

Abuse of dominance: has the effects-based analysis gone too far?

Damien Geradin* and Stijn Huijts**

*Partner, Geradin Partners and Professor of Competition Law & Economics, Tilburg University, Netherlands, e-mail: dgeradin@geradinpartners.com

**Partner, Geradin Partners. Former Legal Director at the Competition & Markets Authority, UK, e-mail: shuijts@geradinpartners.com

The authors represent clients on a wide range of competition matters, particularly in the digital sector. They have no conflicts of interest to declare.

Abstract

In 2008, following a long period of a so-called ‘formalistic’ approach to competition law, the European Commission adopted a more economic, effects-based, approach to the analysis of abuses of a dominant position. This included the use of an as-efficient competitor (AEC) test for price-based exclusionary conduct. However, more recently the EC warned about an overly rigid implementation of the effects-based approach. Moreover, in the period after 2008, the Commission and national authorities started to prioritize cases in digital markets, for which some of the concepts adopted in 2008 were less suitable. This ultimately led to the introduction of *ex ante* regulation of certain digital services in the Digital Markets Act. Against this background, the article seeks to answer whether the Commission did indeed pursue an effects-based analysis after 2008, whether this approach was responsible for the length of investigations and the Commission’s inability to deliver meaningful outcomes, whether *ex ante* regulation is a helpful response to these difficulties, and how the Commission should address the criticisms against the ineffectiveness of its enforcement of the prohibition against abuse of a dominant position.

Keywords: competition law, abuse of a dominant position, effects-based approach, *ex ante* regulation, Chicago School, Article 102.

JEL codes: L12, L41, L44

I. Introduction

For a long time, the European Commission (EC) and the European Court of Justice (CJEU) pursued a so-called formalistic approach to competition law, whereby the legal nature or form of a conduct seemed to matter more than its effects. This was true in most areas, but especially so with respect to Article 102 of the Treaty on the Functioning of the European Union (TFEU), the prohibition of abuses of a dominant position. For instance, in its seminal *Hoffman-La Roche* judgment, the CJEU ruled that exclusive dealing and rebates conditional on the customer buying all or most of their requirements exclusively from the dominant firm were *per se* illegal.¹ In other words, whether these conducts produced any anticompetitive actual or potential effects and whether such effects were potentially compensated by efficiencies was irrelevant. This created the risk that beneficial conduct could be prohibited under Article 102 TFEU.

This approach stood in contrast with developments in the United States, where active antitrust enforcement had in the 1980s made way for an approach that is perhaps most widely known as the so-called ‘Chicago School’, although the development was by no means restricted to academics at the University of Chicago.² This economic doctrine, and the legal scholarship and case-law based on it,³ cautioned against over-enforcement because markets

¹ C-85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, paras 89–90.

² Developments in the US in this period are clearly summarized in [Hovenkamp \(2022\)](#). William E. Kovacic highlights the parallel role of scholars such as Philip E. Areeda, Donald F. Turner, and Stephen Breyer at Harvard University in [Kovacic \(2007\)](#).

³ For example, [Bork \(1978\)](#); [Easterbrook \(1984\)](#); and Supreme Court judgments *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 594 (1986), and *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 414–15 (2004) (‘Trinko’).

would eventually move towards greater competition. A false negative (or Type I error) would not disturb that process, whereas a false positive (or Type II error) would delay or even stop it. Such errors must therefore be avoided. While this led to greater discipline and the avoidance of Type II errors, it also led to a weakening of enforcement, with subsequent economist and legal authors questioning whether the Chicago School mantra that underenforcement would be corrected by the markets had been correct.⁴

In the mid-1990s, the EU's approach to competition law started to change following significant criticism, which was initially focused on vertical restraints.⁵ However, this criticism also turned on Article 102 TFEU.⁶ This led to the development of what has become known as the 'more economic approach', which featured the adoption of the Vertical Agreements Block Exemption Regulation and Guidelines in 1999,⁷ and the appointment of a Chief Economist of DG Comp (the Directorate-General for Competition at the European Commission) in 2003.

Following this, the EC started to reflect on its Article 102 TFEU enforcement policy,⁸ which led to the adoption of the 2009 *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (the 'Guidance Paper').⁹ The Guidance Paper stated that the EC would normally only intervene against exclusionary conduct by dominant firms if, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to foreclosure, leading in turn to consumer harm.¹⁰

With respect to price-based exclusionary conduct, such as predatory pricing, margin squeeze, and loyalty rebates, it suggested the use of an as-efficient competitor (AEC) test to identify whether the conduct in question could produce anticompetitive effects and should therefore be prioritized by the EC.¹¹ This would need to be determined on the basis of 'economic data relating to cost and sales prices'.¹² Since the adoption of the Guidance Paper, economic analysis has played a greater role in Article 102 TFEU cases with both the EC and private parties involving economists in the investigation.

This, in turn, had an impact at the EU courts, which started to pay closer attention to the decisions of the EC, including their economic reasoning. For instance, in *Intel*, the CJEU stated that the *Hoffman-La Roche* judgment 'must be further clarified' if the dominant firm submits evidence that its conduct was not capable of restricting competition and of producing the alleged foreclosure effects.¹³ If that is the case, the EC is also required to assess 'the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market'.¹⁴

It would be wrong to see these developments in the EU as a delayed implementation of the Chicago School. The 'more economic approach' was always more nuanced than that,¹⁵ and has not led to the reduction of enforcement in unilateral conduct cases unlike what has happened in the United States. Nevertheless, the Guidance Paper's focus on only prioritizing the investigation of conduct if it forecloses competitors that are as efficient as the dominant firm, and the Court's clarification in *Intel*, go towards the idea of avoiding Type II errors, at least by requiring more thorough economic analysis on the part of the EC. The need to consider the dominant firm's conduct's impact on as-efficient-competitors was recognized in subsequent judgments, even outside of price-based conduct.¹⁶

In 2023, the pendulum appeared to be swinging back again, when the EC made amendments to its Guidance Paper, published a *Policy Brief* entitled 'A Dynamic and Workable Effects-based Approach to Abuse of Dominance', and

⁴ Philippon (2019); Wu (2018).

⁵ See, for example, Hawk (1995). In the US, the Supreme Court's *per se* condemnation of vertical restraints had also come under fire, leading to the Supreme Court overruling that *per se* rule. See *Continental TV, Inc. vs GTE Sylvania, Inc.*, 433 US 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 US 365 (1967)).

⁶ For example, Elhauge (2003); Werden (2006); Vickers (2005); and OECD (2006).

⁷ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices OJ 336/21; Commission Notice: Guidelines on Vertical Restraints (2000/C 291/01). See also the Commission's statement in the Guidelines in para 102 stating: 'In the assessment of individual cases, the Commission will adopt an economic approach in the application of Article [101] to vertical restraints. This will limit the scope of application of Article [101] to undertakings holding a certain degree of market power where inter-brand competition may be insufficient. In those cases, the protection of inter-brand and intra-brand competition is important to ensure efficiencies and benefits for consumers.'

⁸ Neelie Kroes (2005), followed by DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels, December 2005.

⁹ Communication from the Commission: 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', OJ C 45/7.

¹⁰ Guidance Paper, paras 19 and 20.

¹¹ *Id.*, para 23.

¹² *Id.*, para 25.

¹³ Case C-413/14, *Intel v Commission*, EU:C:2017:632 ('Intel'), para 138.

¹⁴ *Id.*, para 139.

¹⁵ See, for example, Wils (2014).

¹⁶ See, for example, Case C-377/20, *Servizio Elettrico Nazionale v AGCM*, para 71 *et seq.*; and Case C-680/20, *Unilever Italia v AGCM*, EU:C:2023:33, para 48 *et seq.*

announced that it would adopt guidelines on exclusionary abuses of a dominant position in 2025.¹⁷ According to the *Policy Brief*, recent judgments such as *Deutsche Telekom*, *Post Danmark I* and *II*, *Intel*, and *Unilever Italia* (among others) had ‘confirmed and endorsed the main elements of an effects-based approach to exclusionary conduct by dominant undertakings’.¹⁸ Further, the EC made clear that it considers the effects-based approach to exclusionary conduct to centre around the standard of ‘potential effects’, which requires more than hypothetical effects, but does not go so far as to require actual effects to prove the existence of an abuse of a dominant position.¹⁹ It also explains why it is making certain amendments to the Guidance Paper, including to ensure that the notion of ‘anti-competitive foreclosure’ is not restricted to conduct that produces ‘the full exclusion or marginalisation of competitors’, but includes conduct that weakens an effective competitive structure even without such exclusion or marginalization.²⁰ Finally, the *Policy Brief* noted that while the concept of the AEC is relevant, in certain cases the competitive constraint that less efficient competitors exert may also warrant protection under Article 102, in particular where the emergence of AECs may not be possible because of the structure of the market or because the market is protected by significant barriers.²¹

Indeed, the EC is concerned that ‘an overly rigid implementation of the effects-based approach could set the bar for intervention at a level that would render enforcement against practices that restrict competition unduly burdensome or even impossible’.²² It could be argued that with its 2023 announcements, the EC is moving away from the ‘more economic approach’, just as the EU Courts were warming to it. As we discuss in this article, the effects-based analysis promoted in the Guidance Paper had at least two unintended consequences. First, it contributed to making the investigatory and decision-making process of the EC more complex. For instance, the AEC analysis in the *Intel* decision spans over 150 pages.²³ Second, this complexity caused cases to take longer to resolve. The *Intel* case took almost 9 years from filing of the complaint by AMD to the Commission adopting its decision in 2009.²⁴ It took 8 more years to the CJEU issuing its judgment overturning the EC, and the case is still not fully resolved today.²⁵ The *Google Shopping* case took 7 years from opening of proceedings to infringement decision.²⁶

Moreover, in the period after the adoption of the Guidance Paper the EC and national competition authorities (NCAs) started to prioritize cases in digital markets, for which the concepts outlined in the Guidance Paper were less well-suited. It is, for instance, questionable whether the AEC principle makes any sense in markets characterized by large economies of scale and network effects. The combination of complexity, slowness, and a lack of a clear analytical framework for these new cases led to criticism of EU and UK competition law for their inability to deliver concrete improvements for consumers.²⁷

The persistent issues relating to dominant digital platforms led the Commission to propose *ex ante* legislation in the form of the Digital Markets Act (DMA), which came into force in October 2022.²⁸ The DMA imposes a

¹⁷ European Commission, press release, ‘Commission announces guidelines on exclusionary abuses and amends guidance on enforcement priorities’, 27 March 2023, retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1911.

¹⁸ Competition Policy Brief: A Dynamic and Workable Effects-based Approach to Abuse of Dominance, p. 2.

¹⁹ *Id.*, p. 3.

²⁰ *Id.*, p. 4.

²¹ *Id.*, p. 5.

²² *Id.*, p. 4.

²³ EC Decision of 13 May 2009 in Case COMP/C-3/37.990—*Intel* paras 1002–575.

²⁴ *Id.*, which shows that AMD filed its formal complaint in October 2000.

²⁵ European Commission, press release, ‘Competition: Commission confirms sending of Statement of Objections to Intel’, 27 July 2007, retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_314; European Commission, press release, ‘Antitrust: Commission re-imposes €376.36 million fine on Intel for anticompetitive practices in the market for computer chips’, 22 September 2023, retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4570; European Commission, press release, ‘Antitrust: Commission probes allegations of antitrust violations by Google’, 30 November 2010, retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624; and European Commission, press release, ‘Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service’, 27 June 2017, retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

²⁶ European Commission, press release, ‘Antitrust: Commission probes allegations of antitrust violations by Google’, 30 November 2010, retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624; and European Commission, press release, ‘Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service’, 27 June 2017, retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

²⁷ Stigler Committee on Digital Platforms Final Report (2019) (Stigler Report), retrieved from <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>; Staff of House Committee on The Judiciary 116th Congress, Investigation of Competition of Digital Markets: Majority Staff Report and Recommendations 39 (Comm. Print 2020) (US House Report), retrieved from https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf. The ACCC’s interim reports as part of the 2020–2025 Digital Platform Services Inquiry. See, for example, the ‘ACCC September 2022 Interim Report No.5—Regulatory Reform’, retrieved from <https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25/september-2022-interim-report>. German Report by the Commission Competition Law 4.0. ‘A New Competition Framework for the Digital Economy’, September 2019, retrieved from <https://www.bmwi.de/Redaktion/EN/Downloads/a/a-new-competition-framework.pdf>. Furman *et al.* ‘Unlocking Digital Competition’, Report of the Digital Competition Expert Panel, March 2019, retrieved from https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf.

²⁸ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector.

series of obligations on designated gatekeepers. The DMA pursues a *per se* rule approach. No market definition, dominance, and effects need to be shown once a gatekeeper has been designated. Therefore, rather than refining the ‘more economic approach’ to deal with the conduct of dominant digital platforms, *per se* rules were adopted. This suggests that the pendulum has well and truly swung back, at least insofar as it concerns the enforcement of unilateral conduct by these platforms. This raises the question whether, from the point of view of economic rigour, this is a desirable development.

Against this background, this paper seeks to answer the following questions:

- Did the EC pursue a true effects-based analysis in its enforcement of Article 102 TFEU, and what was the reaction of the EU courts? (section II)
- Is this approach responsible for the length of investigations and the inability of the EC to deliver meaningful outcomes? (section III)
- Is the *ex ante* approach pursued by the DMA a helpful response to these difficulties? (section IV)
- How should the EC address the criticisms made against the ineffectiveness of Article 102 TFEU enforcement in areas not covered by the DMA? (section V)

II. The effects-based approach to Article 102 TFEU: theory versus practice

Prior to the adoption of the Guidance Paper, academics and practitioners had long criticized the formalistic approach pursued by the EC and the EU courts.²⁹ The criticism went that EU competition law placed greater emphasis on the form of a certain conduct than on its effects on competition. This had been true both at the EC and at the EU courts, with the result that in 2006, the EC’s Chief Economist highlighted that the EC had a 98 per cent success rate in abuse of dominance cases.³⁰

Probably the best example of the formalistic approach to abuses of a dominant position was the field of loyalty rebates, which were viewed as *per se* illegal,³¹ even though they often meant that customers ended up paying a lower price.³² In *Hoffmann-La Roche*, the CJEU had found that if a dominant firm ‘ties purchasers... by an obligation or promise on their part to obtain all or most of their requirements exclusively from [the dominant firm]’, it would commit an abuse, ‘whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate’. Further, the CJEU held that the same applies if the dominant firm,

without tying the purchasers by a formal obligation, applies... a system of fidelity rebates, that is to say discounts conditional on the customer’s obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the [dominant firm].³³

Therefore, the CJEU considered loyalty rebates to be anti-competitive even where they applied to a small quantity, and regardless of whether competitors would be able to match or undercut the rebate without having to price below their costs. The same formalistic approach applied to exclusive dealing more generally, as is clear from how the CJEU held that loyalty rebates and exclusive dealing should be treated in the same way. The formalistic approach to exclusive dealing was later confirmed in other pre-Guidance Paper judgments.³⁴

Similarly, tying was treated in a formalistic manner in EU case-law, as follows from cases like *Hilti* and *Tetra Pak II*.³⁵ In the 2004 *Microsoft* case, the EC found that it was also necessary to determine whether the established tying foreclosed competition. This, however, did not entail a full effects analysis, but rather the question whether the conduct was ‘liable’ to have (or ‘capable of having’) a foreclosure effect.³⁶

On the other hand, the CJEU had prescribed a cost-based test for predatory pricing in its *Akzo* judgment of 1991. According to that judgment, if a dominant firm charged prices below average variable costs, these are

²⁹ See https://didattica.unibocconi.it/mypage/upload/48353_20081205_124239_EAGCP_ART82REPORT.PDF

³⁰ Neven (2006).

³¹ *Hoffmann-La Roche*, supra note 1, paras 89–90.

³² For a discussion around the time of the adoption of the Guidance Paper, see Geradin (2009).

³³ *Hoffmann-La Roche* supra note 1 para 89.

³⁴ For example, the judgment of the General Court in T-65/98, *Van den Bergh Foods*.

³⁵ T-30/89, *Hilti AG v Commission*, EU:T:1991:70, upheld in C-53/92 P *Hilti AG v Commission* EU:C:1994:77; T-83/91 *Tetra Pak International SA v Commission*, EU:T:1994:246, upheld in C-333/94 P *Tetra Pak International SA v Commission*, EU:C:1996:436. Criticism on the formalistic approach in the latter case can be found in Korah (1993).

³⁶ EC Decision of 24 March 2004 in Case 37.792, *Microsoft*, para 838.

abusive because: '[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position'.³⁷ Moreover, prices below average total costs but above average variable costs are abusive if they are part of a plan to eliminate a competitor. Those prices 'can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them'.³⁸

After the EC had modernized its analytical approach to horizontal and vertical coordination by doing away with the old regime that required agreements to be notified to it, and by introducing block exemptions with accompanying guidelines as well as guidelines on the application of Article 101(3) of the TFEU (efficiencies),³⁹ the focus among commentators and at the EC turned to Article 102 TFEU.

The EC's efforts to modernize its policies with respect to Article 102 were initiated with a policy speech by then Commissioner Neelie Kroes at the September 2005 Fordham conference. In it, she said that the Commission 'simply want[ed] to develop and explain theories of harm on the basis of a sound economic assessment for the most frequent types of abusive behaviour to make it easier to understand our policy'. She added that Article 102 enforcement 'should focus on real competition problems: In other words, behaviour that has actual or likely restrictive effects on the market, which harm consumers'. After a Discussion Paper and subsequent academic debate, the Commission issued its Guidance Paper in 2009.

The Guidance Paper was a new type of policy instrument, because it set out its enforcement priorities, whereas other guidelines issued by the EC were intended to provide guidance on the EC's substantive analysis of various aspects of competition law. This restricted the extent to which the Guidance Paper could change how the EC would discharge its burden of proof in cases it wanted to pursue on the basis of the prioritization mechanisms of the Guidance Paper. The somewhat peculiar nature of the document was recognized by commentators at the time.⁴⁰ Still now, many handbooks rely on the Guidance Paper to assist in the interpretation of the case-law on certain types of abuse, essentially because other EC guidance on the topic is lacking and in particular there are no Guidelines of the kind that other parts of competition law have, such as horizontal agreements, vertical agreements, market definition, and various aspects of merger control, though this is likely to change in 2025.⁴¹

The EC's own approach to the Guidance Paper in cases brought between 2009 and 2023 has been inconsistent. In some cases, the EC has made explicit that the case meets the criteria of the Guidance Paper for prioritization, though it does not rely on the analytical framework of the Guidance Paper in the substantive analysis of the case in question.⁴² In other cases involving exclusionary conduct, no mention of the Guidance Paper is made at all.⁴³ In a third category of cases, the EC even relies on the Guidance Paper in its substantive analysis of the conduct at issue.⁴⁴ Finally, in its *Intel* decision, the EC considered that the Guidance Paper did not apply to the case because it was adopted after the EC formally opened proceedings in the case. Nevertheless, it took the view that its decision is in line with 'the orientations set out in the Guidance Paper' and proceeds to devote hundreds of paragraphs to conducting an as-efficient competitor test (AEC test), a test described in the Guidance Paper.⁴⁵

In many ways, the *Intel* case weighed like a heavy stone around the neck of the Guidance Paper. The case was opened long before the Guidance Paper was adopted, but at the same time, it is likely that the EC's chief economist team was eager to demonstrate that this landmark case was economically sound by subjecting Intel's rebates to an AEC test. When Intel subsequently appealed the case, the EC however proceeded to defend the case by falling back on the *Hoffmann-La Roche* precedent that said that loyalty rebates are essentially *per se* abusive. Although the General Court still sided with the EC, the CJEU 'clarified' the *Hoffmann-La Roche* case-law by indicating that if the dominant firm submitted evidence that its conduct was not capable of restricting competition and of producing the alleged foreclosure effects, the EC must also test the rebates' ability to exclude competitors as efficient as

³⁷ C-62/86, *AKZO Chemie BV v Commission*, EU:C:1991:286, para 71.

³⁸ *Id.*, para 72.

³⁹ Guidelines on the application of Article [101](3) of the Treaty, OJ C 101, 27 April 2004.

⁴⁰ *Ezrachi* (2009); *Akman* (2010); *Geradin* (2010); *Pace* (2011).

⁴¹ See, for example, *Whish and Bailey* (2021, chs 17 and 18). After this article went to press, the EC published draft Guidelines on the application of Article 102 to exclusionary abuses of dominance. This is likely to lead to the adoption of a final text of these Guidelines in 2025. The draft Guidelines can be found here: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

⁴² A good example is *Perindopril* (Servier), in which the EC confirms that the case meets the Commission enforcement priorities in applying Article 102 as set out in the Guidance Paper. See Commission Decision of 9 July 2014 in Case AT.39612, *Perindopril* (Servier), Provisional Non-confidential version, footnote 84.

⁴³ For example, Commission Decision of 18 July 2018 in Case AT.40099, *Google Android*.

⁴⁴ For example, Commission Decision of 15 October 2014 in Case 39523, *Slovak Telekom*, para 873, where the EC uses the Guidance Paper as authority for the statement that Slovak Telekom's service-specific costs are a sufficiently good proxy for long-run average incremental costs (LRAIC), and may be used in margin squeeze calculations.

⁴⁵ EC Decision of 13 May 2009 *Intel* supra note 23, paras 1002 *et seq.*

the dominant firm from the market.⁴⁶ In effect, this meant the AEC test was first declared dead, but resurrected 3 years later.

In the CJEU's case-law after the Guidance Paper was adopted, a few trends can be identified.⁴⁷ First, there is a category of exclusionary abuses of a dominant position in which economic analysis plays little or no role, and the CJEU has upheld the EC's approach in those cases. One example is *AstraZeneca*, which involved the abuse of making misleading statements to the patent authorities. Similarly, the above-mentioned *AKZO* case demonstrates the CJEU's view that pricing below average variable costs (AVC) is abusive irrespective of its effects. In its recent *Superleague* and *International Skating Union* cases, the CJEU considers that rules by dominant associations like UEFA and the International Skating Union can in certain circumstances be exclusionary where they prevent rival leagues from being set up and do not provide sufficient procedural rights. No effects analysis can be seen in those judgments, despite them dealing with exclusionary practices. Other types of conduct by dominant undertakings, however, require that the EC can show that the conduct had actual or potential anti-competitive effects, such as margin squeeze,⁴⁸ standardized rebate schemes,⁴⁹ and constructive refusals to deal.⁵⁰

The CJEU therefore upheld the notion that the EC needed to pursue greater economic rigour in its decisions relating to certain types of conduct. However, one major difficulty came from the fact the case-law never fully defined the boundaries of the effects-based test. In the first place, it should be noted that the effects-based test is a misnomer. Neither the Guidance Paper nor the case-law of the Courts required the showing of actual effects in exclusionary cases. The CJEU found that effects can be actual or potential, as long as they are not purely hypothetical. This was for a good reason, because if actual effects must be proven, intervention would be delayed until a time when it is pointless to intervene.

This of course led to the difficult question of the type of effects that needed to be shown for the EC to discharge its burden of proof that an abuse of a dominant position had occurred. Clearly, purely hypothetical effects are insufficient. In addition, the CJEU made clear that there must be causality between the conduct adopted by the dominant firm, and the actual or potential effects alleged.⁵¹ If the dominant firm competes 'on the merits', but this leads to less efficient firms leaving the market, then their exit cannot be attributed to an anti-competitive strategy adopted by the firm, but by the fact that the firm's rivals are less competitive. In addition, the CJEU has made clear that the mere fact that competitors are placed at a disadvantage does not provide evidence of actual or potential anti-competitive effects.⁵² Further, it is clear from the case-law that there is no requirement to prove consumer harm. Finally, a number of factors have emerged that are seen to be relevant to proving actual or potential anti-competitive effects, including the coverage of the conduct, the intensity of the requirement placed on the customer by the dominant firm (for instance, as the *Remicade* case in the UK shows, a system of rebates is not always successful at inducing the customer to purchase all requirements from the dominant firm, whereas with an outright exclusivity obligation, the customer does not have much choice), the extent of the dominant position, and whether the conduct is part of a wider strategy.⁵³

That being said, many crucial concepts remain vague under the current state of the case-law. For example, the Courts have referred to the need to prove that conduct is 'liable to produce', 'likely to produce' and 'capable of producing' anti-competitive effects.⁵⁴ Others have pointed out that the CJEU refers to 'capability' and 'likelihood' interchangeably,⁵⁵ and the Commission has stated in its 2023 *Policy Brief* that they must be understood as 'being one and the same',⁵⁶ but they are indicative of a different probability threshold. The courts have also referred to the concept of 'competition on the merits', but this notion does not bring much clarification and has also featured in the above-mentioned category of cases that do not involve any meaningful economic analysis. The as-efficient competitor appears to be relevant in cases involving conduct that cannot, on its face, be said to be abusive (such as price-based conduct), but as we explain below, it is less useful in cases where network effects and economies of scale have given certain firms near unassailable positions of market power.

⁴⁶ *Intel* supra note 13, paras 138 and 139.

⁴⁷ See, for a more detailed analysis, [Ibanez Colomo \(2023\)](#).

⁴⁸ Case C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603.

⁴⁹ Case C-23/14 *Post Danmark II*, EU:C:2015:651.

⁵⁰ Case C-165/19 P *Slovak Telekom v Commission*, EU:C:2021:239.

⁵¹ *Post Danmark II* supra note 49, para 47.

⁵² Case C-525/16 *MEO*, EU:C:2018:942.

⁵³ *Post Danmark II* supra note 49 and *Intel* supra note 13. See also, [Ibanez Colomo \(2023\)](#).

⁵⁴ Discussion of 'capable of' and 'likely to' can be found in the Opinion of Advocate General Wahl in *Intel*, EU:C:2016:788, para 115. The term 'liable to' features in the General Court's judgment in *Microsoft*.

⁵⁵ [Ibanez Colomo \(2023\)](#).

⁵⁶ *Competition Policy Brief*, p. 3.

As a result, one of the key problems of the effects-based approach is that what it means is still very unclear in some important contexts.

III. The ineffectiveness of EU competition law to address large firms' anticompetitive conduct

In recent years, the EC has been subject to criticism for its inability to restore competition to markets that have been harmed by dominant firms, particularly in digital markets.⁵⁷ The criticisms have been multi-fold.

First, as noted in section I above, EC competition investigations have often been excessively lengthy with decisions being adopted after half a dozen years or more. This problem is particularly serious in industries presenting large economies of scale and network effects where, by the time of the decision, the market may have tipped. There is therefore a serious risk that justice delayed may be justice denied in such cases.

Second, EC competition decisions often have a narrow scope, and thus may miss the forest for the trees. Competition authorities may prefer to pursue a narrow scope due to the need to show dominance in a relevant market, but also because it may be easier to identify the likely anticompetitive effects of the dominant firm's conduct in a narrowly defined market than in a broadly defined one. Thus, for instance, the *Google Shopping* decision of the EC focused on comparison-shopping services, which is a rather narrow segment of economic activity. Similarly, the recent decision of the EC related to Apple's anti-steering provisions focuses on music streaming apps only. While these decisions may contain useful principles (such as the notion of self-preferencing at the core of the *Google Shopping* decision), they only bring limited relief to the vast array of companies that may have suffered from Google's self-preferencing practices in search rankings.

Third, the EC has been criticized for adopting ineffective remedies, i.e. remedies that do not restore the *status quo ante*. In some instances, this is due to the fact the remedies were badly designed and/or difficult to monitor. The decision of the Commission against Microsoft, whereby it would have to produce a version of Windows without Windows Media Player at the same price was, for instance, famously ineffective.⁵⁸ A few years later, the EC learned from its past mistake when, in a similar tying case (this time involving Internet Explorer), it accepted Microsoft's commitments to display a choice screen allowing consumers to select their default browsers.⁵⁹ As will be further discussed below, one important limitation to the Commission approach on remedies is its reluctance to adopt structural remedies.

Now, it is important to distinguish the EC's enforcement failures (for which it can be blamed) from the limitations of competition law as a legal instrument.

While the EC certainly shares some part of the blame for failing to sufficiently protect competition against large firms' anticompetitive conduct, it is important to be realistic about what competition investigations can deliver. Competition law investigations are by nature lengthy due to the inescapable need for the EC to define one of several relevant product and geographic markets, and identify dominance on this or those markets. The EC then needs to identify one or several anticompetitive conducts and show that this or these conducts are capable of producing anticompetitive effects. Given this, *ex post* competition law may never be a fast tool.

One relevant question, however, is whether the effects-based approach has had an impact on the length of EC investigations. As mentioned above, while the EU courts have never required the EC to demonstrate the presence of actual anticompetitive effects, the EC in certain cases still needs to demonstrate that the conduct in question is capable of producing (or likely to produce) anticompetitive effects. While some factors that need to be considered as part of the analysis are now clear, the precise boundaries of an effects-based substantiation of an exclusionary abuse of dominance still are not. In addition, the CJEU has made it clear in *Intel* that the EC needed to engage with the economic evidence produced by defendants. Thus, there is no question that the EC is under greater pressure than it used to be to produce cogent economic reasoning. This may obviously have an impact on the length of investigations.

While the effects-based approach probably increased the length of EC competition investigations, other factors have contributed to increasing the length of such cases, such as the increased emphasis in the case-law of the EU courts on the need to protect the rights of defence. In this context, an increasingly large amount of time is spent on matters such as access to the file, taking resources away from work on the substance of the cases. Indeed, there is an

⁵⁷ Geradin and Katsifs (2022); Monti and De Streel (2023). Commission response: Crémer *et al.* (2019).

⁵⁸ Economides and Lianos (2010). Arguably the remedies in the case were a reflection of the EC's case on the abuse relating to the Windows Media Player which, with the benefit of hindsight, had little economic impact.

⁵⁹ See 'Antitrust: Commission accepts Microsoft commitments to give users browser choice page', available at https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1941.

overlap here that must be recognized, which is that the more the EC relies on economic evidence in the preliminary findings in its statement of objections, the more it will invite a detailed rebuttal of that evidence by the parties, and the more it will, in the light of the rights of defence, need to engage with that rebuttal.

One of the unintended consequences of the effects-based approach may also be to strengthen the tendency of the EC to pursue narrow cases as it may be harder for the EC to show the likely presence of effects in broader cases. That may have explained the decision of the EC to focus its *Google Shopping* case on comparison shopping services where the effects of Google's anticompetitive conduct were quite dramatic, as illustrated in the numerous charts showed in its infringement decision. While a broader case may have provided relief to a larger number of companies competing with Google, it would have also made it more difficult for the EC to show that Google's conduct could produce anticompetitive effects.

By contrast, the effects-based approach cannot be blamed for the EC's poor record in terms of remedies. Besides the fact that remedies have often been poorly designed, the EC has been unwilling to impose structural remedies such as requiring a dominant firm to divest part of its business, although the EC recently announced that it would seek structural remedies against Google for its anticompetitive conduct in advertising technology if it were to adopt an infringement decision.⁶⁰

Now, important EC decisions, such as *Google Shopping*, which has been criticized for being adopted after an excessively lengthy investigation and for imposing inadequate remedies, should not only be judged on what the EC 'delivered' in the context of the specific case, but also for the important legal principles that it contained, such as for instance the incompatibility of self-preferencing conducts with Article 102 TFEU. The EC's theory of harm, which has been confirmed by the General Court of the EU,⁶¹ will form a key precedent that will likely be applied by dozens of national competition authorities and courts in a variety of settings. While speed of EC investigations and decision-making is of course critical for the aggrieved parties, it should not be at the expense of the quality of reasoning.

Thus, while the EC may be partly to blame for failing to deliver timely and effective remedies against dominant firms' anticompetitive conducts, in particular in digital markets, some of the criticisms in fact reflect the limitations of competition law as an instrument.

IV. Is *ex ante* regulation the solution?

As noted above, the DMA represents a radical departure from competition law designed to provide an effective response to most of the criticisms made against competition law, especially in fast-moving digital markets. Several other nations have also reached the conclusion that a radical departure is needed to respond to the challenges created by big tech firms in digital markets.⁶²

First, in terms of speed, enforcement proceedings are not to last longer than 12 months,⁶³ which is certainly much faster than abuse of dominance cases.⁶⁴ This increased pace certainly comes from the fact that the EC does not need to (i) show dominance on one or several markets, (ii) define a theory of harm, and (iii) show that the problematic conduct is liable to create anticompetitive effects. Showing dominance on one or several markets is rendered unnecessary by the designation of gatekeepers for the provision of one or several core platform services.⁶⁵ As of May 2024, seven firms had been designated—Alphabet, Amazon, Apple, Booking, ByteDance, Meta, and Microsoft. In addition, the EC does not need to show that the problematic conduct is likely to create actual or potential anticompetitive effects as the DMA pursues a *per se* approach.

One possible limit to timely and effective enforcement of the obligations contained in the DMA may be the lack of resources of the EC. While it is not entirely clear, it appears that only slightly over 100 officials will be devoted to enforcing such obligations, which pales in comparison with the resources of some national regulators, but also with the resources that can be deployed by the gatekeepers. The EC will therefore have to set priorities and there is a significant possibility that some of the obligations contained in the DMA may be sub-optimally enforced.

Second, as to the criticism that competition cases may be too narrow, the DMA offers a rather comprehensive approach by imposing a large set of obligations on designated gatekeepers. While, for instance, Apple was subject

⁶⁰ See 'Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology', 14 June 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207

⁶¹ Case T-612/17—Google and Alphabet v Commission (Google Shopping), EU:T:2021:763

⁶² For instance, Australia, Germany, UK, South Korea.

⁶³ See Article 29(2) of the DMA.

⁶⁴ One potential risk with the strict time limit for the infringement proceedings contained in the DMA is that the EC may decide to investigate the matter informally before it opens proceedings, which would effectively delay such proceedings. Given the tight limit imposed on infringement proceedings, there is the risk that the EC might delay the opening of such proceedings. We will only see whether this risk is material in the months and years to come.

⁶⁵ See Article 3 of the DMA.

to a narrow investigation and subsequent decision by the EC following a complaint filed by Spotify as it focused on Apple's anti-steering provisions,⁶⁶ Apple (and Google) will now be subject to a wide array of obligations not only allowing app developers to communicate with their users within the app, but also forcing Apple to allow alternative modes of app distribution and in-app payment solutions on its iOS devices.

Third, and relatedly, the remedies are also prescribed in the law in that gatekeepers need to comply with specific obligations contained in Articles 5 to 7 of the DMA. The DMA also contains strict rules against circumvention.⁶⁷

Thus, the DMA is at the opposite end of the effects-based approach that has been pursued by the EC and the EU courts over the past couple of decades. However, as noted above, this is not a revolution or even evolution of EU competition law, as the DMA is not competition law, but a regulatory departure from competition law. Whether the shift to *per se* rules is desirable is a moot debate considering this is the will of the legislator. In many instances, the obligations contained in Articles 5 to 7 of the DMA reflect the decision practice of the EC and the case-law of the EU courts,⁶⁸ but perhaps without the nuances contained in such cases.

V. What should be done with the enforcement of Article 102 TFEU?

The *ex ante* approach is limited to the largest firms active in digital markets and, although extensive, the obligations contained in the DMA obviously do not cover all dominant firms and all possible types of anticompetitive conduct. Thus, there is still an important role to play for competition law, and in particular Article 102 TFEU with respect to unilateral conduct, in digital markets and elsewhere. This raises the question of what needs to be done to ensure that competition law will deliver better results in the years to come.

First, as noted above, Article 102 TFEU will never be a fast instrument, but this does not mean that no progress can be made to speed up the investigative and decision-making process of the EC.

In the first place, a radical approach would be to set time limits for antitrust investigations as is already the case for merger control and the DMA. While there are clear differences between these categories of proceedings, there are no fundamental reasons why Article 102 TFEU investigations should not be subject to time limits, although such an approach would certainly be resisted by the EC. In fact, when the EC wants to obtain fast results in order, for instance, to wrap up some cases at the end of the commission mandate, it seems able to do so. The problem with the absence of time limits is that investigations could literally go on forever without any possible recourse by the companies aggrieved by the conduct in question. This can lead to immense frustration and harm the credibility of competition law and the EC.

In the second place, one faster route to deliver results and offer relief to the victims of anticompetitive behaviour has been the commitments procedure, which has been abundantly used by the Commission in recent years.⁶⁹ While this procedure can deliver quicker outcomes and economize the resources of the EC, one limitation with this approach is that it requires the agreement of the defendant, and the defendant will only offer commitments that are commercially acceptable. The commitments procedure will thus generally not deliver strict forms of remedies, such as structural remedies, even when they may be necessary.

In the third place, interim measures, such as orders to end allegedly abusive conduct, have been insufficiently used by the EC. Article 8 of Regulation 1/2003 provides that '[i]n cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures'. The problem is that this test has been interpreted quite strictly by the EU courts.⁷⁰ As a result, the EC has generally refrained from seeking interim measures even when they would have been beneficial. Other competition authorities, such as the French competition authority, have developed a stronger record in terms of adopting interim measures, which is a positive development.⁷¹

In the fourth place, it would make sense to increase the resources of DG Comp, which is considerably smaller in relative terms than large national authorities, such as the Bundeskartellamt, the French competition

⁶⁶ 'Commission fines Apple over €1.8 billion over abusive App store rules for music streaming providers', available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161.

⁶⁷ See Article 13 of the DMA.

⁶⁸ See the table in Cr  mer *et al.* (2023).

⁶⁹ Geradin and Mattioli (2017).

⁷⁰ Order T-808/19 R—*Silgan v Commission* EU:T:2020:16; Order C-318/19 P(R)—*Lantm  nnen v Commission* EU:C:2019:698; Order T-423/17—*R Nexans France and Nexans v Commission* EU:T:2018:579; Order of the President of the General Court T-371/17 R *Qualcomm v Commission* EU:T:2019:232; Order of the Vice-President of the Court of Justice C-386/15 P(R)—*Alcogroup & Alcodis v Commission* EU:C:2015:623.

⁷¹ See, for example, 'Online ad verification: The Autorit   de la concurrence issues interim measures against Meta', available at <https://www.autoritedelaconcurrence.fr/en/article/online-ad-verification-autorite-de-la-concurrence-issues-interim-measures-against-meta>; 'Related rights: the Autorit   has granted requests for urgent interim measures presented by press publishers and the news agency AFP (Agence France Presse)', available at <https://www.autoritedelaconcurrence.fr/en/communiqu  s-de-presse/related-rights-autorite-has-granted-requests-urgent-interim-measures>.

authority, or the UK Competition and Markets Authority. While additional resources would certainly help, it is not likely to happen considering the budgetary constraints facing the European Union. The existence of well-resourced national competition authorities may, however, offer an alternative, yet not perfect, path for the victims of anticompetitive abuses. These authorities may be faster and more inclined to adopt interim measures.

Although the role of economists in competition cases has been the subject of debate in recent months, it would be wrong in our view to abandon the effects-based analysis in abuse of dominance cases. As illustrated by the *Intel* judgments of the CJEU, there is no support among the EU courts for such a drastic shift, and while administrability and speed are important, there is no consensus among academic experts and practitioners that the effects-based analysis should be abandoned or severely curtailed. Sound economic reasoning is important to the quality of decision-making, especially for EC decisions that will often be reviewed by the EU courts and create important precedents. What is clear, however, is that, as noted above, the effects-based approach is still an incomplete doctrine given the gaps that exist in the case-law of the EU courts. As correctly observed by Pablo Ibanez Colomo (2023), the meaning of the notion of effects has never been defined by the EU courts. Going forward, the EU courts need to bring further clarity on the notion of effects as part of an effects-based analysis under Article 102 TFEU.

While it is very unlikely that the EC will broaden the scope of its cases, progress could be made by the EC in terms of its selection of remedies. While the EC could improve the design of its remedies, it should also consider a more frequent use of structural remedies, especially when behavioural remedies may be ineffective due to the vertical integration of market actors (as is often the case in digital platform and network industries). In this respect, it is interesting to observe that in the press release accompanying the issuance of its Statement of Objections in the Google ad tech case, the EC observed that it preliminarily found that, in this particular case, ‘a behavioural remedy is likely to be ineffective to prevent the risk that Google continues such self-preferencing conducts or engages in new ones’.⁷² This is the case considering that:

Google is active on both sides of the market with its publisher ad server and with its ad buying tools and holds a dominant position on both ends. Furthermore, it operates the largest ad exchange. This leads to a situation of inherent conflicts of interest for Google. The Commission’s preliminary view is therefore that only the mandatory divestment by Google of part of its services would address its competition concerns.

VI. Conclusion

The most significant evolution in the enforcement of Article 102 TFEU was the adoption 15 years ago of the effects-based approach as encapsulated in the Guidance Paper of 2009.

While the EC has never considered itself to be bound by the Guidance Paper, it nevertheless expanded economic reasoning in its Article 102 TFEU investigations and decisions. As a result, EC decisions have certainly been more robust and better in line with the teachings of economics in recent years, but this has led to various criticisms, including the fact that investigations have become excessively lengthy and narrow. In this respect, it is important to distinguish what can be attributed to the effects-based approach and what are the constraints and limitations inherent to competition law.

In our view, the effects-based analysis has not gone too far, and perhaps not far enough. As we have noted above, the effects-based approach is still immature due to the uncertainties linked to the notion of effects in the case law. In addition, the effects-based approach has been applied in a context where the EC is resource constrained, with a growing amount of resources devoted to ensuring the protection of the rights of defence, and antitrust investigations are not subject to any time limits. This is not an ideal environment for delivering timely and effective redress to anticompetitive abuses. In any event, some of the criticisms made against the current enforcement approach to Article 102 TFEU, such as the adoption of ineffective remedies, have little to do with the effects-based approach.

The DMA provided a response to such criticisms in digital markets, where it was felt that quicker and more effective intervention was needed. While it is too early to assess the effectiveness of the enforcement of the DMA, as gatekeepers had until 7 March 2024 to conform to their obligations, there is no question that the DMA will be a faster instrument than competition law as it contains *per se* rules, combined with strict time limits for enforcement. The remedies against problematic conduct are also contained in the regulation.

Article 102 TFEU will nevertheless continue to apply to all other sectors of the economy, as well as non-gatekeepers active in digital markets. Its obligations do not cover all the possible problematic conducts pursued by

⁷² See ‘Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology’, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207.

dominant firms. While, as noted above, there are certainly limitations inherent to competition law, we believe that the EC could improve effective enforcement by *inter alia* making more frequent use of interim measures and commitment decisions and resorting to structural remedies in cases presenting conflicts of interest. Regulation 1/2003 does not contain time limits on antitrust investigations, but the EC should nevertheless consider tightening its investigative and decision-making processes.

In this paper, we have focused on enforcement in one jurisdiction, albeit a very important one. But we would expect the lessons to be relevant elsewhere too. For instance, both the US and the UK have experienced difficult and slow enforcement of unilateral conduct cases, especially in the digital sector, with scope for significant improvements in the timeliness and effectiveness of their approaches.

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