ECLF
European Competition Lawyers Forum

ECLF response to the European Commission's call for evidence on adopting guidelines for exclusionary abuses

24 April 2023

1 Introduction

1.1 On 27 March 2023, the European Commission (the "**Commission**") launched a Call for Evidence consulting on the adoption of guidelines on exclusionary abuses for dominant undertakings (the "**Guidelines**") with a view to publishing Guidelines in 2024. In parallel, it has made some amendments to its 2009 enforcement priorities in applying Article 102 TFEU to the abusive exclusionary conduct by dominant undertakings (the "**Guidance Paper**") with immediate effect (the "**Amending Communication**"), which marks a certain shift in its approach to abuse of dominance. It also published a policy brief, which provides background explaining both initiatives (the "**Policy Brief**").

1.2 The European Competition Law Forum (the "**ECLF**")[1] welcomes the Commission's proposal to issue Guidelines on exclusionary abuses. The Guidance Paper has provided helpful practical guidance on the circumstances in which the Commission is likely to pursue practices under Article 102 TFEU. However, the significant changes in commercial realities in the intervening period as well as the Commission's cases and the EU Courts' (the "**Courts**") jurisprudence mean that the firms, practitioners, and regulators would benefit from more formal guidelines on exclusionary abuses. The publication of "Guidelines" may also increase their acceptability among National Competition Authorities ("**NCAs**"), in the same way as in Article 101 TFEU.

1.3 Our comments on how the Commission may best develop Guidelines are set out below. The ECLF looks forward to the publication of the Commission's draft Guidelines in 2024 and is grateful for the opportunity to contribute to their development.

1.4 This response is structured as follows:

- Section 2 sets out our recommendations on the general framework.
- Section 3 sets out our recommendations in relation to the main constituent elements of exclusionary abuses.
- Section 4 sets out our recommendations on pricing abuses.
- Section 5 sets out our recommendations on non-pricing abuses.
- Section 6 sets out our recommendations on discriminatory abuses.

2 General recommendations on the Guidelines

2.1 The Guidance Paper was the culmination of a broader discussion and gestation process about formalism and the role of economics in competition law. It followed the reforms of the substantive rules

[1] The European Competition Lawyers Forum is a group of the leading practitioners in competition law from firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or their law firms. The views set out in this working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 1.

implementing Article 101 TFEU and merger control, with the aim of adopting an approach more grounded in economics.

2.2 The so-called "effects-based" analysis focuses on the existence of negative effects for competition, which harm consumers, and centres around the economic analysis of each case based on its specific circumstances and facts. Contrastingly, the "formalistic" approach (followed until recently in Article 102 TFEU cases) focuses on the nature of the behaviour of the dominant firm and its external characteristics but does not reflect modern economic thinking. In other words, the effects-based approach is not based on an abstract assessment of cases (i.e., an assessment based on the form of business practices) but necessitates an analysis of the *actual* or *likely* effects of this behaviour on consumers. As noted by Advocate General Wahl in *Intel*, '*EU competition rules seek to capture behaviour that has anticompetitive effects*' and '*the form of a particular practice has not been deemed important*'.[2] These effects may relate to a visible reduction of price, quality, innovation, or choice but may also relate to empirically validated theories of harm.

2.3 The main objective of the Guidance Paper was to help companies better assess whether a particular behaviour is likely to lead to antitrust intervention, but also to advance (as far as possible) the interpretation of Article 102 TFEU based on sound economic principles. The Guidance Paper states that:

> '*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. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings*.'[3]

2.4 In addition, the Guidance Paper emphasised that the Commission primarily seeks to preserve the competitive process in the internal market by protecting competition on the merits and not merely protecting competitors. The Guidance Paper states that '[t]*his may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market*'.[4] In that regard, the main thrust of the Guidance Paper was to distinguish between simple and anti-competitive foreclosure, with only the latter being of interest to Article 102 TFEU since it leads to consumer harm. Consumer harm is defined by the Commission in purely economic terms as anything that has '*an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice*'.[5]

2.5 The Guidance Paper was a significant step away from the formalistic approach and led to a more economic (i.e., effects-based) approach, focusing on actual or likely effects on competition based on a verifiable theory of actual or likely anti-competitive harm. This new approach has gradually been endorsed by the Courts in their case-law over the last 11 years, starting with the Court of Justice's judgment in *Post Danmark I* and then culminating in the Court of Justice's judgment in *Intel*. Rulings in *MEO*, *Post Danmark II*, *Slovak Telekom*, *Servizio Elettrico Nazionale*, *Lithuanian Railways*, *Unilever Italia*, *Google Shopping*, *Google Android*, *Qualcomm* and *Intel (renvoi)* have further consolidated the

[2] Case C-413/14 P *Intel Corporation Inc.* [2016] ECLI:EU:C:2017:632, para. 43.

[3] Guidance Paper, para. 5.

[4] Guidance Paper, para. 6.

[5] Guidance Paper, para. 19.

effects-based approach and the focus on credible theories of harm. As such, what was *lex ferenda* in 2009 is now *lex lata*. Indeed, this is now the state of the law as a matter of the Treaty (primary law, as interpreted by the case-law) and there is no way back to the pre-Guidance Paper era. Aside from being legally impossible to do so, the ECLF does not consider that the aim of the Commission is to depart from the effects-based and economic approach and return to formalism.[6] The ECLF welcomes the fact that the Amending Communication has not called into question these fundamental principles on which the Guidance Paper is built. The ECLF also recommends that the Commission (in its review process) continues to be inspired by these fundamental principles, which, in any event, have now also been confirmed by the EU Courts.

2.6 In summary, the ECLF recommends that the Commission continues to be guided by the following fundamental principles (as recently confirmed by the EU Courts on many occasions) when developing its Guidelines:

- The function of Article 102 TFEU is to protect competition and *not competitors* as such.
- Consumer welfare is the '*ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position within the internal market or a substantial part of that market*',[7] without it being necessary, however, to always show direct harm to consumers.
- Foreclosure, as such, may be the result of competition on the merits and Article 102 TFEU should prohibit only *anti-competitive* foreclosure.
- Certain conduct is abusive because it has the '*intrinsic capacity to foreclose*', rather than because of its form and external characteristics.
- It is always important for antitrust intervention to be based on a sound and verifiable 'theory of harm', in the sense that the conduct under assessment leads to actual or likely foreclosure.
- It is not the aim of Article 102 TFEU to protect and guarantee the market presence of less efficient competitors in the face of the dominant company's competition on the merits.
- It is important that the law, when assessing conduct, balances in an unbiased manner potential benefits to consumers (efficiencies) against potential harm to consumers.

2.7 Finally, the ECLF is conscious that the Courts are currently considering several potentially salient cases. The Court of Justice is, for example, currently considering *Google Shopping* and *Google Android*, and there has also been a very recent preliminary reference from Italy on refusal to supply (*Google Android Auto*). These cases may address several points of principle for exclusionary abuses. The ECLF hopes that the Commission will seek to incorporate as much of emerging case-law as is feasible and is clear on the cut-off date for the issuance of the Guidelines.

[6] Whilst the Commission could limit its own discretion by announcing that it will not prioritise certain cases (even if it had the right to bring such cases under the existing case-law at that time) it would not be possible now to do the reverse. In other words, the Commission must bring cases only to the extent the case-law allows. Since the case-law has now moved away from formalism to the effects-based approach, the Commission must follow the case-law of the Courts. As a matter of good administration, if the Commission is minded to publish "Guidelines" in the future (rather than a Communication on "prioritisation") these "Guidelines" should reflect the state of the law.

[7] Case 377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 46.

3 Guidelines on the constituent elements of an exclusionary abuse

3.1 The ECLF recommends that the Guidelines codifies the case-law on the main constituent elements of an exclusionary abuse, namely when practices are potentially contrary to competition on the merits and the nature of *anti-competitive* effects.

3.2 First, the Guidelines could usefully outline the circumstances in which practices other than established categories of abuse are nevertheless contrary to competition on the merits. The Guidance Paper provides an effective overview of the circumstances in which the Commission is likely to pursue investigations concerning established categories of abuse such as exclusive dealing, predation and tying and bundling. However, since its adoption in 2009, the Courts have addressed the circumstances in which conduct is contrary to competition on the merits and hence may be abusive irrespective of whether it falls within an established category of abuse. Clarifying the case-law would serve legal certainty on a topic which has become more salient as competition authorities have sought to probe the effects of practices that do not clearly fall into the bucket of an existing category of abuse.

3.3 In this regard, the General Court reiterated in *Google Shopping* that the list of abusive practices is not exhaustive and clarified that it is necessary to establish that a practice is contrary to competition on the merits as well as giving rise to potential anti-competitive effects.[8] The Court of Justice, in *Servizio Elettrico Nazionale*, outlined two tests for assessing whether practices were contrary to the merits of competition, namely a "replicability test" of whether an as efficient competitor would have the ability to replicate the conduct of the dominant undertaking and a "no economic sense" test of whether the practice has any rationale *'except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position'*.[9]

3.4 Second, the Guidelines should confirm that the as efficient competitor principle acts as the cornerstone for establishing whether practices are abusive subject to objective justification. Since the Guidance Paper, the Courts have repeatedly stipulated that Article 102 TFEU addresses practices that are capable of foreclosing as efficient competitors. To this effect, the Court of Justice recently reiterated in *Unilever Italia* that*:*

> *'competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient … from the point of view of … price, choice, quality or innovation'*.[10]

3.5 The ECLF strongly recommends that the Guidelines clarify that the default threshold for establishing anti-competitive effects is that the relevant practices are likely to foreclose as efficient competitors, as a matter of principle. Absent such clarification, potentially dominant undertakings will have no clarity on when their practices may be potentially abusive. Such an outcome would, in aggregate, be more likely to stifle competition than foster it, as firms hold back from pro-competitive practices due to concerns that they could foreclose inefficient competitors. If the Commission envisages exceptions to the default position, it would be important to (a) explain specifically when such exceptions might arise; and (b) limit such exceptions to situations where protecting less efficient competitors would promote rather than undermine the overarching objective of consumer welfare.

3.6 Third, the Guidelines should address the distinction between whether a practice gives rise to a likelihood of foreclosure and the question of whether a practice produces actual or potential effects.

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[8] Case T-612/17 *Google Shopping* [2021] ECLI:EU:T:2021:763, paras. 154 et seq.

[9] Case 377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, paras. 79-84.

[10] Case 680/20 *Unilever Italia* [2023] ECLI:EU:C:2023:33, para. 37.

3.7 The question of *likelihood* of foreclosure concerns the standard for establishing whether a practice has anti-competitive effects. As Advocate General Kokott observed in *Post Danmark II, 'it is necessary but also sufficient that the rebates in question can produce an exclusionary effect. This is the case where, on the basis of an overall assessment of all the relevant circumstances of the individual case, the presence of the exclusionary effect appears more likely than its absence.'*[11] Conversely, whether the effects are actual or potential refers to whether there are already observable anti-competitive effects on the relevant market or whether the practice is likely to have anti-competitive effects in the future.

3.8 The temporal element of the effects alleged (actual or potential) is thus conceptually distinct from the threshold for establishing anti-competitive effects. Whereas there will always be some uncertainty about potential effects (which involves the application of abstract theories to particular factual circumstances), even where actual effects are alleged, there will typically be some uncertainty as to whether a causal link can be established between the actual effects and the conduct (and therefore whether the conduct was capable of restricting competition in the circumstances). As such, the Guidelines should be careful not to elide the two.

3.9 So it would be helpful if the Guidelines could clarify the fundamental difference between likelihood of foreclosure, in other words '*the intrinsic capacity of [a] practice to foreclose competitors which are at least as efficient as the dominant undertaking*',[12] and actual/potential effects. The two concepts have unfortunately been conflated by the Amending Communication. The issue whether certain conduct has produced actual or potential anti-competitive effects is different from the preliminary and more important question whether the conduct in question is "likely" to lead to anti-competitive foreclosure in the first place. The latter question, put simply, is about whether the enforcer's "theory of harm" can fly.

4 Guidelines on price-based abuses

4.1 The ECLF welcomes the Commission's clarification in the amended Guidance Paper that margin squeeze constitutes a separate category of abuse. The clarification renders the Guidance Paper consistent with the case-law and thus serves legal certainty.[13]

4.2 The ECLF, however, strongly advocates that the Guidelines recognise the important role that price-cost tests such as the "as efficient competitor" test (the "**AEC Test**") and other quantitative indicia perform for assessing the legality of all exclusionary pricing abuses, including exclusivity and loyalty rebates. Consistent with the guidance in the Guidance Paper, the Courts have (in the last fifteen years) developed a sophisticated role for such tests, which take advantage of their effectiveness as analytical tools for demonstrating anti-competitive foreclosure whilst recognising that such tests may not be suitable in all circumstances.

4.3 To this end, the Courts have developed a working principle that pricing practices must, as a general rule, be assessed by reference to whether the relevant prices would foreclose as efficient competitors. In this regard, the Court of Justice held in *Slovak Telekom* that:

[11] Case 23/14 *Post Danmark A/S v Konkurrencerådet,* Opinion of AG Kokott [2015] ECLI:EU:C:2015:343, para. 82.

[12] Case C-413/14 P *Intel Corporation Inc.* [2016] ECLI:EU:C:2017:632, paras. 140.

[13] See Case C-165/19 P *Slovak Telekom v Commission* [2021] EU:C:2021:239, paras. 50-52; Case C-42/21 P *Lietuvos geležinkeliai AB v Commission* [2023] EU:C:2023:12, paras. 81-84, 91; and Case C-295/12 P *Telefónica and Telefónica de España v Commission* EU:C:2014:2062, para. 96.

'to assess the lawfulness of [a] pricing policy … reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy' (emphasis added).[14]

4.4 This was reiterated by the General Court in *Google Shopping*, which stated that '*the use of the as-efficient-competitor test is warranted in the case of pricing practices (predatory pricing or a margin squeeze, for example)*'.[15]

4.5 And most recently, the Court of Justice has reiterated this rule in no uncertain terms:

'*Regarding the first of these two categories of practices [pricing practices], which includes loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the 'as-efficient competitor' test, which seeks specifically to assess whether such a competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position*.'[16]

4.6 The Courts have also affirmed, on the procedural front, that competition authorities must assess price-cost tests such as the AEC Test when submitted by undertakings to demonstrate that their pricing practices are not capable of anti-competitive foreclosure. The Court of Justice stipulated in *Unilever Italia* that, where a dominant firm submits evidence *'capable of demonstrating the inability to produce restrictive effects'*, the relevant competition authority is under an obligation to consider that evidence which, in the case of Unilever, entailed an AEC Test.[17]

4.7 The inclusion of these aspects of the case-law in the Guidelines would serve legal certainty without compromising the Commission's and the NCAs' ability to pursue cases where price cost tests are either not appropriate or impracticable for assessing whether pricing practices are compatible with Article 102 TFEU. These clarifications remain all the more important as the AEC test remains one of the few self-administrable tests of legality that does not require information on rivals and, as such, is of great value to dominant companies who try to comply with competition law *ex ante*. Our experience is that many dominant companies use that tool when adopting pricing practices and it would be unfortunate if such contemporaneous evidence were deprived of any usefulness. That would certainly go against the EU case-law, that characterises the AEC test as a "useful tool".

4.8 The ECLF would also stress that it is not clear why the Commission's policy brief concludes that price-cost tests are inherently likely to be less relevant in rebate cases.[18] The application of price-cost tests must obviously take account of all the relevant circumstances, including the nature of the payment or incentive provided by the terms in questions. However, beside the fact that such an approach is not consistent with *Servizio Elettrico Nazionale*,[19] we see no reason – beyond formalism – to presumptively exclude price-cost tests for rebates while recognising their potential value in predatory pricing. The same holds for the distinction the policy brief draws between exclusivity rebates and loyalty rebates

[14] Case C-165/19 P *Slovak Telekom v Commission* [2021] EU:C:2021:239, para. 110.

[15] Case T-612/17 *Google Shopping* [2021] ECLI:EU:T:2021:763, para. 538 (emphasis added).

[16] Case 377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 80.

[17] Case 680/20 *Unilever Italia* [2023] ECLI:EU:C:2023:33, para. 54.

[18] See European Commission, Competition Policy Brief: A dynamic and workable effects-based approach to abuse of dominance, 1 March 2023, p. 7. The ECLF also notes that the EU Courts' jurisprudence does not distinguish between exclusivity rebates.

[19] Case 377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 80.

which is, furthermore, also inconsistent with the case-law which applies the same legal test to exclusivity and loyalty rebates.[20]

4.9 Finally, the ECLF observes that the Court of Justice has also rightly recognised in *Unilever Italia* that the principles behind an AEC Test can also be relevant for assessing non-pricing practices such as absolute exclusive dealing (i.e., where there is no pricing component to the exclusivity).[21] It then recognised that an AEC Test can be helpful in assessing non-price related abuses, for example to quantify the effects of the conduct in question, where it can act as an effective proxy for the effect on competition.[22]

5 Guidelines on non-price abuses

5.1 The Guidance Paper already addresses in detail the circumstances in which non-price exclusionary practices may be abusive and, as such, provides a useful starting point for preparing Guidelines on non-price exclusionary abuses. The Guidelines could, however, usefully develop the following points given the evolution of the case-law.

A. Clarifying the need to establish anti-competitive effects for abusive tying

5.2 The ECLF recommends, first, that the Guidelines clarify the circumstances in which a competition authority must establish that a tie is likely to result in anti-competitive foreclosure to establish that it is abusive. The General Court outlined in *Microsoft* the conditions for an abusive tie, namely that (i) the tying and tied products are separate; (ii) the undertaking concerned is dominant for the tying product; (iii) customers cannot obtain the tying product without the tied product from the undertaking concerned; (iv) the tying forecloses competition; and (v) the tie has no objective justification.[23]

5.3 However, as the General Court observed in *Google Android*, the case-law retains a residual distinction between "classic" tying practices where a competition authority may ostensibly rely on the premise that a tie has anti-competitive effects *'by its nature'* and cases where a competition authority must establish that a tie has anti-competitive effects.[24] In this regard, the General Court held in *Microsoft* that the circumstances of the case meant that it could not rely on the presumption that a tie gave rise to anti-competitive foreclosure effects (notably that the tied product was "free"). The Commission took a similar approach in *Google Android*.

5.4 The ECLF recommends that the Guidelines clarify that competition authorities should only pursue tying under Article 102 TFEU when it is sufficiently likely to result in anti-competitive effects. The residual distinction is, in particular, contrary to the principle reiterated in *Slovak Telekom* that *'the examination of the abusive nature of a dominant undertaking's practice pursuant to Article 102 TFEU must be carried out by taking into consideration all the specific circumstances of the case.'*[25] It cannot hold, therefore, that tying may be deemed abusive in circumstances where an authority has failed to establish that it is sufficiently likely to give rise to anti-competitive effects.

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[20] See, notably, Case C-413/14 P *Intel Corporation Inc.* [2016] ECLI:EU:C:2017:632, paras. 137 – 138 and Case 680/20 *Unilever Italia* [2023] ECLI:EU:C:2023:33, para. 46.

[21] Case 680/20 *Unilever Italia* [2023] ECLI:EU:C:2023:33.

[22] Case 680/20 *Unilever Italia* [2023] ECLI:EU:C:2023:33, para. 58.

[23] Case T-604/18 *Google Android* [2022] ECLI:EU:T:2022:541, para. 284.

[24] Case T-604/18 *Google Android* [2022] ECLI:EU:T:2022:541, paras. 286-288.

[25] Case C-165/19 P *Slovak Telekom v Commission* [2021] EU:C:2021:239, para. 42.

B. Clarifying the application of the *Bronner* conditions to refusal to supply

5.5 The ECLF recommends that the Guidelines do not create a category of "constructive refusal to supply" as distinct from an "outright refusal to supply" to which the *Bronner* conditions apply.

5.6 The Commission's Policy Brief rightly cites the Court of Justice in *Lithuanian Railways* and *Slovak Telekom* that the *Bronner* conditions apply '*only to outright refusals to supply, not to other abusive conducts concerning access conditions when access has already been given*.'[26] As the Court of Justice held in *Slovak Telekom*:

> *'… where a dominant undertaking gives access to its infrastructure but makes that access … subject to unfair conditions, the conditions laid down by the Court of Justice in … Bronner do not apply.'*[27]

5.7 However, it does not follow that the *Bronner* conditions are inapplicable to any "constructive" refusals to supply and neither of the two cases cited recognises the existence of separate category of abuse, "constructive refusal to supply", to which *Bronner* does not apply. A constructive refusal to supply cannot always be equated with the conditions of access to an input for which access already exists (a "constructive" refusal to supply may occur, for example, where an undertaking is unwilling to grant access apart from on terms that a downstream competitor views as uneconomic irrespective of whether access has been granted previously or not). Such an approach would, moreover, risk cutting across the underlying logic of preserving incentives to invest in infrastructure and innovation. Moreover, there is no obvious consumer welfare reason why a less restrictive act (constructive refusal to supply) should be abusive at a lower threshold than a more restrictive act (outright refusal).

5.8 Furthermore, we would also recommend that the Guidelines clarify the circumstances in which the case-law has held that the *Bronner* conditions do not apply rather than articulating broad principles given the law remains in significant flux. In particular, the Court of Justice's judgments in *Lithuanian Railways* and *Slovak Telekom* held that the *Bronner* conditions did not apply in those cases based on the specific facts rather than articulating any clear *arrêt de principe*:

5.8.1 In *Lithuanian Railways* the Court of Justice agreed with the General Court that the *Bronner* conditions did not apply since *'the infrastructure in question was financed by means not of investments specific to the dominant undertaking, but by means of public funds.'*[28]

5.8.2 In Slovak Telekom the Court of Justice held that the *Bronner* conditions were not relevant since, *inter alia,* the dominant firm was under a regulatory obligation to offer access to its infrastructure.[29]

5.9 The potential judgments in *Google Shopping* and *Google Android Auto* also mean that refusal to supply is a particular area where the Courts may further clarify the case-law ahead of the issuance of the Guidelines.

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[26] European Commission, *Competition Policy Brief: A dynamic and workable effects-based approach to abuse of dominance*, 1 March 2023, pp. 7 – 8.

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

[28] Case C-42/21 P *Lietuvos geležinkeliai AB v Commission* [2023] EU:C:2023:12, para. 87.

[29] Case C-165/19 P *Slovak Telekom v Commission* [2021] EU:C:2021:239, para. 54.

6 Guidelines on discriminatory practices

6.1 The ECLF recommends that the Guidelines address discriminatory abuses and their relationship with the different categories of exclusionary abuses.

6.2 The Guidance Paper does not address discriminatory practices as independent categories of abuse but instead covers discrimination insofar as it is relevant for assessing particular categories of exclusionary abuse (e.g. selective price cuts of tailored conditional rebates).[30] This stance was understandable at the time of its issuance since discriminatory abuses arguably constituted a separate family of abusive practices *vis-a-vis* exclusionary abuses.

6.3 The Courts have, however, since addressed discriminatory practices in a number of cases including *Post Danmark I* (selective price cuts), *MEO* (pure second-line discrimination) and *Google Shopping* (self-preferencing). In all of the cases, the Judgments assess whether the practices were capable of leading to anti-competitive foreclosure. This also holds for *MEO* where the Court of Justice held that pure second line discrimination must *'hinder the competitive position of some of the [dominant firm's] business partners … in relation to others',* notwithstanding that the relevant dominant undertaking is not present downstream (and hence does not stand to benefit from any foreclosure).[31]

6.4 The Guidelines could, therefore, usefully address discrimination insofar as it is relevant for exclusionary abuses. The ECLF considers, in particular, that the Guidelines could usefully clarify (consistent with the Guidance Paper) that selective price cuts should be addressed under the framework of predation established by *Post Danmark I*. The ECLF also considers that the Guidelines should clarify the treatment of self-preferencing following *Google Shopping*. Given that vertical integration is the hallmark of many industries and is seen neutrally by Article 102 TFEU as the General Court stressed in *Google Shopping*, it is particularly important to clarify the circumstances in which self-preferencing may be abusive.

[30] Guidance Paper, paras. 45 and 72.

[31] Case 525/16 *MEO* [2018] ECLI:EU:C:2018:270, para. 25.

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