VARIETIES OF AN EFFECTS-BASED APPROACH TO ABUSE OF DOMINANCE: UNDERSTANDING THE TWO CONCEPTS OF PRESUMPTIONS IN THE EU COMMISSION'S DRAFT GUIDELINES ON EXCLUSIONARY ABUSES

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Following severe dysfunctionalities in the enforcement of Article 102 TFEU and major setbacks in the judicial review of its prohibition decisions, the European Commission has drafted Guidelines on exclusionary abuses that entail two distinct concepts of presumptions to ease the burden borne by the Commission when proving that a dominant undertaking's allegedly abusive conduct is capable of producing exclusionary effects. These presumptions do not abandon an effects-based approach to abuse of dominance. Rather, they fit into the everlasting struggle of finding an adequate evidentiary law standard to show potential exclusionary effects and, in principle, are very much consistent with the Union Courts' recent jurisprudence on Article 102 TFEU. The tests triggering the presumptions might, however, need additional refinement in the process to adopt the Guidelines, or in the Commission's future decision-making practice, and so their practical value is yet to be determined.

1 INTRODUCTION

The public enforcement of Article 102 TFEU has faced significant challenges in the last decade. In cases before the European Commission, proceedings have sometimes lasted up to six, eight or even ten years.[1] This is undoubtedly the result of a multitude of factors, some of which relate to the peculiarities of procedural law in proceedings before the Commission under Regulation 1/2003.[2] Another factor, which stems from the Commission itself, has long been recognized as an obstacle to effective enforcement: since the 2000s, the Commission's so-called 'more economic' approach to abuse of dominance, particularly reflected in its 2009 Priorities Guidance,[3] emphasized the importance of accurately assessing

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[1] See for a comprehensive study, Heike Schweitzer and Simon de Ridder, 'How to Fix a Failing Art. 102 TFEU' (2024) 15(4) Journal of European Competition Law & Practice 222, 223-227.
[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003). These procedural rules are currently under evaluation by the Commission, see Massimiliano Kadar, 'Evaluating 20 Years of Regulation 1/2003: Are EU Antitrust Procedures "Fit for the Digital Age"?' (2024) 85(3) Antitrust Law Journal 577.
[3] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 (2009 Priorities Guidance).

the exclusionary effects of a dominant undertaking's conduct in each individual case in order to avoid false positives in public enforcement. Combined with case law that appears to be increasingly in flux, this could have significant consequences: if a prohibition decision comes a decade, or even half a decade, too late, it can usually no longer remedy the damage to competition already caused by the anti-competitive conduct.[4] In this respect, there is essentially no difference between a false negative and a correct prohibition decision that is issued too late.[5] Furthermore, Article 102 TFEU is at risk of losing its deterrent effect. This is even more true in highly dynamic, especially digital, sectors.

Against this backdrop, the Commission has started its attempt to refine the enforcement of Article 102 TFEU with the key concern of removing obstacles to public enforcement. Its plan to adopt Guidelines on exclusionary abuses in the course of 2025 aims at developing a 'workable effects-based approach to abuse of dominance'.[6] This is now also enshrined in the introduction to the Commission's draft for such Guidelines, which states that 'it is important that Article 102 TFEU is applied vigorously and effectively'.[7] In attempting to achieve this, the Draft Guidelines, in some respects, tend to deviate significantly from the 2009 Priorities Guidance and the Commission's subsequent decision-making practice. Notably, the Draft Guidelines rely on 'general principles' of abuse of dominance by providing a two-pillar test for finding an abuse.[8] In that, apart from a conduct's effects on competition,[9] the deviation of such conduct from the concept of 'competition on the merits' gains considerable weight compared to the Commission's previous decisional practice.[10] Another bold choice by the Commission is to establish a system of presumptions

[4] Schweitzer and de Ridder (n 1) 223.
[5] ibid 225.
[6] Linsey McCallum et al, 'A dynamic and workable effects-based approach to abuse of dominance' (Competition Policy Brief No 1/2023) <https://op.europa.eu/en/publication-detail/-/publication/ef8f0a39-cf77-11ed-a05c-01aa75ed71a1/language-en> accessed 1 September 2025.
[7] Draft for a 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 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025 ('Draft Guidelines'), para 4.
[8] Especially: Draft Guidelines (n 7) para 45.
[9] The insufficiency of an effects criterion alone to distinguish normal competitive behaviour from abuses of dominance has been acknowledged since the earliest days of modern European competition law, see Ernst-Joachim Mestmäcker, *Das marktbeherrschende Unternehmen im Recht der Wettbewerbsbeschränkungen* (Mohr Siebeck 1959) 17: 'Neither the effect nor the means of competitive conduct suffice in and of themselves to separate the exercise of free competition from the exercise of market power. The particular difficulties law faces in assessing market behaviour originate in the fact that every undertaking exerts power as soon as it operates on the market'. (Original German: 'Aber weder die Wirkung […] noch das Mittel […] einer Wettbewerbshandlung reichen für sich allein aus, um […] die Ausübung freien Wettbewerbs von der Ausübung von Marktmacht zu trennen. Die besonderen Schwierigkeiten, die dem Recht […] bei der Beurteilung des Marktverhaltens begegnen, gehen darauf zurück, daß jedes Unternehmen seine Macht ausübt, sobald es auf dem Markt tätig wird').
[10] This has, despite being firmly grounded in the Union Courts' case law on what constitutes an abuse under Article 102 TFEU, sparked considerable criticism, see generally Pınar Akman, 'A Critical Inquiry into "Abuse" in EU Competition Law' (2024) 44(2) Oxford Journal of Legal Studies 405, 412; Chiara Fumagalli and Massimo Motta, 'Economic Principles for the Enforcement of Abuse of Dominance Provisions' (2024) 20(1-2) Journal of Competition Law & Economics 85, 90-92. For criticism with a view specific to the Draft Guidelines, see Pınar Akman, Chiara Fumagalli, and Massimo Motta, 'The European Commission's draft guidelines on exclusionary abuses: a law and economics critique and recommendations' [2025] Journal of European Competition Law & Practice, 4 <https://doi.org/10.1093/jeclap/lpaf020> accessed 1 September 2025; Assimakis Komninos, 'The European Commission's Draft Guidelines on Exclusionary Abuses – A

to assess whether conduct is capable of producing exclusionary effects.[11] This overturns the Commission's previous self-commitment, as part of its 'more economic' approach, to assess foreclosure effects individually on a case-by-case basis.[12]

In doing so, the Commission takes the next step in what appears to be an everlasting struggle of the law on abuse of dominance:[13] Finding an evidentiary law framework for the analysis of effects on competition that properly balances, on one hand, the desire to base decision on up-to-date economic insight and the right to be heard of the dominant undertakings, and on the other, the public interest in a functioning (and deterring) public enforcement of the competition rules and legal certainty on the other hand. Being a less than profound insight, an effects-based approach by no means presupposes that the enforcement of Article 102 TFEU focuses solely on achieving the most correct analysis of effects and avoiding false positives, nor that a case-by-case economic analysis of exclusionary effects is the sole legal standard to finding an abuse.[14] In fact, EU competition law has brought forth different varieties of an effects-based approach to abuse of dominance throughout its history, all of which strike the difficult balance slightly differently. In this article, I intend to show that the case law of the Union Courts in principle supports the establishment of presumptions as part of such an effects-based approach to the notion of abuse under Article 102 TFEU. While bearing the case law in mind, I will examine the two concepts of presumptions, their underlying rationale, their functioning and the respective tests for triggering the presumption, which will show that notable ambiguity remains regarding the relevant tests. Whether the presumptions will live up to the expectations set for them remains an open question.

2 VARIETIES OF AN EFFECTS-BASED APPROACH TO ABUSE OF DOMINANCE

The mere fact that the Commission recognises presumptions of exclusionary effects in no way implies the abandonment of an effects-based approach to abuse of dominance. Since the Court of Justice's judgment in *Hoffmann-La Roche*, an exclusionary abuse has been defined

Very Selective Restatement of the Case Law' (*EU Law Live's Competition Corner*, 14 November 2024) <https://eulawlive.com/competition-corner/op-ed-the-european-commissions-draft-guidelines-on-exclusionary-abuses-a-very-selective-restatement-of-the-case-law/> accessed 1 September 2025; Damien J Neven, 'Competition on the Merits?' (*EU Law Live's Competition Corner*, 30 October 2024) <https://eulawlive.com/competition-corner/competition-on-the-merits-by-damien-j-neven/> accessed 1 September 2025.

[11] Namely in the Draft Guidelines (n 7) para 60. For the fact that the substantive legal test is the 'capability' of a conduct to produce effects, see Draft Guidelines (n 7) para 61; Schweitzer and de Ridder (n 1) 230-231; exemplary from the case law: Case C-377/20 *Servizio Elettrico Nazionale and Others* EU:C:2022:379 para 50.

[12] See below Section 2.2. This has also been positively highlighted by the German Federal Ministry of Economic Affairs and Climate Action in its 'Contribution to the Commission's consultation on the draft Guidelines on exclusionary abuses of dominance', 2 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025.

[13] And EU competition law altogether, looking at the ongoing discussion on delineating 'by object' and 'by effect' restrictions under Article 101 TFEU. Both of these discussions may of course learn from each other, especially given the apparently increased significance of a somewhat 'consistent interpretation' of the competition rules, see Case C-606/23 *Tallinna Kaubamaja and KIA Auto* EU:C:2024:1004 paras 35-36; Case C-333/21 *European Superleague Company* EU:C:2023:1011 para 186.

[14] Even the fiercest critics of the Draft Guidelines' presumptions usually do not resent the idea of presumptions altogether, see Akman, Fumagalli, and Motta (n 10) 9; Komninos, 'The European Commission's Draft Guidelines on Exclusionary Abuses' (n 10).

as conduct which 'through recourse to methods different from those which condition normal competition […], has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.[15] Given this general definition, which has since been constantly confirmed in the Union Courts' case law,[16] any approach to abuse of dominance must take into account the relevant conduct's effect on competition.[17] There are, however, different varieties of this effects-based approach. In the following discussion, I will conceptualize three such varieties.[18]

2.1 VARIETY 1: *HOFFMANN-LA ROCHE*'S CONDUCT-BASED PRESUMPTIONS

The judgment in *Hoffmann-La Roche* is in many ways illustrative of the approach taken by the Courts in the early days of Community competition law: The Commission found that Hoffmann-La Roche had abused its dominant position through agreements that either directly obliged purchasers to buy all their requirements exclusively, or in preference, from Hoffmann-La Roche, or did so indirectly by offering purchasers incentives in the form of fidelity rebates.[19] The Court of Justice upheld the Commission's decision finding that exclusivity agreements and fidelity rebates were indeed abusive.[20] In ruling these types of practices abusive, the Court actively assessed the potential effects they would have on competition: any obligation or incentive for a purchaser to obtain their supplies exclusively from the dominant undertaking would, in the first place, deprive the purchaser of their choice of sources of supply and, in the second place, deny other producers access to the market; this would, of course, consolidate the dominant undertaking's position in the market.[21] Considering fidelity rebates, the Court held that their effects were comparable to those of exclusivity agreements, because, unlike quantity rebates, they were incentivising purchasers to purchase exclusively from the dominant undertaking. Additionally, the Court considered the fidelity rebates to be discriminatory.

Though this has been widely criticized as 'formalistic',[22] the Court's finding was in fact based on an assessment of the possibility that the conduct had exclusionary effects – even if only on an abstract level[23] – and, in doing so, effects-based of sorts. However, the capability to produce effects was presumed for certain types of conduct, and this presumption was irrebuttable. The dominant undertaking in question would not be able to bring forward evidence that, in the circumstances of the individual case, its conduct was not capable of

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15 Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36 para 91.
16 See for example from the last years: *Servizio Elettrico Nazionale* (n 11) para 44; *European Superleague* (n 13) para 125; Case C-48/22 P *Google and Alphabet v Commission (Google Shopping)* EU:C:2024:726 para 88; Case C-240/22 P *Commission v Intel Corporation (Intel II)* EU:C:2024:915 para 176.
17 For the fact that the effects the allegedly abusive conduct has on competition always and constantly played a role, see the examples from Raffaele Di Giovanni Bezzi, 'A Tale of Two Cities: Effects Analysis in Article 102 TFEU Between Competition Process and Market Outcome' (2023) 14(2) Journal of European Competition Law & Practice 83, 84-86.
18 The granularity of this differentiation is rather arbitrary. Importantly, they show that the case law resembles shades of grey rather than a black and white picture.
19 *Vitamins* (Case IV/29.020) Commission Decision 76/642/EEC [1976] OJ L223/27.
20 *Hoffmann-La Roche* (n 15) para 89.
21 See, here and in the following, *Hoffmann-La Roche* (n 15) para 90.
22 See Akman (n 10) 411-412 with further references.
23 Nada Ina Pauer, 'From Intel & Qualcomm to the new Art. 102 TFEU-Guidelines' (2024) 22(2) Zeitschrift für Wettbewerbsrecht 115, 123.

producing exclusionary effects. Rather, once the Commission or the Courts found a type of conduct that was abusive, the dominant undertaking could only rely on an objective justification or an efficiency defence. This type of irrebuttable presumption – even if considered 'formalistic' – provided the undertakings concerned with a high degree of certainty and was arguably based on implicit assumptions on the level of risk competition law should accept regarding harm to competition.[24]

2.2 VARIETY 2: THE COMMISSION'S 'MORE ECONOMIC' APPROACH

In the late 2000s, as part of its so-called 'more economic' approach to abuse of dominance, the Commission committed itself to a detailed analysis of a conduct's effects on competition in each individual case, laying out this rationale in its 2009 Priorities Guidance: '[t]he Commission will normally intervene under Article 82 [now: Article 102 TFEU] where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure'.[25] In an attempt to avoid false positives, making the precision of the economic assessment the primary objective of its enforcement policy, the Commission left no room for any shortcuts in the assessment of exclusionary effects.[26]

The Commission did, of course, not fulfil all the promises of the 'more economic' approach in its subsequent decisional practice. In particular, the Commission quickly abandoned attempts to directly prove consumer harm,[27] but the effects analysis remained an important part of Commission decisions in abuse of dominance cases without recourse to analytical shortcuts, such as presumptions. The Commission first used this approach in its landmark *Intel* decision, which shows its departure from the principles of *Hoffmann-La Roche* – fittingly, a case on rebates as well. The Commission investigated rebates that Intel had granted different Original Equipment Manufacturers (OEMs) upon exclusivity regarding its x86 Central Processing Units (CPUs). The Commission carried out an 'as efficient competitor test', by first calculating the 'required share', i.e. the market share an entrant must obtain to compete against the incumbent, and subsequently comparing this against the 'contestable share', i.e. the share of a customer's purchase requirements that can realistically be switched to a new supplier in a given time.[28] As in each case the contestable share was below the required one, the Commission found Intel's rebates capable of

[24] Schweitzer and de Ridder (n 1) 237. To that respect, it is important to bear in mind that Article 102 TFEU by no means requires a finding of actual effects on competition. It rather reacts to the risk of distortions of competition that some conduct comes with, see *Servizio Elettrico Nazionale* (n 11) para 53; Case C-680/20 *Unilever Italia Mkt. Operations* EU:C:2023:33 para 41.

[25] 2009 Priorities Guidance (n 3) para 20.

[26] According to para 22 of the 2009 Priorities Guidance (n 3), only in cases where 'conduct can only raise obstacles to competition' or 'creates no efficiencies', the Commission would not be required to carry out a detailed assessment of effects.

[27] Tristan Rohner, *Art. 102 AEUV und die Rolle der Ökonomie* (Nomos 2023) 220; for an example see Schweitzer and de Ridder (n 1) 226 in fn 26.

[28] *Intel* (Case COMP/C-3/37.990) Commission Decision of 13 May 2009, recitals 1002-1576. For the 'as efficient competitor test' in general, see Adriano Barbera, Nicolás Fajardo Acosta, Timo Klein, 'The Role of the AEC Principle and Test in a Dynamic and Workable Effects-Based Approach to Abuse of Dominance' (2023) 14(8) Journal of European Competition Law & Practice 582; Damien J Neven, 'The As-Efficient Competitor Test and Principle' (2023) 14(8) Journal of European Competition Law & Practice 565; Renato Nazzini, *The Foundations of European Union Competition Law* (Oxford University Press 2011) ch 7; for the 'as efficient competitor test' in *Intel*, see Robert Lauer, 'The Intel saga: what went wrong with the Commission's AEC test (in the General Court's view)?' (2024) 20(1) European Competition Journal 45.

foreclosing equally efficient competitors.[29]

The 'as efficient competitor test' widely serves as a symbol of the increased complexity in the Commission's economic assessment, but even apart from this test, the Commission would, too, go beyond the requirements of the older case law, as its decision in *Qualcomm (Exclusivity payments)* illustrates.[30] The dominant undertaking, Qualcomm, granted Apple payments under the condition that Apple obtained all its demand for LTE chipsets from Qualcomm, which the Commission considered to be exclusivity agreements.[31] As shown above, this finding alone would have been sufficient under the *Hoffmann-La Roche* doctrine for the Commission to conclude that Qualcomm's conduct could have exclusionary effects. However, the Commission, in its decision, went on to fully analyse the potential of Qualcomm's payments to exert such effects, using quantitative and qualitative evidence, by showing that these payments reduced Apple's incentives to switch to competing LTE chipset suppliers[32] and covered a significant share of the market for LTE chipsets in the period concerned,[33] and that Apple was an attractive customer to LTE chipset suppliers considering its importance for entry and expansion in the global market for LTE chipsets.[34] As opposed to the approach taken by the Court of Justice in *Hoffmann-La Roche*, the Commission's 'more economic' approach no longer regarded the potential exclusionary effects relevant on an abstract level, but instead required it to actually examine the specific capability of the dominant undertaking's conduct to exert effects in each individual case.

2.3 VARIETY 3: THE UNION COURTS' RECENT CASE LAW

The Court of Justice's more recent case law brought forth a third variety of an effects-based approach, located somewhere between *Hoffmann-La Roche*'s conduct-based presumptions and the Commission's self-commitment to assess effects individually in each case. The story of this third variety begins 6 September 2017, when the Court of Justice, supposedly in an attempt to 'clarify' the older case law,[35] significantly modified *Hoffmann-La Roche*'s presumption regarding rebate schemes in its first judgment in the *Intel* saga. Intel had argued that the finding of the capability to exert effects would require 'an examination of all the circumstances, including the level of the rebates in question, their duration, the market shares concerned, the needs of customers and the capability of the rebates to foreclose an as efficient competitor'.[36] Against this background, the Court of Justice held that if the dominant undertaking submits during the administrative procedure, and on the basis of supporting evidence, that its conduct was not capable of restricting competition, the

[29] See Commission Decision in *Intel* (n 28) recitals 1154, 1281, 1406, 1456, 1507, 1573. While the Commission stated in the decision that it was not obligated to carry out an 'as efficient competitor test' (recital 925), this test ultimately was the Commission's main source of finding the alleged foreclosure, see Rohner (n 27) 118.
[30] On the Commission's assessment in this case, see also Massimiliano Kadar, 'Article 102 and Exclusivity Rebates in a Post-Intel World' (2019) 10(7) Journal of European Competition Law & Practice 439, 444-445.
[31] *Qualcomm (Exclusivity payments)* (Case AT.40220) Commission Decision of 24 January 2018, recitals 395-400.
[32] ibid recitals 412-465.
[33] ibid recitals 466-473.
[34] ibid recitals 474-485.
[35] Case C-413/14 P *Intel v Commission (Intel I)* EU:C:2017:632 para 138. In fact, the Court of Justice 'dresses up change as continuity', see Elias Deutscher, 'Causation and counterfactual analysis in abuse of dominance cases' (2023) 19(3) European Competition Journal 481, 517.
[36] See *Intel I* (n 35) para 111.

Commission could no longer rely on the *Hoffmann-La Roche* presumption; rather, the Commission would then have to analyse, inter alia, the extent of the dominant position, the share of the market affected, the duration of the conduct in question and the possible existence of a strategy aiming to exclude competitors.[37] The Court of Justice did not flat out abandon the concept of presumptions, but it did however change their functioning. Now, the dominant undertaking would only have to submit (supported by evidence) that its conduct was not in fact capable of producing the alleged effect in order for the Commission to be obliged to investigate again.

What initially might have looked like a development specific to rebate schemes turned out to be a larger trend. Since *Intel*, the Union Courts have clarified and further specified this case law in a series of judgments. Now, as a general rule, when a dominant undertaking submits, during the administrative procedure and with supporting evidence, that its conduct was not capable of producing exclusionary effects, the Commission[38] is required to examine whether, in the circumstances of case, the conduct in question was indeed capable to do so.[39] The Commission must, then, pay due attention to the arguments submitted by the dominant undertaking, and examine carefully and impartially all the relevant aspects of the individual case, and, in particular, the evidence submitted by that undertaking.[40] This examination must be mirrored in the reasons laid down in the Commission's decision.[41] In particular, the Commission cannot disregard an economic study provided by the dominant undertaking to demonstrate that its conduct is not capable of producing effects, without setting out the reasons why it considers the study to be irrelevant to the assessment of the capability of the conduct in question to produce effects, and without giving the dominant undertaking an opportunity to submit additional evidence to replace it.[42] This thought applies similarly to the specific cases of an undertaking submitting an 'as efficient competitor test' showing that its conduct was not capable to foreclose an equally efficient competitor,[43] and an undertaking submitting a counterfactual analysis challenging the Commission's assessment of the causal link between the conduct at issue and its capability to produce effects.[44]

This distinctly differs from the Union Courts' earlier judgments, such as *Hoffmann-La Roche*, in its implementation of an effects-based approach: the effects of the dominant undertaking's conduct are no longer considered at an abstract level on the basis of the type of conduct in question alone. Rather, the effects that conduct has on competition must be examined in concrete terms in each individual case.[45] Having to show the capability

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[37] See *Intel I* (n 35) paras 138-139.

[38] Most of these more recent judgments were preliminary rulings concerning national competition authorities or Courts. However, as the aim of this article is to help understanding the evidentiary law implications of the Commission's Draft Guidelines, I will focus here on proceedings before the Commission.

[39] *Servizio Elettrico Nazionale* (n 11) para 51; *Unilever Italia* (n 24) para 54; *Google Shopping* (n 16) para 265; *Intel II* (n 16) para 330.

[40] *Servizio Elettrico Nazionale* (n 11) para 52; *Unilever Italia* (n 24) para 54. It seems that this is occasionally understood in a way that the Commission would have to examine *all* aspects of the individual case. In fact, the case law limits the obligation of the Commission to examine the *relevant* aspects.

[41] *Intel II* (n 16) para 332.

[42] *Unilever Italia* (n 24) para 55.

[43] ibid para 60.

[44] Case T-612/17 *Google and Alphabet v Commission* EU:T:2021:763 para 379; confirmed by *Google Shopping* (n 16) paras 227-230.

[45] Similarly: Fernando Castillo de la Torre, 'Is the Effects-Based Approach Too Cumbersome?' in Adina Claici, Assimakis Komninos, and Denis Waelbroeck (eds), *The Transformation of EU Competition Law* (Wolters

to produce effects in each individual case opens the possibility of 'rebuttal', i.e. the possibility for a dominant undertaking to bring forward arguments and evidence suggesting that in the present case, its conduct lacked the requisite capability. Importantly, this does not lead to a reversal of the burden of proof regarding the capability of the conduct to produce effects.[46] The burden of proof lies and remains with the Commission.[47] In its judgment in *Google Shopping*, the Court of Justice stated this regarding the causal link between the dominant undertaking's conduct and the capability to produce effects in unusually clear language. The General Court held that, regarding this causal link, a dominant undertaking may bring forward a counterfactual analysis in order to challenge the Commission's assessment.[48] The Court of Justice found that in doing so, the General Court did not reverse the burden of proof borne by the Commission.[49] In other words, a dominant undertaking does not have to show that its conduct was not capable of having exclusionary effects. It is sufficient for the dominant undertaking to merely call into question this capability, supported by evidence.[50]

In the first place, it is for the Commission to plausibly show that a conduct is capable of producing exclusionary effects.[51] Importantly, the case law does not, however, presuppose a finding of actual exclusionary effects by the Commission or the Courts,[52] and it stresses the Commission's ability to rely on different analytical templates[53] when showing the capability of conduct to have exclusionary effects.[54] In doing so, the case law stays far behind the Commission's former self-commitment to show consumer harm and foreclosure effects individually in each case.[55]

Such analytical templates may include the specific legal tests the case law created for certain types of conduct.[56] It is not entirely clear, however, whether these tests will be

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Kluwer 2023) 145, 177, however stressing that the Courts do not provide a clear standard as to the degree of detail of this analysis.

[46] See Schweitzer and de Ridder (n 1) 237; similarly, Castillo de la Torre (n 45) 177-178.

[47] Regulation 1/2003 (n 2) Article 2; *Intel II* (n 16) para 328.

[48] *Google and Alphabet* (n 44) para 379.

[49] *Google Shopping* (n 16) para 228.

[50] The Commission has phrased this as a 'reversal of the evidentiary burden of proof', i.e. the burden to produce arguments and evidence, see European Union, 'The Standard and the Burden of Proof in Competition Law Cases' (OECD Best Practice Roundtable on the standard and burden of proof in competition law cases, 5 December 2024), para 83 <https://www.oecd.org/en/events/2024/12/the-standard-and-burden-of-proof-in-competition-law-cases.html> accessed 1 September 2025. This is opposed to the 'legal burden of proof', i.e. which party bears the risk of losing if a certain requirement is not shown to the full conviction of the Court.

[51] This follows from Article 2 of Regulation 1/2003 (n 2) and has been explicitly stated by the Court of Justice in *Intel II* (n 16) para 328.

[52] *Servizio Elettrico Nazionale* (n 11) para 53: 'The purpose of Article 102 TFEU is to penalise abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, irrespective of whether such practice has proved successful'. In the same vein: *Unilever Italia* (n 24) para 41; *Intel II* (n 16) para 176.

[53] This is most probably what the Draft Guidelines refer to when the state that 'the case-law has developed tools which can be broadly described and conceptualised […] as "presumptions"', see Draft Guidelines (n 7) fn 131.

[54] *Unilever Italia* (n 24) para 44; *European Superleague* (n 13) para 130; *Google Shopping* (n 16) para 166.

[55] The German Federal Ministry of Economic Affairs and Climate Action welcomes this 'attempt to move away from the more economic approach in individual cases to an approach with economically informed rules', see 'Contribution to the Commission's consultation on the draft Guidelines on exclusionary abuses of dominance', 2 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025.

[56] Castillo de la Torre (n 45) 177; Pauer (n 23) 124.

sufficient in and of themselves for the Commission to reach the conclusion that certain conduct is capable of producing effects. Looking at the origin of the Court of Justice's recent case law on the need to analyse effects in the individual case in *Intel*, one could assume that the older analytical templates developed by the Union Courts suffice to find the capability to produce effects in the first place: The Court of Justice refers to the handling of rebate schemes under *Hoffmann-La Roche*, and subsequently only sees reason to 'clarify' this jurisprudence regarding the case where the undertaking concerned submits that its conduct was not in fact capable of restricting competition. Only in that specific case would it be for the Commission to examine more specifically the market and conduct in question, going beyond the *Hoffmann-La Roche* test for exclusive dealing.[57]

In later judgments, however, the Court of Justice is less cautious in its phrasing. In *Unilever Italia*, it found that 'it is for the competition authorities to demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question', which would include, but apparently not be exhaustive of, the circumstances highlighted in defence by the dominant undertaking.[58] The demonstration of the capability to produce effects 'must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects',[59] and while the Commission may rely on 'guidance from economic sciences', it would also be obligated to contextualize this guidance by considering other factors specific to the circumstances of the case, such as the extent of the conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the dominant undertaking is an inevitable trading partner.[60] This approach seems to be adopted by the Court of Justice in all of its recent jurisprudence on the matter.[61]

3 INTERMEZZO: WATCHING THE 'MORE ECONOMIC' APPROACH DIE

Following up on this case law, the Commission's Draft Guidelines now introduce two concepts of presumptions as the next step in the struggle for the evidentiary law standard to assess an allegedly abusive conduct's effects. To understand their relevance from the Commission's point of view, we have to bear in mind the seismic consequences this struggle has already had in the past years. Not only has the Commission's effort to analyse effects in each individual case itself led to more and more prolonged administrative proceedings, but the mixture between this effort by the Commission on the one hand and the Courts setting up a new framework of evidentiary law on the other hand, both happening at the same time, demanded considerable sacrifices. Namely, these sacrifices from the Commission's point of view were *Intel* and *Qualcomm (Exclusivity payments)*. The prohibition

[57] *Intel I* (n 35) paras 137-139.
[58] *Unilever Italia* (n 24) para 40.
[59] ibid para 42.
[60] ibid para 44.
[61] In *European Superleague*, the Court of Justice held that, even when using an analytical template in assessing an allegedly abusive behaviour, this assessment must be carried out 'in the light of all the relevant factual circumstances' and 'on the basis of specific, tangible points of analysis and evidence' concerning the conduct, the market in question, and the functioning of competition on that market, see *European Superleague* (n 13) para 130. The Court of Justice most recently reiterated this formulation in *Google Shopping* (n 16) para 166; and *Intel II* (n 16) para 179.

decisions in both of these cases[62] were ultimately annulled by the Union Courts, both largely on grounds of the effects analysis being carried out erroneously.

In its second judgment in the *Intel* saga, the General Court, after holding the 'as efficient competitor test' relevant for the assessment of the capability to produce effects where it is in fact carried out,[63] extensively analysed the 'as efficient competitor test' conducted by the Commission and found that it was 'vitiated by errors'.[64] The technical errors the General Court found in the Commission's assessment of the 'as efficient competitor test' mainly related to the use of a misleading value in calculating the contestable share of the market and to an extrapolation of results from a short period of time to the entire period of the alleged infringement.[65] Therefore, given Intel's submission that the rebates were not capable of foreclosing an equally efficient competitor, the Commission was not in a position to hold that the conduct at issue was capable of having anti-competitive effects.[66] The General Court consequently annulled the *Intel* prohibition decision, with the Commission's appeal before the Court of Justice ultimately remaining unsuccessful.[67]

Upon Qualcomm's challenge, the General Court also annulled the Commission decision in *Qualcomm (Exclusivity payments)*, on procedural[68] and substantive grounds. On substantive grounds, the General Court essentially found that in the absence of a competitor even capable of meeting Apple's technical requirements, the exclusivity payments could not incentivize Apple not to switch to a competitor,[69] which has been a core element of the Commission's assessment of effects in that case.[70]

4 THE TWO CONCEPTS OF PRESUMPTIONS

Against this background, the Commission's Draft Guidelines on exclusionary abuses, with their two concepts of presumptions, aim at easing the requirements for the effects analysis in certain cases and in accordance with the judgments issued by the Court of Justice. Based on the much-repeated *Hoffmann-La Roche* formula, the Draft Guidelines base their general approach to the concept of abuse under Article 102 TFEU on two pillars: a deviation of the conduct from competition on the merits and a capability of the conduct to have exclusionary

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[62] See on these above Section 2.2.
[63] Case T-286/09 RENV *Intel Corporation v Commission* EU:T:2022:19 para 126.
[64] ibid para 482.
[65] In detail, see Miroslava Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' (2022) 7(2) European Papers 627, 632-633; Martin Toskov, 'Intel Renvoi: The General Court Sets a Course to Steer the EU Through Troubled Waters' (2023) 7(2) European Competition & Regulatory Law Review 125, 127, each with references to the judgment.
[66] *Intel Renvoi* (n 63) para 526.
[67] See *Intel II* (n 16).
[68] For an overview, see Anton Gerber, 'Qualcomm: Numerous Procedural and Substantive Shortcomings Lead to Spectacular Commission Defeat' (2023) 7(3) European Competition & Regulatory Law Review 183, 185 with references to the judgment.
[69] Case T-235/18 *Qualcomm v Commission (Qualcomm – exclusivity payments)* EU:T:2022:358 para 412. Seemingly approving of this, Dirk Auer and Lazar Radic, 'The Growing Legacy of Intel' (2023) 14(1) Journal of European Competition Law & Practice 15, 17. The judgment's somewhat strange unconditional commitment to the 'as efficient competitor' standard and its apparent misunderstanding of the fact that Article 102 TFEU seeks to prohibit the mere risk of distorted competition that comes with certain conduct have been righteously criticized from various perspectives, see Deutscher (n 35) throughout; Gerber (n 68) 187-188; Pauer (n 23) 118-119; Andreas Heinemann, 'Wettbewerbsrecht: Keine Geldstrafe gegen den Chiphersteller Qualcomm' [2022] Europäische Zeitschrift für Wirtschaftsrecht 648, 662.
[70] See Commission Decision in *Qualcomm (Exclusivity Payments)* (n 31) recitals 412-465.

effects.[71] The presumptions I study in this article concern the second of these pillars, i.e. the capability of the conduct to have exclusionary effects.

In paragraph 60 of the Draft Guidelines, the Commission sets out three different legal scenarios in which the dominant undertaking's conduct is capable of having exclusionary effects. Firstly, the capability to have effects is presumed if one of the specific legal tests developed by the case law for certain conduct due to their typically high potential to produce exclusionary effects is met.[72] Secondly, the capability to have effects is presumed in cases of naked restrictions, i.e. if the dominant undertaking's conduct has no economic sense other than restricting competition.[73] And thirdly, in the absence of one of these two cases, the Commission has to assess the capability of the conduct to have exclusionary effects in the individual case, based on specific, tangible points of analysis and evidence.[74] The two concepts of presumptions each follow their own rationale and rules, that I will study in the following.

4.1 PRESUMPTIONS IN CASES OF SPECIFIC LEGAL TESTS

According to paragraph 60b of the Draft Guidelines, a presumption of the conduct's capability to produce effects applies if one of the specific legal tests is met which the Union Courts have set up for certain types of conduct, namely exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeeze (in the presence of negative spreads) and certain forms of tying.

The Draft Guidelines make it clear that for these types of conduct the capability to have effects is presumed based on the general recognition of their respective high potential to produce exclusionary effects.[75] In other words, economically informed experience suggests that, if certain more easily observable conditions are met, there is typically some capability to produce exclusionary effects. Given this empirical link between the set of facts and the relevant capability, it is only logical to consider an abbreviated analysis of effects to be sufficient at first.[76] Of course, the assessment of these empirical correlations and the observations of such 'typical' scenarios is an inherently economic task, which shows that the use of presumptions does not render the enforcement of the competition rules economically uninformed. Rather, it merely changes the way in which we translate economic insights into law.

This rationale, based on the 'typicality' of certain types of conduct, immediately brings with it the possibility for an undertaking to argue that the case in question lacks this typicality. Since the presumptions follow from empirical reasoning, there is no point to uphold them in cases which withstand the underlying empirical logic. For example, if an undertaking that allegedly entered into abusive exclusivity agreements asserts, based on tangible evidence, that the conduct in question was not capable of foreclosing an equally efficient competitor, that is, in principle, questioning the underlying rationale. If an equally efficient competitor can

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[71] Draft Guidelines (n 7) para 45. See on this framework, Schweitzer and de Ridder (n 1) 228-234.
[72] Draft Guidelines (n 7) para 60b. See below Sections 4.1; 5.1.
[73] Draft Guidelines (n 7) para 60c. See below Sections 4.2, 5.2-5.3.
[74] Draft Guidelines (n 7) para 60a. For the facts that may be relevant in this assessment, see Draft Guidelines (n 7) paras 68-75.
[75] ibid para 60b.
[76] See, on all this, conceptually, Schweitzer and de Ridder (n 1) 236.

still compete, the exclusivity agreement might neither deprive the customer of its choice, nor deny competitors access to the relevant market. That does not mean that an abusive capability to have exclusionary effects is ruled out per se, but such capability must, absent typicality of the case in question, be set out and proven in detail.

The mechanism for the 'rebuttal' of this presumption by the dominant undertaking shows that the Commission's concept of presumptions is strongly based on recent case law of the Union Courts on the admissibility of analytical shortcuts and submissions by the dominant undertaking. A dominant undertaking can 'rebut' the presumption by submitting, on the basis of supporting evidence, that its conduct was not capable of having exclusionary effects.[77] As an example of such a submission, the Draft Guidelines cite the case in which a dominant undertaking would show that the circumstances of the case at hand differ substantially from the assumptions underlying the presumption, to the point where any exclusionary effect is purely hypothetical.[78] Additionally, the case law includes cases in which an undertaking submits an 'as efficient competitor test' showing that its conduct was not capable to foreclose an equally efficient competitor,[79] or a counterfactual analysis challenging the Commission's assessment of the causal link between the conduct at issue and its capability to produce effects.[80]

This submission by the dominant undertaking thus is the basis for the Commission's further assessment. The Commission examines the undertaking's submission, or, in other words: '[t]he submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission's examination obligation'.[81] So, while the burden of proof regarding the capability to produce effects is not at all moved away from the Commission,[82] the presumption is narrowing the way for the Commission to prove said capability. To come to the conclusion that the dominant undertaking's conduct is capable of having exclusionary effects, the Commission can either show that the submission by the dominant undertaking is not sufficient to call into question the presumption, or it can provide additional evidence – based on the submission of the dominant undertaking – that shows

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[77] Draft Guidelines (n 7) para 60b with references to the case law.
[78] ibid para 60b.
[79] *Unilever Italia* (n 24) para 60.
[80] *Google and Alphabet* (n 44) para 379; confirmed by *Google Shopping* (n 16) paras 227-230.
[81] Draft Guidelines (n 7) para 60b. Critically regarding the incentives created for the dominant undertaking to 'flood' (original German: 'überschwemmen') the Commission with submissions, see Carsten König, 'Praktikabilität durch Vermutungen?' [2024] Neue Zeitschrift für Kartellrecht 485, 486.
[82] This mechanism has repeatedly been misinterpreted in the sense that it would – contrary to what the Draft Guidelines, in accordance with the settled case law, state – bestow upon the dominant undertaking the burden of proof regarding the rebuttal. See, for an illustrious example, Akman, Fumagalli, and Motta (n 10) 9. Akman, Fumagalli & Motta have even suggested that the presumptions might *de facto* be irrebuttable (p 9). This suggestion seems quite far off, given the burden of proof lies and remains with the Commission throughout the process, both according to the case law and according to the Draft Guidelines.
The American Bar Association's Antitrust Law and International Law Sections have submitted that this should be made explicit in the final guidelines, see 'Comments of the American Bar Association Antitrust Law Section and International Law Section on the European Commission's Draft Exclusionary Abuse Guidelines', 6 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025; similarly the Austrian Federal Ministry of Labour and Economy, 'Stellungnahme des Österreichischen Bundesministeriums für Arbeit und Wirtschaft zum Entwurf einer Mitteilung der Europäischen Kommission "Leitlinien für die Anwendung von Artikel 102 des Vertrags über die Arbeitsweise der Europäischen Union auf Fälle von Behinderungsmissbrauch durch marktbeherrschende Unternehmen"', 7-8 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025.

the capability of the relevant conduct to exert effects. Even in this second case, the presumption continues to carry at least some evidentiary weight.[83]

For exclusive dealing and exclusivity rebates, the Draft Guidelines include a list of specific factors to be assessed in the case of a 'rebuttal' of the presumption: The extent of the dominant position, the share of the market affected by the conduct, the conditions of the exclusivity agreement, such as their duration, and the possible strategy aimed at excluding a competitor.[84] This may be laid down in the part of the Draft Guidelines specifying exclusive dealing, considering that the examples stem from cases regarding exclusivity agreements,[85] yet most of these facts seem of general interest beyond such cases.[86] At least the extent of the dominant position and the possibility of a strategy to exclude competitors have been recognized relevant for other types of conduct, too.[87]

At first glance, the benefit of such a mechanism from the perspective of the Commission and the public interest in an effective enforcement of Article 102 TFEU might seem small.[88] A look at how the mechanism could work out in practice proves this impression wrong: an example from the Commission's decisional practice heretofore can, again, be found in its *Qualcomm (Exclusivity payments)* case.[89] Arguing that its conduct was not capable of producing any exclusionary effect, Qualcomm submitted an 'as efficient competitor test' meaning to show that a competitor equally efficient to Qualcomm could have covered the relevant costs to poach Apple despite the exclusivity payments, had Apple made the choice to switch to them.[90] The Commission concluded Qualcomm's test to be insufficient to call into question the 'presumption' as it was based on 'unrealistic or incorrect assumptions', such as unrealistically low costs an equally efficient competitor had to bear, or the fact that the contestable share of Apple's LTE chipset requirements was in fact smaller than assumed in the test.[91] If we consider only the scope of the Commission's assessment of the 'as efficient competitor test' as measured in pages of the Commission's prohibition decision, we find that

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[83] Draft Guidelines (n 7) para 60b.
[84] ibid para 83 with references to the case law.
[85] See *Intel I* (n 35) paras 138-139; *Unilever Italia* (n 24) para 48; *Intel II* (n 16) para 331.
[86] However, some cautiousness is appropriate in applying any of said criteria to other types of conduct, given that, for predatory pricing, the General Court has explicitly held the market coverage of the conduct irrelevant for an effects assessment in Case T-671/19 *Qualcomm v Commission (Qualcomm – predation)* EU:T:2024:626 para 522.
[87] See *Google Shopping* (n 16) para 265.
[88] Magali Eben and David Reader, 'Response to European Commission Consultation on Draft Guidelines on the application of Article 102 TFEU to exclusionary abuses of dominance', 7 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025; Assimakis Komninos, "'J'accuse!" – Four Deadly Sins of the Commission's Draft Guidelines on Exclusionary Abuses' (*Network Law Review*, 30 August 2024) <https://www.networklawreview.org/komninos-guidelines/> accessed 1 September 2025: 'a very weak presumption, whose practical value for public enforcement is minimal'. Similarly: Miroslava Marinova, 'Reply to the European Commission Public Consultation on the Draft Guidelines on the Application of Article 102 TFEU to Exclusionary Abuses', para 4.15 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025, who suggests that the Commission sets out clear cases in which it will not accept a rebuttal via an 'as efficient competitor test'.
[89] For the facts of the case, see above Section 2.2.
[90] Commission Decision in *Qualcomm (Exclusivity Payments)* (n 31) recital 487. See also, Kadar, 'Article 102 and Exclusivity Rebates in a Post-Intel World' (n 30) 445; Romana Hajnovicova, Ngoc-Lan Lang, and Andrea Usai, 'Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel' (2019) 10(3) Journal of European Competition Law & Practice 141, 147-148.
[91] Commission Decision in *Qualcomm (Exclusivity Payments)* (n 31) recitals 490-503.

in this case, the Commission discusses Qualcomm's submission in merely five pages. In *Intel*, on the other hand, where the Commission carried out the test itself, this takes up 151 pages. It has been estimated that conducting this test alone took the Commission two years.[92] This comparison may be shallow, but it certainly is useful as an exemplary indicator of the complexity of the Commission's assessment. It shows that the Commission's ability to rely on analytical shortcuts initially and only assess an undertaking's submissions instead of fully analysing the capability to produce effects in each case considerably facilitates the proceedings from the Commission's perspective.[93]

4.2 PRESUMPTIONS IN CASES OF NAKED RESTRICTIONS

According to paragraph 60c of the Draft Guidelines, a presumption of the conduct's capability to produce exclusionary effects also applies to naked restrictions, i.e. types of conduct that have no economic interest for the dominant undertaking, other than that of restricting competition. As examples, the Draft Guidelines list payments by a dominant undertaking to customers that are conditional upon the customers postponing or cancelling the launch of products featuring products offered by the dominant undertaking's competitor, agreements obligating distributors to swap a competing product with the dominant undertaking's product under threats to withdraw discounts and the dismantling by the dominant undertaking of infrastructure used by its competitors.

The presumption in cases of naked restrictions differs significantly from the presumption in cases of specific legal tests, originating in the underlying rationale, that is more normative than empirical.[94] The concept of naked restrictions refers to conduct by dominant undertakings that has no economic sense other than excluding competitors, and can therefore be described as inherently improper. A case that has been described as 'perhaps the most blatant abuse that the European Commission has ever considered'[95] is *Baltic Rail*:[96] In the wake of losing a customer to a competitor, the dominant undertaking dismantled a piece of railroad infrastructure, thereby making its competitor's offer impossible.

While there is broad agreement on the fact that this is a case that hits the very core of the concept of an abuse under Article 102 TFEU,[97] the underlying 'no economic sense' rationale does not provide enforcement with an empirical typicality to lead to exclusionary

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[92] See Wouter Wils, 'The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance' (2014) 37(4) World Competition 405, 431.
[93] See also Pauer (n 23) 123-124 with further references.
[94] However, naked restrictions do as well follow a partially empirical rationale, see Schweitzer and de Ridder (n 1) 239. For the fitting example of predatory pricing below AVC, see below Section 5.2.
[95] Pablo Ibáñez Colomo, 'GC Judgment in Case T-814/17, Lithuanian Railways—Part I: object and indispensability' (*Chillin'Competition*, 1 December 2020) <https://chillingcompetition.com/2020/12/01/gc-judgment-in-case-t%E2%80%91814-17-lithuanian-railways-part-i-object-and-indispensability/> accessed 1 September 2025.
[96] *Baltic Rail* (Case AT.39813) Commission Decision of 2 October 2017. See, in more detail, below Section 5.3[b].
[97] See Michele Giannino, 'Lithuanian Railways: The Court of Justice Narrows Down the Scope of Application of the Doctrine of Essential Facilities' (2023) 7(4) European Competition and Regulatory Law Review 260, 263; Massimiliano Kadar, Johannes Holzwarth, and Virgilio Pereira, 'Abuse of Dominance under Article 102 TFEU: a Survey on 2023' (2024) 15 Journal of European Competition Law & Practice 278, 281; Ibáñez Colomo, 'GC Judgment in Case T-814/17' (n 95); Niamh Dunne, 'Dispensing with Indispensability' (2020) 16(1) Journal of Competition Law & Economics 74, 102: 'absurdist proportions'.

effects, as required for the above type of presumptions.[98] Rather, conduct is prohibited because it does not come with the rationale of profit maximization through superior performance, as is an integral part of normal competition.[99] Such behaviour is not worth protecting: In this sort of 'clear cut' abuse cases that lack any pro-competitive and thus socially valuable rationale, the social costs of a falsely positive prohibition decision are drastically reduced. It is suitable in these situations to presume the capability of the conduct to produce exclusionary effects.

This different rationale has implications on the functioning of the presumption, as well, especially concerning the possibility of rebuttal. According to the Draft Guidelines, the dominant undertaking can prove that its conduct was not capable of having exclusionary effects only 'in very exceptional cases',[100] but there apparently remains room for the presumption to be rebutted. The draft is silent on what would be required for such a rebuttal. Given the normative rather than empirical reasoning underlying the presumption, the logic of presumptions in cases of specific legal tests cannot be applied to naked restrictions. If it is not the typical capability to exert effects in certain circumstances that triggers the presumption, there is no point in giving the dominant undertaking the chance to submit that the case in question lacks such typicality.

The dominant undertaking would thus, to rebut the presumption, have to prove that its conduct – even though lacking any pro-competitive rationale – was not in fact capable of producing exclusionary effects. In other words, the presumption in cases of naked restrictions amounts to a full reversal of the burden of proof regarding the conduct's capability to have effects. In not having an authority's possibilities to investigate the relevant facts, especially garnering the immense amount of information required about the market conditions, establishing such a lacking capability to have effects to the full conviction of the Court presents a dominant undertaking with insurmountable challenges.[101] Contrary to the wording of the Draft Guidelines, the presumption in cases of naked restrictions is not rebuttable only 'in very exceptional cases', but it is *de facto* irrebuttable.[102]

That it is irrebuttable does not in itself render such a presumption generally inadmissible. The Court of Justice previously held that it lies within the special responsibility

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[98] As Gregory J Werden puts it in 'Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test' (2006) 73(2) Antitrust Law Journal 413, 417: 'The test [the "no economic sense test"] does not condemn conduct undertaken because of an unreasonable belief that the conduct would have an exclusionary effect. […] But exclusionary conduct is condemned even if the decision maker's rationale for undertaking the conduct was not profit maximization: Burning down a rival's factory is exclusionary conduct even if the defendant is a pyromaniac and never considers the economic benefits of the conduct'.

[99] The presumption in cases of naked restrictions also shows how the two pillars of the abuse test are intertwined: Where conduct has no economic sense but exclusion, this deviates most thoroughly from normal competition and, in turn, the requirements to show a capability to produce effects are lowered. Although the Draft Guidelines do not make it explicit, their wording is generally open to apply this logic beyond the cases of presumptions as well. If neither 'no economic sense' nor a specific legal test apply, the finding of an abuse ultimately comes down to an interplay between the two pillars.

[100] Draft Guidelines (n 7) para 60c.

[101] See, to that respect, Schweitzer and de Ridder (n 1) 236; John M Taladay, 'The use of presumptions in antitrust enforcement and jurisprudence' (2024) 4 Concurrences 30, paras 59-60.

[102] For a different point of view, see Pablo Ibáñez Colomo, 'On the Article 102 TFEU Guidelines (II): 'naked restrictions' (or 'by object' abuses)' (*Chillin'Competition*, 19 November 2024) <https://chillingcompetition.com/2024/11/19/on-the-article-102-tfeu-guidelines-ii-naked-restrictions-or-by-object-abuses/> accessed 1 September 2025, who sees room for a rebuttal in cases where there are 'no real and concrete possibilities' of entry in the market concerned.

borne by an undertaking in a dominant position not to engage in practices the implementation of which holds no economic interest other than eliminating competitors, and that such practices are inherently at odds with competition on the merits.[103] Under certain circumstances, such a deviation from competition on the merits alone may be sufficient to establish an abuse according to the case law,[104] which most likely refers to a finding of 'no economic sense'.[105] To prevent the finding of an abuse, an undertaking can of course argue that its allegedly 'naked' conduct in fact comes with some pro-competitive rationale in the circumstances of the specific case, i.e. that the 'no economic sense test' triggering the presumption is not met in the first place.[106] Also, an undertaking engaging in naked restrictions can still resort to showing that its conduct is objectively justified.[107] In contrast, the fact that a presumption is irrebuttable is of considerable value to the workability of public enforcement. Where the 'no economic sense test' is fulfilled, the Commission can skip the analysis of effects altogether and reach a prohibition decision faster. However, these considerations call for particular caution in the application of the presumption in cases of naked restrictions and especially for a thorough examination of the underlying 'no economic sense test' in each individual case.[108]

5 THE RELEVANT TESTS TO TRIGGER THE PRESUMPTIONS

To trigger one of the presumptions from the Draft Guidelines, the Commission either has to establish the conditions of the respective legal test the case law has developed for the type of conduct at hand (para 60b) or find that the dominant undertaking's conduct has no economic interest for that undertaking, other than that of restricting competition (para 60c). In the following sections, I will study these different tests in an attempt to highlight certain ambiguities that remain when applying them, starting with the 'specific legal tests' from the past case law and continuing with the 'no economic sense test' and its application to price-based and non-price-based conduct.

5.1 THE SPECIFIC LEGAL TESTS FOR CERTAIN TYPES OF CONDUCT

The presumption in cases of specific legal tests applies to four types of conduct: Exclusive dealing (including exclusivity rebates);[109] predatory pricing above average variable costs

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[103] *Servizio Elettrico Nazionale* (n 11) para 77. See Draft Guidelines (n 7) para 54.
[104] *Unilever Italia* (n 24) para 57.
[105] This shows, again, the intertwining of the effects analysis and the assessment of a deviation from competition on the merits, see above n 99.
[106] See on the details of the 'no economic sense test' below at Sections 5.2-5.3.
[107] Draft Guidelines (n 7) para 60c. Highlighting the potentially unlimited possibilities for such an objective justification, see Gregory J Werden, 'Comments of Gregory J. Werden on Draft Article 102 Guidelines' (*SSRN*, 5 September 2024), para 56 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4946326> accessed 1 September 2025.
[108] See on the details of that test, below Sections 5.2-5.3. To not provoke an all to cautious application, Giorgio Monti seems sceptical of understanding para 60c as an irrebuttable presumption, see 'Comments on "Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings"', para 33, <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025.
[109] Draft Guidelines (n 7) para 78 with references to *Hoffmann-La Roche* (n 15) para 89; *Intel I* (n 35) para 137. It is also sufficient to show that a different obligation, e.g. a stocking or volume requirement, is de facto

(AVC) or average avoidable costs (AAC), yet below average total costs (ATC) or long-run average incremental costs (LRAIC), that is part of a plan to eliminate or reduce competition;[110] margin squeeze, if the price-cost-test shows that the spread between the upstream and downstream prices is negative;[111] and 'certain forms' of tying.

For tying, the Draft Guidelines remain particularly blurry on where to draw the line to presume the capability to produce effects. In accordance with the case law, the tying and tied products must be two separate products, the undertaking concerned must be dominant in the market for the tying product and it must not give customers a choice to obtain the tying product without the tied product.[112] In addition, to trigger the presumption, it must 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, which is the case especially 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.[113] This is all but a clear standard.[114] Therefore, it can only really be assumed for typical, straightforward cases of tying having an obvious effect of leveraging.

In contrast, the Draft Guidelines state two cases in which the presumption could not in any way apply: when the tied product is available for free and when it is easy to obtain alternatives to the tied product.[115] In these cases, the customers are realistically not deprived

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playing out to be an exclusivity agreement, see Draft Guidelines (n 7) paras 79 and 81 with references to the case law.

[110] Draft Guidelines (n 7) para 111b with references to the case law, especially Case C-62/86 *AKZO v Commission* EU:C:1991:286 para 72. If the prices charged by the dominant undertaking are below AVC or AAC, the undertaking 'is presumed to pursue no economic objective other than eliminating its competitors', see Draft Guidelines (n 7) para 111a with references to the case law, especially Case C-62/86 *AKZO v Commission* EU:C:1991:286 para 71. Consequently, in the system of the Draft Guidelines, such behaviour is a naked restriction and subject to the second category of presumptions (contrary to what the Draft Guidelines state in para 112), see also Pablo Ibáñez Colomo, 'Draft Guidelines on exclusionary abuses: comments', slide 11 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025. In more detail, see below Section 5.2.

If the costs are above AVC or AAC, yet below ATC or LRAIC, the low-pricing strategy is not a naked restriction, because it can in fact have a pro-competitive rationale: under these circumstances, an equally efficient competitor could still compete with the dominant undertaking without suffering losses unsustainable in the long run, making it possible for the dominant undertaking's strategy to be desired price competition instead of an abusive exclusionary strategy. See, to that respect, Case C-209/10 *Post Danmark* EU:C:2012:172 para 38. See further on this below Section 5.2. Considering a dominant undertaking's potentially higher financial resources compared to equally efficient competitors, such conduct still comes with a high potential to foreclose these competitors, see Case C-62/86 *AKZO v Commission* EU:C:1991:286 para 72.

[111] Draft Guidelines (n 7) para 122a-b, read in conjunction with paras 124 and 128. If the spread is negative, there is no need to further examine the capability to produce effects in the first place, according to para 128, as then the presumption is triggered. This differentiation in the handling between margin squeeze in the presence of negative spreads and margin squeeze in the presence of positive spreads is firmly grounded in the case law: The Court of Justice held in *TeliaSonera* that if the spread is negative, i.e. the wholesale price for an input service is higher than the retail price for the service to the end user, even equally efficient competitors are probably excluded as they will want to prevent selling at losses; such a probability cannot be detected in a situation where the spread is positive, see Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83 paras 73-74.

[112] Draft Guidelines (n 7) para 89 with references to Case T-604/18 *Google and Alphabet v Commission (Google Android)* EU:T:2022:541 para 284; Case T-201/04 *Microsoft v Commission* EU:T:2007:289 paras 842, 859, 862, 864, 867, 869, 1144-1167.

[113] Draft Guidelines (n 7) para 95 and especially fn 233 with references to Case T-30/89 *Hilti v Commission* EU:T:1991:70; Case T-83/91 *Tetra Pak International v Commission* EU:T:1994:246.

[114] This is also a point of critique for the Austrian Federal Ministry of Labour and Economy (n 82) 8.

[115] Draft Guidelines (n 7) para 95 with references to the case law.

of their choice in the first place, making it necessary to take a closer look at the circumstances of the individual case to assess whether the conduct could nevertheless lead to a leveraging of market power by the dominant undertaking. Factors to include in the examination of the capability of a tying practice to exert effects are whether the dominant undertaking also enjoys dominance on the market for the tied product, the significance of the link between the tying and the tied product (e.g. the complementarity of the products), the presence of barriers to entry in the tied market, the degree of consumer inertia or bias in the tied market,[116] the duration of the conduct[117] and the extent of the tying practice[118] in terms of the share of customers tied. These factors, especially where already known to the Commission, may also be of relevance for triggering the presumption in cases of tying, considering the blurry standard as depicted above. Additionally, in the above cases of 'atypical' tying, given they lack a firm foundation in classical theories of harm, the Commission may, exceptionally, be required to establish actual 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.[119]

In the same vein, there might be reason to consider a broader range of aspects of the individual case when applying the other specific legal tests, too. Not only would it be a better solution policy-wise by ensuring that the public enforcement is based on a dynamic and economically sound and up-to-date reading of the case law.[120] Even more, it could ultimately prove risky for the Commission to rely on legal tests, some of which are quite superficial and derive from decades old case law, considering the newer developments in the Union Courts' jurisprudence.[121] To date, it is not entirely clear if such presumptions based only on the specific legal tests for certain types of conduct will stand up in Court. As pointed out above,[122] in newer judgments, the Court of Justice holds that, even when the Commission relies on analytical templates, the assessment of effects has to be 'made in the light of all the relevant factual circumstances […] on the basis of specific, tangible points of evidence'.[123]

The question arises as to whether the specific legal tests as described above meet the requirements of case law on analytical templates.[124] This is probably true for predatory pricing and margin squeeze: Triggering the presumption in these cases presupposes conducting a price-cost-test anyway, therefore being thoroughly grounded in the peculiarities of the individual case. The situation is rather different regarding exclusive dealing, in which the presumption is triggered on grounds of a fairly superficial and abstract analytical template.

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116 For all these, see Draft Guidelines (n 7) para 94 with references to the case law.
117 ibid para 95 with references to the case law.
118 ibid para 70d.
119 ibid para 95. See, to this respect, also Schweitzer and de Ridder (n 1) 238.
120 Similarly, Pablo Ibáñez Colomo, 'The (Second) Modernisation of Article 102 TFEU' (2023) 14(8) Journal of European Competition Law & Practice 608, 619-620 who speaks of 'proxies' and 'bright lines'. Ultimately in the same vein: Berkeley Research Group, 'Response to the European Commission's public consultation on the Draft Guidelines on the application of Article 102 TFEU to exclusionary conduct', para 38 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 1 September 2025.
121 Harsher: Komninos, '"J'accuse!"' (n 88): 'at variance with existing case law'; Komninos, 'The European Commission's Draft Guidelines on Exclusionary Abuses' (n 10): 'arbitrary and form-based'.
122 Section 2.3.
123 *European Superleague* (n 13) para 130; *Google Shopping* (n 16) para 166; *Intel II* (n 16) para 179. Put differently, but essentially saying the same: *Unilever Italia* (n 24) paras 42, 44.
124 Seemingly favourable of the sufficiency, Castillo de la Torre (n 45) 177.

All it presupposes is the finding of an exclusivity requirement or incentivizing scheme.[125] To avoid failing before the Courts, the Commission should consider widening its first assessment in these cases to (at least some of) the factors it holds relevant for the examination of effects in cases of exclusive dealing. These include the extent of the dominant position, the share of the market affected by the conduct, the conditions of the exclusivity agreement, such as their duration, and the possible strategy aimed at excluding a competitor.[126]

5.2 PRICE-BASED NAKED RESTRICTIONS: PREDATORY PRICING BELOW AVC

The presumption in cases of naked restrictions in turn presupposes a finding that the dominant undertaking's conduct has no economic interest for that undertaking, other than that of restricting competition. Under this test, any pro-competitive rationale suffices to eliminate the presumption from the game.[127] Accordingly, the Commission lists only three examples of possible naked restrictions, and has in fact been even more cautious in its previous decisional practice, with the *Intel* case being the only example of the Commission actually relying on the concept of naked restrictions to find an abuse. A manifest differentiation must be made in this regard between price-based conduct and other types of conduct by dominant undertakings.

This differentiation helps operationalizing the 'no economic sense test', as conduct by a dominant undertaking concerning the pricing of its products and services will typically come with the possibility of a pro-competitive rationale to support it and thus fail the test. As prices are the most standard parameter of competition, the freedom of an undertaking to unilaterally set its prices according to its own costs and business strategy generally remains untouched by competition law.[128] In principle, this also applies to below-cost pricing: some of the reasons for which an undertaking may opt for such a strategy are not particularly probable in cases of dominant undertakings,[129] but it may nevertheless be rational for dominant undertakings under certain circumstances, such as where the pricing strategy is built upon the complementarity of products.[130] Even without complementarity in a technical sense, it may still be rational for the dominant undertaking to sell certain products below

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[125] See Draft Guidelines (n 7) para 78.

[126] See for this, ibid para 83 with references to the case law, as well as the respective sections in para 70. The type of exclusive dealing in question hence can influence the exact scope of the effects analysis: Is it for example 'only' a stocking requirement incentivizing the customer to purchase exclusively from the dominant undertaking, the Commission might want to take a closer look at the conduct and market in question than it would in case of a flat-out formal obligation to exclusively purchase.

[127] See Eric B Rasmusen, J Mark Ramseyer, and John S Wiley Jr, 'Naked Exclusion' (1991) 81(5) The American Economic Review 1137: 'conduct unabashedly meant to exclude rivals, for which no one offers any efficiency justification'. See also Schweitzer and de Ridder (n 1) 239-240 with a discussion of whether the newer case law on restrictions by object under Article 101 TFEU might be significant in modifying this condition.

[128] The same idea calls for caution in applying the concept of exploitative abuses to prices, see Ernst-Joachim Mestmäcker and Heike Schweitzer, *Europäisches Wettbewerbsrecht* (3rd edn, C.H. Beck 2014) 439 with further references.

[129] For example gaining consumers' goodwill is typically not going to be a priority for an already dominant undertaking, see Chiara Fumagalli, Massimo Motta, and Claudio Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (Cambridge University Press 2018) 84.

[130] ibid 85.

costs and cross-finance this with other sales.[131] Another possible explanation for prices below cost includes 'fire sales' of goods that are considered excess or obsolete by the seller.[132]

Price-based conduct may only come with no economic sense for the dominant undertaking except restricting competition under the conditions of the first step of the Union Courts' predatory pricing test. In that regard, the Court of Justice has held in *AKZO* that prices that come below AVC have no economic sense other than eliminating competitors.[133] The above explanations for pricing below costs do not materialise when the prices are even below AVC. In these cases, the conduct in question amounts to a naked restriction.[134]

Given the fact that a price-cost-test needs to be carried out to establish predatory pricing below AVC in the first place, classifying such conduct as a naked restriction may come with limited practical consequences, however. Furthermore, where a price-cost-test indicates prices below AVC, such conduct also tends to be not replicable by an equally efficient competitor and therefore come with a high probability of exclusionary effects. This case blurs the boundaries between the two concepts of presumptions studied in this paper. Yet, even if a dominant undertaking would come forward with arguments and evidence suggesting that in the specific case at hand, its conduct was not capable of producing exclusionary effects (and thereby rebut the probability of effects), this alone is not sufficient to rule out the finding of 'no economic sense' that comes with the observation of prices below AVC.

5.3 OTHER TYPES OF CONDUCT: FROM INTEL TO BALTIC RAIL AND BEYOND

In the realm of non-price-based conduct, the 'no economic sense test' might potentially play a bigger role. For conduct that is not price-based, there cannot be an initial assumption of pro-competitiveness as it is not *prima facie* concerning a parameter of competition. Accordingly, the examples the Draft Guidelines list from the Commission's past decisional practice revolve around non-price-based conduct: payments by a dominant undertaking to customers that are conditional upon the customers postponing or cancelling the launch of products featuring products offered by the dominant undertaking's competitor (modelled after *Intel*), agreements obligating distributors to swap a competing product with the dominant undertaking's under threats to withdraw discounts (modelled after *Irish Sugar*), and the dismantling by the dominant undertaking of infrastructure used by its competitors (modelled after *Baltic Rail*). This list is, of course, not conclusive, as the relevant test stays the

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[131] See, to that respect, the examples at Franz Böhm, *Wettbewerb und Monopolkampf* (Carl Heymanns 1933) 298-300.

[132] In *Qualcomm (predation)*, the dominant undertaking submitted that instead of eliminating a competitor, such 'fire sales' were the explanation for its low pricing strategy, see *Qualcomm (predation)* (n 86) para 585.

[133] *AKZO* (n 110) para 71. For the relation between AVC and AAC, see Draft Guidelines (n 7) para 115.

[134] Pablo Ibáñez Colomo, 'Persistent myths in competition law (V): "there is no such thing as an abuse by object (or by effect) under Article 102 TFEU"' (*Chillin'Competition*, 10 January 2020) <https://chillingcompetition.com/2020/01/10/persistent-myths-in-competition-law-v-there-is-no-such-thing-as-an-abuse-by-object-or-by-effect-under-article-102-tfeu/> accessed 1 September 2025; Pablo Ibáñez Colomo, 'Agree or disagree, abuses "by object" are a thing unless the case law changes' (*Chillin'Competition*, 12 January 2022) <https://chillingcompetition.com/2022/01/12/agree-or-disagree-abuses-by-object-are-a-thing-unless-the-case-law-changes/> accessed 1 September 2025. See to that respect *Qualcomm (predation)* (n 86) para 521: 'there being no need for the Commission to undertake any analysis other than such a comparison of the prices charged by the dominant undertaking and of some of its costs'.

'no economic sense test'. In identifying naked restrictions and in delineating further cases, the examples might prove helpful, however. I will therefore continue by examining the cases underlying the examples and tentatively deducing more general thoughts that might stand behind them.

5.3[a] Intel and Irish Sugar

The relevant part of the *Intel* case was about Intel directing payments towards three OEMs – HP, Acer and Lenovo – for cancelling or delaying the launch of certain products that included its competitor AMD's x86 CPUs.[135] The Commission concluded that it could not 'discern any economic justification in the conducts'.[136] Intel argued that, given AMD's performance, the Commission had not adequately proven the effects of the relevant conduct.[137] The Commission found that not only was it not required to show a foreclosure effect,[138] but it considered its assessment of the actual effect of the conduct in form of cancellation and delays of AMD-based products, depriving customers of a choice they would have otherwise had, sufficient.[139]

The idea might arise that Intel's payments to the OEMs, as it was facing severe competition from AMD, amount to mere 'price competition' and hence are generally excluded from the category of naked restrictions if the overall pricing of Intel's x86 CPUs – taking into account the relevant payments – would not come below AVC. However, this fails to take into account that Intel did in fact not just lower its CPU prices to compete with AMD, but in requiring the OEMs to cancel or delay the commercialization of AMD-based products, it provoked agreements which in and of themselves may defy any pro-competitive rationale. There might be an initial argument to liken Intel's conduct to an 'exclusivity agreement light', as the OEMs did not fully pledge to only purchase from Intel, but rather, agreed just to halt a certain competitor's product. Compared to a situation of exclusivity, however, the classic pro-competitive benefits do not materialize in such conduct; exclusivity agreements may have a pro-competitive rationale because they guarantee long-lasting sales and supply, rendering long-term planning easier feasible and creating economies of scale, and they can contribute to solving hold-up problems.[140] Such explanations do not apply to Intel's conduct at hand, however: the agreement to merely delay the commercialization of a competitor's product does not foster any of the usual reasons brought forward to justify exclusivity agreements. Against this background, a pro-competitive business rationale for such conduct seems, indeed, hard to find. Therefore, the Commission was right to assume that Intel's payments conditional upon its customers postponing or cancelling the launch of products featuring products offered by its competitor

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135 Commission Decision in *Intel* (n 28) recitals 1641 et seq. See also *Intel* (Case AT.37990) Commission Decision of 22 September 2023, in which the Commission re-imposed the fines for naked restrictions, after the original *Intel* decision's suspension by *Intel Renvoi* (n 63) leaving the Commission's reasoning in the uncontested section about naked restrictions untouched.

136 Commission Decision in *Intel* (n 28) recital 1680.

137 ibid recital 1668.

138 ibid recital 1669 with reference to Case T-219/99 *British Airways v Commission* EU:T:2003:343 para 298.

139 Commission Decision in *Intel* (n 28) recital 1670.

140 See Mestmäcker and Schweitzer (n 128) 455; Jonathan M Jacobson and Scott A Sher, '"No Economic Sense" Makes No Sense for Exclusive Dealing' (2006) 73 Antitrust Law Journal 779, 788-790 with further references; Fiona M Scott Morton, 'Contracts that Reference Rivals' (2013) 27(3) Antitrust 72, 75.

amounted to naked restrictions.[141]

In its arguing in the *Intel* case, the Commission heavily relied on its own decision[142] and the judgment of the General Court[143] in *Irish Sugar*. One of the relevant conducts in this case was the so-called 'product swap'. After the commercialization of a competitor's product – the 1 kilogram packet of 'Eurolux' sugar – the dominant undertaking Irish Sugar agreed with one wholesaler and one retailer to exchange its own sugar with Eurolux sugar.[144] Although Irish Sugar claimed that it was due to the insufficient demand for the poorly marketed Eurolux sugar, the Commission found that the goal of the product swap was to prevent Eurolux from gaining any market presence in Ireland[145] and that it resulted in a consolidation of Irish Sugar's almost monopoly position as supplier of sugar in Ireland.[146] Perhaps even more so than in *Intel*, this conduct appears void of any pro-competitive rationale.

5.3[b] Baltic Rail

The case underlying the Commission's decision in *Baltic Rail*[147] epitomizes the concept of an abuse of dominance under Article 102 TFEU to an extent where the facts of the case would be somewhat imaginative or unbelievable, were they not real. The dominant Lithuanian railroad undertaking LG was in the wake of losing a customer in the railway freight business, the producer of refined oil OL, to the Latvian railroad undertaking LDZ.[148] OL transported oil from its refinery in Lithuania to or through Latvia, having contracted LG for the short route from the refinery to the Latvian border, and LDZ for the rest of the way in Latvia. OL wanted to switch from LG to LDZ for the route from its refinery to the Latvian border, and also change is seaborne export business from Lithuanian ports to Latvian ports, transporting the cargo with LDZ. In reaction to these plans, LG dismantled a 19 kilometres piece of railroad that was exclusively used to transport OL's products to Latvia.[149]

Even though the Commission carried out an extensive analysis of effects in this case,[150] it is fairly straightforward to assume that LG's conduct in fact did not have any economic interest but to exclude LDZ and, thus, restrict competition. Therefore, a detailed analysis of effects was obsolete.[151] Before the Courts, LG argued that its dismantling of the tracks amounted to a refusal of access to an essential facility, therefore triggering the application of the *Bronner* criteria to answer the question as to whether LG was obligated under

[141] Similarly, Pauer (n 23) 120-121, speaking of 'prima facie anticompetitiveness'.
[142] *Irish Sugar plc* (Cases IV/34.621, 35.059/F-3) Commission Decision 97/624/EC [1997] OJ L258/1.
[143] Case T-228/97 *Irish Sugar v Commission* EU:T:1999:246.
[144] Commission Decision in *Irish Sugar* (n 142) recital 124.
[145] ibid recital 125.
[146] ibid recital 126. The Commission's reasoning was upheld in *Irish Sugar* (n 143) paras 228-234.
[147] Commission Decision in *Baltic Rail* (n 96); substantially confirmed by Case T-814/17 *Lietuvos geležinkeliai v Commission* EU:T:2020:545 and Case C-42/21 P *Lietuvos geležinkeliai v Commission* EU:C:2023:12.
[148] On the facts of the case, see Commission Decision in *Baltic Rail* (n 96) recitals 16-113.
[149] The Commission nicely illustrates this with a series of somewhat comical photographs of the railroad track in question abruptly ending in the middle of nowhere, see Commission Decision in *Baltic Rail* (n 96) p 25.
[150] See Commission Decision in *Baltic Rail* (n 96) recitals 202-324. In detail, the Commission found that LDZ exerted considerable competitive pressure upon LG prior to the dismantling of the track (recitals 205-284), LDZ was not able to continue exerting competitive pressure after said dismantling (recitals 285-316) and that led to LDZ's foreclosure from the relevant market (recitals 317-324).
[151] Giannino (n 97) 263; Kadar, Holzwarth, and Pereira (n 97) 281.

Article 102 TFEU to grant LDZ access to the respective track.[152] The Court of Justice dismissed the application of the *Bronner* criteria, highlighting the differences between a denial of access and LG's conduct at hand: By destroying the railroad, LG sacrificed an asset, as the track became unusable not only by its competitors, but also by the dominant undertaking itself.[153] As the Court of Justice understands LG's conduct as entailing a sacrifice borne by the dominant undertaking, it likens this conduct to predatory pricing and thereby seems to acknowledge that this conduct is not plausibly explainable except by an exclusionary objective.[154]

5.3[c] Further applying the 'no economic sense test'

Seemingly casuistic at first, this logic of a 'sacrifice' borne by the dominant undertaking may give a first indication on how to apply the 'no economic sense test' beyond the examples given in the Draft Guidelines. Where a practice is not even profitable for the dominant undertaking in the short-run, a closer look must be taken as to whether such conduct comes with any pro-competitive rationale.

Yet more common ground in the three examples from the Draft Guidelines may be found in the reference of the dominant undertaking's conduct to a specific competitor,[155] detached from its own performance. Intel's conduct targeted AMD, Irish Sugar's conduct targeted the Eurolux sugar, and LG's conduct targeted LDZ – three competitors that put the respective dominant undertakings under serious competitive pressure, and three cases in which the dominant undertaking is setting up measures specifically targeting the challenger. Generalizing this idea, if the dominant undertaking is referencing a specific competitor in its conduct, or targeting this competitor with its conduct, this may be another indication that the behaviour – absent the specific competitor's exclusion – does not bear any economic sense. This might include extreme *Baltic Rail*-style cases where a dominant undertaking is destroying a competitor's facilities,[156] or even removing a competitor's products and merchandise from retail stores,[157] but it also might include more subtle *Intel*-style cases of payments or discounts conditional upon some conduct engaging with a competitor.

Since the 'no economic sense test' follows a similar logic as the most clear-cut cases of

[152] See Case C-42/21 P *Lietuvos geležinkeliai v Commission* EU:C:2023:12 paras 62-63.
[153] ibid paras 83-84.
[154] Giannino (n 97) 263. See also Opinion of AG Rantos in Case C-42/21 P *Lietuvos geležinkeliai v Commission* EU:C:2022:537 paras 78-79: 'that behaviour was motivated only by the willingness to harm competitors'.
[155] Generally on the concept of 'contracts that reference rivals', see Scott Morton (n 140). Scott Morton defines this category as 'contracts containing material terms that are contingent not only on the prices or quantities transacted between the parties to the contract, but also on the prices, quantities, or other terms of the relationship between one of the parties and product market rivals of the other'. Examples given by Scott Morton include exclusive dealing, most-favored-nation provisions, meet-or-release provisions and loyalty rebates. See also, Fumagalli and Motta (n 10) 94, deeming 'practices that reference rivals' presumptively unlawful.
[156] See Werden, 'Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test' (n 98) 417.
[157] See for example *Conwood Co., L.P. v U.S. Tobacco Co.*, 290 F 3d 768 (2002). On this, see David T Scheffman and Richard S Higgins, 'Twenty Years of Raising Rivals' Costs: History, Assessment, and Future' (2003) 12 George Mason Law Review 371, 385-387.

a deviation from competition on the merits,[158] the facts which the Commission holds relevant for an assessment of said deviation may as well play a role.[159] Especially the cases in which an undertaking provides misleading information to administrative or judicial authorities, or misuses regulatory procedures,[160] and whether the undertaking violates rules in other areas of law thereby affecting relevant parameters of competition[161] may provide important clues on the rationale pursued by that undertaking and hence, whether the conduct can be explained as pro-competitive.

Such aspects may be the first step for the Commission in the assessment of the 'no economic sense test', but there still is need to properly assess each individual case of unilateral conduct, contextualized by the undertakings and markets in question as well as the rationale of said conduct, against the standard of the 'no economic sense test'. When taking the aspects from above into account, there are essentially two scenarios in which the limitations of such considerations become apparent.

In the first scenario, the aspects laid out above apply to certain conduct that is well-known to come with a pro-competitive explanation. In these cases, the Commission cannot conclude 'no economic sense', and the finding of a naked restriction is ruled out in general. Rather, the Commission would have to resort to the presumption in cases of specific legal tests or a showing of the capability to produce exclusionary effects in the individual case. For example, exclusive dealing is one of the most straightforward cases of a contract referencing a rival. Yet, it may of course be pro-competitive.[162]

In the second scenario, absent a specific type of conduct that is well-known to have pro-competitive benefits, the dominant undertaking can also bring forward arguments, supported by evidence, that its conduct in the individual case can be explained as pro-competitive. It would then be for the Commission, and ultimately for the Union Courts, to decide whether the dominant undertaking actually pursued a pro-competitive rationale with its allegedly abusive conduct. This examination may ultimately coincide with the assessment of a possible efficiency defence.

6 CONCLUDING THOUGHTS

A historical perspective on the struggle for the evidentiary law standard regarding the question whether a dominant undertaking's conduct is capable to produce exclusionary effects shows that an effects-based approach to abuse of dominance is not a static concept. Rather, different varieties of such an effects-based approach are conceivable in principle and observable in practice. Certainly, some of these varieties do not keep pace with the passing of time and the progress of economic insight; others fail to meet the practical needs of

[158] See above n 99. In the system of the Draft Guidelines, this is also illustrated by the fact that a finding of 'no economic sense' also leads to an automatic finding of a deviation from competition on the merits, see Draft Guidelines (n 7) para 54.
[159] Monti (n 108) para 31.
[160] Draft Guidelines (n 7) para 55b with reference to Case C-457/10 P *AstraZeneca v Commission* EU:C:2012:770 paras 98 and 134. Also: Monti (n 108) para 31: 'the two abuses in *Astra Zeneca* are not only inherently suspect when carried out by domco but, in the relevant legal and economic context, reveal in themselves a harm to competition'.
[161] Draft Guidelines (n 7) para 55c with reference to Case C-252/21 *Meta Platforms and Others (General terms of use of a social network)* EU:C:2023:537 paras 47 and 51.
[162] See Scott Morton (n 140) 73-75. The same goes for the other examples given in n 155.

an enforcement authority. The presumptions I have studied in this paper, and the Union Courts' recent judgments they are based on, manifest one such variety that is both aware of the deficiencies of overly simplistic legal tests in light of modern possibilities to assess potential effects in individual cases, and driven by a realistic understanding of the value a functioning system of enforcing the competition rules has.

The Commission's Draft Guidelines contain two distinct concepts of presumptions that can facilitate the Commission's assessment of an allegedly abusive conduct's capability to produce exclusionary effects. The presumptions in cases of specific legal tests follow the empirical rationale that certain types of conduct bear a particularly high potential to produce exclusionary effects. In these cases, a superficial assessment of the conduct's capability to produce such effects will suffice in the first place. For a rebuttal of these presumptions, the dominant undertaking must merely call into question the typicality of the case at hand, supported by evidence: the burden of proof remains with the Commission at all times. In contrast, with the presumption in cases of naked restrictions, i.e. conduct that has no economic interest for the dominant undertaking except that of restricting competition, the burden of proof shifts to the dominant undertaking, *de facto* rendering the presumption irrebuttable. This is due to its normative rather than empirical rationale, expressed in the underlying 'no economic sense test'.

While both of these concepts are in principle construed in accordance with the Union Courts' case law on the evidentiary law of Article 102 TFEU, and both of them come with significant advantages from an enforcer's perspective, it is still uncertain to what extent the presumptions will meet the expectations that are set for them. For the presumptions in cases of specific legal tests, it is not entirely clear if the Commission's approach to simply rely on the specific legal tests developed in the past case law is reasonable from a policy perspective, or even stands up to the Court's requirement of an assessment of all the relevant aspects of the individual case.

For the presumption in cases of naked restrictions, facts to take into account while specifying the underlying 'no economic sense test' may include whether the dominant undertaking bestows upon itself a 'sacrifice', whether the dominant undertaking's conduct references a specific competitor, as well as clear-cut cases of a deviation from competition on the merits. However, the Commission cannot find 'no economic sense' – even when given one of these facts – if there is reason to believe that the conduct in question comes with some pro-competitive rationale, e.g. if such pro-competitiveness is well-known for the type of conduct or proven by the undertaking in the individual case. How narrow or broad this test can be understood to be, which additional facts may be relevant in conducting it and how helpful the presumption can prove to be amidst its necessarily narrow construction is a matter of future development.

In all this, not only do the two concepts of presumptions not defy an effects-based approach to abuse of dominance, but rather they offer a reading of the case law that has the potential to positively shape the enforcement of Article 102 TFEU in the years to come. Until the next variety of an effects-based approach to abuse of dominance comes along.

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