Case C-23/14 - *Post Danmark II*, paragraph 55. See also Case T-612/17 - *Google Shopping*, paragraph 538, where the Court explained that the test is to be applied to pricing practices, mentioning only predatory pricing or margin squeeze.

Second, as regards exclusivity rebates, the use of an AEC test is generally not warranted.⁶¹ Exclusivity rebates applied by a dominant undertaking are by their very nature capable of affecting competition.⁶² Even in situations where the Commission is required to assess the capability of such conduct to restrict competition, the Court of Justice has not referred to an AEC test as one of the elements that the Commission is bound to take into account to carry out its assessment.⁶³ While in certain specific cases it may be appropriate to make use of an AEC test, these cases should be considered as exceptional, in light of the high anticompetitive potential of exclusivity rebates, on the one hand, and the difficulties inherent in the drawing up of an AEC test, on the other.⁶⁴

Finally, even when carried out, an AEC test remains only one element in the overall competitive assessment. As explained above, the Union Courts have clarified that the Commission's assessment of conduct under Article 102 TFEU must take into account all relevant facts and circumstances. The fact that a dominant undertaking's pricing conduct "passes" an AEC test should not be considered as a conclusive indication that such pricing conduct is not capable of negatively affecting competition.⁶⁵ Rather, the outcome of an AEC test should be factored in the Commission's analysis of all relevant facts and circumstances.

As a result, a generalised use of the AEC test to determine which cases of price-based exclusionary conduct to pursue as a matter of priority is not warranted and, if such test is carried out, its results should in any event be assessed together with all other relevant circumstances. Therefore, to reflect the Commission's enforcement practice and the clarifications provided by the case law of the Union Courts, paragraph 3 of the Annex to the Amending Communication replaced the text of the Guidance on

enforcement priorities, paragraph 25, with the following: "In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking *in terms of costs* would likely be foreclosed by the conduct in question, the Commission *may* examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing". (emphasis added) Furthermore, paragraph 3 of the Annex to the Amending Communication replaced the text of the Guidance on enforcement priorities, paragraph 27, with the following: "*When analysing data to assess whether an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will integrate this analysis in the general assessment of anti-competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence*".

D. Constructive refusals and unfair access conditions

The Guidance on enforcement priorities stated that a constructive refusal to supply could, for example, take the form of "*unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply*".⁶⁶ and generally treated constructive refusal to supply in the same manner as an outright refusal to supply.

Since constructive refusals or the imposition of unreasonable supply conditions were viewed as similar to outright refusals, the Guidance on enforcement priorities applied the same criteria to both types of abuses. In particular, it considered these practices as an enforcement priority where they relate to a product or service that is indispensable; are likely to lead to the elimination of effective competition; likely to lead to consumer harm, and cannot be objectively justified.⁶⁷ These are generally known as the *Bronner* criteria, in reference to the respective judgment.⁶⁸

Taking into account the experience gained through the Commission's enforcement practice regarding access to the dominant undertaking's input or assets and the clarifications provided by the case law of the Union Courts on such access, it is important to distinguish situations of outright refusal to supply from situations where the dominant company makes access subject to unfair conditions ("constructive refusal to supply").

Notably, the case law of the Union Courts, has clarified that practices other than an outright refusal supply, in particular making the access subject to unfair conditions, cannot be equated to a simple refusal to supply. In these cases, antitrust intervention will not result in an obligation to grant access, given that access has already been granted.⁶⁹ In view of this, the Union Courts have considered that the scope of application of the *Bronner* criteria, in particular the criterion of indispensability, is narrower than the scope envisaged in the Guidance on enforcement priorities. The Court of Justice has stated that the indispensability criterion in *Bronner* applies only to outright refusals to supply, not to other abusive conducts concerning

⁶¹ The Guidance on enforcement priorities itself did not mention exclusivity rebates among the type of rebates for which an AEC test can be used, as it considered them as a form of exclusive dealing (separate from pricing abuses). See Guidance on enforcement priorities, paragraph 34.

⁶² See Case C-413/14 P - *Intel*, paragraph 137 and Case C-680/20 - *Unilever*, paragraph 46.

⁶³ According to the Court of Justice, the elements to be considered are: "first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market". See Case C-413/14 P - *Intel*, paragraph 139.

⁶⁴ Examples of some of these difficulties are discussed in footnote 60 above. In any event, if during the administrative procedure the undertaking concerned submits the results of an AEC test, the Commission will assess their probative value (Case C-680/20 - *Unilever*, paragraphs 60 and 62). For the avoidance of doubt, this does not mean that the Commission will necessarily need to elaborate an own AEC test in response, given that the Commission may for example find that the undertaking's test is methodologically flawed or consider that an AEC test is not appropriate to assess the specific practice at hand.

⁶⁵ Paragraph 27 of the Guidance on enforcement priorities stated that "If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene".

⁶⁶ See paragraph 79 of the Guidance on enforcement priorities.

⁶⁷ See paragraph 81 and paragraphs 83-90 of the Guidance on enforcement priorities.

⁶⁸ Judgment of 26 November 1998, *Oscar Bronner v. Mediaprint (Bronner)*, Case C- 7/97, EU:C:1998:569, paragraph 41.

⁶⁹ Judgment of 25 March 2021, *Slovak Telekom v. Commission (Slovak Telekom)*, Case C-165/19 P, EU:C:2021:239, paragraphs 50-51 and judgment of 12 February 2023, *Lietuvos geležinkiai AB v. European Commission*, Case C-42/21 P, EU:C:2023:12, paragraphs 81-84 and 91.

access conditions when access has already been given.⁷⁰ A similar reasoning was also followed by the General Court in *Google Shopping*, even though the standard to be applied in that case was in any event not one of constructive refusal to supply.⁷¹

Accordingly, paragraph 4 of the Annex to the Amending Communication deleted the last two sentences of paragraph 79 of the Guidance on enforcement priorities, which made reference to constructive refusal to supply being assessed in the same manner as actual refusal to supply. This does not mean that the enforcement in constructive refusal to supply cases should not be prioritised, but rather that prioritisation should not depend on whether the standard set out in the original version of the Guidance on enforcement priorities for outright refusal to supply is met.

E. Margin Squeeze

The Guidance on enforcement priorities considered margin squeeze abuses as a specific type of refusal to supply.⁷² Accordingly, it established that the assessment of whether to give priority to a case of margin squeeze should also meet the so-called *Bronner* criteria, mentioned in Section D above.

However, taking into account the experience gained through the Commission's enforcement practice and the clarifications provided by the case law of the Union Courts, it is not appropriate to pursue as a matter of priority margin squeeze cases only where those cases involve a product or service that is objectively necessary to be able to compete effectively on the downstream market.

Notably, the case law of the Union Courts has clarified that a margin squeeze is not a type of refusal to supply but an independent form of abuse to which the *Bronner* criteria, in particular the condition of indispensability, do not apply. In *TeliaSonera*, the Court of Justice stated that it could not be inferred from the judgment in *Bronner* “that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser”.⁷³ Moreover, the Court of Justice stated that margin squeeze “may, in itself, constitute an independent form of abuse distinct from that of refusal to supply”.⁷⁴

This position was confirmed in later judgments. For example, in *Telefónica*, the Court of Justice confirmed that “the abusive conduct of which the appellants stand charged, which takes the form of a margin squeeze, constitutes an independent form of abuse distinct from that of refusal to supply [...], to which the criteria established in *Bronner* are not applicable, in particular, the essential nature of the inputs”.⁷⁵

Therefore, paragraph 5 of the Annex to the Amending Communication changed the text of the Guidance on enforcement priorities by (i) moving paragraph 80 to become paragraph 90 under a separate, newly created section, titled “E. Margin squeeze”, to reflect the independent nature of this type of abuse and the fact that the criteria for assessment are not the same as for refusal to supply;⁷⁶ and (ii) amending footnote 3 to paragraph 90 as follows: “This includes a situation in which an integrated undertaking that sells a ‘system’ of complementary products sells one of the complementary products on an unbundled basis to a competitor that produces the other complementary product.” (emphasis added).

IV. Conclusion: a dynamic and workable effects-based approach to abuse of dominance

It follows from the Commission's Amending Communication that the Commission is fully committed to a robust enforcement of Article 102 TFEU, in line with the case law of the Union Courts.

This Policy Brief has explained the background to the changes introduced by the Amending Communication. In particular, it has outlined some key developments in the Commission's enforcement priorities thanks to the experience gained through the Commission's practice since the adoption of the Guidance on enforcement priorities, which took into account the evolution of the case law of the Union Courts as regards exclusionary abuses under Article 102 TFEU and market developments.

While the Union Courts' judgments discussed above and the Commission's enforcement practice have embraced an effects-based approach to Article 102 TFEU, they have done so in a way that does not jeopardise a vigorous enforcement of Article 102 TFEU. Notably, these judgments have provided several indications and clarifications on the substantive standard, the evidentiary requirements upon the Commission and specific types of abuses (such as rebates, refusal to supply and margin squeeze).

For the purpose of providing increased transparency on the Commission's priorities, in light of such developments, the Commission's Amending Communication has amended certain paragraphs of the Guidance on enforcement priorities.

At the same time, the developments in the case law go significantly beyond the topics covered in the Amending Communication and further outlined in this Policy Brief. In view of this, the Commission has published today a Call for Evidence announcing an initiative aiming at reflecting the Article 102 TFEU case law on exclusionary conduct and the Commission's enforcement practice based on such case law in new guidelines, which would allow the Commission to fully take stock of these developments.

⁷⁰ See Case C-165/19 P – *Slovak Telekom*, paragraph 50 and judgment of 12 February 2023, *Lietuvos geležinkiai AB v European Commission*, Case C-42/21 P, EU:C:2023:12, paragraphs 81 to 84 and 91.

⁷¹ Case T-612/17 – *Google Shopping*, paragraphs 230-234.

⁷² Margin squeeze is therefore discussed together with refusal to supply in section IV.D of the Guidance on enforcement priorities ‘Refusal to supply and margin squeeze’.

⁷³ Case C-52/09 – *TeliaSonera*, paragraph 55.

⁷⁴ Case C-52/09 – *TeliaSonera*, paragraph 56.

⁷⁵ Case C-295/12 P – *Telefónica*, paragraph 96. See also Case C-165/19 P – *Slovak Telekom*, paragraph 52.

⁷⁶ See to that effect paragraph 5 of the Amending Communication, which includes the new footnote 2 to paragraph 90 of the Guidance on enforcement priorities.