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The Value of Liability Tests in Abuses of Dominance*

*Mariateresa Maggiolino***

ABSTRACT: Currently, there is a debate in the European Union regarding the European Commission's approach in assessing the behaviour of dominant firms. It is argued that as digital ecosystems become more powerful, there is increasing pressure on the Commission to act against their practices, regardless of whether they meet the test established by the European Courts to find out liability. This article aims to demonstrate that the Commission's approach, which occasionally deviates from liability tests, is legitimate, because it aligns with the effects-based notion of abuse and the teleological interpretation of treaty rules. Moreover, this article maintains that if such liability tests were unalterable, their individual components would be elevated to essential elements of the concept of abuse, which directly contradicts the current interpretation of this notion. Finally, the article asserts that the liability tests used thus far represent a collection of factual circumstances that hold substantial evidential value in demonstrating the effects of dominant firms' practices. It however acknowledges that, while this evidential value has remained high over time, it may still vary depending on the circumstances. This is why the particular circumstances that make up the elements of these tests can be substituted with alternative circumstances, depending on the specific scenario being analysed.

KEYWORDS: exclusionary practices, abuses, liability tests, effects-based approach, teleological interpretation

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** Associate professor and Director of the Integrated Master of Arts in Law at Bocconi University, Milan, e-mail: mariateresa.maggiolino@unibocconi.it. ORCID: 0000-0003-1951-1081.

1. Introduction

If someone were to peruse an EU competition law textbook today, they would discover that the section dedicated to Article 102 of the Treaty on the Functioning of the European Union (TFEU) encompasses not only chapters on dominance and the concept of abuse, but also several chapters delving into dominant firms' behaviours that are frequently found to be abusive. Beyond the sections covering exploitative practices, these readers would encounter chapters specifically focused on exclusionary anticompetitive conduct, often referred to as "predatory pricing", "exclusive dealing", "conditional rebates", "tie-ins", "bundle rebates", "refusals to deal", and "margin squeeze".

Going deeper into the analysis of the aforementioned pages, our readers would also discover that each of the mentioned practices is considered unlawful when certain conditions are met collectively, that is, when a specific legal test to establish liability under article 102 ("liability test") is satisfied.

For example, price-based exclusionary practices are evaluated through various versions of the "as efficient rival test", employing different cost benchmarks depending on the specific practice under consideration.[1] Likewise, under the *Microsoft* ruling of the General Court (GC), tie-ins are prohibited when: *(i)* the firm in question possesses a dominant position in the tying market; *(ii)* the tie exists between two separate products; *(iii)* consumers suffer coercion; *(iv)* there is a reasonable likelihood of foreclosure in the tied market; *(v)* the dominant firm's conduct lacks objective justification.[2] Similarly, under the *Oscar Bronner* judgment of the Court of Justice (CJ), refusals to deal that prevent the emergence of new business relationships are proscribed when: (*i*) the claimed resource is essential; *(ii)* the refusal is likely to have a negative effect on competition; and (*iii*) the conduct does not have any objective justification.[3]

Hence, at the end of their journey through a handbook of EU competition law, our readers would develop two different perspectives. On the one

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[1] European Commission, Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings' (OJ 2009 C 45), February 24, 2009, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29.

[2] Judgement of 17 September 2007, *Microsoft Corp. v. Commission*, T-201/04, EU:T:2007:289.

[3] Judgement of 26 November 1998, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*, C-7/97, EU:C:1998:569.

hand, they would correctly conclude that any behaviour exhibited by a dominant firm may potentially violate Article 102, as the concept of abuse is pervasive, and the practices listed therein serve as mere examples.[4] On the other hand, they would realize that, throughout time, the Commission has typified some classes of practices to which it applies rule-like liability tests,[5] and EU Courts have affirmed this enforcing strategy.

However, in recent years, possibly in response to the rise of digital ecosystems, the European Commission has, at times,[6] distanced itself from the aforementioned tests.[7] Specifically, in the well-known *Google Shopping* case,[8] the Commission declared the conduct unlawful despite not satisfying any of the tests identified thus far, but meeting a new one, including the following criteria: *(i)* the universal vocation and openness of Google's search engine; *(ii)* the features of the Google's general results page, which *were deemed akin to* those of an essential facility; *(iii)* Google's super-dominant or ultra-dominant position, which enabled the firm to act as a gateway to the Internet; *(iv)* a market characterized by very high barriers

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[4] Richard Whish and David Bailey, *Competition law* (Oxford: Oxford University Press, 2021), 198. "Article 102 is capable of being applied to new situations: markets and business practices change and develop over time, and the law must be able to adapt accordingly". See also Judgement of 18 November 2020, *Lietuvos geležinkeliai AB v. European Commission*, T-814/17, EU:T:2020:545, paragraph 85 and caselaw cited.

[5] Justin Lindeboom, "Formalism in competition law", *Journal of Competition Law & Economics* 18, no. 4 (2022), 841: "if the resulting substantive legal test is rule-like… it is capable of being applied formalistically".

[6] Judgment of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/18, ECLI:EU:T:2022:541. Here, the Court affirmed that the Microsoft test was appropriately applied in assessing the tying agreements that compelled manufacturers to pre-install Google Search and Chrome apps on their devices. However, the Court also acknowledged the importance of considering consumers' status quo bias in comprehending the impact of Google's tying practices, particularly in adapting the factual circumstance of "coercion" to digital consumers.

[7] In this regard, see also Francisco Enrique González-Diaz and John Temple Lang, "The concept of abuse", in *EU competition law, volume 5. Abuse of dominance under Article 102 TFEU*, ed. Francisco Enrique González-Diaz and Robert Snelders (Deventer: Claeys & Casteels, 2013), 154, who already in 2013 spoke of a "willingness to advance in the direction of a more effects-based approach".

[8] For a critical review of the Commission's decision (later upheld by the CG) to qualify Google's conduct as "self-preferencing", see Federico Ghezzi and Mariateresa Maggiolino, "The notion of abuse: Cues from the Italian Amazon case", in *Digital platforms, competition law, and regulation: Comparative perspectives*, ed. Kalpana Tyagi *et al.* (London: Bloomsbury Publishing PLC, forthcoming 2023); on the same point, Pablo Ibáñez Colomo, "Self-preferencing: Yet another epithet in need of limited principles", *World Competition* 43, no. 4 (2020): 417-446.

to entry; *(v)* the idea that Google's conduct was abnormal, not necessarily rational – in sum, it transgressed the scope of competition on the merits.[9]

Also, national authorities have followed such approach. Consider, for example, the *FBA Amazon* case, in which the Italian Competition Authority (ICA) deemed the examined conduct to be unlawful, without applying any of the aforementioned tests; not even the one identified in the *Google Shopping* case.[10]

This attitude has also been recently encompassed in the revised Commission's Guidelines on the application of Article 102 TFEU to exclusionary conduct.[11] In this document, among other things, it has been clarified that the well-established "as efficient rival test" constitutes only one of the methods that can be employed for assessing pricing practices and it should be considered, therefore, optional. Furthermore, the indispensability requirement that serves to establish relevant refusal to supply has been tempered, stating that it does not apply to cases of "constructive refusals to supply", i.e., "situations where the dominant company makes access subject to unfair conditions".[12]

While the departure from the existing liability tests is indeed gaining momentum, it has also sparked intense criticism. Firstly, this enforcement strategy has been viewed as a manoeuvre to prohibit behaviour that, based on the existing tests, would not be considered abusive. Secondly, it has been argued that the variability of these tests creates unpredictability in antitrust rulings, thereby heightening legal uncertainty and impeding business growth.[13]

This article aims to demonstrate the validity of the Commission's approach by highlighting its conformity with the effects-based concept of abuse and the teleological interpretation of treaty rules. Additionally, it emphasizes that maintaining the current liability tests without alteration would result in the incorporation of these tests' elements as integral

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[9] Judgement of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission*, T-612/17, EU:T:2021:763.

[10] Ghezzi and Maggiolino, "The notion of abuse" (n 8).

[11] See European Commission, Annex to the *Communication from the Commission – Amendments to the 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 (C/2023/1923)*, March 3, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2023_116_R_0001, paragraph 3.

[12] *Ibid*., paragraph 4.

[13] See the following paragraph 2.

components of the abuse notion, which contradicts the effects-based approach. Lastly, the paper explores the evidentiary nature of liability tests, arguing that, overall, they provide some of the possible factual circumstances from which the procompetitive and anticompetitive effects of dominant firms' practices can be inferred.

The paper runs as follows. The second section outlines the criticisms surrounding the Commission's decision to deviate from the previously used tests for identifying exclusionary and anticompetitive behaviour, as well as the reasons why such criticisms could be mitigated. In the third section, elaborating on the theory of interpretation, a brief overview is provided of how the discipline of abuse of dominance would be affected if these criticisms were acknowledged and if binding tests were established for the types of exclusionary and anticompetitive conduct so far frequently punished. In contrast with this possible scenario, the fourth section explains how the flexibility to have multiple tests and modify them according to the specific circumstances of the case at hand aligns with the effects-based concept of abuse. Furthermore, the fifth section emphasizes how the existence of these numerous, albeit adaptable, tests aligns with the teleological interpretation of treaty rules. The sixth section then explains what these liability tests could be, presenting it as a matter of legal theory. The seventh section concludes.

2. The impact of non-binding tests on Commission discretion and legal certainty

The objections to the Commission's authority to deviate from precedent-based tests can be attributed to three underlying concerns: the risk of granting excessive discretion to the Commission in prosecuting dominant firms; the potential reduction in predictability within its decisions, thereby undermining legal certainty and deterrence; and the possibility of disconnecting the imposed remedy from the severity of the unlawful practice.

In greater detail, critics have *firstly* argued that, although the Commission must enjoy a certain degree of discretion,[14] the presence of multiple non-binding tests, along with the ability to establish new tests based on specific circumstances, allows the Commission to evade the strict requirements of existing tests. Certain scholars have even suggested that the

[14] Giorgio Monti, "Rebates after the General Court's 2022 Intel judgment", *Common Market Law Review* 60, no. 1 (2023): 107-140. See also Erwann Kerguelen, "What if error risk could embrace uncertainty?", *European Competition Journal* 17, no. 1 (2021): 189.

brand-new offence of *self-preferencing* has been intentionally employed by the Commission as a means to penalize practices that would have been deemed lawful if categorized as tie-ins or refusals to deal, as they would not have met the associated tests for such conduct.[15] Interestingly, this was the defence put forth by Google: although the Commission had accused Google of denying (equal) access,[16] it did not classify the scrutinized behaviour as a refusal to deal, did not apply the *Bronner* criteria, and thus failed to satisfy the indispensability condition.[17]

Nevertheless, the General Court noted that Google's general results page has characteristics "*akin* to those of an essential facility" (emphasis added).[18] More importantly, it held that "not every issue of (…) access, like that in the present case, necessarily means that the conditions set out in [*Bronner*] relating to the refusal to supply must be applied",[19] because a "independent form of abuse" may be at hand,[20] "not limited to indispensable goods and services",[21] and different from the precedents.[22] Finally, the practice examined in the case of *Google Shopping* was actually exclusionary and anticompetitive. It did result in the exclusion of horizontal rivals and in adverse impacts on prices and innovation, without any accompanying compensatory benefits. Thus, while not conforming to the criteria for unlawful refusals to deal, that practice nonetheless fulfilled all the fundamental elements of the effects-based notion of abuse.

Indeed – and even regardless of the *Google Shopping* case – the counter-argument to the aforementioned criticism, which centres around the Commission's perceived excessive discretion unconstrained by well-defined liability tests, is as follows: there can be no unlawful or illegitimate discretion as long as the Commission establishes that the conduct of a dominant firm is capable of generating excluding and predominantly

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[15] Pablo Ibáñez Colomo, "Self-preferencing" (n 8).

[16] Judgment of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission*, EU:T:2021:763, paragraph 222.

[17] *Ibid*., paragraphs 199-203.

[18] *Ibid*., paragraph 224.

[19] *Ibid*., paragraph 230.

[20] *Ibid*., paragraph 236.

[21] *Ibid*., paragraph 234.

[22] *Ibid*., paragraph 233: the lack of access to Google's services constituted a difference in treatment rather than a refusal to supply, as outlined in the *Bronner* case. The GC concurred with the Commission that, unlike the specific circumstances in *Bronner*, Google had not refused any express request. In the absence of such an explicit refusal, there were no measurable effects on the market, as acknowledged by the GC.

anticompetitive effects. This is because, as will be explained in section 4, the concept of abuse has the ability to encompass any practice that can generate the aforementioned consequences.

Secondly, the use of multiple non-binding tests has been found highly unpredictable, because it broadens and blurs the boundaries of Article 102 prohibition.[23] It has been argued that firms, when unsure about the specific criteria underlying antitrust enforcers' decisions, also experience uncertainty regarding the legality of their practices. Indeed, it is generally assumed that having a clear understanding of the exact boundaries of a prohibition affects firms' practices, because it shapes firms' expectations of future judicial outcomes. Consequently, it has been maintained that the absence of predictability has two negative effects in terms of deterrence. On the one hand, it discourages firms from engaging in vigorous competition and innovation – simply put, it produces overdeterrence. On the other hand, it fails to effectively deter firms from engaging in harmful practices – in other words, it entails underdeterrence.

However, this argument that combines predictability, legal certainty, and deterrence within a single rationale is overreaching at least for two distinct reasons. First, the presence of multiple non-binding standards can coexist harmoniously with a precise and well-defined notion of abuse, which ensures predictability in the decisions made by antitrust enforcers. As outlined in section 4, under the current effects-based understanding of abuse, on the one hand, dominant firms are protected from liability as long as their practices, even if exclusionary, result in efficiency gains and innovation. On the other hand, they violate Article 102 if their conduct has the capacity to exclude rivals and harm consumer welfare without producing any redeeming virtue in return. Hence, given this clear notion of abuse, it remains unclear why dominant firms would ever find themselves uncertain about the limits of their antitrust liability and, consequently, the actions they can safely undertake.

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[23] Pablo Ibáñez Colomo, "Indispensability and abuse of dominance: From Commercial Solvents to Slovak Telekom and Google Shopping", *Journal of European Competition Law & Practice* 10, no. 9 (2020): 546; Jan Broulìk, "Preventing anticompetitive conduct directly and indirectly: Accuracy versus predictability", *The Antitrust Bullettin* 64, no. 1 (2019): 124; and Yasmine Bouzoraa, "Between substance and autonomy: Finding legal certainty in *Google Shopping*", *Journal of European Competition Law & Practice* 13, no. 2 (2022): 148-149: "it is unlikely that Google could have predicted, on the basis of the relative characteristics of its conduct noted by the Commission, that its behaviour went beyond competition on the merits. The GC failed to engage with these concerns on a substantive level, rendering its response inadequate in light of legal certainty".

From another perspective, while firms may experience legal uncertainty when the boundaries of a legal norm are imprecise, this cannot be the case when the determination of legality hinges on whether the practices in question are capable of generating procompetitive or anticompetitive effects. Firms, particularly dominant ones such as digital ecosystems that analyse vast quantities of data,[24] possess the ability to discern between potential procompetitive and anticompetitive effects and, consequently, distinguish procompetitive from anticompetitive practices. Hence, since the notion of abuse is contingent upon these potential effects, they should not encounter any legal uncertainty, even when the liability tests adopted are multiple and non-binding.

To be sure, one could argue in response that there is a distinction between expecting a practice to generate procompetitive/anticompetitive effects and subsequently verifying that it actually did so.[25] However, antitrust decisions are founded on the *ex ante* potential effects of their practices, and not on their actual *ex post* effects.[26] Consequently, dominant firms should not be held liable if a practice that, on the basis of the initial factual circumstances, was capable of producing efficiency and innovation later transpires to be anticompetitive.

Finally, it has been argued that if dominant firms' practices were to be evaluated solely based on their exclusionary and anticompetitive effects, the Commission would not face limitations in imposing highly intrusive remedies in specific circumstances, such as refusal to deal cases. In other words, the absence of binding tests and, in particular, the absence

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[24] James Bessen, *The new Goliaths: How corporations use software to dominate industries, kill innovation, and undermine regulation* (New Haven: Yale University Press, 2022), 33. Such a vast availability of data may in itself constitute a problematic issue for competition law, as recent cases at domestic level testify. See, e.g., the case of the Italian Competition Authority against Amazon: AGCM, 30-11-2021, FBA *Amazon*, in 49/2021. Also, the German saga against Facebook: Bundesgerichtshof, "Federal Court of Justice provisionally confirms allegation of Facebook abusing dominant position" (2020). https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?_blob=publicatinFile&v=2.

[25] Pablo Ibáñez Colomo, "Indispensability and abuse of dominance" (n 22), 546: "The EU legal order […] acknowledges, in other words, that a firm may never have developed an infrastructure (or may not continue investing in it) if it had been subject, from the outset to an obligation to deal with rivals on regulated terms and conditions. Accordingly, an abuse cannot be established simply by pointing out that, from an *ex post* perspective, a given practice appears to restrict competition".

[26] Recently, on this specific point Judgement of 19 January 2023, *Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato*, Case C-680/20, ECLI:EU:C:2023:33, paragraphs 41-44.

of binding tests tailored to the expected remedy would not prevent the Commission from being overly deterrent and imposing invasive remedies,[27] as seen in the case of *Google Shopping*, where the Commission imposed a quasi-duty to engage in business, even without meeting the indispensability requirement.[28]

Nevertheless, although this critique holds merit, it can be effectively addressed without necessitating mandatory binding liability tests. Instead, it can be achieved by granting the Commission the authority to impose intrusive remedies solely in cases where the extent of exclusion is nearly absolute, as seen in claims pertaining to essential facilities. In simpler terms, the objective of minimizing the use of invasive remedies can be fulfilled by regulating the remedies themselves, rather than the circumstances that trigger the infringement of Article 102.

Overall, therefore, the criticisms levelled at the Commission's decision to depart from the liability tests it had thus far employed to establish the illicit nature of exclusionary conduct by dominant firms are not disruptive or conclusive. However, it is worthwhile to contemplate what the implications would be if, alternatively, only a few binding tests were implemented, meaning that each category of exclusionary and anticompetitive behaviour had a single mandatory test to determine its unlawfulness.

To accomplish this, a concise exploration into the theory of interpretation would prove beneficial.

3. Implications of multiple binding tests for regulating exclusionary and anticompetitive practices: Indications from the theory of interpretation

It is widely recognized that, barring a few exceptions,[29] the so-called "logical or syntactic structure" of legal norms takes the form of a conditional statement, indicating what actions should be taken or avoided in the event

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[27] *Ibid*., 544.

[28] Pablo Ibáñez Colomo, "Legal tests in EU competition law: Taxonomy and operation", *Journal of European Competition Law & Practice* 10, no. 7 (2019): 424-438. See also Pablo Ibáñez Colomo, "Self-preferencing" (n 8): "the authority argued that, in order to determine whether indispensability is an element of the legal test, what matters is not what intervention demands in substance but *what the authority formally requires* in its decision" (emphasis added).

[29] I.e., the rules of express repeal of determined norms (e.g., "Article *x* of Law *y* is repealed") and the rules of authentic interpretation (e.g., "Article *x* of law *y* is to be understood in the sense that...".).

of certain circumstances.[30] In other words, legal norms are not categorical or unconditional prescriptions such as "it is forbidden to kill" or "it is forbidden to cause unjust harm". They are conditional or hypothetical prescriptions, encompassing two essential components: the antecedent, or *protasis*, which establishes the condition ("if…".); and the consequent, or *apodosis*, which denotes the resulting consequence ("then…".). Therefore, the great majority of legal norms are of the kind: "if someone causes the death of another person, they must be punished", "if someone causes unjust harm, they must provide compensation", or – focusing on Article 102 TFEU – "if firms abuse their dominant positions, their conduct must be prohibited".

Legal theorists who have extensively explored the theory of interpretation contend that distinguishing between the antecedent and the consequent is not always straightforward.[31] This difficulty can arise, for instance, when a legal provision encompasses multiple norms and, consequently, multiple antecedents. Or it can arise when a single norm emerges from the combination of several provisions, sometimes placed in different statutes and legal texts. Nonetheless, these theorists unanimously agree that the antecedent pertains to a set of *abstract factual circumstances* (e.g., two parties entering into a contract, one party causing harm to another, etc.),[32] specifying the subject of regulation, essentially answering the question "what is being regulated?". Instead, the consequent relates to a set of legal outcomes (such as the obligation to fulfil contractual obligations,

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[30] See, *inter alia*: Alf Ross, *On law and justice* (Berkeley-Los Angeles: University of California Press, 1959), 32; Carlos Eduardo Alchourrón, Eugenio Bulygin, *Normative systems* (Wien-New York: Springer, 1971); William Twining, David Miers, *How to do things with rules* (London: Weidenfeld & Nicolson, 1982); David Mendonça, *Exploraciones normativas. Hacia una teoría general de las normas* (Ciudad de México: Distribuciones Fontamara, 1995); Carlos Eduardo Alchourrón, Eugenio Bulygin, "Norma giuridica", in *Il positivismo giuridico*, ed. Eugenio Bulygin (Milano: Giuffè, 2007), 217.

[31] Pierluigi Chiassoni, *Tecnica dell'interpretazione giuridica* (Bologna: Il Mulino, 2007), 53; Giuseppe G. Floridia, "Scomposizione e rappresentazione grafica degli enunciati normativi fra teoria dell'interpretazione e tecnica del drafting legislativo", and "Rappresentazioni grafiche, tecniche interpretative, e drafting legislativo", in *G.G. Floridia, Scritti minori*, ed. Federico Sorrentino (Torino: Giappichelli, 2008), 429, 465.

[32] In Italian the antecedent is named "*fattispecie*"; in French, "état des faits"; in German, "*Tatbestand*"; in Spanish "*caso*" and in Portuguese "*fattispécie*".

the obligation to compensate the injured party, etc.) and determines the method of regulation, addressing the question "how is it regulated?".[33]

Furthermore, legal theorists also explain that when enforcers are entrusted with the task of applying a legal provision, they must undertake two cognitive processes. Firstly, they must grasp the intended meaning of the provision's text to identify the norm(s) contained within it, particularly the antecedent(s) that trigger(s) the consequent. This process is commonly referred to as text-oriented interpretation, which entails identifying all the abstract factual circumstances constituting the one or more antecedents included in a legal provision.[34] Secondly, enforcers must determine whether the specific case they are examining falls within the scope of the legal norm they have previously identified. In other words, they must establish whether the abstract factual circumstances of the identified antecedent have actually manifested in the scenario under their scrutiny. This process is commonly known as fact-oriented interpretation.[35]

Therefore, the entire discourse surrounding the binding nature of the tests employed thus far to characterize dominant firms' practices as exclusionary and anticompetitive can be succinctly summarized with a straightforward question: "what are the abstract factual circumstances that constitute the antecedent(s) included in Article 102?".

There is room to argue that those who advocate for limiting the Commission's discretion by imposing binding tests inadvertently suggest that these abstract factual elements must correspond to the criteria of the tests associated with each exclusionary and anticompetitive practice.[36] More expressly, they seem to maintain that Article 102 can encom-

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[33] Riccardo Guastini, *Interpretare e argomentare*, in *Trattato di diritto civile e commerciale*, ed. Antonio Cicu, Francesco Messineo, Luigi Mengoni (Milano: Giuffré, 2011), 19.

[34] Ibid., 24-25.

[35] Eduardo Alchourrón, Eugenio Bulygin, *Analisti lògico y derecbo* (Madrid: Editorial Trotta, 1991), 303; Eugenio Bulygin, *Norme, validità, sistemi normativi* (Torino: Giappichelli, 1995), 267; Ronald Dworkin, "No right answer?", in *Law, morality and society. Essays in honour of H. L. A. Hart*, ed. Peter Hacker and Joseph Raz (Oxford: Oxford University Press, 1977).

[36] See Pablo Ibáñez Colomo, "Legal tests in EU Competition Law" (n 26): 424. However, it is interesting to note that the language of the Courts' decisions varies a lot and uses different terms to refer to the components of each test. Those different qualifications make it difficult to consider the requirements of the tests as *proper legal conditions*. In *Google Shopping*, for instance, the GC referred to them first as "conditions" (para 215), yet later as "criteri[a]" (para 217), and then also as "circumstances" (para 132) amounting to an infringement. See Judgment of the General Court of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission*, T-612/17, EU:T:2021:763. Also, in *SEN*, the ECJ for the same purposes adopts the

pass several but not infinite antecedents – for example, one for predatory pricing, one for bundle rebates, one for refusals to deal, but not one for self-preferencing. Additionally, they appear to imply that those antecedents include the prongs of the liability tests associated with each of those categories of conduct. Thus, for example, due to the factual circumstances found out in *Oscar Bronner*, the antecedent for a refusal to deal could read as follows: "if the refused resource is essential, and if the refusal is likely to have a negative impact on competition and does not admit any objective justification". Expressed in this manner, therefore, the liability test formulated by the Commission in the *Google Shopping* case to determine self-preferencing would be considered illegitimate, as it deviated from the antecedents already specified in Article 102.

However, this *interpretation* of Article 102 and of the antecedents included in such provision is not consistent with what EU Courts have elaborated thus far in relation to the notion of exclusionary and anticompetitive abuses.

4. Multiple binding tests are not compatible with the singular notion of exclusionary and anticompetitive abuse

For EU competition law scholars, seeking to understand the abstract factual circumstances that form the antecedent(s) of Article 102 means discussing on the notion of abuse.

In this regard, it is widely recognized that Article 102 encompasses two distinct categories of abuses:[37] exploitative practices and exclusionary-and-anticompetitive conduct.[38] These categories serve different policy objectives. Exploitative practices directly harm consumers and the counterparts of dominant firms, and their prohibition aims to promote fairness and equitable wealth distribution. On the other hand, exclusionary and anticompetitive practices harm competitors, thereby impacting consumers and their overall well-being. Consequently, they are prohibited to safeguard the competitive structure of markets, as competitive markets in

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terms "factor[s]" (para 63-64) and "criteri[a]" (para 24, 65, and 82). See Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA et al. v. Autorità Garante della Concorrenza e del Mercato et al.*, C-377/20, EU:C:2022:379.

[37] Giorgio Monti, "The General Court's Google Shopping judgment and the scope of Article 102 TFEU" (November 14, 2021), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3963336; Whish and Bailey, *Competition Law* (n 4), 200; Alison Jones and Brenda Sufrin, *EU Competition Law* (Oxford: Oxford University Press, 2009), 358.

[38] Note that discriminatory practices are a subset of either exploitative or exclusionary practices.

market economies are expected to generate economic growth and prosperity for the benefit of all stakeholders, including consumers.[39]

Now, considering the preceding discussion on the logical and syntactical structure of norms, it is evident that Article 102 encompasses, at a minimum, two legal norms stating "the practice of a dominant firm must be prohibited, if it is exploitative" or "the practice of a dominant firm must be prohibited, if it is exclusionary and anticompetitive".

Regarding the family of exclusionary and anticompetitive abuses, EU Courts have consistently reaffirmed that a dominant firm violates Article 102 when its actions amount to "methods different from those which condition normal competition" and thus result in "the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[40] Therefore, on the one hand, if a practice is to be characterized as abusive, it must be found to be "capable of restricting competition and, in particular, of producing the alleged exclusionary effects".[41] On the other hand, "not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation".[42]

Consequently, unless antitrust decision-makers decide to prosecute a dominant firm for the exploitative nature of its practices, under Article 102 dominant firms are decidedly allowed to engage in practices that *do not exclude* rivals – as is the case, for example, when a firm signs a one-year exclusive contract with a small distributor. Moreover, they can adopt practices that exclude actual rivals, marginalize them in a niche of the relevant

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[39] Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA et al. v. Autorità Garante della Concorrenza e del Mercato et al.*, C-377/20, EU:C:2022:379, paragraph 44.

[40] Judgement of 13 February 1979, *Hoffmann-La Roche v. Commission*, C-85/76, EU:C:1979:36.

[41] Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA et al. v. Autorità Garante della Concorrenza e del Mercato et al.*, C-377/20, EU:C:2022:379, paragraphs 50-61.

[42] Judgment of 6 September 2017, *Intel Corp. v. European Commission Intel*, C-413/14, EU:C:2017:632, paragraphs 133–134. *See* also Judgement of 27 March 2012, *Post Danmark A/S v. Konkurrencerådet*, C-209/10, EU:C:2012:172, paragraphs 40–41, stating that "[i]t is open to a dominant undertaking to provide justification for behavior that is liable to be caught by the prohibition under Article [102]. In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary […] or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers". And Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA et al. v. Autorità Garante della Concorrenza e del Mercato et al.*, C-377/20, EU:C:2022:379, paragraphs 84-86.

market, or prevent potential rivals from entering it, if these exclusionary effects are *not anticompetitive* – that is, if they are the natural consequence of competition on the merits, as happens, for example, when a dominant firm launches an innovation that its rivals cannot match. Finally, under Article 102, dominant firms are even free to engage in practices that produce exclusionary and anticompetitive effects if indeed these practices can be objectively justified because they produce countervailing effects in terms of price, choice (also called "variety"), quality, and innovation that benefit consumers.

In other words, the abstract factual circumstances that form the antecedent of exclusionary and anticompetitive practices are three: *(i)* their likely exclusionary effects; *(ii)* their likely anticompetitive effects that are not offset by likely efficiency and innovation gains; and *(iii)* the absence of additional and different objective justifications for such practices. After all, this interpretation of the notion of abuse confirms and exemplifies what has been clear since many years ago: under Article 102, the illegality of exclusionary and anticompetitive practices does not depend on the *form* these practices take,[43] but on their *effects* – even potential ones.[44]

As a consequence – and for what is more relevant here – first one should conclude that the legal norm governing exclusionary and anticompetitive abuses should read in the following way: "a dominant firm's practice must

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[43] Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA et al. v. Autorità Garante della Concorrenza e del Mercato et al.*, C-377/20, EU:C:2022:379, paragraph 72 and caselaw cited. In that regard, *see* also Pablo Ibáñez Colomo, "Anticompetitive effects in EU competition law", *Journal of Competition Law & Economics* 17, no. 2 (2020), 350-351: "The analysis of effects is the same across provisions… The evolution of the case law, in particular following *Deutsche Telekom*, *TeliaSonera*, *Post Danmark I and II* and *Intel*, seems to have dissipated any doubts in this respect. In these judgements, the Court clarified that the practices at stake were only caught by Article 102 insofar as they were likely to have anticompetitive effects".

[44] Therefore, as is well known, Article 102 TFEU identifies an inchoate wrongdoing since, in order to enforce the prohibition, antitrust authorities and judges do not have to wait for competitive harm to occur. The point is settled in case law: *see* Judgement of 14 October 2010, *Deutsche Telekom AG v. European Commission*, C-280/08 P, EU:C:2010:603, paragraph 252; Judgement of 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09, EU:C:2011:83, paragraph 64; Judgment of 6 September 2017, *Intel Corp. v. European Commission Intel*, C-413/14, EU:C:2017:632, paragraph 138; as well as Judgement of 30 January 2020, *Generics (UK) Ltd et al. v. Competition and Markets Authority*, C-307/18, EU:C:2020:52, paragraph 154. Thus, to enforce Article 102, antitrust authorities and judges shall not wait for the competitive harm to occur. They are entitled to apply the prohibition even when the restrictive effects of dominant firms' practices have not yet taken place.

be prohibited, if it is likely to produce exclusionary effects and prevailing anticompetitive effects".

Next, one should note that proceeding with a few obligatory liability tests specifically designed for each category of frequently prosecuted exclusionary and anticompetitive practices is incompatible with this effects-based interpretation of Article 102. Asking someone to demonstrate the exclusionary and anticompetitive nature of a conduct by proving the occurrence of the conditions set forth in one of these tests would, in fact, imply that the factual circumstances constituting the antecedent of Article 102 are those encompassed within these tests and not the above-mentioned three.

Finally, within the framework of the effects-based interpretation of Article 102, it is essential to recognize that practices with similar characteristics but producing different effects should be subject to varying probabilities of prohibition based on the specific potential or actual effects they entail. Conversely, practices with comparable exclusionary and anticompetitive effects should face equal probabilities of prohibition, irrespective of their distinct forms. Achieving this outcome necessitates the use of multiple non-binding tests, as relying solely on evaluative processes that adhere to the criteria outlined in a particular liability test would result in the characterization of a practice being contingent upon the specific test selected to evaluate it. Put simply, multiple binding tests would not only contradict the effects-based notion of abuse, but also give room to a formalistic approach that the actual interpretation of Article 102 refutes.

In light of this, it is possible to understand the recent attitude of the European decision-makers in *Google Shopping* and other cases in which they focused on the effects of the conduct at hand but took distance from the liability tests established thus far.

But there is more.

5. Multiple non-binding tests are compatible with the teleological Treaty interpretation

The utilization of multiple non-binding tests corresponds with another stable element of EU law: the enduring teleological interpretation of the treaties by EU courts.

In the realm of EU law, teleological interpretation encompasses the Court's approach to thoroughly examine the overall context in which a specific provision is situated. It aims to provide an interpretation that best

serves the intended objectives of that provision, as perceived by the Court.[45] Scholars further categorize teleological reasoning into three distinct types: (*i*) the 'functional interpretation,' which prioritizes the preservation of the provision's effectiveness; (*ii*) the 'teleological interpretation *stricto sensu*', invoked when the provision exhibits notable ambiguity or incompleteness; and (*iii*) the 'consequentialist' interpretation, which focuses on the outcomes arising from a particular interpretive decision.[46]

In this regard, the effects-based approach outlined earlier appears to align with each of the three perspectives on teleological interpretation. Firstly, as observed, treating legal tests as alternatives to determine the most suitable approach for the given case contributes to promoting the effectiveness of Article 102 and its fundamental objective: safeguarding the proper functioning of the internal market. Secondly, it is widely acknowledged that the prohibition of abuse of dominance under the TFEU is intentionally broad and adaptable, allowing for the variation of the law to the economy changes, while creating a veil of uncertainty around the concept of abuse, which justifies the gap-filling activity inherent in teleological interpretation.[47] Thirdly, it is evident from the case law that the Courts consistently consider the potential consequences that may impact the market and subsequent cases when adopting a particular interpretation. This is particularly true concerning the Courts' vigilance in ensuring that a specific judgment does not undermine competition in the long run.[48]

The proposed reading can gain further legitimacy, from an interpretive perspective, by considering the concept of constructive interpretation. Constructive interpretation adopts a purposive, principle-based, and

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[45] Paul Craig and Gráinne de Búrca, *EU law: Text, cases, and materials* (Oxford: Oxford University Press, 2020), 94.

[46] Koen Lenaerts and José A. Gutiérrez-Fons, "To say what the law of the EU is: Methods of interpretation and the European Court of Justice" (EUI Working Paper AEL No. 2013/9, European University Institute, 2013), 25.

[47] González-Diaz and Temple Lang, "The concept of abuse" (n 7), 122. Of the same opinion, *inter alia*, Justin Lindeboom, "Rules, discretion, and reasoning according to law", *Journal of European Competition Law & Practice* 13, no. 2 (2022), 65.

[48] As an example of this attitude, see Opinion of AG Jacobs in Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*, EU:C:1998:264, paragraph 57: "The incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus, the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".

results-oriented approach, aiming to reconstruct the essence of the law based on its intended purpose.[49] This interpretive criterion is particularly well-suited for a legal domain such as competition law, which possesses an inherently "responsive" nature. In fact, the inherent characteristics of competition law as an open and evolving normative field, coupled with the normative uncertainties surrounding its scope and its flexible vocabulary, can lead to both uncertainty and unpredictability. However, it also enables the law to exhibit flexibility, adaptability, and efficacy in incorporating new knowledge and addressing emerging market challenges.[50]

Moreover, employing a teleological interpretation when applying Article 102 allows for the avoidance of typical criticisms levelled against the CJ's approach to treaty interpretation. The Court often faces accusations of being activist by significantly expanding the reach of EU law in relation to member states and applying community principles contrary to legal provisions.[51] These criticisms are often countered by acknowledging that the Court's seemingly *contra legem* judgments actually provide solutions to issues where the Treaties are vague or silent.[52] In the case of Article 102, not only does teleological interpretation minimize challenges regarding the extension of EU law vis-à-vis member states, but it also easily harmonizes with the evident level of flexibility within the provision.

Lastly, while proponents of a teleological interpretation would readily embrace the proposed effects-based approach to abuses of dominance, the reverse is not true: favouring the utilization of immutable legal tests or even incorporating the elements of such tests into the definition of abuse does not align with a more literal interpretation of the Treaties. In fact, a strict textualist reading would require decision-makers to adhere closely to

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[49] Stavros Makris, "EU competition law as responsive law", *Cambridge Yearbook of European Legal Studies* 23 (2021), 244. Constructive interpretation differs from traditional teleological interpretation in that it acknowledges that legal interpreters frequently make value judgments, normative decisions, and (re)construct a conception of a rule's purpose in order to apply it. This is in contrast to traditional teleological interpretation, which looks for some 'true and fixed intent or objective'. In other terms, this interpretive technique "reconstruct[s] the purpose of the law in light of its effects".

[50] *Ibid*., 266-267.

[51] For a comprehensive review of the criticisms to the ECJ's teleological interpretation, see Stephen Brittain, "Justifying the teleological methodology of the European Court of Justice: A rebuttal", *Irish Jurist* 55 (2016), 134-165.

[52] Anthony Arnull, "Judicial activism and the European Court of Justice: How should academics respond?", in *Judicial Activism at the European Court of Justice*, ed. Mark Dawson *et al.* (Cheltenham: Edward Elgar, 2013), 224.

the wording of the provision in question.[53] However, if one were to adopt a rigid textualist approach to Article 102, it would contradict the very concept of employing legal tests. These tests serve the purpose of giving practicality to the enumerated abuses, as well as establishing new forms of abuse not explicitly outlined in the provision. Furthermore, it is essential to acknowledge that these tests are inherently value-based and driven by the objectives of the law.[54]

In conclusion, the aforementioned effects-based approach not only holds appeal from a policy perspective, but also aligns harmoniously with the teleological interpretation of EU law. This approach not only strengthens the efficacy of Article 102, but also considers the market implications and future case law consequences. Finally, by aligning with the purpose and objective of the provision, this approach effectively mitigates the criticisms of excessive discretion and activism attributed to the Commission.

6. The nature of tests: An open question in legal theory

Having established that the presence of multiple, non-binding liability tests aligns with a teleological interpretation of the Treaty, and clarifying that the current understanding of the notion of exclusionary and anticompetitive abuse cannot coexist with binding liability tests, a fundamental question arises: from a legal theory perspective, what precisely are these liability tests?

Here, it is contended that these tests comprise factual circumstances from which the potential exclusionary or anticompetitive effects can be inferred. In simpler terms, they serve as evidentiary indicators of whether the antecedents outlined in Article 102 have occurred or could potentially occur. Hence, the liability tests developed thus far represent a collection of evidentiary elements that antitrust enforcers know – based on their accumulated experience – can establish the examined conduct as illicit, that is, can reveal if it is *true* that the practice at hand is capable of producing exclusionary and prevailing anticompetitive effects. However, this does not preclude the possibility of substituting or supplementing these pieces of evidence with others factual circumstances that can prove that the conduct at hand is unlawful. Indeed, like any other form of evidence, each

[53] Lenaerts and Gutiérrez-Fons, "to say what the law of the EU is" (n 44), 7.

[54] Lindeboom, "Formalism in competition law" (n 5), 873: "the creation, amendment, or refinement of substantive legal tests is rarely the result of formalistic reasoning but rather the result of purposive (re-)construction of the law".

prong of these tests carries a distinct probative value depending on the specific circumstances. Consequently, the various conditions delineated in these tests can be combined or even replaced with stronger evidence to support – that is, to prove the truth of – one narrative over another.

As a way of example, consider the conditions that make a tying practice unlawful.[55] Beyond the circumstances referring to the firm's dominance, the potential exclusionary and anticompetitive effects, and the absence of any objective justification, the case law hinges on the existence of a link between the two distinct products and on consumer coercion.

When verified, the first condition serves to exclude that: (*i*) tied products are not the equivalent of a right shoe and a left shoe – they do not correspond to two inseparable components of a single product; or (*ii*) the dominant firm's behaviour does not mark the advent of a new product capable of supplanting the goods that previously circulated separately from one another – as happened when, in the 1970s and 1980s, IBM assembled into a single machine several hardware components that until then were sold separately.[56] However, this consideration – or, more precisely, the amount of truth and accuracy this consideration contains – would not be lost by asking plaintiffs to merely focus on the exclusionary and anticompetitive effects of the dominant firm's practice. The above scenarios of the two inseparable products and of the revolutionary innovation should, however, be considered while discussing the objective justification of the practice and its prevailing pro-competitive effects.

As for consumer coercion, this factual element can also be absorbed into the discussion that takes place – and must always take place – while analysing the exclusionary and anticompetitive impact of the tie-in. More explicitly, the coercion of consumers – or, more generally, the coercion experienced by tie-in buyers – indicates that exclusion is highly likely because the individuals targeted by the dominant firm cannot switch to the products of its rivals. However, depending on the scenario at hand, other factual elements – from super-dominance to cognitive biases[57] – may show that exclusion is equally very likely precisely because the individuals

[55] See *supra*, paragraph 1.

[56] *Transamerica Computer Company, Inc. v. IBM*, 698 F.2d 1377 (9th Cir. 1983); *Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980); and *California Computer Products, Inc. and Century Data System, Inc., v. IBM*, 613 F.2d 727 (9th Cir. 1979).

[57] Judgement of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/2018, EU:T:2022:552. See, in this regard, Competition & Markets Authority, "Online choice architecture: How digital design can harm competition and consumers" (April 2022), available at

targeted by the tie-in product are prevented from choosing otherwise. In assessing bundle rebates, the Commission already accepts the occurrence of exclusionary effect in the absence of a legal obligation to choose the bundle but in the presence of an economic incentive to do so.[58] In other words, the Commission already accepts that the exclusion relevant to the application of Article 102 TFEU can arise not from a legal obligation but from another factual circumstance. As a result, it is unclear why consumer coercion should be the only factual circumstance relevant to finding tying abusive, if one can otherwise show that such a practice is exclusionary, produces more anticompetitive than pro-competitive effects, and admits of no other objective justification.

The same observation can be made regarding the significance of false information in cases like *AstraZeneca*.[59] In that particular instance, the fact that the pharmaceutical company had provided false information about the duration of its patent and, consequently, the necessity of obtaining a supplementary protection certificate indicated that the expected procompetitive benefits associated with such a certificate would not materialize. As a result, the exclusionary and anticompetitive effects inherent in these certificates, which hinder the entry of generic drug manufacturers and prevent a decrease in market prices, could not be counterbalanced by any procompetitive effect.[60]

And again, a similar consideration should take place with respect to the requirement of essentiality that needs to be verified in order to consider

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https://assets.publishing.service.gov.uk/ government/uploads/system/uploads/attachment_data/file/1066524/Online_choice_architecture_discussion_paper.pdf.

[58] See European Commission, *Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings' (OJ 2009 C 45)*, February 24, 2009, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29, paragraphs 47-62.

[59] See Case COMP/A. 37.507/F3, *AstraZeneca*, affirmed in Judgment of 6 December 2012, *AstraZeneca AB and AstraZeneca plc v. European Commission*, C-457/10 P, ECLI:EU:C:2012:770.

[60] In fact, when the scope of a patent overlaps with the relevant market, such an application not only produces exclusionary effects, because it prevents generic drug manufacturers from entering the market, but also causes a failure to increase consumer welfare, because it prevents the market price from falling dramatically as a result of the very sale of generic drugs. However, in deference to the patent rationale that the duration of exclusivity remunerates the inventor for the investment incurred thus inducing him to continue innovating, it must be admitted that each supplementary certificate application also produces procompetitive effects precisely because it serves as an intertemporal incentive to innovation. Consequently, applications for supplementary certificates cannot necessarily be considered abusive, even when made by dominant firms that own market-making patents.

unlawful a refusal to deal that prevents the beginning of a new business relationship. With respect to this scenario, indeed, the essentiality requirement tells that exclusion will be highly probable precisely because rivals cannot carry out their business activities without access to the essential resource at hand. However, as *Google Shopping* shows, other factual circumstances can lead to the same conclusion. In the (presumed) impossibility of demonstrating the essential nature of Google Search, the Commission nonetheless pointed out that other elements – from the universal functionality of the search engine to the super-dominance of Google – made plausible the idea that Google's rivals interested in competing in secondary markets would have found it unreasonably difficult to vertically integrate upstream and substitute Google Search with their own search engines.

Likewise, consider that in *Slovak Telekom* – a case that involved a practice in between an outright refusal to deal and a margin squeeze – the GC dispensed with the requirement of essentiality because the existence of a regulatory duty to offer access to the firm's infrastructures would be in itself sufficient, in conjunction with the unfair terms and conditions offered for the infrastructure's sharing, to demonstrate the likelihood of exclusionary and anticompetitive effects.[61]

In summary, the liability tests utilized in cases falling under Article 102 are collections of evidentiary elements that the Commission has *routinely* employed to establish the unlawful nature of the practices subject to their examination, based on the understanding that the factual circumstances included in those tests could effectively support or refute the allegations.[62] However, the high probative value of the facts included in these tests does not contradict the principle requiring the Commission, as well as any other antitrust plaintiff, to consider "all the relevant circumstances" in determining whether a practice is capable of producing adverse effects on competition.[63] Hence, there is nothing unorthodox about substantiating

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[61] Judgment of 25 March 2021, *Slovak Telekom v. Commission (Slovak Telekom)*, Case C-165/19 P, EU:C:2021:239, paragraphs 50-51; and European Commission, Annex to the Communication from the Commission – Amendments to the 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 (C/2023/1923), March 3, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2023_116_R_0001, paragraph 4.

[62] Lindeboom, "Formalism in competition law" (n 5), 874.

[63] See, e.g., Judgment of 19 January 2023, *Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato*, C-680/20, ECLI:EU:C:2023:33; Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA et al. v. Autorità Garante della Concorrenza e del Mercato*

the exclusionary and anticompetitive effects of a practice by considering evidentiary elements other than those previously and frequently used. This does not entail the development of a new test or an inventive interpretation of the law. It simply involves analysing the specific market scenario at hand to determine the potential or actual effects of the practice under examination. This is why, very recently, the Commission has deemed liability tests, such as the as-efficient-rival test, as purely optional in the revised Guidelines on the application of Article 102 TFEU to exclusionary conduct.[64] Ultimately – as is the case whenever one faces a proof – the key objective remains to demonstrate that the considered evidence can effectively shed light on the veracity of the allegations at hand. Therefore, contrary to what one might assume, the pursuit of identifying the circumstances that demonstrate the exclusionary and pervasive anticompetitive effects of the practice at hand aims to reveal the truth. It is not a contrived endeavour to bestow unwarranted discretion and excessive deterrence upon the Commission.

7. Concluding remarks

The debate surrounding the tests to be utilized in identifying the exclusionary and anticompetitive practices of dominant firms is fiercely contested within the European Union. As highlighted in the second section, the arguments fuelling this discussion revolve around matters of legal policy. Specifically, they centre on the Commission's discretionary authority, the predictability of its decisions, the level of legal certainty offered, the effectiveness of its deterrent measures, and the varying degrees of intrusiveness associated with the remedies implemented by the Commission.[65]

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et al., C-377/20, EU:C:2022:379, paragraph 72; Judgement of 30 January 2020, *Generics (UK) Ltd et al. v. Competition and Markets Authority*, C-307/18, EU:C:2020:52, paragraph 154; Judgement of 22 March 2012, *Slovak Telekom v. European Commission*, joined cases T-458/09 and T-171/10, EU:T:2012:145, paragraph 42; and Judgment of 19 April 2012, *Tomra Systems and Others v. Commission*, C-549/10 P, EU:C:2012:221, paragraph 18.

[64] See European Commission, Annex to the Communication from the Commission – Amendments to the 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 *(C/*2023/1923*)*, March 3, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2023_116_R_0001, paragraphs 3 and 23.

[65] On the (limited) relevance of legal certainty, see also Christopher Townley, *A framework for European competition law: Co-ordinated diversity* (Bloomsbury Publishing, 2018) and Yane Svetiev, *Experimentalist competition law* (Bloomsbury Publishing, 2020).

However, the third and sixth sections reveal that the same debate can be approached using alternative arguments rooted in legal theory. Specifically, one can differentiate between the foundational elements of the notion of abuse, commonly referred to as "the abstract factual circumstances comprising the antecedent of the norm outlined in Article 102", and the evidentiary factors that can be employed to ascertain the validity or invalidity of a specific claim.

The CJ has consistently ruled that there are three fundamental components that make up the concept of abuse. Specifically, these elements are: (*i*) the likely exclusionary effects of the practice at hand; (*ii*) its likely anticompetitive effects as long as they prevail over potential procompetitive effects; and (*iii*) the absence of additional and different objective justifications for such practices. Additionally, the Court has repeatedly determined that the occurrence of an abuse can be proven by considering all the pertinent circumstances pertaining the case.

Therefore, based on these theoretical and jurisprudential elements, it can be concluded that the tests used thus far to identify exclusionary and anticompetitive practices are compilations of evidentiary elements. For sure, they are pieces of evidence that hold a significant probative power, as they have often yielded conclusive results. Still, they remain evidentiary in nature and, hence, capable of being combined or substituted with others. This, in fact, aligns with the Court's determination to evaluate the veracity of an accusation based on all relevant circumstances. On the other hand, if the tests were deemed binding, then their prongs should be regarded as the abstract circumstances that constitute the antecedent included in the norm within Article 102. However, such an interpretation would directly conflict with the current understanding of abuse and its recognized constituent elements as determined by the Court.

And this final reference to the fundamental elements comprising the concept of abuse also serves to return to the policy arguments that strongly oppose the adoption of multiple, non-binding liability tests. It is undeniable that, presently, the Commission possesses significant discretion in determining a practice to be exclusionary and anticompetitive. However, it is important to note that this flexibility, which in complete harmony with the teleological interpretation commonly ascribed to treaty provisions, does encounter limitations in the three abstract factual circumstances that constitute the essence of abuse when applied to exclusionary and anticompetitive practices. Furthermore, dominant firms cannot assert

that such flexibility increases their uncertainty in distinguishing between lawful and unlawful practices because, as the effects-based interpretation of the notion of abuse makes this distinction contingent upon discerning between procompetitive and anticompetitive effects – a task in which businesspeople possess superior expertise compared to any judge, officer, or legal scholar.

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