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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

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Table of Contents

1. INTRODUCTION

1.1. Purpose of the Guidelines

1. The Union rules on competition pursue the protection of genuine, undistorted competition ("effective competition") in the internal market. Effective competition drives market players to deliver the best products[1] in terms of choice, quality and innovation, at the lowest prices for consumers[2]. It ensures that markets remain open and dynamic, creating new opportunities for innovative players including small and medium-sized enterprises ("SMEs") and start-ups to operate on a level playing field with other players. It also spurs innovation and ensures an efficient allocation of resources, thereby contributing to sustainable development and enabling strong and diversified supply chains, all of which contributes to the Union's resilience and long-term prosperity.

2. While achieving a dominant position in the Union is not in itself unlawful, dominant undertakings may behave in ways that distort or impair effective competition, to the detriment of the public interest, other market players and consumers[3]. The competitive harm generated by dominant undertakings' abusive conduct may take various forms, such as higher prices, a deterioration in the quality of goods and services[4], a reduction in innovation or a limitation of consumers' choice[5].

3. It is to address such forms of competitive harm that Article 102 of the Treaty on the Functioning of the European Union ("TFEU") places a special responsibility on dominant undertakings by prohibiting them from abusing their market position.

4. In view of growing market concentration in various industries and the digitisation of the Union economy, which makes strong network effects and "winner-takes-all" dynamics increasingly widespread, it is important that Article 102 TFEU is applied vigorously and

[1] All references to "product(s)" in these Guidelines should be understood as also referring to services.

[2] In these Guidelines, the concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct of a dominant undertaking, including intermediate producers that use the products as an input, as well as distributors, wholesalers, retailers and final consumers.

[3] Judgment of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 42; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 22; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 124; judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, Case T-604/18, EU:T:2022:541, paragraph 1028; and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions of 18 November 2021, A competition policy fit for new challenges, COM(2021) 713 final.

[4] The term "quality" in these Guidelines should be understood as covering all various aspects related to the quality of a given product, such as its sustainability, resource efficiency, durability, the value and variety of uses offered by the product, the possibility to integrate the product with other products, the image conveyed or the security and privacy protection afforded by the product, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs. See Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 15.

[5] Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 281. See also judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 133, where the Court refers, amongst other things to "*limiting […] production, product or alternative service development*".

effectively[6]. It is equally important that Article 102 TFEU is applied in a predictable and transparent manner so that companies can operate freely in the internal market, within the limits laid down in Union legislation, also considering the decentralised enforcement of Article 102 TFEU[7].

5. Pursuant to the Union Courts' case law[8], Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers[9], including practices that may harm consumers by undermining an effective structure of competition[10].

6. In particular, dominant undertakings can harm consumers by hindering, through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition[11]. Such behaviour, if not objectively justified, is hereinafter referred to as "exclusionary abuse" and its effects are hereinafter referred to as "exclusionary effects". Those effects refer to any hindrance to actual or potential competitors' ability or incentive to exercise a competitive constraint on the dominant undertaking[12], such as the full-fledged exclusion or marginalisation of competitors, an increase in barriers to entry or expansion[13], the hampering or elimination of effective access to markets or to parts thereof[14] or the imposition of constraints on the potential growth of competitors[15].

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6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions of 18 November 2021, A competition policy fit for new challenges, COM(2021) 713 final.

7 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 [now Articles 101 and 102 TFEU], OJ L1, 4.1.2003, p. 1, Articles 1, 3, 5 and 6.

8 Throughout these Guidelines, the term "Union Courts" refers to the Court of Justice and the General Court.

9 Judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraphs 44 and 46, as well as the case-law quoted therein.

10 Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission*, Case 6/72, EU:C:1973:22,paragraph 26; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 24; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraph 44, as well as the case-law quoted therein.

11 Judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 91; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 27; judgment 19 April 2012, *Tomra & Others v. Commission*, C-549/10, EU:C:2012:221, paragraph 17; judgment 30 January 2020, *Generics UK & Others*, C-307/18, EU:C:2020:52, paragraph 148; judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, Case C-152/19 P, EU:C:2021:238, paragraphs 41 and 42; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraphs 44 and 68; judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, EU:C:2023:537, paragraph 47; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 131.

12 Judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 117.

13 Judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 154.

14 Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, Case T-604/18, EU:T:2022:541, paragraph 281.

15 Judgment of 8 October 1996, *Compagnie maritime belge transports et Compagnie maritime belge, Dafra-Lines, Deutsche Afrika-Linien. et Nedlloyd Lijnen v. Commission*, Joined Cases T-24/93, T-25/93, T-26/93 et T-28/93, EU:T:1996:139, paragraph 149 ; judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, EU:C:2023:537, paragraph 47; judgment of 21 December 2023, *European Superleague Company*, Case C-333/21, EU:C:2023:1011, paragraph 131.

7. Against this background, these Guidelines set out principles to assess whether conduct by dominant undertakings constitutes an exclusionary abuse under Article 102 TFEU, in the light of the case law of the Union Courts.

8. By issuing these Guidelines, the Commission seeks to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU. Although not binding on them, these Guidelines are also intended to give guidance to national courts and national competition authorities of the Member States in their application of Article 102 TFEU.

9. These Guidelines are based on the case law of the Union Courts at the time of their adoption. These Guidelines are without prejudice to the interpretation that the Union Courts may give to Article 102 TFEU through relevant developments in the case law.

1.2. Scope and structure of the Guidelines

1.2.1. Scope

10. The general principles set out in these Guidelines need to be applied to the particular facts and circumstances of each case. The list of practices listed in the text of Article 102 TFEU does not exhaust the methods of abusing a dominant position prohibited by Union law[16]. Given the large number of possible types of exclusionary abuses by dominant undertakings and the wide range of market contexts in which they may occur, it is not possible to provide specific guidance for every possible scenario.

11. While these Guidelines only concern exclusionary abuses, the principles relevant to the assessment of dominance (section 2) and the justifications based on objective necessity and efficiencies (section 5) are also relevant for the assessment of other forms of abusive conduct, such as exploitative abuses[17].

12. These Guidelines are without prejudice to the application of other provisions of Union competition law to the same facts, in particular Article 101 TFEU and the rules concerning its application[18].

13. Article 102 TFEU may also apply to conduct which falls within the scope of other regulations, Union or national, that govern the behaviour of undertakings in the market[19]

[16] Judgments of 21 February 1973, *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, paragraph 26; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 26, and judgment of 16 March 2023, *Towercast*, C-449/21, EU:C:2023:207, paragraph 46.

[17] For the avoidance of doubt, the same conduct by a dominant undertaking may have both exclusionary and exploitative effects.

[18] Judgment of 13 February 1979, *Hoffmann-La-Roche* v *Commission*, Case 85/76, EU:C:1979:36, paragraph 116; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 119 and case law quoted therein. Moreover, as regards the application of the Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24, 29.1.2004, p. 1-22), the Court of Justice held that "*Article 21(1) of Regulation No 139/2004 must be interpreted as not precluding the competition authority of a Member State from regarding a concentration of undertakings which has no Community dimension within the meaning of Article 1 thereof, is below the thresholds for mandatory ex ante control laid down in national law, and has not been referred to the Commission under Article 22 of that regulation, as constituting an abuse of a dominant position prohibited under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope*" (judgment of 16 March 2023, *Towercast*, C-449/21, EU:C:2023:207, paragraph 53).

and which pursue different objectives from that of the competition rules[20]. The fact that the conduct of a dominant undertaking has been found to have infringed other legislation does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for an infringement of Article 102 TFEU for the same conduct[21]. In addition, the fact that an undertaking's conduct has been found to comply with other legislation – or even been encouraged by it – does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for infringing Article 102 TFEU through the same conduct[22].

1.2.2. Structure

14. In order to assess whether an undertaking has infringed Article 102 TFEU, the following steps are required. First, as a general rule, it is necessary to define the relevant product and geographic market (or markets)[23]. The Market Definition Notice provides guidance on the rules, criteria and evidence that the Commission uses when defining markets[24]. Second, it is necessary to assess whether the undertaking concerned holds a dominant position in the relevant market(s). Third, it is necessary to assess whether the conduct of the dominant undertaking is liable to be abusive, namely whether it departs from competition on the merits and it is capable of having exclusionary effects[25]. Fourth, it may be necessary to assess whether the conduct is objectively justified, including on the basis of efficiencies.

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19 Judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, paragraphs 47-54; and judgment of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, paragraph 88.

20 Judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 47; judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, paragraph 48. See also judgment of 1 July 2010, *AstraZeneca* v *Commission*, case T-321/05, EU:T:2010:266, paragraph 366, where the Court stated that the existence of remedies specific to the other regulatory system (in that case, the patent system) does not alter the conditions of application of the competition law regime.

21 This is only possible if: (i) there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; (ii) the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and (iii) the overall penalties imposed correspond to the seriousness of the offences committed. See judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 58.

22 Judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraphs 81-84; judgment of 10 July 2014, *Telefónica and Telefónica de Espana* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 133; judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraphs 813-817 and 864. If a conduct is required of undertakings by legislation, or if legislation creates a legal framework which eliminates any possibility of competitive activity, Article 102 TFEU does not apply. In such a situation, the abusive conduct is not attributable to the dominant undertaking, as Article 102 TFEU implicitly requires the autonomous conduct of that undertaking. Article 102 TFEU may apply, however, if it is found that legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings. Judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 80 and case-law therein cited.

23 Market definition allows the identification in a systematic way of the immediate competitive constraints exerted on the undertaking in question when offering products in a certain area. Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 127 and 128.

24 Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024. Market definition is not discussed in detail in these Guidelines.

25 In these Guidelines, the expressions "liable to be abusive" or "liable to constitute an exclusionary abuse" refer to conduct that departs from competition on the merits and it is capable of having exclusionary effects, irrespective of whether the conduct may be deemed, in a later step in the analysis, to be objectively justified or not.

15. Accordingly, these Guidelines are structured as follows:

- section 2 describes the general principles applicable to the assessment of dominance.

- section 3 describes the general principles to determine if conduct by dominant undertakings is liable to constitute an exclusionary abuse.

- section 4 describes the principles to determine whether specific types of conduct by dominant undertakings are liable to be abusive.

- section 5 describes the general principles applicable to the assessment of objective justifications and efficiencies, which under certain conditions may justify or counterbalance the effects of conduct that is liable to be abusive.

16. Finally, for completeness, it is recalled that conduct that is not capable of appreciably affecting trade between Member States falls outside the scope of Article 102 TFEU. The Commission has provided guidance on the assessment of effect on trade in the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty[26].

2. GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF DOMINANCE

2.1. Introduction

17. Article 102 TFEU does not prevent an undertaking from acquiring on its own merits, in particular on account of its skills and abilities, a dominant position on a given market[27]. It only prohibits the abuse of such dominant position.

18. A dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers[28].

19. Establishing dominance is not precluded by the existence of a certain degree of competition on a particular market, as long as the undertaking concerned is able to act to an appreciable extent without having to take account of such competition in its market strategy and without, for that reason, suffering detrimental effects from such behaviour[29]. Accordingly, the fact that there may be a certain degree of competition on a market is a relevant but not a decisive factor for determining whether a dominant position exists[30].

[26] OJ C101, 27.4.2004, p.81.

[27] Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 37; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 73.

[28] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraph 65.

[29] Judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, Case 85/76, EU:C:1979:36, paragraph 70.

[30] Judgment of 30 January 2007, *France Télécom* v *Commission*, Case T-340/03, EU:T:2007:22, paragraph 101. See also Commission decision of 10 February 2021 in case AT.40394 – *Aspen*, paragraph 63.

20. To assess dominance, it is in general necessary to define the relevant market[31]. Market definition involves identifying in a systematic way the competitive constraints exerted on the undertakings concerned when they offer products in a certain area. When defining the relevant market, the Commission may need to take into account that the undertakings concerned already exert market power[32]. The definition of the relevant market and the assessment of whether the undertakings concerned hold a dominant position within that relevant market may therefore be interrelated.

21. Once dominance has been established, Article 102 TFEU becomes applicable, and the degree of dominance is not as such decisive to determine its scope of application. However, the degree of dominance may be relevant, among other factors, for the purpose of analysing whether the conduct of the undertaking concerned is capable of producing exclusionary effects[33].

22. A dominant position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance), as explained below.

2.2. Single dominance

23. Single dominance relates to a situation where a single undertaking[34] has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers on the relevant market[35].

24. The existence of a dominant position derives in general from a combination of several factors that, taken separately, are not necessarily determinative[36]. The following sections illustrate some of these factors, in a non-exhaustive manner. Further factors may be

[31] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission*, C-6/72, EU:C:1973:22, paragraph 32; judgment 30 January 2020, *Generics UK & Others*, C-307/18, EU:C:2020:52, paragraph 127.

[32] One issue that can arise in the context of market definition in Article 102 TFEU cases is that the price charged by the undertaking concerned may have been raised above the competitive level. In such a scenario, the use of the so-called SSNIP test (Small but Significant and Non-transitory Increase in Price) as a tool for defining the boundaries of the relevant market may not be appropriate, as market definition must be based on substitution at the competitive prices and not at prices that have already been raised above the competitive level. The risk that a SSNIP test analysis starting at an already inflated price leads to the wrong conclusion of wide relevant markets is called the "cellophane fallacy". Therefore, if used at all, the SSNIP test must be applied carefully in Article 102 TFEU cases. See, for example, Commission decision of 15 October 2014 in case AT.39253 – *Slovak Telekom*, paragraphs 158-171. See also Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 18 c) and footnote 55.

[33] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 80 and 81; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139 and judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, Case T-612/17, EU:T:2021:763, paragraph 183. See also Commission decision COMP/C-1/36915, *Deutsche Post AG*, paragraph 103.

[34] Specific characteristics of a market may allow more than one undertaking within the same market to be individually dominant. See for example Commission decision of 26 November 2008 in case AT.39388 – *German Electricity Wholesale Market* and AT.39389 – *German Electricity Balancing Market*, paragraph 13.

[35] See to that effect judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraph 65.

[36] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraph 66; judgment of 15 December 1994, *Gøttrup-Klim u.a. Grovvareforeninger / Dansk Landbrugs Grovvareselska*, C-250/92, EU:C:1994:413, paragraph 47.

relevant for the assessment of dominance, depending on the specific circumstances of each case[37].

2.2.1. Market position of the undertaking concerned and of its competitors

25. The analysis of the market position of the undertaking concerned and of its competitors during the time period considered[38] provides insights into the constraints that those undertakings face from actual competition in the relevant product and geographic market.

26. One important factor is the existence of very large market shares, which are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position[39]. This is the case in particular where an undertaking holds a market share of 50% or above[40]. Dominance may also be found in cases where an undertaking has a market share below 50%[41]. Generally, both the value of sales or purchases and the volume of sales or purchases provide useful information for assessing market power. Typically, market shares based on sales value are the most appropriate indicator, but in other instances, sales volumes or other indicators may better reflect the competitive strength of undertakings[42].

[37] For example, in the context of multi-sided platforms, with two different user groups, constraints on the market power of the platform operator vis-à-vis one side can also come from the user group on the other side of the platform; see Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraphs 335 and section 8.2.2.5. Moreover, in the presence of aftermarkets, effective competition on the primary markets may constrain an undertaking's market power in the secondary market; see Commission decision of 20 May 2009 rejecting the complaint in Case C-3/39.391 – *EFIM*; confirmed in Case T-296/09 *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commissio*n, EU:T:2011:693, paragraphs 60, 90 and 91 and Case C-56/12, EU:C:2013:575, paragraphs 12 and 36 et seq.

[38] See also Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 18 b).

[39] Judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, Case 85/76, EU:C:1979:36, paragraph 41.

[40] Judgment of 3 July 1991, *Akzo* v *Commission*, C-62/86, EU:C:1991:286, paragraph 60. For example, in judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraph 92, a market share of between 70% and 80% was considered as a clear indication of the existence of a dominant position in a relevant market.

[41] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, 27/76, EU:C:1978:22, paragraphs 108 and 109, where dominance was found with a market share of between 40% and 45%. In such a scenario, factors other than the market share of the undertaking concerned, such as the strength and number of competitors need to be considered; see also judgment of 17 December 2003, *British Airways v Commission*, T-219/99, EU:T:2003:343, paragraphs 211 and 224and judgment of 15 December 1994, *Gøttrup-Klim u.a. Grovvareforeninger / Dansk Landbrugs Grovvareselska*, C-250/92, EU:C:1994:413, paragraph 48. Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances; see judgment of 22 October 1986, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, Case 75/84, paragraphs 85 and 86.

[42] For more information, see Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 111. In the context of zero-price markets, other measures such as the numbers of users, transactions, or indicators of the intensity of usage may provide a better basis for analysing dominance; see, for example, Commission decision of 27 June 2017 in case AT. 39740 - *Google Shopping*, paragraphs 275 et seq.

27. A comparison between the market shares of the undertaking concerned and of its competitors is also important[43]. For example, where an undertaking holds a market share that is much larger than that of its competitors, this is a relevant factor for the assessment of whether the undertaking concerned holds a dominant position[44].

28. Market shares should be interpreted in light of the relevant market conditions, the dynamics of the market and the extent to which products are differentiated. In particular, it is often appropriate to take into account the trend of market shares over time[45]. In fast-growing markets with short innovation cycles, high market shares in themselves may be a less useful indicator of market power given that those shares may turn out to be ephemeral[46]. However, market shares that remain stable over time may still be a reliable indicator of dominance in these markets[47].

2.2.2. Barriers to expansion and entry

29. The second relevant factor for establishing dominance is the existence of barriers to market expansion and entry that prevent actual competitors from expanding their activities on the market or that prevent potential competitors from gaining access to the market[48]. Easy expansion and entry in a market limits the ability of an undertaking in that market to behave independently, as applying prices or other conditions above the competitive level would attract expansion or new entry by rivals. Conversely, the existence of barriers to expansion and entry increases the ability of the undertaking concerned to behave independently and exert market power.

30. Barriers to expansion and entry may result from various factors. Legal and regulatory barriers have been found to include, for example, tariffs or quotas, planning regulations[49], licensing requirements and authorisation requirements[50], statutory monopolies[51] and intellectual property rights[52]. Other barriers to expansion and entry

[43] Judgment of 17 December 2003, *British Airways* v *Commission*, T-219/99, EU:T:2003:343, paragraph 211. See, for example, also Commission decision of 15 October 2014 in case AT.39523 – *Slovak Telekom*, paragraph 312.

[44] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraph 112.

[45] Judgment of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 151; see also Commission decision of 13 May 2019 in case AT.40134 - *AB InBev beer trade restrictions*, paragraphs 69 and 70.

[46] Judgment of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T-79/12, EU:T:2013:635, paragraph 69.

[47] Judgment of 30 January 2007, *France Telecom* v *Commission*, EU:T:2007:22, T-340/03, paragraphs 107-108.

[48] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraphs 122 and 124; judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, Case 85/76, EU:C:1979:36, paragraph 48.

[49] Regulations intended to control or regulate the construction, demolition, alteration or use of land or buildings.

[50] In pharmaceutical markets, potential market entrants typically have to obtain marketing authorisations and negotiate pricing and reimbursement conditions with national authorities; see Commission decision of 10 February 2021 in case AT.40394 – *Aspen*, paragraph 67. See also Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraphs 341 and 342. This includes, for example, also regulations that only allow certain activities to be carried out after the completion of a professional qualification.

[51] See for example judgment of 23 April 1991, *Höfner* v *Macrotron*, C-41/90, EU:C:1991:161, paragraph 28; see also the Commission's decision of 2 October 2017 in case AT.39813 – *Baltic rail*, paragraph 162.

[52] The mere possession of IP rights cannot as such be considered to confer a dominant position, but their possession may in certain circumstances create a dominant position by enabling an undertaking to prevent

that derive from certain advantages that have been identified in the past include: (i) an established distribution and sales network[53], (ii) economies of scale[54] and scope[55], (iii) vertical integration and exclusive or preferential access to inputs or customers[56], (iv) access to critical raw materials[57], (v) inertia of doctors in their prescribing habits[58], (vi) brand image and brand effects[59], (vii) data-driven advantages[60] and (viii) the existence of a first mover advantage[61]. Other factors that may create barriers to expansion and entry are significant upfront investments and high sunk costs[62], as well as costs and other impediments when switching to a rival[63], including behavioural biases[64].

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effective competition on the market; see judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10, EU:C:2012:770, paragraphs 186 et seq. While ownership of a standard essential patent ("SEP") does not on its own equate to dominance, it may nevertheless be established that a SEP confers a dominant position vis-à-vis market participants on the basis of all relevant factors. See in this respect Commission decision of 29 April 2014 in case AT.39985 – *Motorola*, paragraphs 223 and 241 and Commission decision of 29 April 2014 in case AT.39939 – Samsung, paragraph 46.

[53] Judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, Case 85/76, EU:C:1979:36, paragraph 48, and Commission decision of 13 May 2019 in case AT.40134 – *AB InBev beer trade restrictions*, paragraph 74.

[54] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraph 122; Commission decision of 22 June 2011 in case COMP/39.525 – *Telekomunikacja Polska*, paragraphs 656.

[55] Commission decision of 15 October 2014 in case AT.39523 – *Slovak Telekom*, paragraph 332.

[56] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraphs 70 et seq.; Commission decision of 15 October 2014 in case AT.39523 – *Slovak Telekom*, paragraph 291. When most companies in an industry are vertically integrated, potential market entrants may need to enter the markets at all levels to compete, which increases financial and managerial resources required to enter and compete. Vertical integration may also allow the undertaking concerned to make entry more difficult by giving itself certain advantages that can be duplicated only by other companies that are similarly integrated.

[57] Commission decision of 24 May 2018 in case AT.39816 – *Upstream gas supplies in Central and Eastern Europe*, paragraph 34.

[58] Judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, paragraph 105; see also judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, paragraph 50.

[59] Judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, Case 27/76, EU:C:1978:22, paragraphs 91-94. See also Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraph 709 et seq., confirmed in the judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraph 489; Commission decision of 13 May 2019 in case AT.40134 – *AB InBev beer trade restrictions*, paragraph 74, and Commission decision of 20 December 2022 in case AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, paragraph 89.

[60] Judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraph 115; Commission decision of 27 June 2017 in case AT.39740 – *Google Search (Shopping)*, paragraphs 287 et seq. Data-driven advantages that may create entry barriers include, for example, access to unique data, economies of scale and scope relating to data or data-driven network effects.

[61] Judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 278; Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraph 637.

[62] Commission decision of 22 June 2011 in case COMP/39.525 – *Telekomunikacja Polska*, paragraphs 648 et seq; Commission decision of 20 March 2019 in case AT.40411 – *Google Search (AdSense)*, paragraph 242 and Commission decision of 20 December 2022 in case AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, paragraph 89.

[63] Judgment of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T-79/12, EU:T:2013:635, paragraph 73; judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraph 115 and paragraphs 202 et seq. See also Commission decision of 4 May 2017 in Case AT.40153 – *E-book MFNs and related matters (Amazon)*, paragraph 65.

[64] Judgment of 14 September 2022, *Google Android*, T-604/18, EU :T :2022 :541, paragraph 115 and paragraphs 184 et seq.

31. In particular in platform markets, network effects can also create barriers to entry and expansion. This is because a rival platform that wishes to enter the market may have to persuade a critical mass of users to switch platform. In the case of direct network effects the willingness of users to switch to a new platform is dependent on the willingness of users on the same side of the platform to switch whereas in the case of indirect network effects, the willingness of one group of users to switch to a new platform depends on the willingness of the group of users on the other side of the platform to switch. A market entrant can thus face the difficulty of simultaneously attracting a sufficient number of users on both sides of the platform[65]. Entry barriers resulting from network effects may be even higher when users single-home[66].

32. Persistently high market shares of the undertakings concerned over a prolonged period may in themselves indicate the existence of barriers to expansion and entry[67].

2.2.3. Countervailing buyer power

33. Competitive constraints may be exerted not only by actual or potential competitors of the undertaking concerned, but also by customers with countervailing buyer power. Countervailing buyer power can prevent even an undertaking with a high market share from acting to an appreciable extent independently of customers[68]. Buyer power of this sort may result from the customers' size or their commercial significance for the undertaking concerned. Countervailing buyer power differs from general bargaining or negotiation power, which refers to the ability to favourably influence the outcome of a negotiation[69]. Countervailing buyer power refers to the ability of customers to switch quickly to competing suppliers, to promote new entry or to vertically integrate, or at least the ability to credibly threaten to do so. If countervailing buyer power is sufficiently strong, it may deter or defeat an attempt by the undertaking concerned to exercise market power. However, buyer power which only ensures that a particular or limited segment of customers is shielded from the market power of the undertaking concerned cannot be considered a sufficiently effective constraint to rule out dominance[70]. Countervailing buyer power is less likely to be present when the

[65] Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraphs 344 and 345; Commission decision of 20 March 2019 in case AT.40411 – *Google Search (AdSense)*, paragraphs 249, 250 and 251; Commission decision of 20 December 2022 in case AT.40462 - *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, paragraph 90. See to that effect also judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 171.

[66] 'Single-homing' refers to the use by consumers of one platform for a given product, as opposed to the use of multiple platforms in parallel for the same product (multi-homing). See Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, footnote 131.

[67] Commission decision of 27 June 2017 in case AT. 39740 - *Google Shopping*, paragraph 300.

[68] Judgment of 7 October 1999, *Irish Sugar* v *Commission*, T-228/97, EU:T:1999:246, paragraphs 97-104, in which it was considered whether the alleged lack of independence of the undertaking vis-à-vis its customers should be seen as an exceptional circumstance preventing the finding of a dominant position in spite of the fact that the undertaking was responsible for a very large share of sales on the industrial sugar market in Ireland. See also Commission decision of 17 October 2013 in case No COMP/39.866 – *Ryanair/DAA-Aer Lingus*, paragraph 78.

[69] Commission decision of 29 April 2014 in case AT.39985 – *Motorola*, paragraphs 242, 243 and 257.

[70] Commission decision of 29 April 2014 in case AT.39985 – *Motorola*, paragraph 244; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (predation)*, paragraph 322.

undertaking concerned faces a large number of dispersed buyers[71], or when switching away from the undertaking is subject to significant difficulties[72].

2.3. Collective dominance

34. A finding of collective dominance requires that two or more economic entities that are legally independent of each other present themselves or act together on a particular market as a collective entity from an economic point of view[73]. Once this has been established, the assessment of dominance is based on essentially the same factors that are relevant for single dominance[74]. Collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated, that the undertakings concerned adopt identical conduct on the market in all respects or that the abuse involves all the undertakings concerned[75]. It is sufficient that the action amounting to an abuse can be identified as one of the manifestations of such a joint dominant position[76].

35. To establish collective dominance, it is necessary to examine the economic links or factors giving rise to a connection between the undertakings concerned[77] that enable them to act together independently of their competitors, their customers and consumers[78]. Such a connection may result from the nature and terms of an agreement between the undertakings concerned or from the implementation of such agreement, or it may result from structural or other links (e.g. personal ties), provided that those links lead the undertakings to present themselves or act together as a collective entity[79]. This could be the case if undertakings have concluded cooperation agreements that lead them to coordinate their activities on the market, or if cross-shareholdings, participation in

[71] Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraph 353; Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraph 48.

[72] Commission decision of 20 December 2012 in case AT.39654 – *Reuters Instrument Codes*, paragraph 36, Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraphs 644 et seq. and Commission decision of 10 February 2021 in case AT.40394 – *Aspen*, paragraph 70.

[73] Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others* v *Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 36.

[74] A collective market share above 50 % is, in the absence of evidence to the contrary, a strong indication of the ability of the collective entity to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers; see judgments of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, EU:T:2003:245, Joined cases T-191/98 and T-212/98 to T-214/98, paragraphs 932 et seq. and judgment of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraph 206. It is noteworthy that the concept of collective dominance has developed in parallel in the case law on Article 102 TFEU and the case law on mergers under Council Regulation (EC) No 139/2004, and that a similar concept of collective dominance is applied under both instruments; see judgment of 26 January 2005, *Laurent Piau* v *Commission*, T-193/02, EU:T:2005:22, paragraphs 109, 110 and 111.

[75] Judgments of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, EU:T:2003:245, Joined cases T-191/98 and T-212/98 to T-214/98, paragraphs, 632, 633 and 653 et seq.

[76] Judgment of 7 October 1999, *Irish Sugar* v *Commission*, T-228/97, EU:T:1999:246, paragraph 66. See also Commission decision of 26 November 2008 in case COMP/39388 – *German Electricity Wholesale Market* and Case COMP/39.389 – *German Electricity Balancing Market*, paragraph 27.

[77] Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others* v *Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 41.

[78] Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others* v *Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 42.

[79] Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others* v *Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraphs 44 and 45.

joint ventures, interlocking directorships[80] or other links in law lead the undertakings concerned to coordinate.

36. However, the existence of an agreement or structural links between undertakings is not indispensable to establish collective dominance[81]. Collective dominance may also be established based on other connecting factors, or on an economic assessment of the structure of the market in question[82] and the way in which the undertakings in question interact on the market. Where the characteristics of the market facilitate the adoption of a common policy by the undertakings concerned, collective dominance can also be established without there being an agreement or structural links[83].

37. The following sub-sections describe the elements that are relevant to establish collective dominance on the basis of (tacit) coordination between the undertakings in question[84]. The first sub-section below relates to the possibility of the undertakings reaching terms of coordination, while the other three sub-sections relate to whether such coordination is sustainable over time.

2.3.1. Reaching terms of coordination

38. Tacit coordination is more likely to emerge if competitors can easily arrive at a common perception of how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination[85]. The less complex and more stable the economic environment, the easier it is for undertakings to reach a common understanding on the terms of coordination, as they are able to coordinate their behaviour on the market by simply observing and reacting to each other's behaviour[86]. Whether a market is conducive to coordination depends on the characteristics of the relevant market. Coordination is typically easier when a small number of undertakings are involved, and it becomes more difficult when many competitors are involved[87]. Coordination may also be easier between undertakings that exhibit a high degree of symmetry in relation to, for instance, market shares[88], cost structures, production capacities, product offering (e.g. in terms of price or quality), market positioning (e.g. degree of brand recognition) and level of vertical integration[89].

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80 Two or more undertakings have interlocking directorships when they have one or more members of their management boards in common.

81 Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others* v *Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 45 and judgment of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraphs 273 et seq.

82 Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others* v *Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 45.

83 Judgment of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraphs 273 and 276.

84 See also judgment of 6 June 2002, *Airtours* v *Commission*, T-342/99, EU:T:2002:146, paragraphs 61 et seq. and judgment of 26 January 2005, *Laurent Piau* v *Commission*, Case T-193/02, EU:T:2005:22, paragraph 111.

85 Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Independent Music Publishers and Labels Association (Impala)*, C-413/06, EU:C:2008:392, paragraph 123.

86 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C31, 5.2.2004, paragraph 45.

87 Horizontal Merger Guidelines, paragraph 45.

88 Judgment of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraph 134.

89 Horizontal Merger Guidelines, paragraph 48. Corporate links such as cross-shareholding or participation in joint ventures may also help in aligning incentives and encourage parallel behaviour; see Commission

2.3.2. Ability to monitor adherence to terms of coordination

39. Each of the undertakings must have the means to know whether the other undertakings are adopting and maintaining the same strategy[90]. Therefore, there must be sufficient market transparency for the undertakings involved in the coordination to be aware, sufficiently precisely and quickly, of the way in which the other participants' market conduct is changing. Coordination is easier to sustain when undertakings can observe each other's market behaviour with respect to the parameters of coordination or when undertakings can easily obtain this information[91]. This ensures that any deviation from the focal point can be easily identified and reacted to by the other undertakings.

2.3.3. Existence of a credible deterrence mechanism

40. To make the common policy sustainable over time, there must be an incentive for each undertaking concerned not to depart from the common policy on the market[92]. This may be the case where each undertaking is aware that competitive action on its part designed to increase its market share would provoke similar actions by the others, so that it would derive no benefit from its initiative[93]. Coordination would not be sustainable unless the consequences of deviation are sufficiently severe and timely to convince coordinating undertakings that it is in their best interest to comply with the common policy. In that case, it is the threat of future retaliation that makes the coordination sustainable. The mere existence of a credible deterrence mechanism suffices, and there is no need to adduce proof of either a threat or the effective use of a retaliatory mechanism[94].

2.3.4. External stability – lack of constraints exercised by actual or potential competitors and lack of countervailing power by customers

41. For coordination to be successful, the actions of actual or potential competitors or customers should not be able to jeopardise the intended outcome of the coordination[95]. In other words, competitive pressure exerted by competitors or the countervailing buyer power exerted by customers must not be of such a magnitude that it would render the coordination by the undertakings concerned unsuccessful. This requires an analysis of the market position and strength of rivals that do not form part of the collective entity, the market position and strength of buyers, and the potential for new entry, as indicated by the magnitude of any barriers to entry (see section 2).

decision of 13 June 2000 in case COMP/M.1673 – *VEBA/VIAG*, paragraph 226 and Commission decision of 8 November 2011 in case COMP/M.2567 - *Nordbanken/Postgirot*, paragraph 54.

90 See judgment of 6 June 2002, *Airtours* v *Commission*, T-342/99, EU:T:2002:146, paragraph 62, first indent.

91 Market transparency depends not only on the availability of data, but also on the characteristics of the data, i.e. age, fluctuation and degree of aggregation, as well as a possible delays in obtaining data.

92 Judgment of 6 June 2002, *Airtours* v *Commission*, T-342/99, EU:T:2002:146, paragraph 62, second indent.

93 Judgment of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraph 134.

94 Judgment of 6 June 2002, *Airtours* v *Commission*, T-342/99, EU:T:2002:146, paragraph 195; judgment of 13 July 2006, *Independent Music Publishers and Labels Association (Impala)* v *Commission*, T-464/04, EU:T:2006:216, paragraph 466.

95 See also the Horizontal Merger Guidelines, paragraph 56.

42. The analysis of the four elements set out in sub-sections 2.3.1 to 2.3.4 should not be undertaken mechanically and in an isolated and abstract manner, but should take the overall mechanism of a hypothetical tacit coordination into account[96].

3. GENERAL PRINCIPLES TO DETERMINE IF CONDUCT BY A DOMINANT UNDERTAKING IS LIABLE TO BE ABUSIVE

3.1. Introduction

43. This section provides guidance on the general principles applicable to the assessment of whether conduct by dominant undertakings is liable to be abusive[97].

44. Dominant undertakings have a special responsibility not to engage in conduct that impairs effective competition[98]. This applies whether dominant undertakings engage in such conduct directly or through the actions of third parties[99]. Since the concept of abuse is an objective one, it is generally not necessary to show that an undertaking had the intent to impair effective competition in order to establish an abuse of a dominant position[100].

45. To determine whether conduct by dominant undertakings is liable to constitute an exclusionary abuse, it is generally necessary to establish whether the conduct departs from competition on the merits (see section 3.2 below) and whether the conduct is capable of having exclusionary effects (see section 3.3 below)[101].

46. While the assessment of whether the conduct departs from competition on the merits is conceptually different from the assessment of whether the conduct is capable of having exclusionary effects, certain factual elements may be relevant to the assessment of both. Depending on the circumstances of the case, it may be necessary to carry out a comparatively more detailed assessment of whether the conduct departs from

96 Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, C-413/06, EU:C:2008:392, paragraphs 125 et seq.

97 While sections 3, 4 and 5 of these Guidelines generally refer to conduct by one undertaking holding a single dominant position, all considerations equally apply *mutatis mutandis* to conduct by collectively dominant undertakings.

98 Judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 135. The actual scope of that special responsibility must be considered in the light of the specific circumstances of each case. See judgment of 14 November 1996, *Tetra Pak* v *Commission*, C-333/94 P, EU:C:1996:436, paragraph 24.

99 Actions by third parties (for instance, a dominant undertaking's distributors) may be attributed to a dominant undertaking if it is established that those actions were not adopted independently by those third parties, but form part of a policy that is decided unilaterally by the dominant undertaking (judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 33).

100 See judgment of 19 April 2012, *Tomra and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 21; Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 60-62, and the case law cited therein; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 45; judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 254-257; judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 359. Proof of intent may however constitute a relevant factor to be taken into consideration in the assessment of the abuse, see paragraph 70(f) of these Guidelines.

101 Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 68 and 103. judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 129-131.

competition on the merits or of whether the conduct is capable of having exclusionary effects.

47. The case law of the Union Courts has developed specific analytical frameworks to establish whether certain types of conduct by dominant undertakings infringe Article 102 TFEU (hereinafter referred to as "specific legal tests")[102]. Those specific legal tests are an expression of the application of the general principles discussed in this section to the specific conduct in question. Therefore, when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects. The specific legal tests relating to five types of conduct are outlined in section 4.2 below.

48. Finally, where it is demonstrated that the conduct of an undertaking in a dominant position is liable to be abusive, it remains possible for that undertaking to show that the conduct is either objectively justified and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers[103]. The framework used for that assessment is described in section 5.

3.2. Conduct departing from competition on the merits

3.2.1. The concept of conduct departing from competition on the merits

49. Dominant undertakings have a special responsibility not to allow their conduct to impair effective competition on the internal market. At the same time, the fact that an undertaking is in a dominant position does not disqualify it from protecting its own commercial interests, if they are attacked. Such an undertaking may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to strengthen its dominant position or to abuse it[104].

50. Consequently, although dominant undertakings can defend themselves against their competitors, they must do so by using means which fall within the scope of competition on the merits[105]. For this reason, the Union Courts have established that only conduct that deviates from competition on the merits can constitute an exclusionary abuse within the meaning of Article 102 TFEU[106].

[102] Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130.

[103] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 103.

[104] Judgment of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, C-27/76, EU:C:1978:22, paragraph 189; judgment of 2 April 2009, *France Télécom* v *Commission*, C-202/07 P, EU:C:2009:214, paragraph 46; judgment 30 January 2020, *Generics UK & Others*, C-307/18, EU:C:2020:52, paragraphs 149-151; and judgment of 30 September 2003, *Atlantic Container Line AB and Others* v *Commission*, Joined cases T-191/98, T-212/98 to T-214/98, EU:T:2003:245, paragraph 1120.

[105] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 74-75.

[106] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 103.

51. The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators[107] 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[108]. Article 102 TFEU does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation[109].

52. On the other hand, the Union courts have highlighted that a dominant undertaking's intention to compete on the merits, even if established, is not sufficient to prove the absence of an abuse[110]. Moreover, a dominant undertaking may have to refrain from engaging in certain practices that are unobjectionable for undertakings that do not hold a dominant position. The mere circumstance that the conduct is also implemented by non-dominant undertakings in the market is not sufficient to exclude that it departs from competition on the merits[111].

3.2.2. Relevant factors to establish that conduct departs from competition on the merits

53. As stated in paragraph 47, conduct fulfilling the requirements of a specific legal test is deemed as falling outside the scope of competition on the merits. Notably, this is the case for the types of conduct examined in section 4.2 below, namely exclusive dealing[112], tying and bundling[113], refusal to supply[114], predatory pricing[115] and margin squeeze[116], which satisfy the applicable specific legal test.

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[107] Judgment of 17 July 1998, *ITT Promedia v Commission*, T-111/96, EU:T:1998:183, paragraph 138; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 75; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 24 and the case-law cited therein; judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission,* C-42/21 P, EU:C:2023:12, paragraph 107. See also judgment of 3 July 1991, *Akzo v Commission*, Case C-62/86, EU:C:1991:286, paragraph 70 and judgment of 2 April 2009, *France Telecom v Commission*, EU:T:2009:214, Case C-202/07 P, paragraph 106, which refer to the concept of "competition on the basis of quality".

[108] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 85.

[109] Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 37; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 45 and 73; judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 134; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 21 and 22.

[110] See judgment of 19 April 2012, *Tomra and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 22.

[111] Judgment of 17 July 1998, *ITT Promedia v Commission*, T-111/96, EU:T:1998:183, paragraph 139; judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 159; judgment of 9 September 2009, *Clearstream Banking and Clearstream International v Commission*, T-301/04, EU:T:2009:317, paragraph 133; judgment of 30 September 2003, *Atlantic Container Line and Others v Commission*, Cases T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraphs 1124 and 1460.

[112] Judgment of 13 February 1979, *Hoffmann-La-Roche* v *Commission*, C-85/76, EU:C:1979:36, paragraphs 89-91; judgment of 23 October 2003, *Van den Bergh Foods* v *Commission*, T-65/98, EU:T:2003:281, paragraphs 157-159. See section 4.2.1 of these Guidelines.

[113] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 1046-1047 and 1069-1070. See section 4.2.2 of these Guidelines.

[114] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 79 and 83. See section 4.2.3. of these Guidelines.

54. Likewise, conduct that holds no economic interest for a dominant undertaking, except that of restricting competition (so-called naked restrictions, see paragraph 60(c) below) is also deemed as falling outside the scope of competition on the merits[117].

55. As regards other conduct, it needs to be shown that the conduct departs from competition on the merits based on the specific circumstances of the case. The Union Courts have held that the following factors are relevant for this assessment[118]:

a) whether the dominant undertaking prevents consumers from exercising their choice based on the merits of the products, including product quality[119];

b) whether the dominant undertaking provides misleading information to administrative or judicial authorities or other bodies[120], or misuses regulatory procedures, to prevent or make it more difficult for competitors to enter the market[121];

c) whether the dominant undertaking violates rules in other areas of law (for instance, data protection law) and thereby affects a relevant parameter of competition, such as price, choice, quality or innovation[122];

d) whether the dominant undertaking's conduct consists of, or enables, biased or discriminatory treatment that favours itself over its competitors[123];

e) whether the dominant undertaking changes its prior behaviour in a way that is considered as abnormal or unreasonable in light of the market circumstances at stake, such as an unjustified termination of an existing business relationship[124]; and

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115 Judgment of 3 July 1991, *AKZO* v *Commission*, C-62/86, EU:C:1991:286, paragraphs 70-72. See section 4.2.4 and paragraph 56 of these Guidelines.

116 Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 43. See section 4.2.5 and paragraph 5656 of these Guidelines.

117 Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 77; judgment of 26 January 2022, *Intel Corp.* v *Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 96, readopting the finding made in the judgment of 12 June 2014, *Intel* v *Commission*, T-286/09, EU:T:2014:547, paragraph 210; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 131.

118 This should not be understood as an exhaustive list of all the factors that may be relevant to establish that a given conduct departs from competition on the merits. In addition, one factor may be sufficient to conclude that a given conduct departs from competition on the merits in light of the specific circumstances at hand.

119 See judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, in particular, paragraphs 1046-1047, 1057-1058 and 1069-1070. See also judgment of 23 October 2023, *Van den Bergh Foods* v *Commission*, T-65/98, EU:T:2003:281, paragraphs 148, 152 and 157.

120 Judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 98.

121 Judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 134; judgment of 17 July 1998, *ITT Promedia v Commission*, T-111/96, EU:T:1998:183, paragraph 72.

122 Judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, EU:C:2023:537, paragraphs 47 and 51.

123 Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 96-99; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 131 and 135.

124 Judgment of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, joined cases C-6/73 and C-7/73, EU:C:1974:18, paragraph 25; judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 179 and 616.

f) whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market[125].

56. In the case of certain pricing practices, namely predatory pricing (section 4.2.4) and margin squeeze (section 4.2.5), a price-cost test is required to establish whether conduct of a dominant undertaking departs from competition on the merits[126]. Whenever a price-cost test is carried out to establish whether conduct departs from competition on the merits, the outcome of the test can also be relevant for the assessment of the capability of such conduct to produce exclusionary effects[127]. Conversely, a price-cost test is generally inappropriate for assessing whether non-pricing practices depart from competition on the merits[128].

57. Conduct that at first sight does not depart from competition on the merits (e.g. pricing above average total costs ("ATC")) and therefore does not normally infringe Article 102 TFEU may, in specific circumstances, be found to depart from competition on the merits, based on an analysis of all legal and factual elements, notably: (i) market dynamics; (ii) the extent of the dominant position; and (iii) the specific features of the conduct at stake.

58. If a dominant undertaking argues 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, this argument is evaluated as part of the assessment of the objective justifications (see section 5 below)[129].

[125] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 78, 91 and 92.

[126] Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 55; Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 80-82.

[127] In particular, the fact that the price-cost test is met can trigger a presumption that the conduct is capable of having exclusionary effects in the case of predatory pricing (see paragraphs 111 and 112 below) and margin squeeze in the presence of a negative spread (see paragraph 128 below). In the areas of rebates and margin squeeze in the presence of a positive spread, a price-cost test showing that even a hypothetical as-efficient competitor would not be able to match the conduct of the dominant undertaking is a relevant factor for the analysis of the conduct's capability to produce exclusionary effects (see in particular paragraphs 129 and 145 (f) below).

[128] Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 57; judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 539. Nevertheless, the relevance of a price-cost test cannot be automatically ruled out, when it is possible to reliably quantify the non-price elements of the conduct, see judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 59.

[129] See judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 85 and 86; judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 188 and 266. See also section 5 of these Guidelines.

3.3. Capability to produce exclusionary effects

3.3.1. The evidentiary burden to demonstrate a conduct's capability to produce exclusionary effects

59. The Union Courts have established rules regarding the evidentiary burden to show that a conduct is capable of producing exclusionary effects, which depend on the type of conduct, the likelihood that it will result in exclusionary effects and the relevant circumstances.

60. In particular, the following categories of conduct can be identified:

a) *Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects:* as a general rule, in order to conclude that a conduct is liable to be abusive, it is necessary to demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects[130]. A dominant undertaking may also show to the requisite legal standard that the conduct is justified on the basis of an objective justification (see section 5 below).

b) *Conduct that is presumed to lead to exclusionary effects:* certain types of conduct are generally recognised as having a high potential to produce exclusionary effects. Accordingly, they are subject to a presumption concerning their capability of producing exclusionary effects[131]. As discussed further in section 4.2, this presumption applies to: (i) exclusive supply or purchasing agreements[132]; (ii) rebates conditional upon exclusivity[133]; (iii) predatory pricing[134]; (iv) margin squeeze in the presence of negative spreads[135]; and (v) certain forms of tying[136]. Once the factual existence of the relevant conduct is established, if need be under the conditions established in the specific legal test, its exclusionary effects can be presumed.

A dominant undertaking can seek to rebut the probative value of the presumption in the specific circumstances at hand by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects[137]. There may be different ways to show that the conduct is not capable of having exclusionary effects, depending on the circumstances at hand. The undertaking

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[130] Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:120, paragraphs 41-42, and judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130.

[131] While the Union Courts have not always made explicit use of the term "presumption" for each one of these practices, the Commission considers that the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as "presumptions". Therefore, these Guidelines make use of the expression "presumption" (or "presumed") for allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts.

[132] See section 4.2.1 of these Guidelines.

[133] See section 4.2.1 of these Guidelines.

[134] See section 4.2.4 of these Guidelines.

[135] See section 4.2.5 of these Guidelines.

[136] A presumption can exist depending on the specific characteristics of the markets and products at hand. See paragraph 95 and footnote 234below.

[137] Judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 138; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 47-48.

may, for instance, attempt to overturn the presumption by submitting evidence showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption is based, to the point of rendering any potential effect purely hypothetical.

The submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission's examination obligation, meaning that the Commission will examine whether the presumption is rebutted based on the arguments and supporting evidence submitted by the dominant undertaking during that procedure.

The capability to produce exclusionary effects is established if the Commission either:

(i) shows that the arguments and supporting evidence submitted by the dominant undertaking are insufficient to call into question the presumption, for instance due to the insufficient probative value of the evidence or the fact that the arguments refer to theoretical assumptions rather than the actual competitive reality of the market[138]; or

(ii) provides evidentiary elements demonstrating the capability of the conduct to have exclusionary effects. The scope and nature of the analysis will necessarily depend on the scope and nature of the arguments and evidence submitted by the dominant undertaking.

Even in the scenario set out in (ii), the evidentiary assessment must give due weight to the probative value of a presumption, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects, as part of the overall assessment of the body of evidence in the light of all the relevant legal and economic circumstances.

A dominant undertaking may also seek to show that the conduct is justified on the basis of an objective justification. The fact that the conduct has a high potential to lead to exclusionary effects must be given due weight in the balancing exercise to be carried out in this context (see section 5 below).

c) *Naked restrictions:* certain types of conduct by a dominant undertaking have no economic interest for that undertaking, other than that of restricting competition. These types of conduct are by their very nature capable of restricting competition[139]. Only in very exceptional cases will a dominant undertaking be able to prove that in the specific circumstances of the case the conduct was not capable of having exclusionary effects. Examples of naked restrictions are: (i) payments by the dominant undertaking to customers that are conditional on the

[138] See to that effect judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 428.

[139] See, to that effect, judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 131, 148 and 185; Commission decision of 22 September 2009 in case AT.37990 – *Intel*, paragraph 10, and judgment of 26 January 2022, *Intel Corp.* v *Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 96, readopting the finding made in the judgment of 12 June 2014, *Intel* v *Commission*, T-286/09, EU:T:2014:547, paragraph 210.

customers postponing or cancelling the launch of products that are based on products offered by the dominant undertaking's competitors[140]; (ii) the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors[141]; or (iii) the dominant undertaking actively dismantling an infrastructure used by a competitor[142].

While it is in principle open to the dominant undertaking to seek to show that the naked restriction is justified on the basis of an objective justification, it is highly unlikely that such behaviour can be justified in this way (see section 5 below).

3.3.2. The substantive legal standard to establish a conduct's capability to produce exclusionary effects

61. Under the legal standard that is applicable in cases where the evidentiary burden cannot be initially discharged on the basis of paragraphs 60(b) and (c) above, the Commission needs to demonstrate that a conduct is at least capable of producing exclusionary effects[143]. While the effects in question must be more than hypothetical[144], establishing that a conduct is liable to be abusive does not require proof that the conduct at issue has produced actual exclusionary effects[145].

62. The assessment of whether a conduct is capable of having exclusionary effects is based on the facts and circumstances existing at the time when the conduct was implemented[146]. In this regard, it is sufficient to show that the conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors that existed at the time of the conduct's implementation.[147] Moreover, where it is established that a conduct is objectively capable of restricting competition[148], this cannot be called into question by the actual reaction of third parties[149].

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140 Judgment of 26 January 2022, *Intel Corp.* v *Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 96. The General Court's findings on the unlawfulness of the naked restrictions have become *res judicata*. – See judgment of 26 January 2022, *Intel Corp.* v *Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 531 and Commission decision of 22 September 2009 in case AT.37990 – *Intel*, paragraph 6.

141 See to that effect judgment of 7 October 1999, *Irish Sugar* v *Commission*, T-228/97, EU:T:1999:246, paragraphs 228-234.

142 See to that effect judgment of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, paragraphs 83-84 and 89-91.

143 For the concept of exclusionary effects, see paragraph 6 of these Guidelines and judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 50. See also judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 77 and judgment of 19 April 2012, *Tomra and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 68.

144 Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 65; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 98; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 42. A practice cannot be deemed to be abusive it if has remained at the planning stage (see judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 43).

145 Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 41 and case-law cited therein.

146 Judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraph 110.

147 See, in the context of Article 101 TFEU, judgment of 8 September 2016, *Lundbeck v Commission*, T-472/13, EU:T:2016:449, paragraph 363.

148 The Court of Justice also refers to the 'intrinsic capacity' of the conduct to produce effects: see judgment of 6 September 2017, C-413/14 P, *Intel v Commission*, EU:C:2017:632, paragraph 140; judgment of 14

63. If a conduct has been in place for a sufficiently long period of time, it may be possible to demonstrate, by identifying market developments which followed the implementation of the conduct, that it has produced actual exclusionary effects. Such a demonstration can confirm that the conduct was indeed capable of having exclusionary effects.

64. However, the fact that a conduct has failed to produce *actual* exclusionary effects cannot in itself disprove its *capability* to produce exclusionary effects. The absence of actual exclusionary effects could be due to a variety of causes: for example, changes that have occurred on the relevant market since the conduct began but that are unrelated to the conduct, the fact that the undertaking in a dominant position was unable to fully implement the strategy underpinning the conduct[150], or the fact that third parties did not react as expected.[151] The absence of actual exclusionary effects is not sufficient to exclude the application of Article 102 TFEU and may only constitute indicia that the conduct at issue was incapable of producing the alleged exclusionary effects[152]. The undertaking concerned must supplement such indicia by evidence showing that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects[153].

65. The actual or potential exclusionary effects identified in the analysis need to be attributable to the conduct at issue[154]. However, the conduct does not need to be the sole cause of those exclusionary effects[155]. It is sufficient to establish that the conduct contributes to increasing the likelihood of the exclusionary effects materialising on the market[156].

66. Conceptually, the analysis of the capability of the conduct to produce exclusionary effects requires a comparison of the situation where the conduct was implemented with the situation absent the conduct. This can generally be done by comparing the market situation before the conduct was implemented with the market situation after the implementation of the conduct[157].

67. In certain cases, it may be appropriate to use as a basis for the comparison an alternative hypothetical scenario where the conduct would be absent and where certain likely

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September 2022, T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, paragraphs 640-641.

[149] Judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 360.

[150] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 65; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 54-55.

[151] Judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 602.

[152] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 56.

[153] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 56.

[154] Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 441.

[155] Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 412.

[156] See to that effect judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 412. The existence of other facts or conducts that may also increase the likelihood of the exclusionary effects at hand does not prevent a finding of abuse in relation to a given conduct.

[157] See to that effect judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 377 and 452-454.

developments in the market are also taken into account[158]. Given the difficulty to develop credible assumptions, it is not necessary to account for all possible changes and combinations of outcomes and circumstances that could have arisen absent the conduct. It is sufficient to establish a plausible outcome amongst various possible outcomes[159]. In any event, such comparison may not be required in particular where the conduct of the undertaking has made it very difficult or impossible to ascertain the objective causes of observed market developments[160].

3.3.3. Elements that may be relevant to the assessment of a conduct's capability to produce exclusionary effects

68. Conduct may take place and produce exclusionary effects on the dominated market(s) or on non-dominated markets[161]. However, the substantive legal standard to prove the exclusionary effects of a conduct is the same irrespective of whether the effects take place in the dominated market or in a market different from, but related to, the dominated market[162]. At the same time, when assessing effects in a dominated market, the fact that in such a market competition is already weakened due to the very presence of the dominant undertaking can be taken into account.

69. The assessment of whether a conduct is capable of having exclusionary effects must take into account all the facts and circumstances that are relevant to the conduct at issue[163]. That assessment should aim to establish, on the basis of specific, tangible points of analysis and evidence, that the conduct is at least capable of producing exclusionary effects[164].

70. The relevant facts and circumstances to be taken into account in the analysis and their relative importance may vary depending on the specific case. They may include, amongst other things, one or more of the following elements.

[158] This will be appropriate, for example, in cases where there are developments in the market that with sufficient likelihood would have occurred independent of the conduct.

[159] Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 377 and 378.

[160] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, Case C-377/20, EU:C:2022:379, paragraphs 98-99. See also, judgment of 14 September 2022, T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, paragraph 893, where the General Court considered that carrying out a counterfactual "*to evaluate the hypothetical consequences that might have been observed, in the absence of the* […] *abuse*" may not be needed where effects have been proven by using different tools and evidence.

[161] See to that effect judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 163-164; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 84-87.

[162] Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 437.

[163] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 51 and 72; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 40; judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 154; judgment of 25 March 2021, *Slovak Telekom* v *Commission*, C-165/19 P, EU:C:2021:239, paragraph 42.

[164] Judgments of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraphs 42, 51 and 52, and judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130.

a) *The position of the dominant undertaking*. In general, the greater the extent of the dominant position of an undertaking, the more likely it is that its conduct is capable of having exclusionary effects[165].

b) *The conditions on the relevant market*. This includes the conditions of entry and expansion, such as the existence of economies of scale or scope and network effects[166]. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking occupies a significant part of the relevant market. Similarly, the conduct may allow the dominant undertaking to 'tip' a market characterised by network effects in its favour, or to further entrench its position on such a market[167].

c) *The position of the dominant undertaking's competitors*. This includes the importance of actual or potential competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. Despite smaller market shares, a competitor may, for example: (i) be a close competitor to the dominant undertaking; (ii) be a particularly innovative competitor; or (iii) have the reputation of systematically cutting prices. While the position of competitors is relevant in the assessment, the finding of capability to produce exclusionary effects cannot be called into question by the actions that competitors may have taken – or could have taken – to limit the effects of the conduct of the dominant undertaking[168].

d) *The extent of the allegedly abusive conduct*. In general, the higher the share of total sales in the relevant market affected by the conduct, the longer the duration of the conduct, and the more regularly it has been applied, the greater is the capability of the conduct to produce exclusionary effects[169]. At the same time, even conduct affecting a small share of total sales in the relevant market can be capable of having exclusionary effects, for instance where the customers or the market segment targeted by the conduct are of strategic importance for entry or expansion (see point (e) below)[170].

e) *The position of the customers or input suppliers*. The dominant undertaking may apply the conduct only to selected customers or input suppliers who may be of

[165] Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 183; judgment of 19 April 2012, *Tomra and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 39; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 81.

[166] Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 226; judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 562, 1061 and 1062.

[167] Commission decision of 16 October 2019 in case AT.40608 - *Broadcom*, paragraphs 475 and 478.

[168] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 102.

[169] Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 68; judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 139; judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 640; and judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 44 and 48.

[170] Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 696.

particular importance for the entry or expansion of competitors[171]. Those customers or suppliers: (i) may represent a particular means of distributing the product that would be suitable for a new entrant; (ii) may be situated in a geographic area well suited to new entry; or (iii) may be likely to influence the behaviour of other customers. In the case of customers, they may, for example, be the customers most able and likely to sponsor entry to the market – or expansion – by alternative upstream competitors of the dominant undertaking. In the case of input suppliers, they may be the input suppliers most able and likely to sponsor entry or expansion by downstream competitors of the dominant undertaking in a downstream market, or they may produce a variety of the product – or produce at a location –particularly suitable for a new entrant.

f) *Evidence of an exclusionary strategy*. Although the abuse of dominance is an objective concept, for which it is not necessary to establish exclusionary intent (see paragraph 44 above)[172], evidence of such intent may still be relevant for the purposes of establishing an abuse[173]. Such evidence may include: (i) internal documents indicating a strategy to exclude actual or potential competitors, such as a plan to engage in certain conduct in order to exclude a competitor, prevent entry or prevent the emergence of a market; or (ii) concrete threats of exclusionary action[174].

g) *Evidence relating to actual market developments*. Although it is not necessary to demonstrate that the conduct at stake has produced actual exclusionary effects (see paragraph 61 above), if the conduct has been in place for a sufficiently long period of time, the market performance of the dominant undertaking and its competitors after the implementation of the conduct may provide evidence of the conduct's capability to have exclusionary effects[175]. In particular: (i) the market share of the dominant undertaking may have risen; (ii) a faster or more significant decline in the dominant undertaking's market share may have been prevented; (iii) actual competitors may have been marginalised or may have exited; (iv) potential competitors may have tried to enter the market and failed; or (v) the ability or

[171] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 904, 1038 and 1049 et seq.; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 399-406 and 1218.

[172] See however paragraph 111 (b) of these Guidelines in relation to the specific legal requirement to prove intent as regards predatory pricing at price levels between AVC and ATC.

[173] Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 162 and the case-law cited therein; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 63; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 45; judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 359; judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 254.

[174] Judgment of 9 December 2010, *Tomra Systems and Others* v *Commission*, T-155/06, EU:T:2010:370, paragraph 35; judgment of 22 March 2012, *Slovak Telekom* v *Commission*, T-458/09 and T-171/10, EU:T:2012:145, paragraph 61; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, in particular, paragraphs 1118-1119 et seq.

[175] See to that effect judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraphs 258-259; judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 402; judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 1078 et seq. See paragraphs 63 and 64 above.

incentive of actual or potential competitors to exercise a competitive constraint on the dominant undertaking may have been otherwise reduced[176].

3.3.4. Elements that are not necessary to show the capability to produce exclusionary effects

71. As explained in paragraph 61 above, the finding of a conduct's capability to produce exclusionary effects does not require actual harm to competition to be demonstrated, i.e. that the dominant undertaking's conduct has been successful in having exclusionary effects. Moreover, finding that a conduct is capable of restricting competition does not require establishing the profitability of the conduct at issue, as this would amount to having to show that the conduct results in actual exclusionary effects[177].

72. It is equally not necessary to prove that the conduct resulted in direct consumer harm, in other words that the dominant undertaking has effectively influenced, to the detriment of consumers, prices or other parameters of competition such as output, innovation, variety or quality of goods or services[178].

73. The assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking[179].

74. Moreover, the assessment of whether a conduct is capable of having exclusionary effects does not require proof that the conduct is enabled by the dominant position[180].

75. Finally, there is no *de minimis* threshold for the purposes of determining whether a conduct infringes Article 102 TFEU[181]. Any actual or potential exclusionary effect of a conduct that departs from competition on the merits will constitute a further weakening of competition, and as such will be captured by Article 102 TFEU. Once an actual or potential effect has been established, there is no need to prove that it is of a serious or appreciable nature[182]. Similarly, conduct by a dominant undertaking that affects a

[176] See paragraph 6 of these Guidelines. In addition, see judgment of 15 March 2007, *British Airways* v *Commission*, Case T-219/99 P, EU:T:2003:343, paragraphs 297-298, judgment of 8 October 1996, *Compagnie maritime belge transports and Compagnie maritime belge , Dafra-Lines , Deutsche Afrika-Linien and Nedlloyd Lijnen* v *Commission*, Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, EU:T:1996:139, paragraph, 149; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 55-56.

[177] The need for the Commission to show that abusive conduct results in profitable gains has been dismissed by the Court of Justice in response to arguments by the parties, for instance in the area of predatory pricing. See judgment of 2 April 2009, *France Télécom* v *Commission*, C-202/07 P, EU:C:2009:214 paragraphs 110-113.

[178] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 44 and 47; judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 443.

[179] Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 540-541.

[180] Judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, C-85/76, EU:C:1979:36, paragraph 91; judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission*, C-6/72, EU:C:1973:22, paragraph 27. See also judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 354. However, the fact that the conduct relies on the use of resources or means inherent to the holding of a dominant position can indicate that it departs from competition on the merits, see paragraph 55(f) above.

[181] See to that effect, judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 72-73.

[182] See to that effect, judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 74.

substantial part of the market cannot be justified by proving that the remaining part of the market is still sufficient to accommodate a limited number of competitors[183].

4. PRINCIPLES TO DETERMINE WHETHER SPECIFIC CATEGORIES OF CONDUCT ARE LIABLE TO BE ABUSIVE

4.1. Introduction

76. This section provides guidance on certain categories of conduct that have been the object of judgments by the Union Courts, namely conducts subject to specific legal tests (section 4.2) and conducts with no specific legal test (section 4.3).

4.2. Conducts subject to specific legal tests

77. This section discusses five types of abuse for which a specific legal test has been developed, as outlined in paragraph 47 above.

4.2.1. Exclusive dealing

78. Exclusive dealing refers to various forms of obligation to purchase or sell all or most[184] of a customer or a supplier's requirements from/to the dominant undertaking, or incentive schemes that are conditional on a customer or a supplier purchasing or selling all or most of their requirements from/to the dominant undertaking.

79. Exclusive dealing can stem from arrangements creating a formal exclusivity requirement, or from arrangements which do not explicitly, but *de facto* amount to exclusivity requirements, or from a mix of the two. Exclusive dealing may be abusive even if it is agreed at the request of the contractual counterpart of the dominant undertaking[185].

80. Exclusive dealing through formal contractual arrangements can take various forms: (i) an exclusive purchasing requirement that imposes an obligation on the customer, or involves a promise on its part[186], to purchase exclusively from the dominant undertaking ("exclusive purchase obligation"); (ii) an exclusive supply requirement that imposes an obligation on the supplier, or involves a promise on its part, to sell exclusively to the dominant undertaking ("exclusive supply obligation"); or (iii) a system of incentives consisting of the grant of a rebate or other advantages[187] conditional on the customer or

[183] Judgment of 19 April 2012, *Tomra and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 42; judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 161.

[184] All references to "exclusive", "exclusivity" or "exclusively" in this section equally apply to situations where the purchase or supply obligation or the incentive schemes relate to *most* rather than *all* of a customer's demand or supplier's supply (see judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 89; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137). For example, a rebate conditional on customers purchasing 75% of their requirements from a dominant undertaking has been held to be an exclusivity rebate, see judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 83.

[185] Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 89; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137.

[186] Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 89.

[187] Such advantages may consist of price advantages such as discounts, rebates, payments, or bonuses, and also non-price advantages such us technical support conditions, free-of-charge upgrades or installations, or early access to a technology. Commission decision of 29 March 2006, Case COMP/E-1/38.113 – *Prokent-Tomra*,

supplier purchasing or supplying exclusively from or to the dominant undertaking, even in the absence of formal contractual obligations ("exclusivity rebates")[188].

81. Certain other obligations, such as stocking or volume requirements[189], which appear to fall short of requiring exclusivity, may in practice lead to the same effect and can be therefore qualified as *de facto* exclusive dealing[190].

82. Exclusive dealing by a dominant firm has a high potential to produce exclusionary effects as it is likely to deprive or restrict the customer's or seller's choice of possible sources of supply or demand[191]. As such, exclusive dealing is presumed to be capable of having exclusionary effects (see paragraph 60(b) above)[192] .

83. If the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess such evidence[193]. In situations where an assessment of the capability of exclusive dealing to produce exclusionary effects is carried out, the relevant elements to be considered typically include[194]:

a) the extent of the undertaking's dominant position on the relevant market, namely the degree of market power held by the dominant firm[195] and the fact that, for a given share of the demand, the dominant undertaking may be an unavoidable trading partner[196];

b) the share of the market that is affected by the conduct: in general terms, the larger the share of the market covered by the exclusivity obligations (in terms

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paragraph 317; Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraph 364(b) (2) and (3), and footnote 269.

188 Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph, 89; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137; *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 46.

189 Stocking requirements refers to obligations to reserve a given space only for the products of the dominant undertaking, in a way that in practice excludes the possibility for competitors' products to be shown to customers.

190 Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281. In this case, the obligation to use freezers exclusively for the products of the dominant undertaking was considered to lead *de facto* to outlet exclusivity.

191 Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 90; judgment of 9 September 2010, *Tomra Systems and Others v Commission*, T-155/06, EU:T:2010:370, paragraph 209.

192 Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 89-90; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137; judgment of 26 January 2022, *Intel Corp.* v *Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 124; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 46.

193 Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 138; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 50-52 and 60.

194 Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139. Depending on the circumstances, other elements listed in paragraph 70 of these Guidelines may also be relevant.

195 Judgment of 19 April 2012, *Tomra and Others v Commission*, EU:C:2012:221, C-549/10 P, paragraph 39.

196 Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 41 and 133; judgment of 9 September 2010, *Tomra Systems and Others v Commission*, T-155/06, EU:T:2010:370, paragraph 269, upheld in judgment of 19 April 2012, *Tomra and Others v Commission*, EU:C:2012:221, C-549/10 P, paragraph 79. See also Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraph 365; Commission decision of 20 March 2019, Case AT.40411 - *Google Search (AdSense)*, paragraph 364.

of share of customers covered and in terms of share of demand by each customer)[197], the more likely the conduct is to produce exclusionary effects[198]. However, even conduct affecting a small share of the market can be capable of having exclusionary effects, in particular where the customers or the market segment targeted by the conduct have strategic importance for entry or expansion[199];

c) the conditions and arrangements of the exclusivity conditions, such as their duration[200] or whether the agreement directly or indirectly references volumes purchased from competitors (for instance, by specifying percentage requirements or thresholds upon which the rebates are conditional). In the case of exclusivity rebates, the amount or value of the incentives that are granted in return for exclusivity may be particularly relevant. For instance, the granting of strategic advantages or retroactive rebates may significantly strengthen the exclusionary effects[201]; and

d) the possible existence of a strategy aimed at excluding actual or potential competitors of the dominant firm[202]. Such exclusionary strategy is not legally required to establish the conduct's capability to produce exclusionary effects, but may play an important role in the assessment in those cases where it is established.

4.2.2. Tying and bundling

84. Tying consists of offering a specific product ("tying product") only together with another product ("tied product")[203].

85. Tying can take place on a technical[204] or a contractual basis[205]. Technical tying occurs, for instance, when the tying product and the tied product are physically or technically integrated. Contractual tying occurs when the customer who purchases or uses the tying product is also required to acquire or use the tied product. The legal requirements that

[197] Similarly, for exclusive supply obligations, the relevant element would be the share of suppliers and the overall share of supply covered by the obligation.

[198] Judgment of 19 April 2012, *Tomra and Others v Commission*, EU:C:2012:221, C-549/10 P, paragraphs 43-46; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139. See also Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraphs 366, 385-389; Commission decision of 20 March 2019, Case AT.40411 – *Google Search (AdSense)*, paragraphs 381-385.

[199] Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 696.

[200] See Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraph 68, where the duration of 1 to 3 years was considered long, in view of the characteristics of the industry and the presence of automatic renewal clauses.

[201] Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraphs 364(b), 367, 382, 383, 384, 390 and 391.

[202] Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 48 and 50. See also Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraphs 293, 368 and 370.

[203] Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 283.

[204] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289.

[205] Judgment of 6 October 1994, *Tetra Pak International* v *Commission*, T-83/91, EU:T:1994:246.

must be satisfied to prove that tying by a dominant undertaking is abusive are the same whether the tying is technical or contractual.

86. Bundling occurs when two products are offered jointly as a single package. In cases of pure bundling, the two products are only sold jointly, and they are not available for purchase on a standalone basis[206]. In cases of mixed bundling (or 'multi-product rebates'), the two products are available for purchase on a standalone basis and are also sold jointly, typically at a discount compared to the sum of the standalone prices.

87. Tying and bundling are common practices which may provide customers with better products or offerings in more cost-effective ways.[207] However, such practices may also limit customer choice and harm competition by leveraging an undertaking's dominance from one market into another one.

88. Since pure bundling ties two products to each other such that neither of them can be purchased alone, the assessment of pure bundling by a dominant undertaking is subject to the same legal requirements as tying and will not be discussed separately in this sub-section. Mixed bundling by a dominant undertaking is examined using different legal criteria and will be discussed in section 4.3.2.

89. Tying is liable to be abusive where the following conditions are met[208]:

    a) the tying and tied products must be two separate products;

    b) the undertaking concerned must be dominant in the market for the tying product[209];

    c) the undertaking concerned must not give customers a choice to obtain the tying product without the tied product (a situation referred to as 'coercion'); and

    d) the tying conduct is capable of having exclusionary effects[210].

90. For the purpose of establishing the requirement set out in paragraph 89(a), it is usually relevant to assess whether there is separate customer demand for the tied product. This may be the case if an appreciable number of customers would purchase or would have purchased the tied product independently, that is without buying it with the tying product from the same supplier. Whether this is the case may depend on several factors[211], including: (i) the nature and technical features of the products concerned, (ii)

[206] Conversely, in the context of tying, the tied product may also be offered stand-alone.

[207] Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 283.

[208] Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 284; judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 842, 859, 862, 864, 867, 869 and 1144-1167.

[209] See section 2 above. In bundling cases, the undertaking needs to be dominant in one of the markets concerned. In the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied after-market.

[210] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 842, 859, 862, 864, 867, 869, and 1144-1167. See also section 3.3 on the notion of capability to have exclusionary effects. In addition, see judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, ECLI:EU:C:1996:436, paragraph 27, for the specific case of closely associated markets.

[211] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 925.

the facts observed on the market[212], (iii) the history of the development of the products concerned and (iv) the commercial practice of the dominant undertaking[213]. The fact that the tying and tied product belong to separate product markets[214] (respectively, the "tying market" and the "tied market") is usually an indication that those are two separate products[215]. Complementary products can constitute separate products, as customers may wish to obtain them together, but from different sources[216]. In addition, the technical integration of one product into another does not mean that the two products can no longer be considered separate[217]. Similarly, even when tying two products is consistent with commercial usage or when there is a natural link between the two products, they may nonetheless be separate products[218].

91. The requirement set out in paragraph 89(b) concerns the dominance of the undertaking concerned in the relevant tying market, which is to be assessed based on the principles set out in section 2 above. There is no condition that the undertaking must also be dominant in the tied market.

92. As regards the requirement set out in paragraph 89(c), the customers who are not given a choice to obtain the tying product without the tied product can either be the customers of the dominant undertaking[219], or intermediate parties, who pass on such coercion to final customers[220]. Coercion can still exist where the party accepting the tied product is not charged a separate price for that product[221]. As coercion only requires that customers are not given the choice to obtain the tying product without the tied product, it can still exist even if the party accepting the tied product is not forced to use it or is not prevented from using the equivalent product supplied by a competitor of the dominant undertaking[222]. Coercion can also exist if the dominant company refuses *de facto* to offer the tying product without the tied product[223].

[212] For instance, evidence that customers purchase the tying and the tied products separately from different sources of supply; or that there are companies specialising in the manufacture and sale of the tied product on an autonomous basis, see judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraph 67; judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 36 and judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 927.

[213] See judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 925 et seq.

[214] See Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024.

[215] Judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraph 66.

[216] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 921–922 and 932.

[217] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 935.

[218] Judgment of 14 November 1996, *Tetra Pak* v *Commission*, C-333/94 P, EU:C:1996:436, paragraph 37 and judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 942.

[219] Judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraphs 16 and 100.

[220] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 962.

[221] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 967, 968 and 969.

[222] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 970. Accordingly, tying does not require proof that customers are obliged to purchase or use the tied product exclusively. Coercion can also be reinforced by the fact that it is not possible to uninstall the tied product: see judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 963.

[223] Judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraph 4.

93. As regards the requirement set out in paragraph 89(d), tying may result in exclusionary effects in the tied market[224] or in both the tied market and the tying market.[225] Tying may in particular be capable of resulting in exclusionary effects in the tied market if it is used to leverage dominance in the tying market into the tied market. This may be the case if the tying confers a significant competitive advantage on the dominant company in the tied market that is unrelated to the quality of the tied product, where that advantage is unlikely to be offset by competitors[226]. In some cases, the tying may have the aim of – or be objectively capable of – protecting the dominant undertaking's position in the tying market, by producing exclusionary effects on the tied market.

94. In addition to the elements mentioned in section 3.3 , the following elements may be relevant for the assessment of the exclusionary effects, depending on the specific circumstances of the case:

a) Whether the dominant company also enjoys dominance or market power in the tied market[227];

b) The significance of the link between the tying product and the tied product. This link may for example derive from the complementarity of the products[228] or from the share of customers in the tied market that also purchase the tying product[229];

c) The presence of barriers to entry or expansion in the tied market (such as the need to achieve significant economies of scale or scope[230] or the presence of network effects, for instance in digital markets)[231]; and

d) The degree of consumer inertia or bias in the tied market[232].

95. The depth of the analysis required to show that the tying is capable of having exclusionary effects depends on the specific circumstances of the case. In certain

[224] Judgment of 14 November 1996, *Tetra Pak* v *Commission*, C-333/94 P, EU:C:1996:436, paragraph 25.

[225] Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 283.

[226] This is the case, for instance, when, due to the distribution through the tying product, the tied product achieves such a level of market penetration that competitors are unable to counterbalance it or match it with alternative means to reach customers or end users; see judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 1036-1039; Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraphs 805 and 811; judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraphs 559 and 1087.

[227] Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraphs 68 and 69. When the dominant undertaking is also dominant on the market for the tied product, tying can help to maintain and strengthen the dominant position in the latter market; see Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraph 858.

[228] Conversely, if a tying practice concerns two entirely unrelated products, the link/connection between the tying and the tied product is weak and exclusionary effects are less likely.

[229] Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraph 73.

[230] Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraphs 70-72; Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraphs 859 and 860.

[231] Commission decision of 21 April 2004 in case COMP/C-3/37.792 – *Microsoft*, paragraphs 878 et seq. and 980; Commission decision of 16 December 2009 in case COMP/39.530 — *Microsoft (Tying)*, paragraphs 55-56.

[232] Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 1041 – 1042; judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraphs 583 and 593; Commission decision of 16 December 2009, Case COMP/39.530 — *Microsoft (Tying)*, paragraphs 47-54.

circumstances, it may be possible to conclude that, due to the specific characteristics of the markets and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed.[233] In other circumstances, a closer examination of actual market conditions may be warranted. This is typically the case when (i) the tied product is available for free and (ii) it is easy to obtain alternatives to the tied product[234]. When the tying practice at stake has been in place for a long period, the Commission may have a more complete evidentiary basis to assess whether such tying has been capable of having exclusionary effects[235]. Where it is carried out, this closer examination of actual market developments aims to identify any evidence confirming the capability of the tying to have exclusionary effects, such as the actual marginalisation or exit of competitors in the tied market or an actual increase in the barriers to entry and expansion on that market.

4.2.3. Refusal to supply

96. A refusal to supply refers to situations where a dominant undertaking has developed an input[236] exclusively or mainly for its own use and, when requested access by a party (typically, an actual or potential competitor), refuses to give access[237].

97. Refusal to supply is a self-standing type of abuse, which is different from the access restrictions that are described in section 4.3.4. A finding that a dominant undertaking has abused its dominant position through a refusal to supply an input to an actual or potential competitor places that undertaking under a duty to give access to the requested input to that competitor. This obligation directly impinges on freedom of contract and the right to property of the dominant undertaking. It may also affect the incentives for competitors to develop competing inputs and the incentives for the dominant

[233] This is notably the case in situations where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects: see judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, in relation to the requirement that users of Hilti's patented nail cartridges should also buy nails; and judgment of 6 October 1994, *Tetra Pak International* v *Commission*, T-83/91, EU:T:1994:246 in relation to the requirement by Tetra Pak that buyers of liquid packaging machines would also have to purchase cartons and maintenance services from it. See also Commission decision of 21 April 2004 in case COMP/C-3/37.792 – *Microsoft*, paragraph 841, confirmed in judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 1035 and 1036. If the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess such evidence (see paragraph 60(b) above).

[234] Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraphs 292-295.

[235] Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraphs 295 and 296.

[236] In this context, the term 'input' refers to different types of assets, e.g. goods, service, infrastructure, network, or intellectual property right. In some cases, access to the input in question may require some steps by the dominant undertaking, as the input may not exist "as such" in an accessible way in the market. Such steps may include, for instance, drawing up interoperability information which was not drawn up in an accessible way before (judgment of 17 September 2007, Microsoft v Commission, T-201/04, EU:T:2007:289, paragraphs 249 and 807); or changes to the computer systems, detailed preparation and numerous series of tests (judgment of 9 September 2009, *Clearstream Banking and Clearstream International v Commission*, T-301/04, EU:T:2009:317, paragraph 106).

[237] Judgement of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 45, and judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 79.

undertaking to invest in inputs[238]. Consequently, the Union Courts has set up relatively strict conditions for finding that a refusal to supply is liable to be abusive and, therefore, that an obligation to give access can be imposed.

98. To find that a refusal to supply is abusive, it is sufficient that a potential market or even a hypothetical market for the input can be identified, which may be the case when there is demand for the input from potential purchasers[239].

99. A refusal to supply is liable to be abusive where the following conditions are met[240]:

a) the input is indispensable for the undertaking requesting access to compete with the dominant undertaking in a downstream market; and

b) the refusal is capable of having exclusionary effects, which in this specific context means the capability to eliminate all competition on the part of the requesting undertaking[241].

100. The condition under paragraph 99(a) is meant to determine whether the dominant undertaking has a genuinely tight grip on the market concerned by virtue of that input and whether, therefore, it may be appropriate to force the dominant undertaking to grant access to that input[242].

101. In this regard, an input is considered indispensable if there is no real or potential substitute to it[243]. More specifically, this means that:

i. the input cannot be duplicated realistically and in a viable way due to physical, technical, legal or economic reasons;

ii. an equivalent input cannot be obtained from other sources; and

iii. access to the input is necessary for the requesting firm to remain viably on the market and exert an effective competitive constraint.

102. Should there be a real or potential substitute to the input in question, even if access were less advantageous for the requesting undertaking, the input cannot normally be considered as indispensable[244].

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238 Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 46 and 47.

239 Judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257, paragraphs 43 and 44.

240 Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraph 41; judgment of 9 September 2009, *Clearstream v Commission*, T-301/04, EU:T:2009:317, paragraph 147; judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, EU:C:2021:239, paragraph 44, and judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 79.

241 The case law of the Union Courts also specifies that that refusal must not be objectively justified. For the assessment of objective justifications, see section 5.

242 Judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, EU:C:2021:238, paragraphs 48 and 49; judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 48 and 49.

243 Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraphs 41 and 44 to 46; judgment of 9 September 2009, *Clearstream v Commission*, T-301/04, EU:T:2009:317, paragraph 147 and judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, paragraph 49. See also Commission decision of 17 January 2024, in AT.40735 – *Online rail ticket distribution in Spain*, paragraph 107.

103. As regards the condition under paragraph 99(b), such requirement needs to be interpreted as capability to eliminate all *effective* competition on the part of the requesting undertaking.[245] In this regard, the fact that the dominant undertaking's competitors retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of effective competition[246].

104. The exercise of an exclusive intellectual property right by a right-holder can also be found as liable to be abusive. This can be the case for instance in relation to the refusal to license intellectual property rights[247], including when the licence is necessary to provide interface information[248], or the bringing of an action for infringement of an intellectual property right[249].

105. In these cases, the refusal to supply an input protected by an intellectual property right may be regarded as liable to be abusive if it fulfils the requirements of the specific legal test for refusal to supply (see paragraph 99) and in addition, if it limits technical development on the market[250].

106. A refusal can limit the technical development on the market if, for instance, it prevents the requesting undertaking from producing new products that are not offered by the dominant undertaking and for which there is a potential consumer demand (limitation of production or markets)[251], even if such goods or services are in competition with those of the dominant undertaking. In other words, in these circumstances, the undertaking which requested the licence should not limit itself essentially to duplicating the goods or

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[244] Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraph 43 and judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257, paragraph 28.

[245] Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraph 41; judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 79 and judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 229 and 332. See Commission decision of 17 January 2024, in AT.40735 – *Online rail ticket distribution in Spain*, paragraphs 115, 116, 118 and 119.

[246] Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 563.

[247] Judgment of 5 October 1988, *AB Volvo v Erik Veng*, C-238/87, EU:C:1988:477; judgment of 6 April 1995, *RTE v Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98 and judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257.

[248] Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289.

[249] Judgment of 16 July 2015, *Huawei Technologies v ZTE and ZTE Deutschland*, C-170/13, EU:C:2015:477.

[250] Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 647 to 656, where the Court found that Microsoft's refusal to provide interoperability information prevented its competitors from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture, with the consequence that consumers' purchasing decisions in respect of work group server operating systems were channelled towards Microsoft's products. Absent this refusal, Microsoft competitors would be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, would be distinguished from those systems with respect to parameters which consumers consider important (for example, security and reliability). The Court also clarified that the marginal presence of the dominant undertaking's competitors in certain niches is not sufficient to conclude that there is effective competition (paragraph 563 of the judgment).

[251] Judgment of 6 April 1995, C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, EU:C:1995:98, paragraph 54, where the Court found that the dominant undertaking's refusal to provide basic information by relying on national copyright provisions prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the dominant undertaking did not offer and for which there was a potential consumer demand.

services already offered on the secondary market by the owner of the intellectual property right[252].

4.2.4. Predatory pricing

107. Predatory pricing refers to below-cost pricing strategies of a dominant undertaking. Predatory pricing can take place in the market on which the undertaking is dominant or in related markets[253]. It can also take place in a market segment, for example with the intention of increasing the attractiveness of the dominant undertaking's overall portfolio on the market or of having exclusionary effects by preventing actual or potential competitors from getting a solid foothold in the market[254].

108. Below cost pricing that is selectively applied to specific customers can also infringe Article 102 TFEU[255]. In fact, pricing practices that target certain markets, market segments or specific customers can be an effective means of predation from the point of view of the dominant undertaking. This is because, as compared with a general policy of low prices, selective predation allows the dominant undertaking to limit the negative impact of the below-cost pricing on its profits[256].

109. To assess whether pricing conduct is predatory, an analysis based on a comparison of the average prices charged and the average costs incurred by the dominant undertaking in relation to the products concerned is necessary and carried out by means of a price-cost test[257]. Relevant cost benchmarks include average variable cost ("AVC"), that is to say costs that vary depending on the quantities produced, and ATC, which is the sum of an undertaking's fixed and variable costs[258].

110. While AVC and ATC have been used as relevant cost benchmarks to establish the specific legal test for the purposes of assessing the lawfulness of potential predatory-pricing conduct, the notions of average avoidable cost ("AAC") and long-run average

[252] Judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257, paragraph 49.

[253] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 35-45; Commission decision of 14 December 1985 in Case IV/30.698 – *ECS/AKZO*, paragraph 85.

[254] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 126; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 399-401.

[255] See, to that effect, judgment of 7 October 1999, *Irish Sugar* v *Commission*, T-228/97, EU:T:1999:246, paragraphs 117-120; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 29; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 402-406.

[256] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 43 and 115.

[257] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 71-73; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 27-28. However, for a pricing practice that does not require a price-cost to be considered abusive see judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, C-395/96 P, EU:C:2000:132, paragraph 120, upholding judgment of 8 October 1996, *Compagnie maritime belge transports and Others v Commission*, EU:T:1996:139, paragraphs 139-153.

[258] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 71-72; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 108. When deciding whether, in a particular case, a cost element is variable, as opposed to being fixed, a relevant aspect to consider is the reference period, that is the period over which costs are to be assessed. In that respect, the general rule is that the longer that reference period, the more likely it is that costs will be classified as variable.

incremental cost ("LRAIC") may better capture the relevant dominant undertaking's costs, depending on the circumstances[259].

111. Depending on the outcome of the price-cost test, the following two different scenarios can be distinguished:

a) If prices are below AVC or AAC, the pricing conduct can be considered predatory as, in applying such prices, a dominant undertaking is presumed to pursue no economic objective other than eliminating its competitors[260].

b) If prices are below ATC or LRAIC but above AVC or AAC, the pricing conduct can be regarded as predatory if it is part of a plan to eliminate or reduce competition in the relevant market[261]. The objective of that plan can be the elimination or marginalisation of one or more specific competitors[262], or the elimination or reduction of competition as such[263]. To demonstrate the existence of such a plan, reference can be made to direct evidence[264], indirect evidence,[265] or both, insofar as that evidence is sound and consistent[266].

112. Predatory pricing has a high potential to produce exclusionary effects and is therefore presumed to do so (see paragraph 60(b) above)[267]. If the dominant undertaking submits

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[259] See, to that effect judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 31-39; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 780-796.

[260] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 71; judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 41; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 109; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 27.

[261] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 72; judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 41; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 109; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 27.

[262] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 75, 82 and 109; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraph 1118.

[263] Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 199 and 206-208.

[264] Direct evidence of eliminatory intent includes, in particular, contemporaneous statements made within the dominant undertaking, such as in emails, letters, presentations, minutes and meeting notes, as well as external statements, such as threats to competitors. See judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 76-82; judgment of 8 October 1996, *Compagnie maritime belge transports and Others v Commission*, T-24/93, EU:T:1996:139, paragraph 147; judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 199-209; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 1120-1137.

[265] Indirect evidence can be described as a series of important and convergent factors, which provide evidence of the existence of an eliminatory intent, and which may relate, in particular, to the duration, the continuity and the scale of the below cost sales, as well as the targeted nature and the importance of the market (segment) in which the below-cost pricing takes place. See judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 210-215; judgment of 6 October 1994, T-83/91, *Tetra Pak v Commission*, EU:T:1994:246, paragraphs 151 and 190; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 1138 to 1146.

[266] Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 197 with reference to judgment of 6 October 1994, T-83/91, *Tetra Pak v Commission*, EU:T:1994:246, paragraph 151.

[267] See, by analogy, judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 89-90; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 46.

evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess that evidence[268].

113. In any event, while applying predatory prices may enable the dominant undertaking to subsequently increase its prices by taking advantage of its dominant position and thus the market power that it enjoys[269], it is not necessary to demonstrate that it is possible for the dominant undertaking to recoup its losses[270].

The application of a price-cost test in predatory pricing cases

114. The following considerations are relevant to establish whether the prices charged by a dominant undertaking can be considered as predatory by means of a price-cost test.

a) Cost benchmarks

115. AAC is the average of the costs that could have been avoided if the company had not produced the discrete amount of (extra) output which is the subject of the abusive conduct. AAC and AVC will often be the same, as over the short to medium term only variable costs can be avoided. However, as compared with AVC, AAC may include not only variable costs but also fixed costs that can either be avoided, including costs that become sunk once incurred, or recovered, e.g. through the sale of assets that are no longer needed.

116. LRAIC is the average of all the variable and fixed costs incurred in producing a particular product during its lifecycle, which therefore include product specific fixed costs incurred before the period in which the allegedly abusive conduct took place, including costs that are sunk. LRAIC can be understood as including not only all variable costs and fixed costs directly attributable to the production of the total volume of output of the product in question, but also the increase in all common costs insofar as the increase is caused by the production of that product[271]. As regards common costs, the mere fact that a certain cost is common to several operations does not necessarily imply that the LRAIC due to the activity in question is zero for any individual product[272]. It is necessary to assess whether such a common cost would have been

[268] See, by analogy, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 138; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 50-52 and 60.

[269] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 71.

[270] Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 44; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraphs 37, 110 and 113. That interpretation does not preclude the Commission from finding such a possibility of recoupment of losses to be a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists. See judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 111.

[271] Commission decision of 4 July 2007 in case COMP/38784 – *Wanadoo España vs. Telefónica*, paragraph 319.

[272] Commission decision of 4 July 2007 in case COMP/38784 – *Wanadoo España vs. Telefónica*, paragraph 320; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraph 780.

incurred, partially or totally[273], if the undertaking had decided not to provide the product in question[274].

b) Price and cost data to be considered and possibly adjusted

117. The price-cost test is generally carried out on the basis of the price and cost data of the dominant undertaking itself, rather than of the price and cost data of actual or potential competitors[275]. This is in line with the principle of legal certainty to enable dominant undertakings to assess the lawfulness of their conduct[276].

118. In this regard, it is appropriate to consider the data in the dominant undertaking's accounts[277]. Where these data are not available or are not sufficiently reliable[278], proxies and any other pertinent information can be used, for example data from customers of the dominant undertaking that show the prices quoted and discounts granted[279]. Depending on the circumstances of the case, it can be necessary to adjust the dominant undertaking's data to calculate the effective prices paid (for example to calculate the effective prices net of discounts) or costs incurred under the applicable cost standard (for example by spreading costs over a certain period in line with the principle of depreciation of assets)[280]. Furthermore, it may be appropriate to account for opportunity costs of the dominant undertaking. In the case of two-sided markets, it may also be necessary to include in the assessment revenues and costs incurred on both sides at the same time.

c) Scope and reference period

119. Depending on the circumstances of the case, the price-cost test can be carried out for all the products and customers that are subject to the alleged predation or separately for each product or customer[281].

[273] See, to that effect, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 33-35, notably the method of attributing common costs by way of percentages.

[274] Take the example of a superstore that markets two categories of products (e.g. books and electronic devices). If the store only marketed books, some common costs would be incurred (e.g. paying for the managing director) but others would be reduced in proportion to the volume of electronic devices (e.g. the store's surface area would be smaller, it would have fewer cash desks, etc.). In other words, if a proportion of the common cost is avoidable, this proportion is incremental.

[275] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 41 with reference to judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 74; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 108.

[276] While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 44 judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 202.

[277] Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131 and 154.

[278] Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131 and 154.

[279] Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 99-100; judgment of 6 October 1994, T-83/91, *Tetra Pak v Commission*, EU:T:1994:246 , paragraphs 201-202.

[280] Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131-132 and 137.

[281] Commission decision of 14 December 1985 in Case IV/30.698 – *ECS/AKZO*, paragraph 82-87; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 399-401.

120. As regards the reference period for which the price-cost test is carried out, relevant factors to consider include the timing of the competitive interaction and the price setting intervals for each product under investigation[282].

4.2.5. Margin squeeze

121. Margin squeeze refers to a situation where an undertaking that is active in an upstream input market and an associated downstream market[283] sets its upstream or downstream prices at a level that prevents downstream competitors relying on that input from operating profitably on a lasting basis[284].

122. A margin squeeze is considered as liable to be abusive where the following conditions are met:

a) the undertaking concerned is vertically integrated and is dominant on the upstream market;

b) the spread between the upstream and downstream prices prevents equally efficient competitors that rely on the dominant undertaking's input from operating profitably on a lasting basis on the downstream market; and

c) the conduct is capable of producing exclusionary effects.

123. The condition under paragraph 122(a) requires that a vertically integrated undertaking, regardless of the actual form of the integration[285], sells a product to undertakings on an upstream market where it is dominant and competes with those same undertakings on a downstream market for which the product is an input. There is no need for the undertaking to also be dominant on the downstream market for an abusive margin squeeze to exist[286].

124. The condition under paragraph 122(b) requires it to be established, by means of a price-cost test, that the spread between the price that the dominant undertaking charges to competitors upstream and the price that it charges to its customers downstream is either negative or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs that that undertaking has to incur to supply its downstream products[287]. The first step of the analysis consists in determining the extent of the

[282] Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131 and 137; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 630-632. Where appropriate, robustness checks can be used to verify the correctness of the price-cost test, see Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 1007-1033.

[283] This also includes a situation in which the input is at the same level as or downstream from the market for which it is needed. This may, for instance, arise where one undertaking controls a downstream distribution level that is needed in order to access customers.

[284] Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 70.

[285] The actual form of integration of the vertically integrated undertaking (e.g. sole vertically integrated company, different divisions, separate companies controlled by the same group, etc.) is not relevant.

[286] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 89; judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 146.

[287] Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 169; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 32; and judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 73.

spread[288]. If the spread is negative, the price-cost test is not met and it is not necessary to consider the downstream costs in detail. If, on the other hand, the spread is positive, a second step in the analysis is required in order to determine whether the spread is sufficient to cover the dominant undertaking's product-specific costs at the downstream level. If the spread is not sufficient (i.e. it leads to a negative margin), the price-cost test is not met[289].

125. For a margin squeeze to be abusive, it is not necessary to establish that the upstream prices for the input are in themselves excessive or that the downstream prices are in themselves predatory[290].

126. Furthermore, it is also not necessary to demonstrate that the dominant undertaking is capable of recouping any losses it may suffer to squeeze the margins of its competitors[291].

127. The condition under paragraph 122(c) requires that the margin squeeze is capable of having exclusionary effects[292], for instance by making the entry of competitors onto the market concerned more difficult, or impossible[293]. In this regard, it is not necessary to establish that the upstream input is indispensable for rivals to compete downstream[294]. On the other hand, the more important the upstream input is to effectively compete downstream, the more likely it is that the conduct is capable of having exclusionary effects[295].

128. In addition, in circumstances where the price-cost test indicates a negative spread, the margin squeeze has a high potential to produce exclusionary effects and those effects can be presumed (see paragraph 60(b))[296]. If the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess that evidence [297].

129. In circumstances where the spread is positive but not sufficient to cover the dominant undertaking's product-specific costs at the downstream level, this element can be

[288] The spread corresponds to the downstream price minus the upstream price.

[289] The margin corresponds to the downstream price minus the upstream price minus the downstream costs. The computation of the margin takes into account the cost of capital.

[290] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 34; and judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 187.

[291] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 100.

[292] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 61.

[293] Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 253; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 63.

[294] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 55 and 56 and 72; judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraphs 75 and 96; judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 52.

[295] See, to that effect, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 70 and 71.

[296] See, to that effect, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 73.

[297] See, by analogy, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 138; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 50-52 and 60.

relevant for the assessment of the capability of the conduct to produce exclusionary effects[298].

The application of a price-cost test in margin squeeze cases

130. A margin squeeze is generally demonstrated by showing by means of a price-cost test that the downstream arm of the dominant undertaking could not operate profitably on the basis of the upstream price charged to its downstream competitors and the downstream price charged by the downstream arm of the dominant undertaking[299].

131. Several factors and metrics may influence the results of the price-cost test, in particular: (a) the price and cost benchmarks, and (b) the level of product aggregation. The choice of the relevant factors and metrics is made on a case-by-case basis depending notably on the market, the competitive conditions and the other circumstances of the case.

a) Price and cost benchmarks

132. The price-cost test is usually based on the difference between, on the one hand, the effective downstream price charged by the dominant undertaking and, on the other hand, the sum of the wholesale price charged by the dominant undertaking to its downstream competitors and the LRAIC[300] of the dominant undertaking's downstream arm.

133. As a general rule, and for the same reasons as those mentioned in paragraph 117 above, the price-cost test is based on the prices and costs of the dominant undertaking, since such a test can establish whether the dominant undertaking would itself be able to offer its downstream products profitably if it had to pay its own upstream prices[301]. In particular circumstances, where it is not possible to refer to the prices and costs of the dominant undertaking (e.g. if such data is not available or not sufficiently reliable), then the prices and costs of competitors can be taken into account[302].

134. The application of the price-cost test in margin squeeze cases does not imply that the competitors of the dominant undertaking would be able to replicate its upstream assets. The price-cost test is applied from the perspective of a hypothetical as efficient downstream competitor, namely a competitor that uses the upstream product of the dominant undertaking, is in competition with the dominant undertaking on the downstream market, and whose costs on that market are the same as those of the dominant undertaking[303].

[298] See, to that effect, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 74. See also paragraph 56 of these Guidelines.

[299] Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraphs 200-204; and judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 31-34.

[300] See paragraph 116 above for more explanations about LRAIC.

[301] Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraphs 198, 200 and 201; and judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 41-42.

[302] See judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 44-45.

[303] Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 209.

b) The level of product aggregation

135. The price-cost test can be applied at the most granular level (that is, at the level of each individual offer or product) or at the aggregate portfolio level (that is at the level of the mix of products involved in the margin squeeze)[304].

136. In general, it is appropriate to apply the test at a level of aggregation which corresponds to the relevant product market[305]. However, in some circumstances[306], it may be appropriate to conduct the test at a more granular level, e.g. the level of each individual offer.

4.3. Conducts with no specific legal test

137. This section discusses specific types of conduct for which no specific legal test has been developed in the sense set out in paragraph 47 above, but for which the Union Courts have provided guidance as to how to apply the general legal principles set out in section 3.

4.3.1. Conditional rebates that are not subject to exclusive purchase or supply requirements

138. Under these Guidelines, conditional rebates refer to a system of rebates or other advantages[307], whether monetary or not, granted by a dominant undertaking to its customers to reward them for a particular form of purchasing behaviour, but that are not conditional on them purchasing all or most of their requirements from the dominant undertaking[308]. The usual feature of a conditional rebate is that the customer is given a rebate or advantage if its purchases over a defined reference period exceed a certain threshold.

139. Conditional rebates may be related to the purchase of one product ("single product rebates") or to the purchase of two or more different products ("multi-product rebates"). Multi-product rebates are discussed in section 4.3.2 below.

140. Conditional rebate schemes can differ depending on (amongst other factors):

- The type of threshold necessary to trigger the rebate, for example based on volume ("volume rebates") or value ("value rebates"), a certain share requirement

[304] See, for example, Commission decision of 15 October 2014 in case AT.39523 - *Slovak Telekom*, paragraph 832; and Commission decision of 4 July 2007 in case COMP/38784 - *Wanadoo España v Telefónica*, paragraph 386.

[305] Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraphs 200-211.

[306] This would, for example, be the case for a new offer giving rise to a margin squeeze, which is currently subsidised by other profitable offers, but whose volumes could increase substantially in the future, subsequently leading to an overall negative margin in the future.

[307] See footnote 187.

[308] This equally applies to rebates that are not conditional on a supplier selling all or most of its output to the dominant undertaking. For exclusivity rebates, see Section 4.2.1 above.

("market share rebates")[309] or a certain increase compared to the previous contract period ("growth rebates");

- Whether, upon reaching a given threshold, the rebate is granted on all purchases ("retroactive rebates") or only on those made in excess of those required to achieve the threshold ("incremental rebates");

- Whether the rebates are individualised (e.g. the conditions for granting the rebate - such as the threshold - vary across customers or customer groups) or standardised[310].

141. Conditional rebates are a common business practice. Undertakings may offer such rebates in order to attract more demand and, as a result, they may stimulate demand and benefit consumers. However, when granted by a dominant undertaking, and depending on the circumstances, these rebates may infringe Article 102 TFEU.

142. To assess whether a system of conditional rebates is abusive, it is necessary to establish that the rebate scheme departs from competition on the merits and is capable of having exclusionary effects.

143. To demonstrate that a conditional rebate scheme departs from competition on the merits, it may be appropriate to make use of a price-cost test (see sub-section below)[311]. In this regard, whether a price-cost test is appropriate and can be carried out will depend on the circumstances of the case[312].

144. In particular:

a) The use of a price-cost test is required to assess standardised volume-based incremental rebates, given that these specific rebates are considered not to depart from competition on the merits, unless they result in pricing below cost[313]; and

b) The use of a price-cost test may not be appropriate in cases where: (i) the inducements offered by the dominant undertaking are not monetary and cannot

[309] Rebates conditional on share requirements that amount to all or most of the customer's requirements, see Section 4.2.1 above.

[310] Note that market share rebates are by definition individualised, as the share requirement applies to the volumes of each specific buyer.

[311] Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651,paragraphs 57 and 61; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 58 and 62; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraph 81; judgment of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/183, EU:T:2022:541, paragraph 643.

[312] Judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraph 82; and judgment of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/183, EU:T:2022:541, paragraph 1003, in which the General Court refers to the "*difficulties inherent in drawing up an AEC test*".

[313] See judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission (Michelin I)*, Case 322/81, EU:C:1983:313, paragraph 71; judgment of 29 March 2001, *Portuguese Republic v Commission* in C-163/99, EU:C:2001:189, paragraph 50; judgment of 30 September 2003, *Michelin v Commission (Michelin II)*, T-203/01, EU:T:2003:250, paragraph 58.

easily be converted into a quantified monetary amount[314]; or (ii) the emergence of an as-efficient competitor would be practically impossible, for instance, because of the dominant undertaking's very large market share or the presence of significant barriers to entry or expansion in the market, or the existence of regulatory constraints[315]. In these circumstances, even a less efficient competitor may also exert a genuine constraint on the dominant undertaking[316]. In these cases, the assessment of whether the conduct departs from competition on the merits will be carried out on the basis of the general principles set out in section 3.2.

145. To establish whether a conditional rebates scheme is capable of having exclusionary effects, it is necessary to analyse all the relevant legal and economic circumstances. In addition to the elements mentioned in section 3.3, the following considerations are generally relevant with regard to conditional rebates[317]:

a) The extent of the undertaking's dominant position on the relevant market, namely the degree of market power held by the dominant firm[318] and the fact that, for a given part of the demand, the dominant undertaking may be an unavoidable trading partner[319];

b) The size of the rebate as a percentage of the total price, or the value of the non-price advantages, and the threshold triggering the rebate[320]; in this regard, the transparency of the conditions regarding governing the rebate is also a relevant consideration[321];

c) The retroactivity of the rebates: compared to incremental rebates, retroactive rebates generally have a higher capability to produce exclusionary effects, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if the customer risks losing the whole retroactive rebate[322];

[314] Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 57. In general, converting non-monetary inducements to monetary amounts may prove difficult or impossible, see Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraph 352.

[315] Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 57.

[316] Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 59 and 60.

[317] Judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission (Michelin I)*, C-322/81, EU:C:1983:313 paragraph 73; judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 67, judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 29.

[318] Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 30 and 39.

[319] Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 75; Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 40.

[320] Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs, 97-100; judgment of 7 October 1999, *Irish Sugar v Commission*, EU:T:1999:246, T-228/97, paragraphs 207-214.

[321] For example, a lack of transparency can put pressure on customers and make it less attractive to switch to a competitor where the effects of complying or failing with the conditions that govern the rebate scheme are uncertain. Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, EU:C:1983:313, paragraphs 83 and 84.

[322] Judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission (Michelin I)*, Case 322/81, EU:C:1983:313, paragraph 81; judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 32.

d) The individualised nature of the rebate: rebates that are individualised for each customer (or type of customer) are in general more capable of producing exclusionary effects because they allow the dominant undertaking to target the rebate thresholds to each customer's size/demand, thereby enhancing the loyalty effect[323];

e) The length of the reference period: in general terms, the longer the reference period, the higher the pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period, therefore making it more difficult for an entrant to compete for that customer[324]; and

f) The fact that even a hypothetical as-efficient competitor would be unable to compensate the loss of the rebates as demonstrated by means of a price-cost test, if such test is carried out to determine whether the rebate scheme departs from competition on the merits[325].

The possible application of a price-cost test to conditional rebates

146. The application of a price-cost test to conditional rebates must be based on effective prices and costs calculated over the part of demand which customers could switch to competitors of the dominant undertaking (the "relevant range")[326].

147. The identification of the relevant range depends on the specific facts of each case and on whether the rebate is incremental or retroactive.

148. For incremental rebates, the relevant range is normally the purchases exceeding the required threshold to qualify for the rebate.

149. For retroactive rebates, determining the relevant range generally requires assessing, in the specific market context, the share or purchase requirements that a customer is realistically able and willing to switch to competitors of the dominant undertaking. This portion of the customers' demand is also known as the "contestable share"[327] as opposed to the "non-contestable share", which refers to the portion of demand that customers in any event want to obtain from the dominant undertaking, given its potential position as unavoidable trading partner. A retroactive rebate granted by a dominant undertaking may enable it to use the non-contestable share of demand of each

[323] Judgment of 9 September 2010, *Tomra Systems and Others v Commission*, T-155/06, EU:T:2010:370, paragraphs 261, 262, and 269.

[324] Judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission (Michelin I),* Case 322/81, EU:C:1983:313, paragraph 81; judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 34.

[325] Conversely, the fact that a hypothetical as-efficient competitor would be able to compensate the loss of the rebates is not necessarily a relevant factor showing that the rebates scheme is incapable of producing exclusionary effects. This is because the conduct's capability to have exclusionary effects needs to be assessed in relation to the existing actual or potential competitors of the dominant firm, rather than in relation to hypothetical competitors (see paragraph 73 above).

[326] See section 4.2.4 for an explanation of the relevant cost benchmarks.

[327] The exercise of assessing the contestable share may be subject to significant limitations. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible.

customer as leverage to decrease below cost the effective price paid by the customer for the contestable share of demand.

150. When the Commission uses a price-cost test over the contestable share of demand, it will estimate the effective price per contestable unit that a competitor to the dominant undertaking would have to offer in order to compensate the customer for the loss of the rebate if the latter were to switch the contestable share of its demand away from the dominant undertaking. The effective price per contestable unit that the competitor will have to offer is not the average price per unit applied by the dominant undertaking, but the normal (list) price per unit less the total value of the rebate the customer loses by switching the contestable volumes to the competitor, distributed over the contestable units in the relevant period of time.

151. Finally, when a price-cost test is carried out and shows that the effective price charged by the dominant undertaking is below AAC[328], the rebate scheme is found to depart from competition on the merits. The finding that the effective price is below AAC can also be relevant for the assessment of the capability of the rebate scheme to produce exclusionary effects (see paragraph 145(f)).

4.3.2. Multi-product rebates

152. Dominant undertakings may also market two or more separate products together and offer the buyer a certain inducement, such as a rebate ("multi-product rebate"), compared to the case in which it purchases the products separately on a standalone basis. This practice is also known as "mixed bundling" or "bundled rebates".

153. For this type of abuse, the guidance provided by the case-law in relation to exclusive dealing and conditional rebates, depending on the cases, applies by analogy.

154. Multi-product rebates that are conditional on customers buying all or most of their requirements of at least one of the products from the dominant undertaking are subject to the specific legal test set out in section 4.2.1.

155. Multi-product rebates that are not conditional on customers buying all or most of their requirements of at least one of the products from the dominant undertaking are liable to be abusive if such conduct departs from competition on the merits and is capable of producing exclusionary effects. This is typically the case where the multi-product rebate enables the dominant undertaking to leverage a dominant position from one market into one or more other markets and where this is capable of producing exclusionary effects, for instance, by strengthening or protecting the dominant position. The guidance set out in section 4.3.1 can be relevant[329].

[328] See section 4.2.4 for an explanation of the relevant cost benchmarks.

[329] In case of multi-product rebates, where a price-cost test is done, it consists of comparing the incremental price that customers pay for each of the dominant undertaking's products in the bundle and the cost incurred by the dominant undertaking for including that product in the bundle.

4.3.3. Self-preferencing

156. Self-preferencing consists of a dominant undertaking actively[330] giving preferential treatment to its own products compared to those of competitors, mainly by means of non-pricing behaviour.

157. Self-preferencing can be widespread in certain sectors of the economy and the question whether a given self-preferencing conduct contravenes Article 102 TFEU depends on an analysis of all relevant circumstances.

158. In particular, self-preferencing may be liable to be abusive when the dominant undertaking leverages its dominance in a given market (the "leveraging market") to gain an advantage in a related market (the "leveraged market") by means of preferential treatment. There are various ways in which two markets can be related, for instance if they are in a vertical relationship, if the competitors of the dominant undertaking in the leveraged market are actual or potential users in the leveraging market or if the two markets are part of the same value chain[331].

159. Preferential treatment can concern, for example, the positioning or display of the leveraged product in the leveraging market[332], manipulating consumer behaviour and choice[333] or manipulating auctions. Preferential treatment can also consist of a combination or succession of different practices over time[334].

160. To establish whether self-preferencing is liable to be abusive, it is necessary to assess whether granting preferential treatment to the dominant undertaking's own products departs from competition on the merits and whether it is capable of producing exclusionary effects[335].

161. As regards the first condition, in addition to the factors mentioned in section 3.2 above, the following elements, which are neither cumulative nor exhaustive, may indicate that the conduct departs from competition on the merits:

    (i) the preferential treatment takes place on a leveraging market that constitutes an important source of business for competitors in the leveraged market, which competitors cannot effectively replace through other means[336];

[330] Judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 240.

[331] This may be the case, for instance, if customers of the product of one market use it to transact with customers of the other market.

[332] See, to that effect, Commission decision of 27 June 2017 in case AT. 39740 - *Google Shopping*, section 7.2.1 and judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 283. See also Commission decision of 20 December 2022 in case AT.40462 - *Amazon Marketplace* and AT.40703 - *Amazon Buy Box*, paragraph 203.

[333] See by analogy judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 96-99.

[334] Judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 187 and 329.

[335] Judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 161-166, 175 and 195-196.

[336] Judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 170, 171 and 174. The importance of the product provided by the dominant

(ii) the preferential treatment is likely to influence the behaviour of users, irrespective of the intrinsic qualities of the leveraged product[337];

(iii) the preferential treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's activities in the leveraging market, for instance by being contrary to its interests or those of its customers in that market[338].

162. As regards the analysis of the conduct's capability to produce exclusionary effects, the general considerations of section 3.3 apply. Self-preferencing can produce exclusionary effects on the leveraged market or on both the leveraged and the leveraging market. If the self-preferencing takes the form of a combination or succession of practices, the analysis of effects should take into account the overall effects of those practices[339].

4.3.4. Access restrictions

163. "Access restrictions" refer to the imposition by a dominant undertaking of restrictions on access to an input that are different from a refusal to supply[340].

164. Access restrictions do not have to meet the specific legal test for a refusal to supply set out in section 4.2.3 above in order to be found to be abusive[341], but should rather be assessed according to the general framework of assessment set out in section 3. This means that in the specific case at hand, it will need to be established that the conduct departs from competition on the merits and is capable of producing exclusionary effects.

165. Access restrictions can be liable to be abusive even if the input at stake is not indispensable, as the need to protect the undertaking's freedom of contract and

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undertaking in the leveraging market for competitors should not be understood as indispensability as required under refusal to supply abuses, given that self-preferencing constitutes a different type of abuse; accordingly, the criteria established in the judgment of 26 November 1998, *Bronner*, Case 7/97, EU:C:1998:569 need not be met, see judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 230 and 240. However, a finding of indispensability may provide a strong indication that the conduct amounts to an abuse, see by analogy judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 70-71. The fact that the leveraging market is an important source of business for competitors that cannot be effectively replaced may also be informative of the capability of self-preferencing to produce exclusionary effects, see judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, Case T-612/17, EU:T:2021:763, paragraph 454; Commission decision of 27 June 2017 in case AT. 39740 - *Google Shopping*, paragraphs 591-592, and Commission decision of 20 December 2022 in case AT.40462 - *Amazon Marketplace* and case AT.40703 - *Amazon Buy Box*, paragraphs 173–176.

337 Judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 172. The possible influence of self-preferencing on user behaviour is relevant in particular in those instances where the conduct relies on the behavioural bias of users.

338 Judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 176-185.

339 Judgment of 10 November 2021, *Google and Alphabet* v *Commission* (*Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 374.

340 See the notion of "refusal to supply" for the purpose of these Guidelines, set out in section 4.2.3, which refers to situations where a dominant undertaking has developed an input exclusively or mainly for its own use.

341 Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 50 and 51.

incentives to invest does not apply to the same extent as in a refusal to supply setting[342]. However, the importance of the input for the access seeker will increase the likelihood that access restrictions will lead to exclusionary effects[343].

166. The following are examples of access restrictions that, based on the concrete circumstances of each case, may be considered as contrary to Article 102 TFEU[344]:

a) Where the commercial practices of the dominant undertaking may lead to the disruption of supply of existing customers. In particular, dominant undertakings cannot cease supplying existing customers who are competing with them in a downstream market, if the customers abide by regular commercial practices and the orders placed by them are in no way out of the ordinary[345].

b) Where the dominant undertaking fails to comply with a regulatory obligation to give access[346].

c) Where the dominant undertaking degrades or delays the existing supply of an input by imposing unfair access conditions (also called "constructive refusal to supply"). This could be the case, for instance, where the dominant undertaking[347]:

(i) fails to set reasonable and transparent terms and conditions for access, including pricing rules; or

(ii) fails to provide timely responses to requests for access or delays the start of access negotiations and the signing of contracts to give access to third parties.

d) Where the dominant undertaking develops an input for the declared purpose of sharing it widely with third parties but later does not provide access or restricts access to that input. In such cases, the dominant undertaking has already made

[342] Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 44-51. For instance, situations where the following two conditions are met: (i) the dominant undertaking's input is financed by means of public funds rather than private investments and (ii) the dominant undertaking is not the owner of the input may indicate that the criteria established in paragraph 41 of the judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, do not apply. See, by analogy, judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 87.

[343] Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 50.

[344] This list should not be considered as an exhaustive enumeration of all possible instances of access restrictions that are liable to be abusive.

[345] Judgment of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents Corporation v Commission*, joined cases C-6/73 and C-7/73, EU:C:1974:18, paragraph 25; and judgment of 16 September 2008, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 77. See also, by analogy, judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 50.

[346] Judgment of 13 December 2018, *Slovak Telekom v Commission*, T-851/14, EU:T:2018:929, paragraph 121 and judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, EU:C:2021:239, paragraphs 54 to 59.

[347] Commission decision of 15 October 2014 in AT.39.523 — *Slovak Telekom*, paragraphs 428 to 821; judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, EU:C:2021:239, paragraph 50; Commission decision of 22 June 2011 in AT.39.525 — *Telekomunikacja Polska*, paragraph 566; and Commission decision of 13 December 2011 in COMP/C-3/39692 — *IBM Maintenance Services*, paragraphs 31 to 37.

the business and investment decision to share the input from the outset and to contract with third parties to give access thereto[348].

5. GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF OBJECTIVE JUSTIFICATIONS

167. Conduct that is liable to be abusive may escape the prohibition of Article 102 TFEU where the dominant undertaking can demonstrate to the requisite standard that such conduct is objectively justified. To be objectively justified, the conduct must be objectively necessary (so-called "objective necessity defence") or produce efficiencies that counterbalance, or even outweigh, the negative effect of the conduct on competition (so-called "efficiency defence")[349].

168. An objective necessity defence must be based on evidence that the behaviour of the dominant undertaking was objectively necessary to achieve a certain aim[350]. The objective necessity may stem from legitimate commercial considerations, for example, the protection of the dominant undertaking against unfair competition[351], or the placing of orders by the customer that are out of the ordinary[352] or if the customer's conduct is inconsistent with fair trade practices[353]. It may also stem from technical justifications, for example linked to maintaining or improving the performance of the dominant undertaking's product[354]. While the arguments supporting an objective necessity defence may also relate, for instance, to public health, safety or other public interest considerations[355], the Union Courts have confirmed that it is not the dominant undertaking's task to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or as inferior in quality to its own products[356], nor more generally to enforce other undertakings' compliance with the law[357]. An objective

[348] By analogy, see judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 177 to 185.

[349] Judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 40 and 41 and case-law cited therein; judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 165; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 84; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 201 and 202. The examples provided in this section are not exhaustive of the possible objective justifications that can be raised in the context of Article 102 TFEU cases.

[350] See to that effect judgment of 3 October 1985, *CBEM v CLT and IPB*, C-311/84, EU:C:1985:394, paragraphs 26 and 27.

[351] Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping*), T-612/17, EU:T:2021:763, paragraph 552.

[352] Judgment of 16 September 2008, *Sot. Lelos kai Sia and Others*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 70.

[353] Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case C-27/76, EU:C:1978:22, paragraphs 182-187.

[354] Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 552. See also judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 1146 and 1159, where the argument that the integration of Windows Media Player in Windows created technical efficiencies or led to "*superior technical product performance*" was rejected.

[355] For instance, that the conduct contributes to the Union's resilience as it is necessary to reduce dependencies and mitigate shortages and disruptions in supply chains.

[356] Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraph 118; judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 138.

[357] See to that effect judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraphs 116-118.

necessity defence will be accepted only if the actual or potential exclusionary effects resulting from the conduct are proportionate to the alleged necessary aim[358]. The proportionality condition is not met where the same aim could be achieved through means that are less restrictive of competition[359].

169. An efficiency defence requires to demonstrate that the exclusionary effects resulting from the dominant undertaking's conduct are counterbalanced, or even outweighed, by advantages in efficiency that also benefit consumers[360]. Where a dominant undertaking's conduct is capable of producing exclusionary effects, any advantages in terms of efficiency can be taken into account only at the stage where objective justifications are being examined[361]. An efficiency defence cannot be accepted, if the exclusionary effects produced by the conduct bear no relation to the alleged advantages for consumers, or if those effects go beyond what is necessary in order to achieve these advantages[362]. To prove an efficiency defence, the dominant undertaking must show to the requisite standard of proof that the following four cumulative conditions are fulfilled:

    a) that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and on the interests of consumers in the affected markets;

    b) that those gains have been, or are likely to be, brought about as a result of the conduct;

    c) that the conduct is necessary for the achievement of those efficiency gains; and

    d) that the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition[363].

170. While it remains open to the dominant undertaking to justify any conduct that is liable to be abusive, whether the conduct has a high potential to produce exclusionary effects or whether it is a naked restriction must be given due weight in the balancing exercise to be carried out in this context.

171. The burden of proof for an objective necessity or efficiency defence is on the dominant undertaking[364]. Vague, general and theoretical claims or those which rely exclusively on

[358] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 103. See to that effect, judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 883.

[359] *Ibid*.

[360] Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 86; judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 48; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 140.

[361] Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 188. See also to that effect judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 84-86.

[362] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 76.

[363] Judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 42; judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 166; judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraphs 602, 876 and, to that effect, paragraphs 889-891; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 204.

the dominant undertaking's own commercial interests are not sufficient to demonstrate an efficiency defence[365]. Similarly, whether the practices at issue were deliberate or, on the contrary, only accidental is not relevant for the assessment of an efficiency defence[366]. In addition, proving an objective necessity or efficiency defence requires a cogent and consistent body of evidence, especially where the dominant undertaking is naturally better placed than the Commission to disclose its existence or demonstrate its relevance[367], which is typically the case in the context of the application of Article 102 TFEU.

[364] Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 49; judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 688 and 1144; judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 554; judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 601. It is for the undertaking invoking the benefit of that defence against the finding of an infringement to demonstrate that the conditions for applying the defence are satisfied, 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 EC [now Articles 101 and 102 TFEU], OJ L1, 4.1.2003, recital 5 and Article 2.

[365] Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 166.

[366] Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 168.

[367] Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 686 (see also paragraphs 688-689 and 693, indicating that the allegation regarding the objective justification was not credible in view of the lack of any internal document in support of the alleged justification and the inconsistency of AstraZeneca's conduct in different Member States); judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 577.