# ETNO position paper on EU guidelines on exclusionary abuses by dominant undertakings

With a view to the European Commission's soon to be expected publication of the draft guidelines for the enforcement of Article 102 TFEU and the prohibition of exclusionary abuses by dominant undertakings, ETNO would like to provide some insights regarding its competitive experience on the telecoms market. The following position is based on an internal legal assessment of the case law applied for the Guidance on enforcement priorities concerning exclusionary abuses (previously Article 82 of the EC Treaty, now Article 102 TFEU), which was amended in 2023 and on exchanges with policymakers and legal experts with the Commission's department for EU competition policy (DG COMP).

As a general remark, further detailed throughout the document, ETNO believes that the few, yet substantial, changes made to the 2009 Guidance are not based, as they should be, on straightforward evidence coming from the Court of Justice jurisprudence. As a result, a further careful assessment is required prior to the Guidelines adoption.

Ahead of the announced consultation and with the aim of already contributing to the draft Guidelines, ETNO would like to submit to the Commission some preliminary comments on specific points.

**Definition of anti-competitive foreclosure**

ETNO considers that the nuances of the case law referred to for the definition of anti-competitive foreclosure have not been reflected into the amendments made by the Commission. According to the new Guidance, an adverse impact on the effective competitive structure is based on an abstract level of competition and not on an identified actual or potential competitor. This means that any conclusions as to the real impact on the competitive structure can never be justified.

Furthermore, the Commission has amended its Guidance on a selective reading of the Google and Alphabet v Commission judgement[1] basing the qualification of anticompetitive foreclosure on a broad criterion of negative influence on competition and '*the various parameters of competition, such as price, production, innovation, variety or quality of goods or service*s' even though paragraph 281 of the Court's judgement was perfectly faithful to the Commission's definitions in its Guidance which referred to the identification of an actual or potential competitors[2]. Thus, contrary to the definition previously adopted, the issue of affecting identified actual or potential competitors would no longer be a prerequisite. As a result, the distinction between dominance and abuse is being blurred and many

[1] Judgment of 14 September 2022, Google and Alphabet v Commission (Google Android)

[2] "*Exclusionary effects characterise situations in which effective access of actual or potential competitors to markets or to their components is hampered or eliminated as a result of the conduct of the dominant undertaking, thus allowing that undertaking negatively to influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services.*"

more situations could be potentially problematic under Article 102, thus multiplying possible false positives. This confusion allows for negative side effects to take shape through the increased risk of opportunistic private enforcement. It is therefore crucial that any actual or potential competitors affected are identified in the demonstration of anticompetitive foreclosure.

**Notion of profitability**

The dilution of the notion of profitability to qualify anticompetitive foreclosure cannot be considered appropriate as this leads, in practice, to the abandonment of a real analysis of this criterion in cases where competition is based on price (today, most of the Commission's competition analysis is based on the analysis of this price criterion to the benefit of the consumer[3]). To justify the amendment in paragraph 19 of the Guidance, the Commission explains that it will no longer prioritise cases '*only where the dominant undertaking can profitably maintain supra-competitive prices or profitably influence other parameters of competition*'[4]. This approach is contradictory with the definition of dominance in the non-revised paragraph 11 of the Guidance. With the revised guidance, the Commission could prosecute companies that are unable to profitably extract themselves from market conditions. Yet, dominant companies are the only ones able to profitably extract themselves from market conditions.

Competition authorities apply a few indicators to determine a dominant market position, such as market share, brand awareness, ownership of key infrastructures, etc. The concept of profitability, in practice, does not play a significant role in this assessment. It is presupposed afterwards that dominance offers this ability to profitably 'increase prices' – in the meaning of paragraph 11 of the Guidance – to overcome this discussion at the stage of characterizing anti-competitive foreclosure. Profitability in a telco market is essentially reflected in price competition and, in digital markets, for example, in other parameters of competition. ETNO strongly believes that this element of profitability is essential for qualifying dominance. Disregarding such analysis would seriously distort the analysis under Article 102 and be highly problematic in terms of legal certainty.

Alternatively, ETNO considers that the Commission should clarify the cases where a company would not be able to profitably extract itself from market conditions, therefore not being in a dominant position according to the definition, and still be prosecuted for an abuse of dominant position, in particular regarding predatory pricing practices.

**Less efficient competitor and AEC test**

Regarding the legal assessment leading to the strengthened wording for less efficient competitors, ETNO would like to highlight that both judgements[5] are primarily based only on the exclusion of competitors as efficient as the dominant firm, and it is also the case for the subsequent judgments Intel and Unilever. The crucial idea therein is that competition rules are not intended to protect less

[3] Guidance, paragraph 5: "*In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services.*"
[4] Annex to the Communication from the Commission on the amendments, paragraph 1
[5] Judgment of 3 July 1991, AKZO Chemie v Commission; judgment 10 April 2008, Deutsche Telekom v Commission

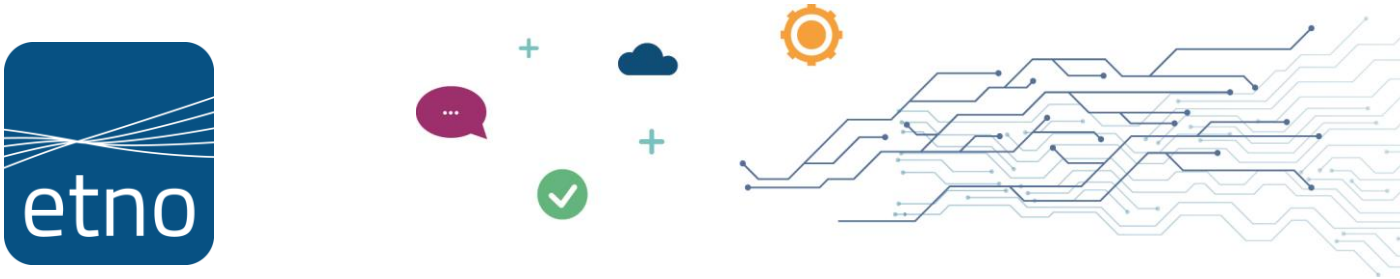
efficient competitors even though in theory and according to specific circumstances from a dynamic perspective, a less effective competitor could also bring benefits to competition. Adding to this, it should also be stipulated that the legal foundation[6] indicating '*that the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market'* must be seen as an exception and hence cannot be considered as a rule of thumb. Firstly because the Post Danmark judgment is not a typical case of price-based exclusionary conduct, as it involves a tying issue and a rebate scheme which applies simultaneously to monopoly and liberalized products, and secondly, because the Unilever decision[7] again reconfirms the general line adopting the as efficient competitor (AEC) principle as standard. Consequently, in ETNO's view the premise should continue to be that normally only conduct which would exclude a hypothetical 'as efficient' competitor may be abusive. It also important to stress that in order to ensure that companies are given the legal certainty to plan and operate their businesses, and also with regard to practicability, it is paramount that liability for pricing conduct cannot be based on the costs of a less efficient rival or a hypothetical entity that the dominant company does not control or even know about.

Moreover, the conclusions drawn from the case law explaining the revision of the notion of AEC test[8] are unjustified. An 'as efficient competitor' is a hypothetical competitor having the same costs as the dominant company. A broad concept of efficient competitor leaves too many open questions, as does considering efficiency indicators other than costs. The reference in the Intel and Unilever judgments to '*attractiveness to consumers from the point of view of, among other things, price, choice, quality or innovation*' can be seen as an expected consequence of efficiency, rather than as a new standard or indicator of efficiency. Any price-based economic assessment should thus compare *as efficient competitors* in a facts-based manner. Any changes to the AEC test constitute a significant change to the application of Article 102 TFEU to exclusionary abuses based on pricing. For this reason, ETNO would welcome further guidance on the instances in which, according to the Commission, the current AEC test is not warranted.

That said, efforts to address '*other relevant circumstances'* with the AEC test, as clarified by the Court of Justice (COJ) should not mean the importance of the economic analysis is reduced, nor make the use of the test optional. The case law does not indicate to generally revise the importance of the economic analysis, but rather that '*its results should in any event be assessed together with all other relevant circumstances*'[9]. Quite on the contrary, the case law clearly states that 'loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices must be assessed, as a general rule, using AEC test'[10].

What is more, the Court of Justice restates the importance of the AEC test also in cases where its application is not straightforward (non-pricing practices); '*Nevertheless, even in the case of non-pricing practices, the relevance of such a test cannot be ruled out. A test of that type may prove useful where the consequences of the practice in question can be quantified*'[11]. Therefore, the Court does not leave

[6] Judgment of 6 October 2015, Post Danmark A/S v Konkurrencerådet
[7] Judgment of 19 January 2023, Unilever Italia Mkt. Operations
[8] In the amendments to footnote 1 of the Guidance
[9] Annex to the Guidance Paper
[10] Judgment of 12 May 2022, Servizio Elettrico Nazionale e.a. (SEN), paragraph 80
[11] Judgment of 19 January 2023, Unilever Italia Mkt. Operations, paragraph 59



doubts on the importance of the AEC test and the Commission should rely on it as a matter of principle and only employ other methods on a subsidiary basis.

**Essentiality of the input**

ETNO considers that it is important to maintain the condition of objective necessity of the input for competitors to be able to compete effectively on the downstream market in cases of margin squeeze, even if this conduct constitutes an independent form of abuse distinct from refusal to supply. In fact, if there are substitute inputs that downstream competitors can rely on, the practice of margin squeeze by e.g. rising the wholesale price will be unsuccessful, because buyers will switch to those substitutes and therefore the practice will not be able to restrict competition.

**Abuses in the digital space**

Beyond the problems that are already touch upon in prior guidance we believe that it is important for new guidelines to also address forms of exclusionary foreclosure that are becoming more immanent in the digital space. Even though they may not be new their impact is very different. Most prominent here are the different forms of leveraging in digital markets, for which there is also some relevant legal precedents, such as for example the Google Shopping case. In accordance with the positions of the General Court and the Opinion of Advocate General Juliane Kokott[12], new sort of unequal treatment using a leverage effect ('leveraging') must be recognized as an independent form of abuse of a dominant position within the meaning of Art. 102 TFEU (e.g., self-preferencing). This abusive behaviour deserves to be prioritised for prosecution, particularly in the area of digital markets, as it leads to the strengthening of ecosystems with considerable market foreclosure potential, fuelled by (indirect) network effects.

In this respect, the Google Shopping case represents a trend that may intensify in the future. The Commission's proceedings against Amazon (AT.40703), in which Amazon was accused of using the data of its contractual partners from a dominated market to benefit its own retail division is another example for such developments. What is even more concerning, there is a risk in the field of generative AI that the companies with the most powerful foundation models will use them to leverage their market power into downstream markets.

In view of the above, it is crucial that new guidelines ensure overall legal certainty to companies and the market in general by creating workable and reliable conditions and the self-assessment of individual cases. This is necessary for businesses to plan their activities, allocate resources and make strategic decisions. In order to prevent detrimental consequences for companies, stemming from any unforeseen changes, ETNO would like to underline the importance of closely involving stakeholders and the private sector in the preparation of the new draft guidelines from as early as possible and prior to their public consultation.

[12] Advocate General's Opinion in Case C-48/22 P, Google and Alphabet v Commission (Google Shopping)

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European electronic communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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