I. Introduction

Determining the appropriate standards to apply in Article 102 cases involving allegedly exclusionary conduct by a dominant firm continues to provide substantial room for debate between and within the legal and economic communities. However, the nature of the debate has progressed substantially since the European Commission adopted an approach to assessing whether a dominant firm’s conduct amounts to anti-competitive foreclosure that is more closely aligned with the economic literature by publishing its Priority Guidance Paper ("PGP"). [1]

In this forward, I briefly review aspects of the case-law and outline the important contribution the PGP has made to the recent case-law. In doing so I have the benefit of a large prior literature including in particular Nazzini (2012) [2] and Ezrachi (2016) [3]. In short the PGP has succeeded to a significant degree in providing a coherent framework of case-law connected, to at least a greater extent than evident in the earlier case-law, to the framework provided by economists for analysing exclusionary conduct by dominant firms. The case-law has also recognised the As Efficient Competitor ("AEC") standard’s limitations. In the second part of the paper, I describe some of the limits to the AEC framework and discuss in particular the relationship between the AEC test and whether the conduct caused consumer harm (although the important topics of objective necessity and efficiencies are largely left for another occasion).

I close by noting that the normative question of the role that the AEC test should play in future cases seems likely to be a prominent element of the debate in cases involving the digital economy. The reason is that agencies worry incumbents have benefits from scale derived from access to data that entrants may not be able to match.

II. The Case-Law and the PGP’s Move to a ‘More Economic Approach’

The PGP described the purpose of the Commission’s enforcement activity in relation to exclusionary conduct as ensuring that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare. The PGP describes "the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering
competition from competitors which are considered to be as efficient as the dominant undertaking’ (emphasis added, paragraph 23, PGP). In Continental Can (Europemballage and Continental Can v. Commission, Case 6/72, [1973], Court of Justice) the Court of Justice described that Article 102 “is not only aimed at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure” (paragraph 26, Continental Can). Direct consumer harm can arise in exploitative abuse cases when, for example, prices are excessively high while indirect harm may arise when a dominant firm’s conduct is exclusionary. Consistent with this approach, the PGP describes 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…” (paragraph 19, PGP).

Thus, the two cumulative conditions the PGP describes as normally required for intervention against anticompetitive foreclosure are: (i) foreclosure or hampering of as efficient competitors and (ii) an assessment, albeit not necessarily a detailed one, concluding that the dominant firm’s conduct is likely to result in consumer harm. The first condition can be described as the AEC standard.

A. Predation and the Origins of the AEC Test

Prior to any European case-law on the topic, the AEC standard received attention in the US in the context of predation cases. [4] In Europe, in Akzo (Akzo Chemie BV v Commission, Case C-62/86, Court of Justice [1991]) the Court of Justice considered the Commission’s decision that Akzo had abused its dominant position by offering selective and below-cost prices in order to exclude a competitor called Engineering and Chemical Supplies Limited ("ECS"). Famously, the Court of Justice found that a dominant undertaking seeking to eliminate a competitor by pricing below average variable costs must be regarded as abusive and that prices between average variable costs and average total costs must also be abusive if they are determined as a part of a plan for eliminating a competitor (paragraph 71, Akzo). The Court expressed its concern that: ”Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them” (emphasis added, paragraph 72, Akzo).

B. Selective Price Discrimination and Average Incremental Costs

Post Danmark I (Post Danmark A/S v Konkurrencerådet, Case C-209/10, Court of Justice [2012]) involved an infringement decision (subsequently upheld by the Danish competition appeals tribunal) against Post Danmark, holder of the legal monopoly for the delivery of addressed letters and parcels not exceeding a certain weight through a national network. The allegation was that it had offered selective discounts to customers of a rival Forbruger-Kontakt for the distribution of unaddressed mail (brochures, telephone directories, guides, local and regional newspapers, etc.). The decision led to a request to the Court of Justice for a preliminary ruling on the interpretation of Article 102 TFEU concerning the prices Post Danmark had charged to three former customers of its competitor Forbruger-Kontakt a-s, namely SuperBest, Spar, and Coop groups.

In this case, the AEC test was undertaken in a context where common costs were supporting Post Danmark’s activities in two market segments, addressed mail and unaddressed mail, and this had implications for the way in which the AEC test was applied. The Court of Justice describes the approach to the AEC test taken in this context: “In the present case, it emerges from the case-file that, for the purpose of carrying out a price-cost comparison, the Danish competition authorities had recourse, not to the concept of ‘variable costs’ mentioned in the case-law stemming from AKZO v Commission, but to another concept, which those authorities termed ‘incremental costs.’

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In this respect, it can be seen from, in particular, the written observations of the Danish Government and its written replies to the questions asked by the Court, that those authorities defined ‘incremental costs’ as being ‘those costs destined to disappear in the short or medium term (three to five years), if Post Danmark were to give up its business activity of distributing unaddressed mail.’ In addition, that government stated that ‘average total costs’ were defined as being ‘average incremental costs to which were added a portion, determined by estimation, of Post Danmark’s common costs connected to activities other than those covered by the universal service obligation’ (paragraph 31, Post Danmark I).

In particular, to estimate average incremental costs the Konkurrencerådet “included, among other things, not only those fixed and variable costs attributable solely to the activity of distributing unaddressed mail, but also elements described as ‘common variable costs’, 75% of the attributable common costs of logistical capacity and 25% of non-attributable common costs” (paragraph 33, Post Danmark I). These allocations of common variable costs were considerable and motivated by the fact that Post Danmark was using the same infrastructure and the same staff for distributing both addressed and unaddressed mail.

Spar and SuperBest groups were found to have prices higher than average total costs and the Court of Justice states that “it cannot be considered that such prices have anti-competitive effects” (paragraph 36, Post Danmark I). For Co-op group, the price was found to be above average incremental costs (AIC) but below average total costs for the activity. The Court of Justice notes that “a pricing policy ... cannot be considered to amount to an exclusionary abuse simply because the price charged to a single customer by a dominant undertaking is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to the latter, as respectively estimated in the case in the main proceedings” (paragraph 37, Post Danmark I).

The court then notes that "to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term" (paragraph 38, Post Danmark I).

Although the Court of Justice expresses some implicit scepticism about the merits of this particular case, as a general matter the Court is also clear that (i) price discrimination cannot itself establish an exclusionary abuse (paragraph 30, Post Danmark I) and, in particular, (ii) that pricing below average total costs attributed to the activity but higher than average incremental costs may be abusive if (iii) the “pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers’ interests” (paragraph 44, Post Danmark I).

C. Margin Squeeze and Vertical Foreclosure

The Competition Appeal Tribunal's ("CAT") decision in Genzyme (Genzyme Limited v The Office of Fair Trading, Case No. 1016/1/1/03, Competition Appeal Tribunal [2004] CAT 4) surveys the prior case-law on margin squeeze. In particular, the CAT refers to Industrie des Poudres Sphériques which defines a margin or, using the language of the time, price squeeze "to take place when an undertaking which is in a dominant position on the market for an unprocessed product and itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product" (paragraph 178, Industrie des Poudres Sphériques v. Commission, Case T-5/97, General Court [2000]).
The CAT also highlights *National Carbonising Company*, where the Commission held that "an undertaking which is in a dominant position as regards the production of a raw material...and therefore able to control its price to independent manufacturers of derivatives...and which is itself producing the same derivatives in competition with these manufacturers, may abuse its dominant position if it acts in such a way as to eliminate the competition from these manufacturers in the market for derivatives. From this general principle the services of the Commission deduced that the enterprise in a dominant position may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term" (L35/7, National Carbonising Company, 76/185/ECSC, European Commission [1976]).

A significant number of more recent margin squeeze cases have involved allegations that former telecoms monopolies have engaged in margin squeezes following a package of liberalisation measures introduced in 1998. In *Deutsche Telecom* (Deutsche Telkom AG v Commission, Case C-280/08 P Court of Justice [2010]), the Court of Justice reiterated that the Commission found that the wholesale price Deutsche Telecom charged its competitors for unbundled access to local fixed networks for broadband access was greater than the retail prices it charged its own customers. The result was competitors faced a margin which was "insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the [retail] market" (paragraph 143, Deutsche Telekom). Other cases in a similar vein include those against telecoms operators in Lithuania, TEO [6]; the Commission’s decision against the Spanish incumbent telecoms operator, Telefonica [7], and Tele2’s (a competing service provider’s) complaint against the tariffs offered by Belgium’s former national telecoms operator, Belgacom. [8] And there were in addition margin squeeze cases in respect of ADSL Broadband (Wanadoo, a subsidiary of France Télécom, marketed its ADSL services known as Wanadoo ADSL and eXtense at prices which were below their average costs leading to the foreclosure of a competing ADSL service provider, Mangoosta) [9] and text messaging (*Telecom Italia / Vodafone* [10] were fined by the Italian Competition Authority for abusing their dominant position on the market for wholesale bulk SMS services).

Notably, in *Deutsche Telekom* the Court of Justice described that Article 102 "prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits" (paragraph 177, Deutsche Telekom) and that a margin squeeze by a dominant firm is an abuse within the meaning of Article 102 "if [the pricing practice] has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and is capable of making market entry more difficult or impossible for those competitors, and thus of strengthening its dominant position on that market to the detriment of consumers’ interests" (paragraph 253, Deutsche Telekom). Deutsche Telekom argued unsuccessfully that the AEC test should not apply in its circumstances since it and its competitors operated under different regulatory and competitive conditions. [11]

**D. Rebates and the Capacity to Foreclose**

In *Hoffmann-La Roche* (Hoffmann-La Roche & Co AG. v. Commission, Case 85/76, Court of Justice [1979]) the Court of Justice made a statement which condemned the use of exclusivity rebates by dominant firms in much broader terms than later was embodied in the PGP: "An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position...whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of a
rebate” (paragraph 89, Hoffmann-La Roche) and went on to say that: “The same applies if the said undertaking without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer’s obtaining all or most of its requirements – whether the quantity of its purchases be large or small – from the undertaking in a dominant position” (paragraph 89, Hoffmann-La Roche).

The contrast with the more recent case-law is significant. In Post Danmark I, the Court emphasises that in order to apply the AEC test, it is necessary to consider the detailed effects of the rebate under consideration: “In order to apply the as efficient competitor test in case of rebates it is necessary to establish over which range of demand customers are willing to switch to competitors of the dominant firm and for which these competitors are able to compete. It is over this range that the effect of the eventual loss of the rebate needs to be calculated, as it will show what is the effective price that competitors will have to beat in order to make customers switch part of their demand. If that price is below the cost of the dominant firm, this means that the rebate is capable to exclude an equally efficient competitor.” [12]

In respect of exclusivity and loyalty-inducing rebates, in Intel (Intel Corp. Inc. v Commission, Case C-413/14P [2017]) the Court of Justice echoed its Post Danmark I decision (at paragraphs 20–22 [13] and 25) making clear that while “[c]ompetition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient” (paragraph 134, Intel), it is the case that “Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits” (emphasis added, paragraph 136, Intel). Accordingly the Court of Justice decides that the Commission’s foreclosure analysis must involve “an analysis of the intrinsic capacity of [the pricing] practice to foreclosure competitors which are at least as efficient” (emphasis added, paragraph 140, Intel).

In terms of the specifics, in Intel, the Grand Chamber of the Court of Justice noted the decision in Hoffmann-La Roche that exclusivity obligations by dominant firms were an abuse of dominance [14] and that the same applies if there is no formal obligation but exclusivity arises implicitly via the rebate structure. [15] However the Court went on to say that the Hoffmann-La Roche derived “case-law must be further clarified in the case where the undertaking concerned 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” (paragraph 138, Intel). In particular, the Court argued that “In that case, the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market” (paragraph 139, Intel).

Thus, the Court of Justice in Intel has largely recognised the need for both an AEC test and an effects-based analysis of loyalty rebates more generally, albeit subject to the proviso that the allegedly dominant firm must first suggest the need for one – an invitation parties are surely likely to take up.

III. Limits to the AEC Test

A. A Price-Cost Test alone is Not Sufficient to Establish Foreclosure
In the economic literature, Telser (1966) famously argued that a dominant firm may have deeper pockets (a ‘longer purse’ in which to keep funds) than its weaker competitors and as a result a predation strategy can work. In contrast, if a dominant firm does not have greater access to funds than a rival, then the competitor may be able to replicate the low-then-high pricing strategy of the dominant firm and defeat a predation strategy. The more recent economic literature underpinning predation cases has motivated such asymmetries of competitive position as sometimes arising inherently from the different positions of an incumbent and recent entrant. Specifically, when banks financing an entrant may not be able to tell the difference between a firm that requires additional finance because of poor performance driven by low productivity or an unattractive product and those that are poorly performing because of strategic action by a rival to anti-competitively foreclose entry.

The ability of the weaker competitor to replicate the dominant firm’s conduct plays an important role in the assessing the capacity to foreclose more generally. For example, consider a situation where a dominant firm has offered a retroactive rebate on condition that sales to a customer exceed some sales threshold during a given time period, say a year. Towards the end of the year, the competitor may find it very challenging to induce a buyer to switch volumes from the dominant firm to a competitor if the dominant firm’s rebate is material and would, as a result, not be paid. However, at the start of the rebate period, if the dominant firm’s competitor can replicate the dominant firm’s rebate structure, it is unclear that the buyer faces any incentive to stay with the dominant firm as a result of the rebate structure. For this reason, rebate cases often involve leverage of sales in a market segment where the dominant firm’s sales are not contestable by the competitor in a manner that ensures that the competitor cannot replicate the dominant firm’s rebate structure.

In margin squeeze cases an entrant may, in principle, be able to replicate all or some aspects of the upstream position of the dominant firm. However, the challenges in doing so in some contexts would clearly be significant. In telecoms margin squeeze cases, for example, duplication could require building out an entire national fixed telephone-line network.

While the feasibility of replication will be case specific, these examples serve to illustrate that the AEC test alone need not be sufficient to establish foreclosure since the ability of an entrant to replicate the strategy of the dominant firm may limit the dominant firm’s capacity to foreclose.

B. The AEC Standard Is Not Sufficient to Establish Consumer Harm

The aim of Article 102 is to prevent both direct and indirect harm to customers. In particular, Article 102, "is not only aimed at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure..." (paragraph 26 Continental Can, cited at paragraph 106 in British Airways (British Airways v Commission, Case C-95/04, Court of Justice [2007]) and also referred to in paragraph 20 in Post Danmark). Consistent with this approach, the PGP makes clear 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...” (paragraph 19, PGP).

The PGP and the case-law’s focus on consumer welfare is important because there is a large economic literature examining potentially exclusionary conduct which finds that while such behaviour can sometimes be harmful to consumers, it can also sometimes result in competition being intensified to the benefit of consumers. For example, predatory pricing involves firms competing hard to win customers, even charging customers prices below cost during the predatory period. Only if a dominant firm succeeds in its effort to predate and then subsequently
increases prices do consumers suffer harm. For the net impact of such intense competition to be negative for consumers, the overall the market power from successful predation must be realised and it must be sustained for a sufficient period.

Similarly, the PGP describes that "Tying and Bundling are common practices intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market" (paragraph 49, PGP).

Indeed, economists generally consider that discounts in exchange for exclusivity can sometimes be pro-competitive and provide significant benefits to customers. Thus, even though they can on other occasions certainly be harmful, the broad prohibition against exclusive arrangements for dominant firms in Hoffmann-La Roche is hard to defend as economically rational. [17]

Following Continental Can it is not necessary for the Commission to prove direct harm to consumers. The UK Court of Appeal recently wrote in National Grid (National Grid Plc v. Gas and Electricity Markets Authority 1099/1/2/08): "It is common ground [between the parties] that in order to find an abuse it is not necessary to prove direct harm to consumers. The competition rules promote consumer welfare indirectly by their effect on market structure and the promotion of competition..." (paragraph 85, National Grid).

The PGP describes that "the identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence" (paragraph 19, PGP). It also describes that "There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitor or provides financial incentives to its customers on condition they do not test such products, or pays a distributor or customer to delay the introduction of a competitor’s product" (paragraph 22, PGP).

In a predation case, the Akzo implementation of the AEC test considers whether price is below the average variable cost ("AVC") or between the average total cost ("ATC") and AVC and there is evidence of predatory intent. In Europe, under the Akzo test, it is not necessary to show that after the period of low prices associated with predatory conduct, the predator did in fact raise its prices to the point that there was harm to consumers overall.[18]

Thus, the case law highlights the aims of Article 102 – to protect both direct and indirect harm to consumers – but does not necessarily impose the burden of establishing proof of consumer harm in order to establish an infringement.

C. An AEC Test Is Not Always Necessary in Law

In Post Danmark I I (Post Danmark v. Konkurrencerådet, Case C-23/14, Court of Justice [2015]), the Danish Maritime and Commercial Court considered that while it was established that a rebate scheme must be capable of having an exclusionary effect, the criteria to be applied to decide whether it did were uncertain. Among other things, it therefore asked the Court of Justice "to clarify the relevance to be attached to the as-efficient-competitor test in
assessing a rebate scheme’ (paragraph 51, Post Danmark II) under Article 102, noting that the “application of the as-efficient-competitor test consists in examining whether the pricing practices of a dominant undertaking could drive an equally efficient competitor from the market.” (paragraph 53, Post Danmark II).

The Court noted that “the as-efficient-competitor test has been specifically applied by the Court to low-pricing practices in the form of selective prices or predatory prices (see, in respect of selective prices, judgment in Post Danmark, C-209/10, EU:C:2012:172, paragraphs 28 to 35, and in respect of predatory prices, judgments in AKZO v Commission, C-62/86, EUC:1991:286, paragraphs 70 to 73, and France Télécom v Commission, C-202/07 P, EU:C:2009:214, paragraphs 107 and 108), and margin squeeze (judgment in TeliaSonera Sverige, C-52/09, EU:C:2011:83, paragraphs 40 to 46)” (paragraph 55, Post Danmark II).

However, it also noted that in the circumstance of Tomra (Tomra Systems and Others v Commission, C-549/10 P, Court of Justice [2012]), the Court found “that the absence of a comparison of prices charged with costs did not constitute an error of law.” (Paragraph 56, Post-Danmark II.) The Court of Justice in Post Danmark II concludes that “it is not possible to infer from Article [102 TFEU] or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test.” (paragraph 57, Post-Danmark II). Albeit that that conclusion ought not to exclude, on principle, using the AEC test in cases involving rebates (paragraph 58, Post Danmark II).

The Court goes on to say that the AEC test is not necessary in the circumstances of the Post Danmark case. Specifically, the Court notes that the circumstances in Post Danmark II are “characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking’s statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible” (paragraph 59, Post Danmark II). In effect, the Court suggests that the comparison becomes too hypothetical to be necessary in the context of that case. As a general matter, the Court goes on to say that the “as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme” (paragraph 61, Post Danmark II). Alexiadis and Wood [19] argue that this implies “economic analysis of the impact of the behaviour of dominant undertakings in markets where competition is already severely limited is scarcely relevant. If an impact is probable, it need not be measured.”

The limits to this exception will only be established in the future case law. While there will certainly be cases where the AEC test is deemed unnecessary, it will be important for the case-law not to lose the discipline imposed by the AEC test in establishing the likelihood of the dominant firm’s conduct actually being capable of foreclosure in cases where it can be appropriately applied. Even in cases where the AEC test itself may appear challenging to apply convincingly – (since, for example, an entrant’s costs will only fall over time to the point where it is as efficient as a dominant firm, due for example to learning or scale effects), it seems likely to prove valuable to consider the plausibility that an entrant will become efficient over a reasonable time-horizon by incorporating a ‘dynamic’ element to the AEC test whereby the data inform an analysis of that proposition. Of course, the exception to the need to apply an AEC test may also prove helpful in other cases given the potential limitations of the AEC test described previously and expanded on in the next sub-section.

D. The AEC Standard Is Not Necessary for Consumer Harm
The AEC standard does not rule out all conduct by dominant firms that may harm consumers. In particular, a dominant firm's conduct which eliminates a less than equally efficient competitor who would nonetheless act as a competitive constraint on the dominant firm absent the conduct will adversely impact consumer welfare. This point was raised by the General Court in *Intel* (*Intel Corp. v Commission, Case T-286/09, General Court [2014]*) where it observed "a positive result means only that an as-efficient competitor is able to cover its costs (...the average avoidable costs.) That does not however mean that there is no foreclosure effect. The mechanism of exclusivity rebates...is still capable of making access to the market more difficult for competitors of the undertaking in a dominant position, even if that access is not economically impossible" (paragraph 150, General Court judgment in *Intel* citing the Opinion of Advocate General Mazák in Case C-549/10 P Tomra).

Even so, the PGP says such conduct will not normally lead to intervention (paragraph 23, PGP). However, it does go on to say: "[T]he Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency" (paragraph 24, PGP). There is therefore scope under the PGP for a finding of abuse even if the AEC standard is not met – at least in the short or medium term – if consumers are adversely impacted by dominant firm conduct.

In *Post Danmark I*, the Court of Justice reiterated that Article 102 does not "seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market" (paragraph 21, *Post Danmark I*). However, this does not necessarily rule out seeking to prevent foreclosure of competitors that would harm customers even though the competitor was inefficient. And the Court went on to say expressly in *Post Danmark II* that high barriers to entry mean "the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking" (paragraph 60, *Post Danmark II*).

The Court is not the first to make this observation. As a result, the AEC standard for evaluating foreclosure is not without its critics suggesting it is too permissive an approach. Hovenkamp (Herbert Hovenkamp, "The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal," Review of Industrial Organization 46, no. 3 (2015): 209-228) in particular writes in respect of predation cases that: "The 'equally efficient rival' limitation is a severe one, particularly when one considers that predatory pricing is a plausible strategy only in markets that are structurally conducive to monopolization. These markets are typically characterized by significant fixed costs and, accordingly, substantial economies of scale. As a result one might well presume that in most markets that contain a durable dominant firm, that firm will have at least some cost advantages over its rivals. Particularly when one considers the possibility of price discrimination, this means that a dominant firm can price in such a way as to either exclude rivals or limit their output without ever seeing its own prices fall below short run marginal cost or average variable cost." [20]

As a matter of economic theory, there is clearly some force in such concerns. Consider for example, an industry with significant fixed costs. The economic literature suggests that when a dominant firm can make an irrevocable commitment to investment, perhaps through sinking expenditure in R&D or in the construction of physical capital, that can be effective in successfully deterring entry. [27]

**IV. Conclusions**
The Commission are to be congratulated as a great deal of progress has been made since the publication of the PGP. However, there remains a number of very significant questions about the boundaries of conduct by a dominant firm that can, and in the future will, be pursued under Article 102.

In particular, the PGP describes that the Commission will, in certain circumstances, take a dynamic view of the competitive constraints offered by less efficient competitors (paragraph 24, PGP). The boundaries of such dynamic AEC assessments are likely to play a significant role in future cases. To see why, consider the Commission’s current focus on allegations of abuse of dominance in the digital sector. In such cases, the Commission may emphasise the dynamic AEC test wherever it believes that a dominant platform business benefits from the advantages of scale generated by network effects whereas smaller competitors do not – at least until they have successfully grown sufficiently.

Despite the successes for the Commission in the fact that the Court of Justice has clearly recognised the as-efficient-competitor approach adopted in the PGP in cases ranging from Deutsche Telecom to Post Danmark and Intel, the question for the future is whether we may see a willingness of both the Commission and the Courts to move significantly beyond the static AEC test, at least in the sense of expanding the use and role of a dynamic AEC standard.

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[5] The full quotation is: “[Article 102 TFEU] must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers’ interests” (paragraph 44, Post Danmark I).


[13] Not all exits are 'bad.' In Post Danmark, the Court states that "...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 marginalisation 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" (paragraph 22, Post Danmark I).
The Court noted that “an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102 TFEU], whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate” (paragraph 89, Hoffmann-La Roche).

The Court noted that “[i]f the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer’s obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position” (paragraph 89, Hoffmann-La Roche).


This is closely related to, but distinct from, the Court of Justice ruling in Akzo where it decided there is no requirement to show recoupment; that the dominant firm was ultimately better off as a result of predatory conduct.

