Has the Turning Point Been Missed? Exclusivity Payments Granted by Dominant Undertakings in the Light of the Enforcement Priorities Guidance

by

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CONTENTS

Abstract

For many years, exclusivity payments and its specific type – loyalty rebates – were treated by the European Commission (Commission) as restrictions by object. This approach has been gradually revised towards a more effect-based reasoning. In the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance), the Commission demonstrated its willingness to follow the so-called

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The views expressed in this publication are those of the author.

Article received: 22 April 2021, accepted: 6 July 2021.

'economic approach'. In particular, the Commission announced that for price-based exclusionary conduct the so-called 'as-efficient competitor' test (AEC test) is going to be used. This article aims to verify whether the Commission followed the Guidance in its assessment of exclusionary practices in two cases, *Qualcomm* and *Google (Android)*, considered by the Author as an opportunity to make a move from a form-based to an economic-based approach. In his considerations, the Author provides proposals on how the practice of the Commission should be changed to ensure dominant undertakings are provided with a sufficient level of legal certainty.

Resumé

Pendant de nombreuses années, les paiements d'exclusivité et le type spécifique de rabais de fidélité ont été traités par la Commission européenne (la Commission) comme des restrictions par objet. Cette approche a été progressivement révisée en faveur d'un raisonnement fondé sur les effets. Dans les Orientations sur les priorités retenues par la Commission pour l'application de l'article 82 du Traité CE aux pratiques d'éviction abusives des entreprises dominantes (Orientations), la Commission a démontré sa volonté de suivre l'approche "économique". En particulier, la Commission a annoncé que pour les pratiques d'exclusion fondées sur les prix, le test du "concurrent le plus efficace" sera utilisé. Cet article vise à vérifier si la Commission a suivi les lignes directrices dans son évaluation des pratiques d'exclusion dans deux affaires, Qualcomm et Google (Android), considérées par l'auteur comme des occasions de passer d'une approche fondée sur la forme à une approche économique. Dans ses considérations, l'Auteur fournit des propositions sur la manière dont la pratique de la Commission devrait être modifiée afin de garantir que les entreprises dominantes bénéficient d'un niveau suffisant de sécurité juridique.

Key words: competition law; dominant position; abuse of dominant position; exclusivity; as-efficient competitor test.

JEL: K21, K23, L40, L41

I. Exclusivity payments

Dominant undertakings selling their product on the market are, most of the time, interested in becoming the preferred or sole supplier to customers, which means that buyers would fulfill most of their purchase needs or even all of them buying the relevant product from the dominant undertaking. This effect is, however, not necessarily achieved as a result of normal market competition. Instead, companies might use so-called exclusivity payments, granted under

the condition of purchasing only the contractor's products or fulfilling certain parts of their needs with his assortment. Exclusivity payments can take the form of explicit exclusivity clauses in the contract, as well as discounts decreasing the effective price of the products, dependent on the amount or value of the products purchased by the customer. Exclusivity can be also secured by introducing in the contract so-called 'English clauses', which are provisions requiring the buyer to report any better offer obtained from another supplier, and allowing the customer to accept such an offer only when the contractor does not match it (European Commission, 2005, p. 43). The diversity of the forms of exclusivity payments is also reflected in how strongly the different customers are bound to a certain supplier. It is very obvious that certain forms of exclusivity payments are more harmful than others (OECD, 2020, p. 37). In particular, it should be noted that payments granted for purchasing a given part of a buyer's purchasing needs are going to have less anticompetitive effects comparing to those provided for refraining from buying the products of competitors at all. Such conduct can be recognized as abuse of market power by the supplier and therefore fall under the provisions of Article 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU or Treaty) that establishes a prohibition of an abuse of a dominant position. To avoid an intervention of the Commission, it is therefore crucial for suppliers holding market power to understand what the assessment criteria of such practice are, and under which conditions they could use it.

Depending on whether the restriction is related to the price or not, two types of exclusionary conducts can be distinguished – these are, respectively, price-based and non-price-based conducts (Lianos, 2009). The application of this dichotomy to exclusivity arrangements results in the conclusion that a practice in question can fall in both of these categories. If the obligation for exclusive purchases depends on payments provided by the supplier, for instance rebates decreasing the price of the product that will be covered by the exclusivity obligation, the said practice will be considered as price-based; if, however, exclusivity is detached from any payment granted by the supplier, it shall constitute non-price-based conduct. It should be noted that considering a given conduct as price-based does not necessarily mean that the payment directly decreases the product's price (like in the case of discounts). A contractual provision can literally separate payment from price, but, in its substance, the effect will be the same as in the case of providing a rebate in exchange for exclusive purchases.

Exclusivity payments lead to certain anticompetitive effects on the relevant market. As such, one should mention especially the exclusion of competitors. Such effect is stronger when the exclusivity covers all purchase needs, and it is weaker when it comes to quantity or purchase share requirements. However, in

any case, the exclusionary effect is an actual condition of granting the payment or a discount. A certain limitation of market competition comes from the sole nature of the exclusivity payments, what can differ is the share of the purchase for which other suppliers can compete with the dominant undertaking. The smaller this share is, the stronger of an anticompetitive effect can the conduct create. In connection to the above, it should be mentioned that in specific cases when a supplier is offering so-called 'must-stock brands', the contestable share is already reduced as a customer must offer certain products from the suppliers' portfolio. The market does not necessarily have to be closed-off, exclusivity payments can, however, force competing suppliers to make additional investments, such as higher discounts, and so access to market can be restricted. Although in this article the Author will focus on the exclusionary effect, it should be mentioned that in case of price-setting mechanisms, such as discounts, another anticompetitive effect can appear. This is discrimination of similar customers by offering them products at different effective prices (prices decreased by the rebate).

It is crucial to underline that exclusivity payments lead to certain procompetitive effects also by increasing the efficiency of undertakings. For example, a supplier ensuring for himself exclusive access to an outlet (or outlets) is more willing to invest additional financial resources and efforts aiming to increase the affordability of products.[1] This can also cover sharing by a supplier of his know-how and experience with the buyer in order to support the resale of his products, once he ensures this investment will not be used for the benefit of his competitors. Due to the fact that exclusivity payments can lead to both pro- and anticompetitive effects, for the purpose of their proper assessment, aiming to verify what their prevailing impact is on market competition, it is required to conduct a full assessment of the conduct of the dominant supplier. At the same time, undertakings should be provided with the criteria of such assessment to ensure legal certainty and to allow them to self-assess in order to avoid illegal market behavior.

II. Conditions of admissibility

In case of anticompetitive agreements, the conditions of an exception from the prohibition have been listed in Article 101(3) TFEU. In order not to fall under Article 101(1), an agreement has to: contribute to improving the

[1] 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 2009 C 45/7) (hereinafter: Guidance), para. 46.

production or distribution of goods or to promoting technical or economic progress; allow consumers a fair share of the resulting benefits; not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the above objectives, and not to afford such undertakings the possibility of eliminating competition in respect of the substantial part of the products in question. These conditions are not very specific and can be interpreted in very different ways not only by the undertakings themselves but also by authorities and courts. The apparent lack of clarity is, however, at least to a certain extent, resolved by Block Exception Regulations indicating more specific requirements the verification of which does not require a complex economic analysis.

Such clarification is not ensured in the area of unilateral practices that can establish an abuse of a dominant position. Article 102 TFEU provides only a general prohibition of dominance abuse and examples of such practices. There are also no additional regulations issued by the Council in this regard. The lack of such provisions does not mean, however, that a dominant company cannot defend itself. In the jurisprudence of EU courts, two potential 'strategies' of defense have been developed: 1) providing an objective justification of the practice and 2) demonstrating efficiencies outweighing the negative effects of the practice on competition. As far as the first type is concerned, there are two types of arguments that can be used by a dominant undertaking to prove the permissibility of a conduct that otherwise would be considered as an abuse. The dominant undertaking can show that the practice in question is objectively necessary due to factors that are external to the dominant company (Hunt, 2006). The undertaking can also try to prove that a certain practice was objectively necessary to 'meet competition'. For the purpose of the considerations conducted in this article, the efficiency defense is more important however.

The Commission specified certain requirements the fulfillment of which must be proven by the dominant undertaking in order to successfully take advantage of the efficiency defense. According to the provisions of the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (hereinafter: Guidance), efficiencies have to be realized as a result of the scrutinized conduct; the conduct is indispensable to the realization of the efficiencies; the efficiencies outweigh any likely negative effects on competition; the conduct does not eliminate effective competition by removing all, or most existing resources of actual or potential competition.[2] Of crucial importance in this regard is the third requirement, constituting a kind of consumer welfare test

[2] Guidance, para. 30.

based on comparing pro- and anticompetitive effects of the conduct on market competition. An exclusionary practice violates competition law when it reduces competition without creating a sufficient improvement in performance to fully offset these potential adverse effects (Salop, 2006, p. 330). The Commission also underlines the importance of 'consumer welfare' saying that 'the aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare'.[3] As already indicated above, exclusivity payments can lead to certain procompetitive effects having a positive impact on consumer welfare, in particular in the form of lower prices. Therefore, one should conclude that an efficiency defense can be used by dominant undertakings to justify using such practices on the relevant market.

Of major importance for further analysis is the statement of the Commission whereby it is the dominant undertaking who is obliged to demonstrate that it meets all of the requirements described above, including the prevalence of the efficiency benefits of the conduct over its anticompetitive effects. This design frames the burden of proof in a similar way as in the case of anticompetitive agreements. According to Article 2 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and Articles 82 of the Treaty (hereinafter: Regulation 1/2003), the undertaking or association of undertakings claiming the benefit of Article 81(3) TEC (current Article 101(3) TFEU – TK) shall bear the burden of proving that the conditions of that paragraph are fulfilled. Regardless of who is bound by this duty, it has to be clarified how the analysis should be carried out. This results in the conclusion that for the purpose of demonstrating efficiencies it is crucial to develop a certain standard of assessment.

III. Enforcement Priorities Guidance

Using the formalistic approach, and insufficient attention paid to economic principles demonstrated in the past be the Commission, was broadly criticized in the doctrine of competition law (Gormsen, 2010, p. 45). It seems that the decision taken in 2009 by the Commission to issue a specific Guidance was a sign of the acknowledgment of the above (Geradin, 2008).[4] On different

[3] Guidance, para. 19.

[4] The process of reflecting on this matter started in July 2005, in a report by the Economic Advisory Group on Competition Policy and then in December 2005, in a staff discussion paper (Kadar, 2019, p. 441).

occasions, the Commission used to refer to consumer welfare as the value protected by competition law enforcement.[5] This approach entails the necessity of adapting the effect-based, more economic approach towards the assessment of exclusionary conducts (Subiotto, Little, Lepetska, 2018, p. 294). According to the Commission, the Guidance sets out the enforcement priorities that will guide the Commission's actions in applying what is now Article 102 TFEU to exclusionary conduct by dominant undertakings.[6] Nevertheless, this statement, as well as the very title of the document, is misleading. Namely, instead of explaining where the Commission plans to allocate its resources, for example, digital markets, the document provides an interpretation of the law (Gormsen, 2010, p. 46). As such, the document in question creates a justified expectation on the undertakings' side that upon reviewing the specific case, the Commission will follow the provisions of this Guidance. One should come to this conclusion despite repeated statements of the Commission whereby the Guidance is not intended to constitute a statement of the law. The Commission provides very specific information about the approach it will take towards practices of dominant companies. The document contains a section related to the general approach to exclusionary conduct, as well as one dedicated for specific forms of abuse such as exclusive purchasing.

There are several factors that the Commission declared to take into consideration upon conducting an analysis of a case.

The first one is, obviously, the market position of the undertaking whose practice has been questioned. Ascertaining dominance, the Commission shall consider the market power of the company in question; the market position of its competitors (as well as barriers to expansion for existing competitors and barriers to entry for potential ones); and the countervailing buying power of the scrutinized company's customers. The term 'dominance' has been deeply analyzed over the years by the Commission and EU courts. For the purpose of this article, it needs only to be said that an undertaking should be considered as dominant if it is capable of profitably increasing prices above the competitive level for a significant period of time without facing sufficient effective competitive constraints.

The Commission indicates that it will also consider anticompetitive market foreclosure leading to consumer harm caused by the questioned conduct. The

[5] Neelie Kroes, Member of the Commission in charge of Competition Policy in one of her speeches stated that 'Article 82 serves to protect competition on the market. Not for its own sake, but rather as a means of enhancing consumer welfare and ensuring the efficient allocation of resources' (Kroes, 2006).

[6] Guidance, point 2. Although the Guidance covers only exclusionary practices, and does not refer to exploitative conduct, it is considered as a major step in the process of introducing a more economics-based approach (Peeperkorn and Viertio, 2009, p. 20).

above requires developing frames of analysis making it possible to distinguish: i) foreclosures having an adverse impact on consumer welfare and, therefore, being 'anticompetitive', from those that ii) do not cause such effect (having a positive net impact or neutral impact on consumer welfare) and thus shall fall outside Article 102 TFEU. The Commission states that upon analysis it will take into consideration certain factors. The first four of them echo factors considered upon determining the market position of the undertaking: market power of the company, its competitors, customers, and market conditions. In addition, the Commission will assess the extent of the allegedly abusive conduct, measured by the total sales on the market covered by the conduct, its duration and regularity. Next, the Commission indicates that it will consider actual foreclosure. Listing it among 'other factors' suggests that lack of evidence of actual foreclosure shall support the argument that the conduct (which lasted for a sufficient period of time and did not foreclose the market) did not, in fact, have an anticompetitive effect. The last factor named by the Commission is an exclusionary strategy. Importantly, the Commission noted that the above analysis shall be conducted jointly with an analysis relevant to specific types of exclusionary conduct, and any other factors which the Commission may consider to be appropriate.[7] It should be underlined that, according to the Commission, for the purpose of demonstrating that foreclosure caused or potentially might cause harm to consumer welfare, it is not sufficient to analyze the above-mentioned factors. It is also required to consider more specific factors relevant to specific types of conduct. At the same time, the Commission leaves itself a door open stating that there are circumstances when it is not required to conduct such an in-depth analysis. In para. 22 of the Guidance, the Commission states that such assessment is not required if it appears that the conduct is 'likely to result in consumer harm'. Such broad, general, and subjective statement creates, in the Author's opinion, a significant lack of legal certainty on the side of dominant undertakings. It can actually shift the burden of proof from the Commission to the defending company. As an example of a situation when the Commission can state that conduct is likely to result in consumer harm, the Guidance indicates: (1) preventing customers from testing products of competitors or (2) providing financial incentives to its customers on condition that they do not test such customers products or (3) paying a distributor or a customer to delay the introduction of a competitor's product. These are very specific situations, however, the Commission can surely indicate other conducts as 'likely to result in consumers harm'. In relation to this, one should refer to the Guidance's provision according to which adverse impact on consumer welfare can be

[7] Guidance, para. 21.

observed in the form of higher prices, limiting quality, or reducing consumer choice.[8] Obviously, the effect of reducing consumer choice is an indissoluble result of introducing exclusivity payments. One should also consider what does the sentence mean that 'it is not necessary for the Commission to carry out a detailed assessment'? It suggests that some of the factors can be omitted in the analysis of a particular case. Considering this aspect, one should conclude that 'possible evidence of actual foreclosure' is an applicable factor only in cases when such effects actually occurred and so it would unlikely be reasonable to ignore them. The 'direct evidence of any exclusionary strategy' is rather an additional factor, which by itself, due to its subjective character, shall not be even required to demonstrate an anticompetitive effect when other factors are demonstrating them and, *a contrario*, by itself shall not be sufficient enough to prove consumer welfare harm. Considering the above, two groups of factors are left. Those in the first group are required in order to prove dominance (market position of the dominant undertaking, its competitors, customers, and market conditions); factors in the second group show the extent of the allegedly abusive conduct (coverage, duration, and regularity). In the Author's opinion, neither of these groups could be omitted in the Commission's analysis of the case. Even then, however, it should be checked if exclusivity payments fall under one of the three examples mentioned in the Guidance. It seems that preventing customers from testing competitive products creates broader limitations for customer as compared to sole exclusivity payments, which are provided in exchange for not purchasing such products. Once an agreement on exclusivity has been reached, a customer that remains able to test other sellers' products can still shift its orders to another provider; if the customer lacks the opportunity to test alternative offerings (it is never given an opportunity to try other products) then the customer is bounded to the dominant provider more closely. The third situation, where a customer is paid to delay the introduction of a competing supplier's product, contradicts the exclusivity concept itself. Therefore, it should be concluded that only the first two cases can be considered as more radical versions of the exclusivity provisions. Consequently, the conduct of providing exclusivity payments does not itself fall under the exceptions mentioned by the Commission. One could say that the provision in question does not establish *numerus clausus* of situations when a detailed analysis is not required from the Commission; however, as demonstrated above, such a position shall not be considered as justified.

In section C of the Guidance, the Commission provides more information about the assessment of price-based exclusionary conducts. In such cases, the

[8] Guidance, para. 19.

Commission considers that, in order to prevent anti-competitive foreclosure, it should take action only when the questioned conduct is capable of hampering competition from competitors which are as efficient as the dominant undertaking.[9] This establishes the base for using the so-called 'as-efficient competitor test' (hereinafter: AEC test) for the purpose of assessing the anti-competitive potential of conduct, the conditions of which require the examination of economic data related to cost and sales price and, in particular, to verify whether the investigated undertaking is using below-cost pricing.[10] For this purpose, the Commission will compare sales prices with: i) average avoidable cost (hereinafter: AAC) and, ii) long-run average incremental cost (hereinafter: LRAIC).[11] If the analysis leads the Commission to the conclusion that an as-efficient competitor can effectively compete with the dominant undertaking, then the Commission will be unlikely to intervene. If, however, the comparison will demonstrate the opposite, then, according to the Commission, it will integrate this outcome into the general assessment of anti-competitive foreclosure, conducted as described above, and other relevant quantitative and/or qualitative evidence.[12] The last commitment is of crucial importance for further considerations. It seems that the Commission pays particular attention to the result of the AEC test. When its outcome is negative, the Commission should not determine that the questionable conduct is anti-competitive solely based on a general assessment. At the same time, one should not conclude from the content of the Guidance that conducting an AEC test is facultative. Rather, it is the opposite – it seems that the importance placed on this tool requires the Commission to always conduct such test when assessing price-based conduct. The conclusion should therefore be that both

[9] Guidance, para. 23. It is worth mentioning that perceiving the requirement to perform the AEC test as evidence of considering consumer welfare protection as the main goal of the Commission can be questioned. G. Monti is pointing out that it is possible that even in case of foreclosing the market for a competitor 'as efficient' as the dominant undertaking, the welfare of consumers is safe and they will not suffer from such practice (Monti, 2010, p. 4).

[10] The theoretical origin of the AEC test can be found in US literature, i.e., R. Posner's works (Marty, 2013). The AEC test was first used by the Commission in the AKZO case in 1991.

[11] In the EU, the AEC has been used for example in the judgment in the *AKZO* case – CJ judgment of 03.07.1991, Case C-62/86 *AKZO Chemie BV v Commission*, ECLI:EU:C:1991:286, paras. 71–72. More on the origins of the AEC test: M. Mandorff, J. Sahl (2013, p. 3–6). The 'as-efficient competitor' test is sometimes contrasted with a 'reasonably efficient competitor' that would require taking some assumptions in terms of a fictious undertaking competing with the dominant one. There are several advantages of the AEC test in this comparison, which are: eliminating uncertainty coming from lack of data (i.e. only the costs of the dominant company are taken into consideration); easing self-assessment as the dominant undertaking is required only to review its own costs and pricing policy; reduction of risks of assisting inefficient market entry (Petit, 2009, p. 490).

[12] Guidance, para. 27.

a general assessment and an AEC test are required to be preformed when the Commission assesses a case. It should be noted that the exception from the requirement of conducting a full analysis, listed in para. 22 of the Guidance, has been placed in the section of the document that relates to general assessment (section III B) and so it refers only to the main analysis, and not to the more specific analysis related to price-based exclusionary conduct including the requirement to conduct a AEC test (section III C).

The Guidance refers also to situations when, despite the fact that the conduct falls under Article 102 TFEU, there are specific circumstances allowing such behavior to be conducted by the dominant undertaking. In the section titled 'Objective necessity and efficiencies', the Commission provided rules regarding the assessment of claims put forward by a dominant undertaking. This clearly entails that evidence of such circumstances (objective necessity) or effects (efficiencies) have to be provided by the dominant undertaking and that the Commission is not required to 'search' for them by itself when analyzing the exclusionary conduct. In case of exclusivity payments, the 'efficiencies' defense is of particularly significant importance. The requirements of a successful defense have already been described in the previous part of this paper; in this place, however, it is important to consider what is the relation between the analysis of anticompetitive foreclosure and the analysis of efficiencies.

One of the elements of the efficiencies defense is the fact that benefits caused by the conduct outweigh its negative effects on competition, such as anticompetitive foreclosure of the market. As already mentioned, anticompetitive foreclosure should be proven by the Commission, while demonstrating that benefits outweigh restrictions rests on the dominant undertaking. Even though this seems to be obvious, it is necessary to underline that these two processes do not overlap each other. In particular, the burden of proof arising from the provisions of the Guidance, does not require the dominant undertaking to demonstrate the negative outcome of the AEC test, which is part of an analysis aiming to verify whether anticompetitive foreclosure took place.

In the Guidance, the Commission included also one section dedicated to specific forms of abuse, among which the Commission notes also exclusive dealing, which is a term used for a joint description of exclusive purchasing obligations and rebates.[13] In this section, the Commission not only describes these types of abuse, but also provides information on what will be taken into consideration when assessing such conduct. Taking into consideration that the character and forms of exclusivity payments have already been presented, this part of the considerations will be focused on the Commission's position towards

[13] Guidance, para. 32.

the assessment of the conduct in question. The Commissions stated that it will focus its attention on cases where it is likely that consumers, as a whole, will not benefit from the problematic conduct. This reference to consumer welfare leads to the conclusion that arrangements, based on which buyer will receive a certain payment in exchange of refraining from purchasing competing products, shall generally be assessed as less likely to result in consumer harm than the sole imposition of exclusivity. This is because an exclusivity payment can, at least theoretically, be fully or partially 'passed-on' to consumers by way of a decrease in the resale price instead of decreasing its own margin. This, however, requires the verification whether, in a particular case, the 'passing-on' of the benefit to consumers actually took place. The Commission says that in its assessment it will consider not only general indicators aiming to verify whether anticompetitive foreclosure took place. For this purpose, it will also verify additional factors. As such, however, the Commission indicates the market position of the dominant undertaking (in particular, its status of unavoidable trading partner), the position of its competitors and the duration of the exclusivity arrangements.[14] This means that, in fact, there are no 'special', additional factors important for the assessment of exclusive purchasing arrangements, as all of the aforementioned ones are a duplication of the general factors described in point 20 of the Guidance.

The other type of exclusive dealing described by the Commission concerns conditional rebates, defined as rebates granted to customers to reward them for a particular form of purchasing behavior.[15] To be considered as a form of exclusivity, such discounts should be given by the seller under the condition that the buyer's purchases, of the products supplied by the dominant undertaking in a specified reference period, exceed certain threshold. Such a rebate can have a retroactive character and cover all purchases (including purchases leading to the achievement of the threshold), or a proactive character (known also as 'incremental discounts') and cover only purchases realized after achieving the threshold. Although the Commission notices the positive impact of such discounts on consumer welfare, it also states that, when granted by dominant undertakings, such conduct can lead to anticompetitive foreclosure similar to exclusive purchasing. Similarly, as in the case of exclusive purchasing, also in the case of conditional discounts, the Commission stated that in addition to general factors, there are also some specific circumstances it will take into consideration when assessing the actual, or potential anticompetitive foreclosure effect caused by the conduct in question. As such, the Commission indicates the market position of the dominant undertaking (this is not an 'additional' factor though, as it is already identified as a general one earlier

[14] Guidance, para. 36.
[15] Guidance, para. 37.

in the Guidance). Attention is also raised at the character of the discount; here the Commission states that retroactive rebates are generally more likely to cause anticompetitive foreclosure comparing to proactive ones. The risk of such effect appearing is also dependent on the height of the rebate as compared to the total price as well as the height of the threshold the achievement of which entitles the buyer to a price decrease.[16]

The Commission provides also detailed information about the application of the AEC test in regard to conditional discounts, aiming to verify whether the rebate system designed by the dominant undertaking is capable of hindering market expansion or entry by competitors.[17] A buyer's decision to shift its orders to another company entails the loss of the benefits coming from the discount. This loss should, therefore, be compensated by the new supplier in the form of a lower price. For the purpose of conducting the AEC test, the price that a competitor would have to match ('effective price') shall be calculated over the relevant range of sales and relevant period of time. When delineating the relevant range of sales, the Commission or the undertaking conducting a self-assessment, shall take into consideration: the character (retroactive or proactive) of the discount, the contestable share (amount of purchases that can be shifted to a competitor), and the capacity of competitors to fulfill the buyer's purchases in the relevant period of time. As per the rules of the AEC test described in the earlier part of this article, the effective price should be compared with costs incurred by the dominant undertaking – average avoidable costs (hereinafter: AAC) and long-run average incremental costs (hereinafter: LRAIC). At this point, the Commission took some assumptions stating that: (a) if the effective price remains consistently above LRAIC, it would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate;[18] (b) if the effective price is below AAC then, as general rule, the rebate is capable of foreclosing even equally efficient competitors.[19] In the borderline case, so when the effective price is between AAC and LRAIC, the Commission shall investigate other factors. These assumptions can be described using the following chart.

Further, the Commission states that the abovementioned analysis 'will be integrated to the general assessment'.[20] This, however, is contradictory to what the Commission said in the earlier part of the Guidance. According to para. 27, if the AEC results in the conclusion that an equally efficient competitor

[16] Guidance, para. 40.

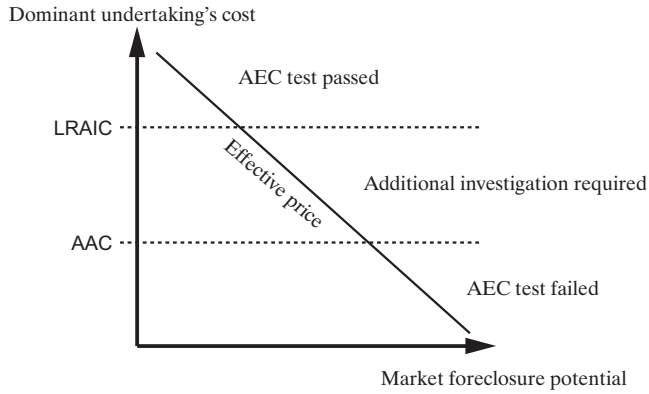
[17] The Commission suggests therefore that the AEC test should apply to all conditional rebates (Petit, 2018, p. 734).

[18] Guidance, para. 43.

[19] Guidance, para. 44.

[20] Guidance, para. 45.

Chart 1. AEC test



Source: Author's own elaboration

can effectively compete with the price-based conduct of the dominant undertaking, the Commission will, in principle, not intervene. Based on this, one shall conclude that it is the AEC test that is prevailing over the general assessment of the case. At the same time, in para. 45, the Commission suggests that even when as a result of the AEC test, it concludes that an equally efficient competitor can effectively compete with the dominant undertaking, the Commission can assess the conduct as abusive based solely on the general assessment. In the opinion of the Author, such discrepancies should not be allowed, and it should be clarified that once the AEC is passed, the conduct shall not be confirmed as abusive.

IV. Applicability of the AEC test – decisions and judgments in the *Intel* and *Post Danmark II* cases

The *Intel* and *Post Danmark II* cases establish crucial points in the history of judgments related to exclusive discounts and, more broadly, exclusive payments after the issuance of the Guidance. The background, summary, and conclusion coming from these two cases are going to be described in this section of the article.

The first case regarded Post Danmark, a state-controlled company responsible for the one-day delivery universal postal service, throughout the Danish territory, for letters and parcels, including bulk mail, weighing less than 2 kg. The undertaking was required to apply a tariff scheme whereby the price for the universal postal service could not differ according to the place of

destination. To offset this obligation, Post Danmark had a statutory monopoly on the distribution of letters (including direct advertising mail) weighing up to 50 g. In the time when Post Danmark had a statutory monopoly on the market, it implemented a rebate scheme with respect to direct advertising mail. Standardized rebates of rates in the scale of 6% to 16% applied to mailings in batches of at least 3 000 copies at a time and aggregated to 30 000 letters per year, or representing an annual gross postage value of at least 300 000 Danish crowns. The last rate, namely 16% applied only to customers sending over 2 million items of mail per year, or items of mail of over DKK 20 million per year.[21] According to the Danish Competition Council (*Konkurrencerådet*), the rebates had the effect of tying customers and 'foreclosing' the market, without being able to substantiate the efficiency gains that might have benefited consumers and neutralised those rebates' restrictive effects on competition.[22] The Council stated also that Post Danmark was an unavoidable trading partner on the bulk mail market. Such conclusion was made based on very high market shares and significant structural advantages of the undertaking, as well as the fact that the market was characterized by high barriers of entry or extension.[23] Post Danmark appealed the decision, however, the decision was upheld by the Competition Appeal Tribunal. Then the undertaking brought the case to the Maritime and Commercial Court that decided to stay the proceeding and refer some question to the Court of Justice (hereinafter: Court or CJ).

The questions were focused on the assessment of the foreclosure effect of the rebate schemes used by dominant undertakings. Among others, the Court has been asked whether it is relevant to consider prices and costs of the dominant undertaking and whether the characteristics of the market can justify the foreclosure effect being demonstrated by examinations and analyses other than an as-efficient-competitor test.[24] In the judgment, the CJ stated that the application of the as-efficient-competitor test does not constitute a necessary condition for a finding to the effect that a rebate scheme is abusive under Article 102 TFEU.[25] This conclusion was based on the fact that, according to the Court, the Guidance 'merely sets out the Commission's approach as to the choice of cases that it intends to pursue as a matter of priority'.[26] The CJ followed the position of the AG Kokott who stated in her opinion that '(…) Article 82 EC does not support the inference of any legal obligation requiring

[21] CJ judgment of 06.10.2015, Case C-23/14 *Post Danmark II,* ECLI:EU:C:2015:651, para. 7.
[22] C-23/14 *Post Danmark II,* para. 13.
[23] C-23/14 *Post Danmark II,* para. 14.
[24] C-23/14 *Post Danmark II,* para. 20.
[25] C-23/14 *Post Danmark II,* para. 62.
[26] C-23/14 *Post Danmark II,* para. 52.

that a finding to the effect that a rebate scheme operated by a dominant undertaking constitutes abuse must always be based on a price/cost analysis as the AEC test'.[27] In the judgment, it was pointed out that conducting the AEC test is not relevant in cases where there is not possibility of the appearance of a competitor that would be as efficient as the dominant undertaking.[28] Therefore, according to the Court, the AEC test should be considered as 'one tool among others', rather than the prerequisite for claiming that a rebate scheme constituted an abuse.

The consideration on this judgment should be started with the view the CJ presented on the Guidance. The Court's position is that the only information the Guidance provides is which exclusionary practices the Commission will consider as requiring prioritization in terms of enforcement. Although such interpretation is in line with the defensive position of the Commission, one should note that the Guidance provides also detailed information on how the assessment of exclusionary practices is going to be conducted. Therefore, it provides more information than only what it will focus on while enforcing competition law, stating also how it will enforce it. The fact that such information will be acknowledged by undertakings cannot be ignored. The CJ stated that the AEC test is only one of the tools available to the Commission. This, however, does not mean that the Commission has full flexibility in terms of choosing the assessment method. In the Author's view, the CJ judgment should be understood as meaning that the AEC test is not a necessary perquisite to recognize the abuse if it is not relevant, that is, when special circumstances appear that make the test only a 'theoretical' exercise. Consequently, the AEC test is a required assessment tool in cases when the test is relevant and, in such cases, passing it by the dominant undertaking should result in the finding that the investigated practice did not amount to an abuse. The conclusion from the judgment in the *Post Danmark II* case should be that the AEC test is not always the answer. It seems that there are certain special circumstances of the case that can limit the applicability of the test as a validation tool aiming to verify whether an abuse took place or not. This, however, is only an exception from the general rule that the test is a required, mandatory step for the Commission to take.

The second case regarded Intel, a US producer of central processing units (hereinafter: CPUs), chipsets and other semiconductors operating in different parts of the world including in locations within the EEA. It is important to note that although the General Court (hereinafter: GC) judgment in the *Intel* case was issued when the Guidance was already in place, that is, after

[27] Opinion of Advocate General Kokott of 21.05.2015 in Case C-23/14 *Post Danmark A/S*, ECLI:EU:C:2015:343, para. 61.

[28] C-23/14 *Post Danmark II,* para. 59.

24th of February 2005, the investigation was launched by the Commission a few years earlier (13th May 2004). Following the complaint submitted by Advanced Micro Devices (hereinafter: AMD) in May 2004, the Commission started its investigation and, as a result, on 13th May 2009 issued a decision in which it declared that Intel has abused its dominant position through two market practices – granting conditional rebates and so-called 'naked restrictions' intended to exclude a competitor from the market for x86 CPUs (type of processors). The rebates were granted to original equipment manufacturers (hereinafter: OEMs) under the condition that they will purchase all or almost all of their x86 CPUs from Intel. The naked restrictions can be described as payments to OEMs in exchange for delaying, canceling, or restricting the marketing of certain producers equipped with AMD CPUs. It should be underlined that the Commission performed the AEC test while assessing the case.[29] However, it named it as 'one possible way of examining whether exclusivity rebates are capable or likely to cause anticompetitive foreclosure'[30] and 'not indispensable for finding an infringement under Article [102 TFEU]'.[31]

Intel brought an action for the annulment of the Commission decision to the GC which upheld in essence the decision of the Commission. In its judgment, the GC states that the question whether exclusivity discounts can be categorized as abusive does not depend on an analysis of the circumstances of the case aimed at establishing the capability of that rebate to restrict competition.[32] The GC based this conclusion on earlier judgments (*Michelin I*, *TeliaSonera*, *Michelin II*). The GC noted that exclusivity arrangements can have pro-competitive effects that require proper assessment. However, according to the GC, these considerations cannot be accepted in the case of conduct performed on a market where competition is already restricted. Such statement is clearly associated with the ordo-liberal approach towards the goal of EU law provisions related to the abuse of dominance, namely protecting the market structure and competition as a process. The GC also referred to the AEC test conducted by the Commission and named it as 'not indispensable for establishing infringement of Article [102 TFEU]".[33] The GC did not reject the AEC test but, somehow, it diminished its importance. This part of the considerations requires the positioning of the GC judgment as supporting

[29] Commission Decision of 13.05.2009, Case COMP/37.990 *Intel*, D(2009) 3726 final, section VII 4.2.3.

[30] EC Decision *Intel*, paras. 1002 and 1155.

[31] EC Decision *Intel*, para. 925.

[32] GC judgment of 12.06.2014, Case T-286/09 *Intel*, ECLI:EU:T:2014:547, paras. 88–89.

[33] T-286/09 *Intel*, para. 173.

the Harvard school's principles, as not using the AEC test creates a risk of protecting less efficient competitors.

Intel appealed the judgment of the GC to the Court of Justice (hereinafter: CJ) listing six grounds to support it including the GC failing to examine the rebates in the light of all the relevant circumstances. According to the undertaking, loyalty rebates may be found abusive only after an examination of all the relevant circumstances in order to assess whether the rebates are capable of restricting competition[34] and to foreclose an 'as efficient' competitor.[35] Intel stated in the appeal that the GC should not have regarded the AEC test carried out by the Commission as irrelevant. According to the undertaking, it is not an issue whether the Commission conducted the abovementioned test or not but rather, the fact that the properly assessed results should have been taken into consideration upon considering all of the circumstances of the case.[36]

In its judgment, the CJ referred to the judgment in the *Post Danmark* case and stated that the provisions of Article 102 TFEU do not aim to create a situation where competitors less efficient than the dominant undertaking remain on the market, and that not every exclusionary effect is necessarily detrimental to competition.[37] According to the CJ, it is indeed the case that when a dominant undertaking ties its purchasers by using exclusivity payments it abuses its dominant position on the market.[38] However, the CJ also stated that the situation looks different in case where the 'dominant undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects'.[39] In this case, the Commission would be required to analyze certain elements. As such, the CJ listed: the extent of the dominant position; the market coverage of the conduct; the conditions and arrangements for granting the rebates; their duration and amount as well as the possible existence of a strategy to exclude competitors that are at least as efficient as the dominant undertaking from the markets'.[40] According to the CJ in the *Intel* case, despite the fact that the Commission repeatedly stated that an AEC test is not required to be conducted due to the fact that the rebates used by Intel were, by their very nature, capable of

[34] CJ judgment of 06.09.2017, Case C-413/14 P *Intel*, ECLI:EU:C:2017:632, para. 109.

[35] C-413/14 P *Intel*, para. 111.

[36] C-413/14 P *Intel,* para. 119.

[37] C-413/14 P *Intel*, para. 133–134.

[38] C-413/14 P *Intel*, para. 137 where the CJ referred to the *Hoffmann-La Roche* case.

[39] Ibidem, para. 138.

[40] Ibidem, para. 139. With reference to this particular requirement, i.e., exclusionary strategy, it should be underlined that the standard of proof of an anticompetitive strategy is extremely high (Petit, 2018, p. 734).

restricting competition, the GC was indeed required to examine all of Intel's arguments concerning this test.[41]

The judgment of the CJ in the *Intel* case is considered important because one can understand it as the CJ's declaration of supporting the view that it is efficiency that is a value protected by Article 102 TFEU (Petit, 2018, p. 742; De Coninck, 2018, p. 80). Some commentators advocate for the Intel judgment to be considered as 'programmatic' or a 'framework' judgment, which pronounces fundamental principles for the Commission, while leaving it for the Commission to choose which tools to use to apply these principles following the effect-based analysis (Komninos, 2018, p. 42–50). It has to be noted that the judgment of CJ still does provide the answer whether conducting an AEC test is a mandatory element of the analysis carried out by the Commission. In the judgment, there is no explicit obligation of conducting the AEC test by the Commission. Still – failing to conduct the test was a ground of referring the case back by the CJ (Petit, 2018, p. 748).

The two cases described above are very important due to the fact that the judgments were issued after the Guidance had been published already. Therefore, they sort of set the standard for the future. The most important question that should be answered is whether it is required from the Commission to conduct the AEC test when assessing price-based practices. Based on the Guidance and the aforementioned judgments, the top line answer to this question should be positive, that is, the Commission should indeed be required to conduct the AEC test when assessing such conduct of a dominant undertaking and, based on its result, it should qualify specific practice as abusive or not. Only very special circumstances can justify the abandonment of the AEC test by the Commission. In general, it should be noted that it is not applicable when the 'as efficient' competitor would never enter the market since its structure makes the emergence of such undertaking practically impossible.[42] This can be the case when relevant regulations are creating barriers of entry, not allowing new undertaking to enter the market (statutory monopoly). As a result of this kind of situation, even if the questioned practice would not result in market foreclosure for a competitor as efficient as the dominant undertaking, the market is foreclosed to such company due to other reasons which result in conducting the AEC test only a theoretical exercise.

[41] C-413/14 P *Intel*, para. 144.

[42] C-23/14 *Post Danmark II*, para. 59.

V. Decision in the *Qualcomm* case

1. Summary of the case

The case regarded a U.S. developer of wireless technology products and services that holds essential intellectual property rights in a number of cellular communication standards ensuring compatibility and interoperability between related products. Qualcomm was also a supplier of a broad range of chips and chipsets used in mobile handsets and other devices. Products offered by the company and its competitors (for example: Intel, Ericsson, Huawei) were usually sold to original equipment manufacturers (hereinafter: OEM) such as Apple, LG, or Samsung.

In this case, the Commission defined the relevant product market as the LTE chipset market covering slim and integrated LTE chipsets, but not captive production of such chipsets.[43] The geographically relevant market has been indicated as worldwide in scope.[44]

Upon investigation, the Commission concluded that, in the period between 2011 and 2016, Qualcomm held a dominant position in the worldwide market for LTE chipsets.[45] It also came to the conclusion that Qualcomm was an unavoidable trading partner for its customers. The Commission noted that the relevant market defined in this case was characterized by the existence of a number of barriers to entry and expansion, such as: the necessity of making significant initial investments in research and development activities related to the design of LTE chipsets before their eventual launch;[46] Qualcomm's licensing strategy, based on which dominant undertaking was requesting and obtaining the right of pass-through of the other party's IP rights to Qualcomm's chipset customers;[47] significant time needed for a baseband chipsets certification process;[48] and, Qualcomm's brand image, reputation and strong business relationships.[49] The Commission also concluded that Qualcomm's customers were not demonstrating significant pressure upon the negotiation process. Therefore, the dominant undertaking did not face countervailing buyer power.[50]

[43] Commission Decision of 24.01.2018, Case AT.39711 *Qualcomm*, C(2018) 240 final, para. 181.

[44] EC Decision *Qualcomm*, para. 290.

[45] Ibidem, para. 305.

[46] EC Decision *Qualcomm*, para. 326.

[47] Ibidem, para. 331.

[48] Ibidem, para. 346.

[49] Ibidem, para. 352.

[50] Ibidem, paras. 368–369.

The Commission accused Qualcomm of abusing its dominant position on the worldwide market for LTE chipsets by granting payments to Apple on condition that Apple obtains from Qualcomm all of its required LTE chipsets; these payments have been classified by the Commission as exclusivity payments.[51]

In the agreements concluded with its customers, Qualcomm included two types of provisions. According to the first, in the event that the buyer (Apple) released a product commercially that incorporated a non-Qualcomm baseband chipset, their mutual agreements would terminate, and Qualcomm would not make any of the incentive payments that were due and payable after the date of such release. Based on the provisions of the second type, in the event that the buyer (Apple) released a product commercially that incorporated a non-Qualcomm baseband chipset in 2013, 2014 or 2015, the buyer (Apple) would reimburse part of the Incentive Payments previously made by Qualcomm, due to the inclusion in their agreements of a repayment mechanism.[52]

The Commission stated that the dominant's conduct could potentially cause anti-competitive effects on the market. This was based on the conclusion that the said exclusivity payments reduced Apple's incentives to switch to competing LTE chipset suppliers;[53] the exclusivity payments granted by Qualcomm covered a significant share of the LTE chipset market;[54] acquiring Apple as a customer is important for entry or expansion in the relevant market.[55]

During the proceedings, Qualcomm claimed that the questioned conduct was not capable of having anti-competitive effects. To support its position, the undertaking raised the argument that an 'as-efficient competitor could profitably compete to supply Apple with baseband chipsets'. The analysis conducted by Qualcomm was meant to prove that if Apple would decide to switch to a hypothetical competitor that would have the same average variable costs as the dominant undertaking, such competitor would be able to cover those costs when supplying LTE chipsets over one, two or three annual generations of iPhones.[56] The Commission did not, however, find this analysis as sufficient since, in the Commission's view, it was based on unrealistic or incorrect assumptions.

The Commission pointed out that 'average variable costs' are not the only category of costs that a hypothetical competitor would have to cover to replace the dominant undertaking as a supplier for Apple. Additionally, it would also

[51] Ibidem, paras. 388–389.
[52] Ibidem, para. 397.
[53] Ibidem, paras. 412–422.
[54] EC Decision *Qualcomm*, paras. 466–473.
[55] Ibidem, paras. 474–485.
[56] Ibidem, para. 487.

have to take some further costs related to research & development coming from the specifics of the market. The Commissions also noted that Apple's requirements of the LTE chipsets for iPhones for years 2012–2015, taken into consideration by Qualcomm in its analysis, were, in the view of the Commission, not contestable at all, even the requirements for 2016 were contestable only in approximately 50%–60%. The third point noted by the Commission was that in its analysis, Qualcomm assumed that by switching suppliers Apple would lose payments related to products that have been already launched. However, undertaking future payments on new generations of Apple products would also be conditioned by the exclusivity and so switching suppliers would entail the loss of payments related to these new generations of iPhones and iPads. This means that depending on the year of the switch, the number of the generations of products for which a hypothetical competitor could have compensated Apple for (to cover the loss of the exclusivity payments) would have varied.[57] The Commission concluded that if the analysis would have been conducted on the basis of revised, correct assumptions, the outcome would be that a hypothetical competitor with the same average variable costs as Qualcomm would have been unable to cover its costs when supplying products as of 2013, 2014 and 2015.[58]

When it comes to the efficiency defense, according to the Commission, Qualcomm did not demonstrate that the potential anti-competitive effects of the conduct were counterbalanced or outweighed by advantages in terms of efficiencies – the dominant undertaking did not prove that its exclusivity payments were necessary for the achievement of any gains in efficiency.[59] Qualcomm claimed that it made investments to develop customized chipsets for Apple. In particular, it should be noted that, according to Qualcomm, such investments would not have been made in case of using another form of exclusivity arrangement, such as minimum purchasing requirements. The undertaking also stated that other suppliers are also using exclusivity payments to recoup their investments.[60] The Commission did not confirm this argumentation but concluded that Qualcomm did not prove its point on the basis of the fact that Qualcomm had previously been producing Apple-specific chipsets without a necessity of providing any payments in exchange for exclusivity.[61]

Qualcomm's defense strategy covered also a reference to the Guidance. According to the company, the Commission did not assess the legality of the

[57] Ibidem, para. 496.
[58] Ibidem, para. 498.
[59] EC Decision *Qualcomm*, para. 504.
[60] Ibidem, para. 510.
[61] Ibidem, para. 514.

conduct in accordance with the Guidance. Qualcomm also stated that the granted exclusivity payments did not fulfill the requirements for its conduct to be treated as an enforcement priority. In this part, the undertaking accused the Commission of failing to conduct the AEC test.[62] The Commission referred to this in its decision stating that by issuing the Guidance it did not 'impose on itself any limitations or requirements regarding the range of tools at its disposal for the purpose of assessing the legality of Qualcomm's exclusivity payments and the types of evidence on which the Commission can rely on as part of that assessment'.[63] The Commission also rejected the argument that there were no grounds to treat the contested conduct with priority stating, among others, that it was not required to conduct the AEC test.

2. Partial conclusions

The decision issued by the Commission should not be assessed positively. One must criticize the Commission's excessive deviation from the standards set out in the Guidance. In this light, one should agree with Qualcomm stating in its defense that the 'Commission has breached (at least to a certain extent – TK) the principles of legal certainty and legitimate expectations'.[64] The Commission stated that it is not required to assess the legality of the exclusivity payments in accordance with the Guidance.[65] Such statement has its roots in the wrong identification of the Guidance's character as an act of soft law (broadly described in the earlier part of this article). The Commission seemed to try to change the classification of the Guidance in a rather unconvincing move, such as naming the document in a certain way. In the opinion of the Author, by formulating the title of the Guidance in such manner, and referring to the 'prioritization' aimed to avoid the imposition of a self-limitation and, therefore, being obliged to follow certain standards when conducing assessments. This is not a right thing to do. The sole fact of treating a certain case as an enforcement priority rather than in the standard manner, has no practical consequences. What matters is that the Guidance provides certain information for dominant undertakings and can be perceived as a valid ground for undertakings having certain expectations towards the Commission's behavior when assessing their conduct.

Following this conclusion, it should be therefore pointed out that the requirement of conducting the AEC test does not come from the fact that

[62] Ibidem, para. 526.
[63] Ibidem, para. 528.
[64] Ibidem, para. 526.
[65] EC Decision *Qualcomm*, para. 527.

certain conduct should be treated with priority. As has been already proven in the earlier part of this paper, the Commission stated very clearly that this test will be conducted by the Commission when assessing price-based conduct including exclusivity payments. Therefore, the Commission should not state in the decision that it was not required to conduct the AEC test. Rather, one should come to the opposite conclusion namely that the Commission was required to conduct the AEC test in the given circumstances. Moreover, in case the outcome of this exercise would prove that an 'as efficient' competitor would not be excluded from the market, the Commission should not find the undertaking's conduct as abusive. Importantly, the Commission conducted a sort of AEC test while verifying the correctness of the analysis provided by Qualcomm. The Commission pointed out some mistakes and wrong assumptions. This, however, is not correct. As it was already clarified, the duty to conduct a full analysis of the case (including the AEC test in case of price-based conduct) lies on the Commission and not on the dominant undertaking.

In the part of the decision where the Commission is referring to Qualcomm's arguments, there is an interesting part related to Qualcomm's good faith. One of the Commission's arguments, aiming to support the statement that it was not required to follow the Guidance while assessing the exclusivity payments, was that Qualcomm did not present evidence showing that it believed in good faith that the Commission would assess the legality of its exclusivity payments in accordance with the Guidance.[66] According to the Commission, the above is allegedly supported by the fact that Qualcomm conducted an AEC analysis specifically for the purpose of the proceeding before the Commission and not as part of its own self-assessment. The conclusion presented by the Commission cannot be assessed positively. The requirement to conduct a proper assessment and fulfill all of the necessary steps in this regard lies on the Commission, regardless of what the undertaking expects and especially what its actions may suggest. Assuming that Qualcomm indeed did not perform the AEC test prior to implanting the questioned conduct, this should be assessed negatively only from the internal risk management perspective. At the same time, it does not mean that by not taking this step Qualcomm released the Commission from the obligation of conducting the analysis. This is because, unlike the dominant undertaking, which is only guided to conduct the AEC test, the Commission is obliged to do it.

To sum up, one should conclude that the Commission did not act according to its own Guidance. At the same time, the justification given by the authority for such behavior does not seem convincing. This means that contrary to the content of the Guidance, the Commission's approach still does not allow to conclude that necessary legal certainty has been ensured for dominant undertakings.

[66] Ibidem, para. 529.

VI. Decision in the *Google (Android)* case

1. Summary of the case

Google is a multinational technology company specializing in Internet-related services and products that include online advertising technologies, Internet search, cloud computing, software, and hardware.[67]

In the case in question, the Commission defined several relevant markets: the worldwide market (excluding China) for the licensing of smart mobile operating systems (hereinafter: OSs); the worldwide market (excluding China) for the Android app stores; national markets for general search services, and the worldwide market for non-OS-specific mobile web browsers. Taking into account the complexity of the case, for clarity purposes, it should be mentioned that the questioned activity of Google related to exclusivity payments conducted on national markets for general search services. The Commission decided to classify general search services as an economic activity for the purpose of competition rules despite the fact that users do not pay a monetary consideration for the use of such services. On these national markets, Google's most significant competitors were Bing and Yahoo![68] Upon conducting the assessment, the Commission concluded that Google holds a dominant position on the first two worldwide markets mentioned above, and on each national market for general search services in the EEA. With reference to the last category, Google's dominance was meant to come from: its 'strong and stable market shares across EEA';[69] the existence of barriers of expansion and entry, such as the requirement to make significant investments in terms of time and resources;[70] infrequency of the so-called 'user multi-homing', defined as a situation when a user of Google's general search services as their main general search services, actually also uses other general search services;[71] and the existence of a brand effect.[72]

In the investigation, the Commission identified several behaviors of Google that allegedly constituted abuse of its dominant position. As such, the Commission identified: tying which related to its proprietary mobile apps; licensing of the Play Store and the Google search app conditionally upon

[67] Commission Decision of 18.07.2018, Case AT.40099 *Google (Android)*, C(2018) 4761 final, para. 6.

[68] Ibidem, para. 681.

[69] EC Decision *Google (Android)*, para. 675.

[70] Ibidem, para. 687.

[71] Ibidem, para. 709.

[72] Ibidem, para. 712.

the anti-fragmentation obligation in the Anti-fragmentation Agreements (hereinafter: AFAs). In this section of the article, the analysis will be focused on the conduct related to granting exclusivity payments. In this regard, the Commission concluded that in the period of time from 2011 till the end of the first quarter of 2014, Google abused its dominant position in the national markets for general search services by granting revenue share payments to OEMs and to mobile network operators (hereinafter: MNOs) under the condition that they would not pre-install a competing general search service on any device within an agreed portfolio.[73] If OEM or MNO would, however, pre-install such competing service on specific devices, it would have foregone the revenue share payments not only for that particular device but also for all the other devices in its portfolio on which another general search service may not have been pre-installed.[74] The exclusivity payments were, therefore, conditional upon the requirement of OEMs and MNOs obtaining all, or almost all, of their requirements for search services on smart mobile devices from Google.

According to the Commission (referring to judgments in *Hoffmann-La Roche* and *Post Danmark* cases), classified exclusivity payments are presumed to constitute an abuse of a dominant position,[75] indicating, however (referring to CJ judgment in the *Intel* case), that the dominant undertaking can seek to rebut the presumption of abuse by submitting evidence that its exclusivity payments were not capable of restricting competition.

The Commission stated that the questioned exclusivity payments were capable of restricting competition because, as a result of their usage, OEMs and MNOs lost the incentive to pre-install competing general search service and so Google's payments made access to national markets more difficult for Google's competitors; moreover, the Commission believed that the contested payments deterred innovation.[76] As far as the effect of decreasing incentives to pre-install competing general search services is concerned, the Commission stated that such competing services could not have marched Google's portfolio-based, revenue share payments to OEMs and MNOs.[77] The Commission concluded that a competing general search service would not be able to meet the payments because it would not be able to compensate OEM or MNO for the loss of Google's payments. The conclusion above was based on an analysis focusing on the fact that OEM or MNO could not realistically have expected that a competing service would capture more than

[73] Ibidem, para. 1192.
[74] Ibidem, para. 1196.
[75] Ibidem, para. 1188.
[76] EC Decision *Google (Android)*, para. 1206.
[77] Ibidem, paras. 1225–1255.

a certain share of general search queries carried out on Google Search, on their portfolio of Google devices, due to the fact that based on the concluded agreements, Google Search had to be pre-installed on all devices and placed on the home screen. Therefore, a competing application could only be pre-installed additionally; this interpretation of the agreement made it possible to state that based on its provisions, OEMs were also required to pre-install Google Search on mobile web browsers.[78]

Google questioned the Commission's conclusions claiming that when assessing whether a competing general search service could have compensated an OEM or MNO for the loss of Google's payments, the Commission failed to consider the ability of equally efficient competing general search services to match the portfolio-based revenue share payments.[79] This claim has been, however, pushed back by the Commission which stated that it indeed considered it in the conducted analysis.[80]

2. Partial conclusions

The Commission decision in the *Google (Android)* case is clearly influenced by the interpretation of the Guidance first presented in the *Intel* judgments.

In its decision, the Commission stated that exclusivity payments constitute an abuse of dominance *per se*. The Commission does not even come to this conclusion but, rather, just refers to earlier jurisprudence. This, however, does not seem to be correct. The Commission tries to shift the burden of proof to the dominant undertaking stating that the investigated company can seek to rebut the presumption of abuse by submitting evidence to support its position whereby its exclusivity payments are not capable of restricting competition. This approach can be also observed in the part of the decision where the Commission elaborates on balancing pro- and anticompetitive effects of the conduct and states that such balancing can only be carried out after analyzing the capacity of the exclusivity payments to foreclose competitors, which are at least as efficient as the dominant undertaking. This can suggest that it is the investigated company that should conduct the AEC test. Therefore, one should note that the Commission tries one more time to eliminate an economic analysis from the phase of analyzing all of the circumstances of the case. This is not in line with the Guidance, which clearly states that such analysis, also covering the AEC test, should be conducted by the Commission.

[78] Ibidem, paras. 1227–1228.
[79] Ibidem, para. 1256 (2).
[80] Ibidem, para. 1259.

Google fairly questioned the analysis conducted by the Commission as it indeed did not conduct the AEC test during the investigation of the case. It seems that in this case, the Commission followed the suggestion presented by the CJ in the *Post Danmark II* judgment and decided that the AEC test would be rather hypothetical and thus not necessary in the context of the case.

VII. Conclusions

Documents issued by the Commission should increase legal certainty for undertakings by creating legitimate expectations on the side of companies (Gormsen, 2010, p. 51).[81] This applies especially to guidelines like the Guidance, being one of the most important benchmarks for companies for the assessment of their business conduct. As it has been proven in this article, the Guidance can be perceived as a base for undertakings to expect that the Commission will conduct the AEC test in all cases concerning price-based conduct. It can thus be a reason for undertakings to conduct the AEC test themselves in the self-assessment process (Boutin, Boutin, 2018). The aforementioned tool aims to verify whether the price-based conduct of a dominant undertaking can foreclose the market for his 'as efficient' competitor. The assumption for the utilization of the test is, therefore, that it can happen that there will be conduct that is indeed exclusionary but, due to the fact that this effect impacts only less efficient undertakings, remains outside of the frame of Article 102 TFEU. In this case, the Commission will assume that foreclosure arises from mere competition on the merits, and the dominant firm's conduct cannot be deemed abusive (Petit, 2009, p. 490).

In the *Intel* decision, which was issued after the Guidance, the Commission conducted a full AEC test in line with the provisions of the Guidance; however, it also presented a more traditional, form-based analysis as well. It seems that on one hand, the Commission did not want to be accused of not following the Guidance but, on the other hand, it did not want to give a clear sign that from now on it will always conduct the AEC test when assessing price-based conduct. This is why the considerations surrounding the AEC

[81] In the judgment in the *Dansk Rørindustri* case, the Court stated that 'In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations' (CJ judgment of 28.06.2005, Case C-189/02 P *Dansk Rørindustri,* ECLI:EU:C:2005:408, para. 59).

test are accompanied by disclaimers that it is by no reason mandatory for the Commission to conduct it. In the *Post Danmark II* judgment, the Court stated that the AEC test is only one of the tools that the Commission can use. This, however, does not mean that the authority has full discretion in terms of selecting the tool. In the opinion of the Author of this article, the Commission is allowed to refrain from carrying out the AEC test when it is not relevant, that is, when the circumstances of the case make the test an only theoretical exercise, because an 'as efficient' competitor cannot enter the market anyway, for example, the relevant market is one where network and/or learning effects are important (CEPS, 2021, p. 30). There is an important distinction between 'freedom of selection' and 'being required to use a specific tool unless special circumstances appear'. Such conclusion has an impact on the burden of proof. As only special circumstances can justify not conducing the AEC test, it does not matter whether the investigated undertaking submitted evidence supporting its position that the conduct was not abusive or not.

After the CJ judgments in the *Post Danmark II* and *Intel* cases, the Commission still seems to consider that the decision whether to conduct the AEC test or not lies fully in its own discretion, and that it is for the Commission to decide that other evidence is sufficient enough in a particular case (De Coninck, 2018, p. 74). In the *Qualcomm* case, it decided not to conduct the AEC test itself but only pointed out mistakes in the test conducted by the dominant undertaking. Also, in the *Google (Android)* case, it came to the conclusion that the dominant company's conduct was an abuse without conducting the AEC test. A similar approach is presented by Director General J. Laitenberger who, in a speech from 2017, said that the 'Commission will apply most suitable tools to assess the specific case – including, where appropriate, analyzing the "as efficient competitor test" when the dominant company provides the necessary information during the administrative procedure' (Laitenberger, 2017, p. 10).

In the Author's opinion, the Commission should adjust its practice and start using the AEC test in all cases concerning price-based conduct and refrain from it only when special circumstances appear which makes the AEC test irrelevant. Following this path, the Commission will undoubtedly increase legal certainty for dominant undertakings (Mandorff and Sahl, 2013, p. 17).[82] Regardless of the details and assumptions (such as contestable shares) of the AEC test that will remain a subject of disputes between undertakings and the authority during antirust proceedings, the sole certainty of the utilization of the test by the Commission in every case can be perceived as of value not only for the companies (a requirement to conduct the test make it very accessible for

[82] This could, to the certain extent, make the approach toward anticompetitive practices based on Art. 102 TFEU more similar to this regarding assessment of bilateral conducts (Geradin, 2010).

the undertaking as only the costs of the dominant company need to be known) but also for the Commission itself, as it would be an important disciplining mechanism (De Coninck, 2018, p. 80). As once said by Philip Lowe, the former Director General of DG COMP, 'safe harbours and presumptions, both for legality and illegality, are necessary to ensure practicality of the effects-based approach – but of course they have to be based on sound economic principles' (Lowe, 2006).

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