Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2026)38

Unclassified English - Or. English

18 November 2026

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

Exploitative Abuses – Contribution from the European Union

- Session III -

11 December 2026

This contribution is submitted by the European Union under Session III of the Global Forum on Competition to be held to be held on 10-11 December 2026.

More documentation related to this discussion can be found at: oe.cd/gfc26.

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JT03598454

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1. Introduction

1. Exploitative abuses have long been recognised as falling within the scope of Article 102 TFEU. As early as in 1973, the EU Court of Justice stated that Article 102 TFEU (then Article 86 of the EEC Treaty) is aimed both at "*practices which may cause damage to consumers directly*" and "*those which are detrimental to them through their impact on an effective competition structure*".[1] Despite that, the enforcement against exploitative abuses has historically taken a backseat to the enforcement against exclusionary conduct. The past focus on exclusionary abuses might have indicated a preference for restoring or preserving effective competition as a way to facilitate fair market outcomes rather than *directly* addressing excessive prices or other unfair trading conditions imposed by dominant market players.[2]

2. However, in recent years, competition authorities − including the European Commission ("Commission") − have turned again to exploitative theories of harm to address direct harm to consumers, business users, and market participants in concentrated markets. This shift reflects a growing recognition that in certain market structures, particularly in digital ecosystems, exclusionary enforcement alone may not be sufficient to curb the detrimental effects that may come with entrenched market power. In recent years, the Commission has encountered unilateral conduct by dominant online platforms that was not aimed at excluding business users, with whom the platform operators may also compete, from the platforms. Rather, the unilateral conduct aimed to exploit the market power the platform operator holds over its users, to the detriment of business users and/or end users. Online platforms (including "hybrid" platforms, which also offer their own products or services) often benefit from the presence of a large number of business users. They therefore have an incentive to keep these business users on the platform rather than to exclude them altogether, whether because they complement the platform's own offering or because consumers simply expect their presence.

3. In 2024, the Commission adopted two prohibition decisions concerning exploitative abuses of dominance in the form of unfair trading conditions, respectively in the *Apple music streaming* case[3] and in the *Facebook Marketplace* case[4]. At the same time, the Commission has continued to pursue excessive pricing where market circumstances

[1] Case C-6/72 *Europemballage and Continental Can*, EU:C:1975:50, paragraph 26. See also case T-191/98, *Atlantic Container Line and Others v Commission*, EU:T:2003:245, paragraph 1124 and case C-209/23, *RRC Sports,* EU:C:2026:597, paragraph 253.

[2] See also contribution of the European Union to the OECD on Excessive Prices, DAF/COMP(2011)18, pages 310 to 312 on the possible reasons for the focus on exclusionary abuses.

[3] Commission decision of 4 March 2024 in AT.40437 *Apple App Store Practices (music streaming).* An action for annulment against the decision is currently pending before the General Court (T-260/24).

[4] Commission decision of 14 November 2024 in AT.40684 *Facebook Marketplace*. An action for annulment against the decision is currently pending before the General Court (T-66/25).

justify intervention, most recently in the *Aspen* case[5] concerning the pharmaceutical sector, in which a commitments decision was adopted in 2021.

4. In parallel, the Digital Markets Act[6] ("DMA"), which was adopted in 2022 and became applicable in 2023, contributed to an increased focus on ensuring fairness in digital platform markets. The DMA prohibits certain exploitative practices by large companies with gatekeeping positions in digital markets, some of which can be considered "exploitative".

5. These developments confirm that the recent focus on countering exploitative practices is not a historical anomaly, but an active and evolving part of the Commission's work. The enforcement against exploitative practices is an important additional tool, particularly in markets where it is difficult to restore effective competition and competitive constraints are weak or slow to emerge. That said, exploitative abuse cases under Article 102 TFEU may raise complex legal and evidentiary questions, and the case law − especially for unfair trading conditions − remains comparatively limited, with the two recent Commission decisions still under appeal.

6. This submission outlines the legal frameworks and enforcement approaches for exploitative practices under EU competition law (Article 102 TFEU) and the DMA. While these frameworks share a common concern − preventing the misuse of market power to the direct detriment of trading partners and consumers − they operate through distinct mechanisms, each with its own strengths and limitations.

7. This note is structured as follows: Section 2 outlines the key features of exploitative abuses under Article 102 TFEU. Sections 3 and 4 focus on exploitative abuses in the form of excessive pricing and other unfair trading conditions, respectively. Section 5 examines how the DMA addresses exploitative conduct by gatekeepers. Section 6 concludes.

2. Exploitative abuses under Article 102 TFEU in general

8. Article 102 TFEU prohibits as incompatible with the internal market any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, in so far as it may affect trade between Member States. The provision lists examples of abusive conduct, which are not exhaustive. It explicitly mentions, under point (a), directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.

9. As also set out above, Article 102 TFEU therefore covers not only exclusionary but also exploitative practices by dominant undertakings. Exclusionary abuses affect competition as a process: they concern conduct that departs from competition on the merits and is capable of weakening or eliminating the competitive constraints on the dominant undertaking, thereby harming consumers indirectly through an impact on market structure.[7] Exploitative abuses, by contrast, relate to the harm that a dominant undertaking directly causes to its trading partners and consumers by imposing unfair prices or conditions.

[5] Commission decision of 10 February 2021 in the case AT.40394 – *Aspen*.

[6] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector.

[7] See Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, C(2026) 6118 final.

10. In general, enforcement against exploitative abuses may be particularly important where the relevant market structure implies that competitive constraints are unlikely to emerge in a timely manner. This may be the case, for instance, where there are important barriers to entry in the medium to long term.

11. Exploitative and exclusionary are not mutually exclusive qualifications. In some cases, the same conduct may be assessed both as an exclusionary abuse and an exploitative abuse. For instance, this may be the case where the terms imposed concern business users that also compete with the dominant undertaking and where the conduct both unfairly extracts value from them and weakens their ability to compete. In those cases, similar to conduct which may be assessed both under Article 101 and 102 TFEU, it is for the Commission to select the approach that it considers the most appropriate based on the type of conduct and the concerns under investigation.

3. Unfair prices under Article 102 TFEU

3.1. The United Brands test and its application in subsequent cases

12. EU case law has long recognized that excessive prices may, in principle, amount to an abuse under Article 102(a) TFEU. The Court of Justice ("the Court") made, however, clear that neither a high price level nor a marked price difference is in itself sufficient to establish an abuse.[8] It was not until its landmark judgment *United Brands*,[9] that the Court set out a framework for assessing excessive pricing under Article 102(a) TFEU.

13. The Commission had found that United Brands had abused its dominant position in the market for bananas by, amongst other things, charging unfair (excessive) prices for the sale of Chiquita bananas to customers in Belgium, Luxembourg, Denmark and Germany.

14. The Court rejected the Commission's analysis and stated that, when assessing whether a dominant undertaking had charged excessive prices to the point of giving rise to an abuse, *"it is advisable […]to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition […] In this case charging a price that is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse."*[10] Against the backdrop of this case, the Court set out a two-limbed test for determining whether a price is liable to be considered abusive:[11]

- First, it must be established whether the difference between the costs actually incurred and the price actually charged is excessive.
- Second, if the difference is excessive, it must be determined whether the price is unfair either in itself or when compared to competing products.

[8] Case 78/70, *Deutsche Grammophon GmbH v Metro SB Grossmärkte GmbH,* EU:C:1971:59, paragraph 19; Case 40/70, *Sirena S.r.l. v Eda S.r.l. and others*, EU:C:1971:18, paragraph 17.

[9] Case C-27/76, *United Brands Co. v Commission,* EU:C:1978:22.

[10] Case C-27/76*, United Brands Co. v Commission,* EU:C:1978:22, paragraphs 249–250.

[11] Case C-27/76, *United Brands Co. v Commission*, EU:C:1978:22, paragraph 252.

15. That said, the Court emphasised that the two-limbed test is only one possible method of establishing that prices are unfair. Other methods may be devised to determine what constitutes an unfair price.[12]

3.1.1. First limb: Is the profit margin (difference between costs and prices) excessive?

16. The first limb of the test for excessive pricing laid down in *United Brands* is essentially a price-cost test. Its application involves two steps. First, it requires measuring the difference between costs and prices in the case at hand (i.e. the profit margin). Second, it entails assessing whether that difference is excessive, which implicitly requires determining what constitutes a reasonable profit margin.

17. As regards the first step, as recognised in *United Brands*, determining the profit margin of the dominant undertaking may involve significant conceptual and practical difficulties.[13] This may particularly be the case in industries characterised by high fixed or sunk costs or in the event of multi-product firms, where questions may arise as to the recovery of upfront investment costs and the allocation of common costs. Evidential limitations may further complicate cost measurement. The Commission's practice illustrates that the calculation of relevant costs is often complex and highly dependent on the specific factual and economic context of the case concerned.[14] For instance, in *Scandlines*, where the Commission rejected a complaint regarding the prices charged by the Port of Helsingborg in Sweden, most of the port operator's costs were fixed, and most costs were also indirect costs which, due to data limitations, could only be allocated between ferry-operators and other types of users of the port with approximation.[15]

18. With regard to the second step, a reasonable profit margin may be determined by reference to a comparator or benchmark. In *Aspen*, which concerned the pricing of six critical off-patent cancer medicines, the Commission used a group of more than 20 comparator companies to benchmark the relevant products' profit levels. The comparators in question had a similar profile to Aspen, were selling similar products, and the Commission had no indication that they operated under insufficiently effective competitive conditions.[16] In *Standard & Poor's*, the Commission took into account – as a sector-specific benchmark - that Standard & Poor, the agency designated under the relevant International Standards Organisation (ISO) standard to issue international securities identification numbers (ISIN) for the US, was required to apply the cost-recovery principle in charging for ISINs.[17]

[12] Case C-27/76, *United Brands Co. v Commission,* EU:C:1978:22, paragraph 253.

[13] Case C-27/76, *United Brands Co. v Commission,* EU:C:1978:22, paragraph 254.

[14] See in that regard Commission decision of 10 February 2021 in the case AT.40394 – *Aspen*, paragraphs 111-115; Commission decision of 25 July 2001 in case AT.36915 – *Deutsche Post AG*, paragraphs 159–166; Commission decision of 23 July 2004 in case AT.36568 – *Scandlines Sverige AB v Port of Helsingborg*, paragraphs 117–119.

[15] Commission decision of 23 July 2004 in case AT.36568 – *Scandlines Sverige AB v Port of Helsingborg*, paragraphs 117–119.

[16] Commission decision of 10 February 2021 in the case AT.40394 – *Aspen*, paragraphs 104, 128 -129.

[17] Commission decision of 15 November 2011 in the case COMP/39.592 – *Standard and Poor's*, paragraphs 29-38.

19. Once a profit margin benchmark is identified, it is necessary to determine whether the difference between the benchmark and the profit margin in question is sufficiently large to constitute an "excess". The relevant benchmarks and the subsequent finding of excess may vary substantially according to the product and market. In *British Leyland*, the prices charged by British Leyland for issuing conformity certificates for right-hand-drive vehicles were found to be excessive as they were 300% to 500% higher than those charged for left-hand-drive vehicles, while the costs were not significantly different.[18] In *Gazprom*, the Commission preliminarily found that Gazprom's long-term contract prices exceeded its costs by around 170%.[19] In *Aspen*, the Commission preliminarily found that Aspen's profits exceeded the "cost-plus level" (the level of Aspen's costs plus the average margin of the comparator undertakings) by 280–300%.[20]

20. As clarified in the case law, there is no minimum difference between a price and a benchmark that must be satisfied for the difference to be qualified as appreciable and thus for the price to be found abusive. Rather, the difference must be significant in light of the circumstances and must persist for a certain period rather than being temporary or episodic.[21]

3.1.2. Second limb: Is the price unfair in itself or when compared to competing products?

21. A finding that the profit margin is excessive does not in itself establish an abuse under Article 102(a) TFEU. Under the second limb of the *United Brands* test, the authority must demonstrate that the price is unfair, either in itself or by comparison to competing products.

22. A range of factors may be considered to assess whether a price is "unfair in itself". For instance, in *Aspen*, the Commission considered the nature of Aspen's products (old, off-patent, but critical to cancer patients and health systems), whether potential legitimate reasons for its high prices existed (such as commercial risk-taking, innovation, investment or material improvement of the products), as well as the existence of a strategy to exploit.[22] A price may also be "unfair in itself" where it is disproportionate to the economic value of the product or service. Economic value does not necessarily correspond to the production cost plus a reasonable return but may also depend on non-cost related factors.[23] For instance, in *Scandlines*, the Commission considered that the unique location of the Port of

[18] Case 226/84, *British Leyland Public Limited Company v Commission*, EU:C:1986:421, paras 25–30.

[19] Commission decision of 24 May 2018 in the case AT.39816 – *Upstream gas supplies in Central and Eastern Europe*, paragraph 69.

[20] Commission decision of 10 February 2021 in the case AT.40394 – *Aspen*, paragraphs 139-141.

[21] Case C-177/16, *AKKA/LAA*, EU:C:2017:689, paragraphs 55–56. See also Case 395/87, *Ministère Publique v Tournier*, EU:C:1989:319, paragraph 38.

[22] Commission decision of 10 February 2021 in the case AT.40394 – *Aspen*, paragraphs 165-195.

[23] Commission decision of 23 July 2004 in case AT.36568 – *Scandlines Sverige AB v Port of Helsingborg*, paragraphs 209, 226–228: "*The demand-side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However, it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service.*"

Helsingborg itself created value by allowing an efficient crossing of the Øresund.[24] The Commission therefore treated customer valuation as one of the relevant economic factors when assessing whether the port charges bore a reasonable relation to the economic value of the services and facilities provided to the ferry operators. On this basis, the Commission found insufficient evidence to conclude that the charges had no reasonable relation to that economic value and therefore held that the charges should not be regarded as unfair in themselves even if the port operator's profit margin were to be assumed "excessive".[25] In *Gazprom*, the Commission considered that Gazprom's practice of linking gas prices to oil prices may have contributed to excessive prices of gas, as oil and gas markets had become largely independent and oil-indexation may not have appropriately captured the economic value of the gas.[26]

23. The second route to establish that a price is unfair is to compare it with competing products. In practice, this may involve an overlap with the assessment of excessiveness under the first limb of the test, if a comparator was relied on in that context. In principle, comparisons should be made with products subject to conditions of "normal and sufficiently effective competition"[27]. In *Gazprom*, the Commission considered two price benchmarks, namely gas prices at two European hubs (which had become the main competitive price signal for gas wholesale markets and were considered the most relevant comparator), and Gazprom's own long-term contract prices in Germany (which was a more competitive market than the Central and Eastern European markets concerned by the decision).[28] In *Aspen*, although it had already preliminarily found that Aspen's prices were unfair in themselves under the second limb of the test, the Commission also considered the suitability of generic versions of the relevant products as comparators. Since in some markets there had only been limited entry by generic suppliers, the prices of those competitors' products did not appear to reflect sufficiently effective competition and hence did not appear to be appropriate comparators for assessing the unfairness of Aspen's prices.[29]

3.2. Other methods for assessing whether prices are excessive

24. While the *United Brands* test remains a central analytical framework in assessing whether prices are excessive, it is not the only valid method for this purpose, as the Court repeatedly pointed out,.[30] Alternative methods to the *United Brands* test may be necessary, in particular, in cases where the price-cost test cannot be meaningfully applied, for instance if cost data is not available or in the case of intangible goods such as copyrighted musical works. Indeed, much of the EU case law on excessive prices consists of preliminary rulings

[24] Commission decision of 23 July 2004 in case AT.36568 – *Scandlines Sverige AB v Port of Helsingborg*, paragraphs 241–242.

[25] Commission decision of 23 July 2004 in case AT.36568 – *Scandlines Sverige AB v Port of Helsingborg*, paragraphs 226–228, 241–247.

[26] Commission decision of 24 May 2018 in the case AT.39816 – *Upstream gas supplies in Central and Eastern Europe*, paragraphs 75–77.

[27] Case C-27/76*, United Brands Co. v Commission,* EU:C:1978:22, paragraph 249.

[28] Commission decision of 24 May 2018 in the case AT.39816 – *Upstream gas supplies in Central and Eastern Europe*, paragraphs 71–74.

[29] Commission decision of 10 February 2021 in the case AT.40394 – *Aspen*, paragraph 199.

[30] See e.g. Case C-177/16, *AKKA/LAA*, EU:C:2017:689, paragraphs 38, 49 and Case C-372/19, *SABAM v Weareone.World BVBA, Wecandance NV*, EU:C:2020:95, paragraph 31.

concerning royalty rates set by copyright management organisations. In such cases, the method mostly involved comparing the prices charged by the dominant undertaking with the prices charged by copyright management organisations in other areas, and was therefore akin to the second limb of the *United Brands* test.

25. In *Tournier*[31] and *SACEM*[32], the Court found that prices charged by a copyright collecting society in one Member State may be unfair where they are appreciably higher than those charged by collecting societies in other Member States, provided the comparison is based on a sufficiently homogeneous basis. In *AKKA/LAA*, the Court held that there is no minimum required number of countries for a comparison, but that competition authorities must choose the suitable benchmark (consisting of one or several countries) following "objective, appropriate and verifiable criteria" (which may, for instance, take into account consumption habits, GDP, culture, and history) and that the comparison is done on a consistent basis (for instance, taking into account the PPP index to account for differences in living standards and ensuring the methods for calculating the rates in the different Member States were analogous).[33]

26. An alternative approach was also used in *Bodson*,[34] where the Court found that prices charged by the holder of an exclusive concession to provide funeral services in a French town may be assessed by comparison with prices applied in areas subject to more competitive conditions (i.e. those where the provision of such services are not subject to an exclusive concession).

27. In the Commission's own practice, the Commission relied on a price comparison approach in the *Deutsche Post* decision, where it could not carry out a price-cost test for the delivery of incoming cross-border mail within Germany as no reliable cost data existed. As Deutsche Post had a statutory monopoly over mail delivery in Germany, no comparison with the prices charged by competitors was possible either. The Commission therefore used a benchmark based on Deutsche Post's domestic tariff.[35]

3.3. Limits and special questions

28. The case law recognises practical limits to enforcement against excessive pricing under Article 102 TFEU.

29. As discussed previously, measuring the dominant undertaking's profit margin under the first limb of the *United Brands* test may be complex and its feasibility may be highly dependent on the characteristics of the industry and the specific circumstances of the case.[36] In such cases, the assessment may require alternative methods, for instance a price comparison akin to the second limb of the *United Brands* test.

30. More fundamentally, EU practice has so far remained rather cautious as to when intervention is appropriate. Enforcement against excessive prices has often related to

[31] Case 395/87, *Ministère Publique v Tournier*, EU:C:1989:319, paragraph 38.

[32] Cases 110/88, 241/88 & 242/88, *F. Lucazeau v Societé des Auteurs, Compositeurs et Editeurs de Musique (SACEM)*, EU:C:1989 :326, paragraph 25.

[33] Case C-177/16, *AKKA/LAA*, EU:C:2017:689, paragraphs 40–51.

[34] Case 30/87, *Corinne Bodson v SA Pompes funèbres des régions libérées,* EU:C:1988:225.

[35] Commission decision of 25 July 2001 Case *COMP/36915 – Deutsche Post AG*, paragraphs 159–166.

[36] As illustrated in *Scandlines*, *Aspen* and *Deutsche Post*.

markets with an entrenched dominant position where entry and expansion of competitors could not be expected to ensure effective competition in the foreseeable future. This, in particular, concerned markets where high prices and high profits could no longer perform their usual signaling function of attracting entry and expansion. The case law and practice points to several sources of such competitive entrenchment: legal monopolies (*General Motors* and *Deutsche Post*), accumulated exclusive concessions (*Bodson*), national monopolies reinforced by network effects (*SACEM*), and very high barriers to entry in pharmaceutical markets which constrain entry even after patent expiry (*Aspen*).

3.4. Designing remedies for excessive prices

31. A remedy for excessive prices will normally consist in the lowering of the relevant prices. This entails the problem of defining the right price as well as the question how any legitimate price changes in the future, for example due to changes in input prices or in the competitive landscape, can be reflected in the remedy.

32. In *Aspen*[37], the Commission accepted commitments by which Aspen's prices for the relevant products were significantly reduced for a period of 10 years by on average 73%, which reflected the price level that had prevailed before the period when Aspen dramatically increased its prices.

33. In *Gazprom*[38], the Commission accepted a commitment which was designed to ensure that the relevant prices would reflect competitive benchmarks. The Commission's concern was that Gazprom may have charged excessive prices in five affected Member States compared with competitive Western European price benchmarks due to the use of oil-indexed contracts. The commitments introduced a right for Gazprom's customers to trigger a price review clause if their prices diverged from competitive Western European price benchmarks, including liquid gas hubs in Continental Europe.

4. Unfair trading conditions under Article 102 TFEU

4.1. The earlier cases on unfair trading conditions

34. One of the first judgments regarding unfair trading conditions was issued in the *BRT v SABAM* case[39]. In this preliminary ruling from 1974, the Court of Justice assessed contracts between the Belgian Association of Authors, Composers and Publishers (SABAM) and its members. The standard clauses provided that members had to assign to SABAM the copyrights in all their present and future compositions not only for the duration of their membership, but also for five years following a member's withdrawal from the association. The Court of Justice considered that, in assessing whether trading conditions were unfair, all relevant interests had to be taken into account *"for the purpose of ensuring a balance between the requirement of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights*"[40] by SABAM. It found that a clause is not unfair where that clause is necessary for the

[37] Commission decision of 10 February 2021 in the case AT.40394 – *Aspen*.

[38] Commission decision of 24 May 2018 in the case AT.39816 – *Upstream gas supplies in Central and Eastern Europe*.

[39] Case 127/73, *BRT v SABAM*, EU:C:1974:25.

[40] Case 127/73, *BRT v SABAM*, EU:C:1974:25, paragraph 8.

dominant undertaking to achieve its objectives, insofar as it does not go beyond what is absolutely necessary to do so.

35. In *Alsatel v Novasam*[41] from 1988, the Court of Justice found that certain clauses in the rental contracts for telephone installations which Alsatel had concluded with its customers were unfair. Those included the right to unilaterally fix prices for modifications done by Alsatel to telephone installations, which would moreover trigger an automatic renewal of the contract depending on the size of that price increase.

36. The preliminary ruling from 1989 in *Ahmed Saeed*[42] related to agreements between air carriers on the pricing of tickets. The Court of Justice found that trading conditions imposed by a dominant company may be unfair if they oblige other carriers to apply excessive tariffs or only one specific tariff on a given route.

37. *Tetra Pak II*[43] (from 1991) concerned a number of conditions the company had defined in its standard contracts for the sale and lease of the machines for filling Tetra Pak cartons. The Commission found that several obligations (such as a provision preventing customers from moving the machine or a provision allowing Tetra Pak to conduct unannounced inspections of the customers' production sites) had no link with the purpose of the contract and were therefore unfair. This Commission's decision was upheld in the subsequent court proceedings.[44]

38. *Amministrazione Autonoma dei Monopoli di Stato (AAMS)* (1998) concerned contracts concluded by AAMS which was found dominant in the production, import, export and wholesale distribution of manufactured tobacco in Italy. AAMS imposed terms on foreign firms located outside of Italy regarding the quantities of cigarettes to be imported, the prices and other conditions.[45] The Commission considered that certain clauses allowed AAMS to control and veto the competitive initiatives of foreign firms, which had to be regarded as essential to a firm's competitive freedom. The General Court upheld the Commission's decision.[46]

39. In *1998 Football World Cup*[47], the Commission decided in 1999 that the Comité français d'organisation de la Coupe du monde de football ("CFO") had imposed unfair terms and conditions on consumers outside of France by requesting an address in France in order to be able to purchase certain tickets for the 1998 Football World Cup.

40. In 2001, the Commission adopted a decision against *Duales System Deutschland (DSD)*[48], a company providing a system for the collection and recovery of sales packaging, thereby exempting companies from their (new) legal obligation to collect and recover

[41] Case 247/86, *Alsatel v Novasam*, EU:1988:469.

[42] Case 66/86, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, EU:C:1989:140.

[43] Commission decision of 24 July 1991 in Case IV/31043 *Tetra Pak II*; Case T-83/91, *Tetra Pak v Commission*, EU:T:1994:246; Case C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436.

[44] Case T-83/91, *Tetra Pak v Commission*, EU:T:1994:246; case C-333/94, *Tetra Pak v Commission*, EU:C:1996:436.

[45] Commission decision of 17 June 1998 in Case IV/36.010 *Amministrazione Autonoma dei Monopoli di Stato (AAMS)*.

[46] Case T-139/98 *AAMS*, EU:T:2001:272.

[47] Commission decision of 20 July 1999 in Case No IV/36.888 – *1998 Football World Cup*.

[48] Commission decision of 20 April 2001 in Case COMP D3/34493 *DSD*.

themselves the packaging they used to sell their products. In return for providing that service, DSD required its clients to print a certain logo (the green dot) on all their sales packaging for domestic consumption and pay a licence fee for using that trademark. The Commission took the view that this clause was disproportionate and thus unfair under Article 102 TFEU. This was because the payable fee covered all the packaging a company used for the domestic sales of its products and was not limited to the (potentially lower) volume of packaging to be collected and recovered by DSD. The Commission's decision was upheld in the subsequent court proceedings.[49]

41. In a commitment decision from 2018 (*Upstream gas supplies in Central and Eastern Europe*[50]*),* the Commission came to the preliminary finding that Gazprom may have infringed Art. 102(a) TFEU by imposing trading conditions on the Bulgarian gas incumbent which made Gazprom's gas supplies to that company conditional upon its agreement to participate in the Gazprom-led South Stream project.

4.2. The most recent cases on unfair trading conditions

42. In 2024, the Commission adopted two decisions regarding unfair trading conditions, respectively in *Apple app store practices (music streaming)*[51] and *Facebook Marketplace* [52]. Drawing on the legal criteria applied in previous cases (notably *BRT v SABAM*), those decisions articulated the test for unfair trading conditions in more detail:

1. the trading conditions have been unilaterally imposed by the dominant company on its trading partners (imposition),
2. they negatively impact the interests of the trading partners of the dominant company or of third parties (harm), and
3. they are neither necessary nor proportionate for the achievement of a legitimate objective (necessity and proportionality).

43. Finally, as is the case for any conduct assessed under Article 102 TFEU, the trading conditions will not be considered abusive if they are objectively justified.

44. The *Apple app store practices (music streaming)* case[53] concerned the conditions imposed by Apple on developers of music streaming apps who distributed their apps through Apple's App Store. The relevant conditions consisted of "anti-steering provisions" defined in Apple's specific terms and conditions (notably Apple's App Store Review Guidelines and the applicable Developer License Agreements). Those conditions prevented app developers from fully informing iOS users in their iOS apps about alternative and

[49] Case T-151/01, *Duales System Deutschland v Commission*, EU:T:2007:154; case C-385/07 P, *Der Grüne Punkt – Duales System Deutschland v Commission*, EU:C:2009:456.

[50] Commission decision of 24 May 2018 in AT.39816 *Upstream gas supplies in Central and Eastern Europe*.

[51] Commission decision of 4 March 2024 in AT.40437 *Apple App Store Practices (music streaming).* An action for annulment against the decision is currently pending before the General Court (T-260/24).

[52] Commission decision of 14 November 2024 in AT.40684 *Facebook Marketplace*. An action for annulment against the decision is currently pending before the General Court (T-66/25).

[53] Commission decision of 4 March 2024 in AT.40437 *Apple App Store Practices (music streaming).* An action for annulment against the decision is currently pending before the General Court (T-260/24).

cheaper music subscription services available outside of the app. App developers had to abide by those rules to be able to distribute their apps to iOS users through the App Store. Both the license agreement and guidelines were standard and non-negotiable, and failure to comply with them attracted a high risk of removal of the respective apps from the App Store.

45. The Commission considered that those trading conditions imposed on developers of music streaming apps inflicted harm on end customers, i.e. the (potential) subscribers of music streaming services. That harm was both monetary and non-monetary in nature. First, Apple's anti-steering provisions may have led many iOS users to pay significantly higher prices for music streaming subscriptions because of a lack of information on cheaper alternatives not relying on Apple's in-app payment service. This is because of the high commission fee imposed by Apple on app developers in relation to sales conducted through Apple's in-app payment service in the iOS app. Because the music streaming industry is a low-margin industry, the high commission fees charged by Apple were in turn passed on to consumers by the app developers. Second, the anti-steering provisions led to a degraded user experience and less choice for iOS users which had to engage in a cumbersome search before they found their way to relevant offers outside the app.

46. Apple had raised among others the argument that its anti-steering provisions were necessary to avoid that music streaming service providers circumvented their obligation to pay a fee to Apple when selling music streaming subscriptions within their iOS app and to make sure that app developers do not engage in free-riding. However, the Commission rejected this argument since Apple's rules allowed the use, within an iOS app, of digital content (including music streaming subscriptions) purchased outside iOS apps and such a purchase outside iOS apps did not trigger an obligation to pay any fee to Apple (the so-called "reader rule"). Since Apple had on its own motion introduced the reader rule, the Commission found that simply informing users about the reader rule could not be considered "circumvention" of an obligation to pay commission fees to Apple, and the existence of the reader rule undermined the alleged objective of preventing such circumvention. The Commission therefore concluded that the anti-steering provisions were not necessary to Apple's stated aim of preventing the circumvention of Apple's commission.

47. In *Facebook Marketplace*[54], the Commission found that Meta had imposed unfair trading conditions relating to its provision of advertising services on its Facebook and Instagram platforms on those advertising customers who were at the same time competitors of Facebook Marketplace, Meta's online classified ads service. Placing ads on Meta's platforms generates data, such as information about users' clicks on ads ("ads related data"). Meta's terms and conditions for advertisers allowed Meta to make unlimited use of such ads-related data – the terms and conditions did not define any relevant limits. Meta was thus free to use ads-related data also to the benefit of Facebook Marketplace and therefore to the detriment of those other classified ads platforms who not only competed against Facebook Marketplace but also advertised their services on Meta's platforms. The investigation found that advertisers had not been able to negotiate different conditions.

48. The Commission considered that Meta's terms and conditions allowed it to use ads-related data from competing online classified ads providers in different ways to the detriment of those specific advertising clients. For example, they allowed Meta to use such data to promote offers on Facebook Marketplace targeting exactly those users of Facebook who had just clicked on an ad placed there by a competing online classified ads service

[54] Commission decision of 14 November 2024 in AT.40684 *Facebook Marketplace*. An action for annulment against the decision is currently pending before the General Court (T-66/25).

provider. Also, Meta could use the ads-related data to improve Facebook Marketplace, for example, by optimising the individual ranking of listings shown to the users when opening Facebook Marketplace. This was considered harmful for online classified ads providers since Facebook Marketplace would have advantages when competing against them. Meta was moreover able to use this data without giving those advertising clients any compensation for the advantages it would be able to gain when using their data against them.

49. The Commission did not identify any legitimate purpose for the relevant trading conditions. It is worth noting that the Commission did not challenge Meta's possibility to use ads-related data in general for the provision of its advertising services, but only the use of ads-related data from those advertisers competing with Facebook Marketplace to the benefit of the latter.

4.3. Limits and special questions

50. In the two most recent cases, the Commission explicitly rejected the need to show **causality**, i.e. that the conduct under investigation must be shown to only be possible due to dominance. This means that the same conduct can be adopted by other, non-dominant companies, without it preventing a finding of infringement. This may particularly be the case in markets where competition is not effective and where the use of similar trading conditions by other non-dominant companies may simply represent an alignment of their conduct to that of the dominant firm. It is settled case law that the dominant company has a special responsibility not to engage in abusive conduct even when such conduct is engaged in by their non-dominant competitors.

51. In both cases, the Commission also took the view that, for an abuse to be found in the form of unfair trading conditions, there is no need to show restrictive **effects on competition** between undertakings. Indeed, as explained above, it is apparent from the case law that Article 102 TFEU also covers practices which may cause harm to trading partners/consumers directly (as opposed to practices which are detrimental to them through their impact on an effective competition structure). Unfair trading conditions relate to direct harm to trading partners/consumers, not to any detriment stemming from effects on competition.

4.4. Designing remedies for unfair trading conditions

52. In practice, remedies in a case regarding the imposition of unfair trading conditions may – depending on the circumstances of the case – be expressed as a simple cease-and-desist order or as an obligation on the dominant undertaking to modify the trading conditions in a way that renders them fair.

53. Designing a precise remedy that will not be circumvented by the dominant undertaking may prove challenging. While a cease-and-desist order may end the practice at stake, an effective remedy may often require that the dominant undertaking cannot simply replace that practice with an alternative one that has an equivalent object or effect and it may be necessary to circumscribe measures that would be considered to have such an equivalent object or effect. Moreover, if a trading condition is pursuing a legitimate objective in a disproportionate way, the remedy may have to determine a "proportionate" way to achieve the legitimate objective.

In *Facebook Marketplace*[55], the Commission required Meta to ensure both legally and technically that the relevant ads-related data cannot be used by Meta to the benefit of Facebook Marketplace. In *Apple App Store Practices (music streaming)* [56], the Commission required Apple to remove the anti-steering provisions from the relevant terms and conditions. In both cases, the Commission required the companies to refrain from repeating the infringement or from adopting practices with an equivalent object or effect in the future.

5. The DMA and how it addresses exploitative conduct in digital markets

5.1. Overview of the DMA

54. The DMA is a regulation that imposes directly applicable obligations – "dos and don'ts" – on companies that are designated as gatekeepers for specific core platform services. The DMA applies to markets in digital sectors and aims to overcome market failures typically encountered in such markets. The main underlying objectives of the DMA, leaving aside the harmonisation of the rules in the EU's internal market, are contestability and fairness.[57]

55. The DMA only applies to a list of 10 core platform services ("CPSs") offered by gatekeepers. CPSs include for instance search engines, social networks, online intermediation services (app stores, marketplaces), operating systems, and messaging services.[58]

56. The Commission can designate providers of CPSs as gatekeepers in two ways: (1) based on quantitative criteria and a (rebuttable) presumption, or (2) based on a qualitative assessment following a market investigation.

57. When it comes to the *quantitative* gatekeeper designation, the three (cumulative) quantitative criteria for designation[59] are proxies for the general characteristics of a gatekeeper pursuant to Article 3(1) DMA, namely that the undertaking (i) has a significant impact on the internal market, (ii) provides a CPS which is an important gateway for business users to reach end users, and (iii) enjoys an entrenched and durable position (or it is foreseeable that it will enjoy such a position in the near future)[60]. The DMA links the term "entrenched and durable position" with the contestability of the position. A limited

[55] Commission decision of 14 November 2024 in AT.40684 *Facebook Marketplace*. An action for annulment against the decision is currently pending before the General Court (T-66/25).

[56] Commission decision of 4 March 2024 in AT.40437 *Apple App Store Practices (music streaming).* An action for annulment against the decision is currently pending before the General Court (T-260/24).

[57] See Article 1(1) DMA. As clarified in recital 4 DMA, the underlying concern is that a lack of contestability and fairness will lead to negative effects on prices, quality, fair competition, choice and innovation in the digital sector.

[58] See Article 2(2) DMA.

[59] See Article 3(2) DMA for the applicable thresholds.

[60] The presumption is rebuttable: a player can argue it is not a gatekeeper even if it meets the quantitative criteria. In its decision practice, the Commission has accepted such rebuttal arguments outright in some instances, in others it rejected them outright, or it opened market investigations for a fuller assessment.

contestability can be assumed to exist if the quantitative criteria have been fulfilled for a period of at least three years[61].

58. For providers of CPSs that do not fulfil the presumptions that require notification of a CPS, the Commission has to undertake a market investigation with a *qualitative* assessment to verify whether an undertaking holds a gatekeeper position based on the criteria in Article 3(8) DMA (e.g., network effects, economies of scale/scope or the possibility to cross-subsidise).

59. The DMA imposes several obligations on gatekeepers to address practices that, based on experience from competition law and other fields, have been considered to be the most damaging for business users and end users.

60. Importantly, the obligations apply *ex ante*, i.e. gatekeepers need to comply with the obligations once they have been designated (the more informational/transparency obligations in Articles 11, 14, 15 and 28 DMA) or six months after designation (the substantive obligations in Articles 5-7 DMA). Where the Commission considers that the gatekeepers do not adequately comply with the obligations set out in the DMA, it may open non-compliance investigations and impose necessary measures for compliance as well as fines. In relation to certain obligations, the Commission can also adopt so-called specification decisions. These are decisions in which the Commission identifies concrete measures that the gatekeeper should take to effectively comply with an obligation without taking a position on whether the gatekeeper complies with the obligation.

5.2. Obligations relating to exploitative practices

61. Some of the obligations in the DMA aim to prevent gatekeepers from engaging in practices that could be considered as exploitative. Those are typically the obligations aimed at promoting fairness to the benefit of business users and/or end users.[62] Examples include the obligation to provide access to app stores, search engines and social networks on fair, reasonable and non-discriminatory terms (Article 6(12) DMA) and.Article 5(2) DMA. The latter provision prevents gatekeepers from combining personal data across their core platform services (or with data from other services) or cross-using data collected in one service for another - unless the end user (i) has been presented with a specific choice to a less personalised but equivalent alternative of the gatekeeper's services and (ii) has given consent within the meaning of the GDPR. Pursuant to that provision, read in light of recital 36 DMA, end users who withhold consent must be given access to a less personalised but "equivalent" alternative.

62. To comply with this obligation, Meta rolled out its "Consent or Pay" advertising model from March to November 2024 on Facebook and Instagram, giving EU users a binary choice – pay a subscription fee for an ads-free version of its social networks (without data being collected for personalised ads), or use the service for free by consenting to that data combination. On 23 April 2025, the Commission found that this model breached Article 5(2) DMA, fining Meta EUR 200 million.[63]

[61] See recital 21 DMA. Recital 25 further explains that high relative growth rates are an example for dynamic criteria that could indicate when a position becomes entrenched and durable.

[62] Some of these obligations also pursue the other core objective of the DMA, namely contestability.

[63] This fine was issued alongside a EUR 500 million fine against Apple for anti-steering breaches, marking the DMA's first non-compliance decisions.

63. In particular, the Commission found that, on the one hand, Meta did not offer a specific choice between a fully personalised version of its social networks Facebook and Instagram, and a less personalised but otherwise equivalent alternative of these services. On the other hand, the Commission also found that Meta's setup failed to allow users to exercise their right to freely consent to the combination of their personal data.

64. In December 2025, Meta committed to a new choice flow that users of Facebook and Instagram in the EU are offered regarding Meta's use of their personal data for targeted advertising on its platforms. Users who do not want to consent to fully personalised ads or pay a monthly subscription to have a version with no ads, now have an alternative choice of a third "Less Personalised Ads Option". The new option offers ads that rely on less data of the end user. The Commission is currently monitoring the uptake and impact of this latest choice flow.

5.3. Adaptability of the DMA to evolving exploitative practices

65. The DMA is also designed to address emerging practices that could be considered exploitative, such as the use of generative AI interfaces, hyper-personalised targeting, or opaque ranking systems, to the extent that they fit within the frame of the DMA's obligations.

66. One example is the prohibition to leverage a gatekeeper position by way of self-preferencing in ranking and related indexing and crawling, set out in Article 6(5) DMA which can at least in parts be considered to address exploitative practices. Ranking systems increasingly rely on complex AI models, which enable hyper-personalised results tailored to individual users. In addition, generative AI interfaces, such as AI shopping assistants, interact with users in a conversational manner, responding to their queries with a generated answer rather than a conventional ranked list of results. These developments can make it more difficult to verify a gatekeeper's compliance with this provision, as it is often not apparent which factors determine the results, and it becomes harder to establish whether the greater prominence of the gatekeeper's own offers compared to similar third-party offers reflects legitimate personalisation or self-preferencing.

67. In this regard, the Commission has been engaging deeply with gatekeepers to understand how they ensure that their generative AI interfaces, such as AI assistants, which are (part of) designated CPSs comply with the self-preferencing ban and other relevant DMA obligations. To do so, the DMA notably enables the Commission to require access to any data and algorithms of gatekeepers and information about testing (Article 21 DMA). The Commission has also asked gatekeepers to provide extensive information on how their ranking algorithms work, in light of a visible shift towards more personalised results based on ranking systems that remain opaque to users. In such context, ensuring that the inputs of the ranking algorithms are non-discriminatory, together with proper governance to ensure that self-preferencing does not occur, is fundamental.

68. There are more ways in which the DMA may adapt to evolving practices. Under Article 53 DMA, the Commission must review and assess the DMA every three years, with the first review report published on 28 April 2026. The purpose of the DMA review is to ensure that the regulation can adapt to evolving practices by primarily assessing whether the DMA is achieving its aim of ensuring contestable and fair markets, its impact on

businesses and end users, and ultimately whether there is a need to modify the DMA's rules.[64]

69. The report finds that, two years since the entry into application of the DMA (i.e., March 2024), the DMA remains fit for purpose and does not need to be reformed. However, given the developments in the sectors of AI and cloud computing services, the report does set out that DMA enforcement will increasingly be focusing on AI and cloud. To that end, the Commission has completed two specification proceedings to detail how Google should comply with the interoperability and online search data-sharing obligations, and launched three market investigations into the potential designation of Amazon Web Services and Microsoft Azure as cloud services and into potentially extending the applicability of some DMA obligations to cloud services.

70. Should further exploitative practices arise in digital markets in the coming years that are not already covered by the DMA, they may either be addressed in the next DMA review (expected in mid-2029) or through the application of EU competition law.

5.4. Interactions with other authorities and other legal instruments

71. While the Commission is the sole enforcer of the DMA (Recital 91), the DMA embeds cooperation with other authorities to ensure the coherent, effective and complementary enforcement of available legal instruments applied to gatekeepers.

72. This includes cooperation with competent authorities enforcing competition rules (Article 38 DMA), through the European Competition Network and national courts (Article 39 DMA), but also other regulatory authorities acting in the digital sector (Article 40 DMA) through the DMA High Level Group ("HLG"). Cooperation within the HLG takes place through three thematic subgroups dedicated to (i) data-related obligations, (ii) Article 7 DMA (interoperability), and (iii) AI.

73. This cooperation is illustrated, for example, by the data-related obligations subgroup of the HLG, which has focused on the obligation to obtain consent for the combination of data between designated services and distinct services as provided for in Article 5(2) of the DMA, the interplay of this provision with the GDPR, the Commission's work regarding data access and portability, as well as the sharing of ranking, query, click, and view data by online search engines.

74. Another example of the Commission's cooperation with other authorities is its collaboration with the European Data Protection Board (the "EDBP") on the joint guidance on the interplay between DMA and the GDPR.[65] The purpose of the guidance is to provide clarity and legal certainty to stakeholders by ensuring that the DMA and GDPR are interpreted and applied in a compatible manner. The guidance explains how gatekeepers can implement the DMA in accordance with the GDPR where data protection is at stake[66] or where they enable interoperability between number-independent interpersonal

[64] For completeness, Article 53 DMA also requires the Commission to evaluate if the scope of Article 7 DMA (interoperability with messaging services) may be extended to online social networking services.

[65] See https://www.edpb.europa.eu/news/dma-and-gdpr-edpb-and-european-commission-endorse-joint-guidelines-to-clarify-common_en

[66] I.e., where gatekeepers need to acquire valid end users' consent for certain processing operations (Article 5(2) DMA), where they allow the use of app stores and apps on users' operating systems (Article 6(4) DMA), where they enable end and business users to port their data (Articles 6(9) and 6(10) DMA) and where they are sharing search data (Article 6(11) DMA).

communications services (Article 7 DMA)). By explaining how the DMA and the GDPR concepts intersect, the guidance seeks to maximise the achievement of the respective objectives of the two frameworks, and avoid risks that gatekeepers, controllers and processors instrumentalise their compliance with the GDPR with a view to make their compliance with the DMA less effective, and vice-versa.

75. In addition, the Commission's enforcement work in relation to Articles 5(2) DMA and 6(11) DMA demonstrates concrete synergies that can be created by the cooperation between the Commission and other authorities. For example, throughout the investigation into Meta's "Consent or Pay" model's compliance with Article 5(2) DMA, the Commission has cooperated closely with the Irish Data Protection Commission which is the competent lead supervisory authority for Meta's processing operations in the Union pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council.

6. Conclusion

76. Exploitative abuses are an established and increasingly relevant component of EU competition enforcement. Although Article 102 TFEU has often been applied primarily to exclusionary conduct, it also clearly covers situations in which a dominant undertaking directly harms consumers or trading partners by imposing unfair prices or other unfair trading conditions. Recent enforcement practice confirms that such intervention is an important additional tool, in particular, in markets where effective competitive constraints are weak, slow to emerge, or structurally unlikely to develop in a timely manner.

77. The assessment of excessive pricing under Article 102(a) TFEU remains anchored in the case law, in particular the *United Brands* framework, while allowing for methodological flexibility. At the same time, excessive-pricing cases remain evidentially and economically demanding, especially in markets characterized by high fixed costs, complex cost allocation, legal or structural monopoly features, or weak comparator evidence. This helps explain why enforcement in this area has tended to be cautious and fact specific, typically focusing on markets where dominance is entrenched and market forces are unlikely to correct the harm within a reasonable period.

78. The same overall logic applies to unfair trading conditions. While the case law and decisional practice in this area remain less developed, recent cases show that Article 102(a) TFEU can address non-price forms of exploitation where dominant firms impose non-negotiable conditions that harm trading partners or end users and are neither necessary nor proportionate to any legitimate objective. These cases also confirm that exploitative abuse control is concerned with direct harm and does not depend on showing restrictive effects on competition between undertakings.

79. Alongside Article 102 TFEU, the DMA now plays a central role in addressing exploitative conduct in digital markets. Its ex-ante obligations applicable to designated gatekeepers are intended to tackle particularly harmful practices more quickly than traditional case-by-case competition enforcement. In that way, the DMA complements, rather than replaces, Article 102 TFEU: the two frameworks pursue related concerns but operate through different legal techniques, with the DMA providing a regulatory layer for structurally important digital services and competition law remaining available for conduct falling outside, alongside, or beyond the DMA's scope.