

Competition Commission of the French Committee to the International Chamber of Commerce (ICC France)

Contribution to the public consultation in relation to the European Commission's draft guidelines on exclusionary abuses

Introduction

1. The French Committee to the International Chamber of Commerce ("**ICC France**") welcomes, in their principle, the new draft guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") to abusive exclusionary conduct by dominant undertakings, published on 1 August 2024 ("**Draft Guidelines**") and the opportunity to contribute.
2. Overall, ICC France finds that the Draft Guidelines seek to grant the EC maximum discretion and flexibility in enforcement of article 102 of TFEU and undermine the stated objectives of increasing transparency in its policy and decision-making and provision of legal certainty to undertakings. ICC France also finds it regrettable that the Draft Guidelines still do not address exploitative abuses.
3. The ICC France finds the Draft Guidelines to be questionable on several points.
 - **EC's increased leeway** – ICC France is concerned about the overarching principle of the Draft Guidelines which could be seen as giving more leeway to the EC to sanction potentially abusive practices, at the expense of legal certainty.
 - **Questionable application of the case law** – ICC France questions the interpretation and selective application of case law, in particular in relation to the introduction of presumptions in respect of several practices and the departure from sound economic analysis in defining theories of harm (such as the "as efficient competitor test" ("**AEC test**") and anticompetitive foreclosure).
 - **Lack of guiding principles** – Although the EC should not legislate or extend beyond case law, the Draft Guidelines do not clarify the EC's interpretation of key concepts and enforcement priorities, notably through concrete examples. Although the Court of Justice of the European Union's ("**ECJ**") case law provides that "*the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position*",¹ the Draft Guidelines do not refer to consumer welfare and could be seen as a missed opportunity to clarify the ultimate goal of Article 102 TFEU enforcement. The ICC France even considers that, to this extent, the Draft Guidelines represent a step-back in comparison with the 2009 enforcement priorities.

¹ ECJ, 12 May 2022, *SEN*, C-377/20, para. 46.

- **Shift to a formalistic approach** – While one objective of the Draft Guidelines is to allow for a more flexible application of Article 102 TFEU, the shift from an economic to a more formalistic and conservative approach is regrettable. This undermines legal certainty by eroding the existing legal framework and creating ambiguity for businesses on application of Article 102 TFEU. Currently, the Draft Guidelines appear one-sided, whereas there should be an effective balance between enforcement and the rights of defence of undertakings. The evidentiary burden on the EC is significantly lowered thereby increasing the burden of proof on undertakings.
 - **Lack of guidance on the interaction with the Digital Market Act (DMA)** – ICC France would welcome the EC's guidance on the interplay between Article 102 TFEU and the DMA. This would be all the more useful given that EC is providing guidelines on practices such as self-preferencing, which can be covered by both the DMA and Article 102 TFEU.
4. ICC France's contribution focuses on the identification of a dominant position (1), the general principles in relation to exclusionary effects (2) as well as on certain specific abuses (3) set out in the Draft Guidelines.

1 Definition of a dominant position

1.1 Importance of market definition

5. The Draft Guidelines imply that market definition may not be the indispensable preliminary step to demonstrate the existence of a dominant position. Paragraph 20 states that *"to assess dominance, it is generally necessary to define the relevant market"* and *"the definition of the relevant market and the assessment of whether the undertakings concerned hold a dominant position within that market may therefore be interrelated"* [underlines added].
6. These statements are not in line with the case law referenced in footnote 31 which explicitly recognises that *"the definition of the relevant market is of essential importance"*² and that *"the definition of the relevant market, in the application of Article 102 TFEU, is, as a general rule, a prerequisite of any assessment of whether the undertaking concerned holds a dominant position"* [underlines added].³ The Draft Guidelines' stance is even more surprising considering that the EC updated on 8 February 2024 its communication on market definition.
7. In accordance with the case law, **ICC France considers that the EC should clarify in the final guidelines that defining the relevant markets is an indispensable step to establish the existence of a dominant position.**

1.2 "Safe harbour" market share threshold

8. According to the 2009 Guidance on the EC's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("**2009 Guidance**"), *"dominance is not likely if the undertaking's market share is below 40 % in the relevant market"*.⁴ The Draft Guidelines no longer include this previously established 40% "safe harbour" threshold.⁵

² ECJ, 21 February 1973, *Europemballage*, C-6/72, para. 32

³ ECJ, 30 January 2020, *Generics UK*, C-307/18, para. 127.

⁴ EC, 2009 Guidance on the EC's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 14.

⁵ EC, 2009 Guidance on the EC's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 14: *"The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market."*

They only provide in a footnote that “*market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances*”.⁶

9. However, in its judgment, the ECJ merely stated that a market share below 10% is “*too small to be regarded as evidence of a dominant position on the market*”.⁷ This implies that a significantly higher market share can also exclude the existence of a dominant position. **ICC France thus observes that the case law has been misinterpreted and the 10% safe harbour threshold should only be viewed as a minimum.**
10. The deletion of the “safe harbour” threshold of 40% creates a “grey zone” between the 10% and 40% market share, which did not exist before, and seems excessively conservative and triggers legal uncertainty while guidelines are supposed to provide more certainty. Although the existing “safe harbour” threshold of 40% results from the EC’s decisional practice and is not based on case law, **ICC France believes the “safe harbour” threshold of 40% should be (re)included in the final guidelines** as it provides more legal certainty to undertakings in the context of their self-assessment.

1.3 Assessment of the dominant position

11. The current Draft Guidelines do not detail the factors the EC will consider as identifying a dominant position when an undertaking’s market share is below 50%,⁸ merely providing a brief mention in footnote 41. Likewise, the Draft Guidelines fail to explain how the “presumption” of dominance in case of market shares over 50% may be rebutted.⁹ This omission undermines the EC’s objective of transparency and predictability.
12. **ICC France respectfully suggests that the EC clarify the importance of establishing a dominant position, interprets the 10% safe harbour threshold as a minimum, and reconsiders the inclusion of the 40% threshold. At the least, ICC France seeks guidance on these points.**

1.4 Secondary markets: dominance and causal link with the abuse

13. While the Draft Guidelines briefly mention the notions of “primary market” and “secondary market”,¹⁰ they lack greater details on the criteria necessary to establish dominance on secondary markets, such as those established by the ECJ in the *EFIM* case.¹¹ Indeed, the ECJ considered in this case that: “*any dominant position on secondary markets, i.e. the ink cartridge markets, can be ruled out if it is established that there is competition on the primary market, i.e. the printer market, and if the primary and secondary markets are closely linked*”.¹²
14. It thus stems from the case law that the assessment of a dominant position needs to take into account the undertaking’s position on interconnected markets to fully assess the dynamics of the competitive process. It seems that the Draft Guidelines miss an opportunity to better frame the EC’s understanding of this case law and its methodology in relation to interconnected markets.

⁶ Draft Guidelines, footnote 41.

⁷ ECJ, 22 October 1986, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, C-75/84, para. 85, according to which “*Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances*”.

⁸ Draft Guidelines, footnote 41.

⁹ Draft Guidelines, para. 6.

¹⁰ Ibid, footnote 37.

¹¹ ECJ, 19 September 2013, *European Federation of Ink and Ink Cartridge Manufacturers*, C-56/12 P, para. 12 and 36-42.

¹² Ibid, para. 37.

15. Furthermore and still regarding secondary markets, regrettably the Draft Guidelines do not address the need for a causal link between the dominant position and the abuse. The Draft Guidelines even seem to imply that this causal link is always irrelevant.¹³
16. Nevertheless, it seems to ICC France that such a general take is not in line with the CJEU's case law. Indeed, there is an ambiguity in the case law regarding the relevance of the causal link between the abuse and the dominant position. It makes it clear that "*an abuse of a dominant position on one market can be condemned because of the effects it produces on another market*".¹⁴ However, the same case law also specifies that: "*where [...] the abuse [...] is located on a market other than the dominated market [...] Article 86 of the Treaty is, apart from particular circumstances, inapplicable*".¹⁵
17. As a consequence, even though such a link can be presumed in most cases, it seems that this criterion is still relevant when the EC's theory of harm relies on interconnected markets; the EC would need to prove this causal link when (i) the abuse has potential effects on a dominated market and (ii) the abuse takes its source on a non-dominated market. This interpretation of the case law would be consistent with the principles set out in the *Tetra Pak* case, "*the application of Article 86 presupposes the existence of a link between the dominant position and the allegedly abusive conduct, which is not normally present when conduct on a market distinct from the dominated market produces effects on that same market*".¹⁶
18. Given the limited examples on such issues in the decisional practice and the theoretical aspects of the ECJ's statements, the Draft Guidelines should elaborate on those questions to provide more legal certainty.
19. **ICC France therefore considers it would be helpful to clarify its methodology in relation to interconnected markets, the necessity of a causal link and how such link should be established.**

2 General principles for establishing an abuse

2.1 Competition on the merits

20. The Draft Guidelines introduce a new two-step test to determine whether conducts by dominant undertakings are likely to constitute an exclusionary abuse. It requires establishing (i) whether a conduct departs from competition on the merits and (ii) whether it can have exclusionary effects.¹⁷ Such a distinction does not seem clear and does not necessarily flow from the case law. This is the reason why **ICC France seeks clarification on the EC's practical reasons for making such a distinction, especially considering the potential risk of confusion for undertakings.**
21. Regarding the first criteria "conduct departing from competition on the merits", the Draft Guidelines do not provide a clear definition of this concept nor sufficient guidance on what constitutes a potential deviation from this concept. The relevant section is worded generally and lacks concrete examples.
22. Notably, the Draft Guidelines seem to suggest that any increment in a dominant undertaking's market share could depart from competition on the merits by stating that "*such an undertaking may take reasonable steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to strengthen its dominant position or to abuse it*".¹⁸

¹³ Draft Guidelines, para. 74.

¹⁴ Court of First Instance, 12 December 2000, *Aéroports de Paris*, T-128/98, para. 164.

¹⁵ Ibid.

¹⁶ ECJ, 14 November 1996, *Tetra Pak II*, C-333/94 P, para. 27.

¹⁷ Draft Guidelines, paragraph 45.

¹⁸ Ibid, para. 49.

However, ICC France notes that an undertaking is not prohibited from (i) gaining a dominant position and (ii) strengthening its dominant position, as long as its conduct does not depart from competition on the merits. This is supported by both the Draft Guidelines themselves “*Article 102 TFEU does not prevent an undertaking from acquiring on its own merits, in particular on account of its skills and abilities, a dominant position on a given market. It only prohibits the abuse of such a dominant position*”¹⁹ and case law “*it follows that Article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality*” [underlines added].²⁰

23. The wording used in the Draft Guidelines (i.e. “*such an undertaking may take reasonable steps [...] provided however that its purpose is not to strengthen its dominant position or to abuse it*”) seems to misrepresent the consistent statements of the Court in this respect, which use the word “and”, not “or”, therefore leading to a more extensive interpretation than that consistently used in the case law cited, “*it is not possible, however, to countenance such behaviour [the protection of a dominant company’s commercial interests] if its actual purpose is to strengthen that dominant position and abuse it*” [underlines added].²¹
24. The Draft Guidelines show a conservative approach which undermines legal certainty. For instance, the Draft Guidelines suggest that “*conduct that at first sight does not depart from competition on the merits [...] and therefore does not normally infringe Article 102 TFEU may, in specific circumstances, be found to depart from competition on the merits, based on an analysis of all legal and factual elements.*”²² This statement sounds vague and lacks specific examples, leading ICC France to worry about the EC excessive leeway to intervene and which severely undermines the initial objective of legal certainty.
25. **In summary, ICC France believes that the EC should clarify the definition of competition on the merits by providing concrete examples of conducts that it considers may depart from competition on the merits, in these specific circumstances. This clarification is necessary to ensure legal certainty and prevent excessive leeway for intervention by the EC. Additionally, ICC France seeks an explanation of the practical reasons behind the introduction of the two-step test for determining exclusionary abuse.**

2.2 Ability to produce exclusionary effects: introduction of presumptions and questionable shift of the burden of proof

26. In the Draft Guidelines, the EC entered into a formalistic approach, dividing the enforcement of Article 102 TFEU between three sets of practices. The first category encompasses so-called naked restrictions which seem to be abusive by their very nature. The second category puts together practices which can be presumed to be abusive even if the presumption is rebuttable. The third category encompasses the remaining practices.
27. ICC France considers that this new categorization has the effect of shifting the burden of proof in favour of the EC without a solid basis in the case law. Criticisms can be made in particular regarding the rebuttable presumptions (2.2.1) and the so-called naked restrictions (2.2.2).

¹⁹ Ibid, para. 17.

²⁰ ECJ, 3 July 1991, *AKZO/EC*, C-62/86, para. 70.

²¹ ECJ, 14 February 1978, *United Brands and United Brands Continentaal v Commission*, C-27/76, para. 189.

²² Draft Guidelines, para. 57.

2.2.1 The so-called rebuttable presumption of para. 60(b)

28. The Draft Guidelines set up presumptions in respect of five categories of practices, i.e. (i) exclusive supply or purchasing agreements; (ii) conditional rebates; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying.²³ In practice, *“once the factual existence of the relevant conduct is established, if need be under the conditions established in the specific legal test, its exclusionary effects can be presumed”*.²⁴
29. This proposal reflects a concerning shift to a formalistic approach. **ICC France considers that the reference and generalization of presumptions result from a misreading of the case law and are not aligned with fundamental principles of Article 102 TFEU and the objective of legal certainty.** Indeed, as the EC itself noted in footnote 131,²⁵ the concept of presumptions is not supported by the case law (except for the pricing below AVC in predatory pricing cases).²⁶
30. Moreover, under Article 102 TFEU, exclusionary effects are not necessarily anticompetitive, as illustrated by the *ENEL* case, i.e. *“not every exclusionary effect is necessarily detrimental to competition since 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”*.²⁷ This questions the relevance of introducing presumptions which are likely to contradict both case law and a sound economic reasoning.
31. The burden of proof currently rests on the EC, to assess the capacity of conduct to produce exclusionary effects in the light of all relevant circumstances, as shown by the recent judgment of the General Court in the *Google AdSense*. This is essential for the presumption of innocence and the benefit of doubt to be granted to the undertaking, as established in the *Unilever* case.²⁸
32. This shift of burden of proof in the Draft Guidelines places a significant weight on undertakings, requiring them to disprove the presumption of exclusionary effects, whereas they do not have the same means of investigation as the EC.
33. According to **ICC France, the use of presumptions in the Draft Guidelines is particularly problematic** for several reasons:
 - **Lack of clarity on how a dominant undertaking can rebut such a presumption** - on this point, the Draft Guidelines merely state that *“the undertaking may [...] attempt to overturn the presumption by submitting evidence showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption is based”*²⁹ [underlines added] without providing any explanation as to what these underlying

²³ Ibid, para. 60(b).

²⁴ Ibid, para. 60(b).

²⁵ Ibid, footnote 131: *“While the Union Courts have not always made explicit use of the term “presumption” for each one of these practices”*.

²⁶ General Court, *Qualcomm*, T-671/19, para 521 and ECJ, 3 July 1991, *AKZO/EC*, C-62/86, para. 71

²⁷ ECJ, 12 May 2022, *Servizio Elettrico Nazionale e.a.*, C-377/20, paras. 72-73.

“Given that the abusive nature of a practice does not depend on the form it takes or took but presupposes that that practice is or was capable of restricting competition and, more specifically, of producing, on implementation, the alleged exclusionary effects, that condition must be assessed having regard to all the relevant facts (...). That said (...), it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits – on account of its skills and abilities in particular – a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. Indeed, not every exclusionary effect is necessarily detrimental to competition since 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”. (emphasis added)

²⁸ ECJ, 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20.

²⁹ Draft Guidelines, para. 60(b).

assumptions are. This lack of specificity leaves undertakings without any clear guidance on how to effectively challenge the presumption.

- **EC broad margin of discretion** – these presumptions seem to be nearly irrefutable in practice. In this context, ICC France finds the final sections of paragraph 60(b) particularly troubling: “*Even in the scenario set out in (ii) the evidentiary assessment must give due weight to the probative value of a presumption*” [underlines added]. Similarly, paragraph 170 on objective justification states: “*While it remains open to the dominant undertaking to justify any conduct that is liable to be abusive, whether the conduct has a high potential to produce exclusionary effects or whether it is a naked restriction must be given due weight in the balancing exercise to be carried out in this context*” [underlines added].
34. At the very least, the EC should therefore clarify the criteria for triggering a presumption, such as the reasoning adopted by the General Court in *Google Adsense*³⁰ where it indicated that exclusivity clauses do not necessarily lead to exclusionary effects and that it is essential to consider the overall context, including their duration and market coverage. Furthermore, the EC should specify the standard of proof that undertakings need to meet to rebut such a presumption.
 35. **ICC France is also concerned by what seems to be the introduction of procedural limitations in the Draft Guidelines.** Indeed, the draft currently states that “*the submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission’s examination obligation*”.³¹ **ICC France submits that the approach adopted by the Draft Guidelines in that regard is overly restrictive**, particularly in light of the general principle of sound administration which poses the duty of considering all relevant circumstances, including those not provided by the incriminated undertaking.
 36. The Draft Guidelines seek to apply the methods used in State Aid administrative proceedings to competition law investigations, but this approach is not supported by references to relevant case law. In fact, the case law states that even an undertaking’s express or implicit acknowledgment of matters of fact or law during the administrative procedure cannot restrict its right to an appeal.³²
 37. In any event, since the EC can respond to arguments aimed at overturning the presumption by relying on arguments never presented to the undertaking – given that the EC is not under any duty to submit its decision to the undertaking for comments – the undertaking must be able to rely on all relevant elements before the Union courts. This includes demonstrating that, in its decision, the EC did not provide sufficient reasons to maintain the presumption, even if these elements were not presented during the administrative phase.
 38. **ICC France suggests that the final guidelines clarify the criteria and underlying assumptions for triggering presumptions, provide specific guidance on how undertakings can effectively rebut these presumptions and ensure that the procedural rights of undertakings are respected in line with established case law. Additionally, ICC France seeks assurance that the burden of proof remains with the EC to demonstrate exclusionary effects in light of all relevant circumstances, to uphold the principles of legal certainty and fair administration.**

³⁰ General Court, 18 September 2024, *Google Adsense*, T-334/19, para. 107.

³¹ Draft Guidelines, para. 60(b).

³² ECJ, 1 July 2010, *Knauf Gips KG/EC*, C-407/08, paras.88-92.

2.2.2 Irrebuttable presumption on naked restrictions

39. The Draft Guidelines deal with so-called “naked restrictions” which give rise to almost irrebuttable presumption³³ and based exclusively on a non-exhaustive list of examples.
40. Given the detrimental consequences for businesses of having a practice classified under this quasi-irrebuttable presumption of abuse, **ICC France respectfully suggests that it would be preferable for the Draft Guidelines to provide for both a more precise definition of naked restrictions**, rather than the vague reference to conduct “*having no economic interest [for the dominant undertaking] other than restricting competition*” **and a comprehensive list of conducts likely to be categorised as such.**

2.3 Substantive legal standard for determining the capacity to produce exclusionary effects

41. The assessment of exclusionary effects as provided in paragraph 62 of the Draft Guidelines seems inconsistent with the counterfactual analysis presented in paragraph 66. While paragraph 66 clearly advocates for a counterfactual analysis (as confirmed by a constant case law of the ECJ), paragraph 62 seems to imply that even hypothetical effects are sufficient, and that the absence of concrete effects is irrelevant.
42. However, paragraph 62 is solely based on a questionable analogy with Article 101 TFEU, quoting a case which relates to restriction of competitions by object. This does not seem to be an appropriate reference for the assessment of effect under Article 102 TFEU.
43. Moreover, the absence of concrete effects, even though it does not prove in itself the absence of potential exclusionary effects, should be considered as a strong clue that no anticompetitive foreclosure was likely to happen, particularly if the practice was implemented during a long period of time, giving a long timeframe to assess its impact.
44. **ICC France would thus appreciate clarifications in the Draft Guidelines concerning the distinction between potential and hypothetical effects³⁴ — notably, criteria for deeming an effect purely hypothetical.** It would also be helpful to clarify the relevance of actual anticompetitive effects, or the absence thereof, in assessing potential effects, including by providing some concrete examples in this respect.³⁵
45. Finally, ICC France is also deeply concerned by the fact that the Draft Guidelines give the EC a broad discretion to depart from the AEC test in paragraph 73 by reference to the General Court’s *Google Shopping* judgment: “*the assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking*”.³⁶

³³ Draft Guidelines, para. 60(c): “[O]nly in very exceptional cases will a dominant undertaking be able to prove that in the specific circumstances of the case the conduct was not capable of having exclusionary effects”.

³⁴ Draft Guidelines, para. 61.

³⁵ Draft Guidelines, paras. 63-64.

³⁶ Ibid, para. 73.

General Court, 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, para. 540-541.

46. **ICC France argues that such an unqualified statement seems to contradict with other parts of the Draft Guidelines, which reference the AEC test.** Specifically, paragraph 51 indicates that the AEC test is relevant for defining competition on the merits and assessing anticompetitive effects, and paragraph 55(f) includes the AEC test as a factor in determining whether conduct departs from competition on the merits. Additionally, **ICC France contends that the statement seems to exceed case law**, which restricts the EC's ability to depart from the AEC test, as evidenced in recent decisions such as *Google Shopping*³⁷ and *Google AdSense*.³⁸
47. **Therefore, ICC France suggests that the final guidelines provide clear distinctions between potential and hypothetical effects, clarify the relevance of actual anticompetitive effects in assessing potential effects, and offer concrete examples for better understanding. Additionally, ICC France seeks clarification on the conditions under which the EC may depart from the AEC test, ensuring consistency with existing case law.**

3 Specific categories of abuse³⁹

3.1 Conduct subject to a specific legal test

3.1.1 Exclusive dealing

48. The EC's 2009 Guidance distinguishes between exclusive purchasing arrangements and conditional rebates, specifying the tests to establish an abuse and the factors most likely to trigger an intervention. Confusingly, the Draft Guidelines combine these distinct types of conduct, applying the same considerations to both, even if the first concerns a *de jure* or *de facto* exclusivity obligation (i.e. exclusive purchasing and the second a mere possibility to purchase following particular conditions (i.e. conditional rebates)).⁴⁰
49. To justify the use of presumptions regarding exclusive dealing practices, the Draft Guidelines refer to the *Unilever* case. This decision however explicitly states that, while exclusivity clauses naturally raise competition concerns, their ability to exclude competitors is not automatic, as highlighted by 2009 Guidance.⁴¹
50. According to ICC France, the Draft Guidelines should thus better reflect the case law and avoid presumptions and automatic assessments of exclusivity which have no robust basis as per the most relevant and recent case law.

³⁷ ECJ, 10 September 2024, *Google Shopping*, C-48/22 P, para. 266: "the EC is required to demonstrate the infringement of Article 102 TFEU, it must establish the existence of an abuse of a dominant position in the light of various criteria, by applying, *inter alia*, the as-efficient competitor test, where that test is relevant, its assessment of the relevance of such a test being, where appropriate, subject to review by the EU judicature".

³⁸ General Court, 18 September 2024, *Google et Alphabet/EC (Google AdSense for Search)*, T-334/19, §105-112, 381-385, 65 : where the Court notes that the Court nonetheless notes that such departure is more likely to be justified in the case of "certain non-pricing practices"; and even then, limits the possibility for the EC to depart from this test, noting in particular that (i) "even in the case of non-pricing practices, the relevance of such a test cannot be ruled out" and further (ii) "where an undertaking in a dominant position suspected of abuse provides the EC with an analysis based on the as-efficient competitor test, that institution cannot disregard that evidence without even examining its probative value".

³⁹ ICC France's contribution focuses on the main practices for which it had the comments and suggestions and did not mention certain practices such as, predatory pricing, margin squeeze, multi-product rebates or, conditional rebates not subject to exclusive purchase or exclusive supply requirements.

⁴⁰ *Ibid*, para.78-80.

⁴¹ ECJ, 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, §51: "it must be held that, although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic, as, moreover, is illustrated by the Communication from the EC entitled 'Guidance on the EC's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings'".

See also, General Court, 18 September 2024, *Google AdSense*, T-334/19, para. 384.

3.1.2 Tying/Bundling

51. ICC France expresses concerns regarding the introduction of presumptions to “*certain forms of tying*”.⁴² The EC considers that “*a presumption can exist depending on the specific characteristics of the markets and products at hand*”.⁴³ The EC further indicates that “*the depth of the analysis required to show that the tying is capable of having exclusionary effects depends on the specific circumstances of the case*” and that exclusionary effects might be presumed depending on these circumstances.⁴⁴ ICC France observes that the presumption of exclusionary effects by specific types of tying is not established in case law and appears contentious in economic theory. Consequently, extending a presumption to “*certain forms of tying*” compromises legal clarity for companies.
52. Moreover, the Draft Guidelines refer to a list of factors that “*may be relevant*” for the assessment of exclusionary effects, “*in addition to the elements mentioned in section 3.3*” which relate to the general framework to assess an abuse, and do not explain clearly which “*specific characteristics*” would justify the application of a presumption or, conversely, in which cases a presumption may not be applied.⁴⁵
53. These factors include: (i) the fact that the dominant undertaking also holds a dominant position on the linked market, (ii) the importance of the link between the tying and the tied products, (iii) barriers to entry and (iv) the degree of consumer inertia in the tied market. The Draft Guidelines could better explain the relationship between these various criteria and how many of them must be fulfilled to trigger the presumption and qualify an abuse.
54. The few examples included in footnote 233 of the Draft Guidelines are welcomed but do not seem to provide sufficient clarity and predictability, in this respect. Therefore, **ICC France respectfully suggests it would be helpful to clarify whether the presumption of exclusionary effects only applies to cases in which one or more of the elements listed in the Draft Guidelines are shown.**⁴⁶
55. At the very least, **the application of a presumption to certain forms of tying/bundling should, therefore, be clearly identified ex ante and rely on objective requirements.**
56. **ICC France respectfully requests that the final guidelines provide explicit clarifications on the specific criteria and circumstances under which a presumption of exclusionary effects from certain forms of tying can be applied. Additionally, ICC France suggests that the EC offer concrete examples to ensure greater legal certainty.**

3.1.3 Refusal to supply

57. The Draft Guidelines distinguish between refusal to supply and refusal of access, but do not provide a precise boundary between the two practices, thereby creating a grey area where both qualifications could apply. Thus, **ICC France would welcome some clarifications on the scope of this distinction**, which seems to echo the distinction (itself unclear) between total refusal and partial refusal to supply.

⁴² Draft Guidelines, para. 60(b).

⁴³ Ibid, footnote. 136.

⁴⁴ Ibid, para. 95.

⁴⁵ Draft Guidelines, para. 94.

⁴⁶ Ibid, para. 94.

58. This seems all the more problematic as the standard applicable to refusal to supply (essential facility doctrine) and the standard applicable to refusal to grant access (far more permissible for the EC, (please see explanations below on that point, paras. 70-80) are very different for practices which only differ in degree and not nature.⁴⁷ ICC France is concerned over the Draft Guidelines' potential overextension of the essential facilities doctrine to instances of refusal to deal that do not present significant challenges, especially in light of available alternative solutions. This broad application risks imposing undue obligations on undertakings and may stifle innovation and competitive dynamics by not adequately recognizing the availability and viability of alternative means to compete effectively in the market.

3.2 Conduct with no specific legal test

3.2.1 Self-preferencing

59. **ICC France believes that certain aspects of the Draft Guidelines' specific section on "self-preferencing" conduct would benefit from additional clarifications or further developments.**
60. As a preliminary comment, the ICC France suggests that the EC, at the outset of its guidelines on self-preferencing, highlight that self-preferencing is a longstanding and widespread practice, especially among vertically integrated companies in various industries. It is important to underscore that self-preferencing is not prohibited *per se*. The subsequent developments should specifically aim to identify and clarify the specific circumstances under which self-preferencing practices could potentially raise competition issues.
61. First, the Draft Guidelines state that self-preferencing practices are implemented "*mainly by means of non-pricing behaviour*".⁴⁸ This implies that, from the EC's perspective, self-preferencing practices could also be carried out through pricing behaviour. However, the EC does not provide concrete examples of pricing practices that might be considered as abusive self-preferencing. ICC France notes that, to its knowledge, there are no existing precedents where a pricing behaviour has been regarded as a self-preferencing practice, whether as a standalone abuse or as part of a single and complex infringement. The only case involving pricing behaviour mentioned in the section on self-preferencing is the *TeliaSonera* case⁴⁹ which concerned a margin squeeze practice which is a practice precisely subject to a specific legal test as opposed to a practice not subject to a specific legal test, as one could expect in this section of the Draft Guidelines.⁵⁰
62. **ICC France suggests this issue requires further clarification by the EC**, particularly, with respect to the few pricing practices such as predatory pricing or margin squeeze, which are subject to a specific legal test and are accordingly covered by section 4.2. of the current Guidelines. Such clarification would help economic operators to assess their pricing behaviour using the legal tests provided by case law. Similarly, a specific test for self-preferencing should be implemented to assist undertakings in their self-assessment.
63. Second, the Draft Guidelines provide in a dedicated section, the circumstances under which a "self-preferencing" practice may infringe Article 102 TFEU, with many references to the General Court's judgment in *Google Shopping*. However, the ECJ's Grand Chamber handed down its judgment on appeal in this case on 10 September 2024 which should be integrated into the final version of the Guidelines.
64. In particular, the ECJ ruled that, similar to any exclusionary conduct, the assessment of self-preferencing practices under Article 102 TFEU must consider "*all the relevant factual*

⁴⁷ See para. 64 of ICC France's contribution for additional comments on refusal of access.

⁴⁸ Ibid, para. 156.

⁴⁹ ECJ, 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, C-52/09.

⁵⁰ Draft Guidelines, para. 336.

circumstances” to establish that such conduct departs from competition on the merits and has the potential to produce exclusionary effects.⁵¹

65. Moreover, the ECJ clarifies that preferential treatment itself is not prohibited *per se*: *“It is important to add that it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits irrespective of the circumstances of the case”*.⁵²
66. **ICC France invites the EC to adjust the final guidelines in light of these findings and to generally recognize that the effects of self-preferencing can sometimes be pro-competitive by improving the quality of services, boosting inter-platform competition and providing a wider range of products and lower prices to consumers.**
67. According to the ECJ, Google’s self-preferencing conduct was found to infringe Article 102 TFEU because of three specific circumstances, i.e. *“(i) the importance of traffic generated by Google’s general search engine for comparison shopping services, (ii) the behaviour of users when searching online and (iii) the fact that diverted traffic from Google’s general results pages accounted for a large proportion of traffic to competing comparison shopping services and could not be effectively replaced by other sources”*.⁵³
68. Therefore, **ICC France respectfully encourages the final guidelines to clarify that “self-preferencing” should only be deemed as an abuse of dominance under exceptional circumstances.** These exceptional circumstances also explain why the indispensability requirement under the *Bronner* case may indeed not be applicable to self-preferencing. **The ICC submits that application of the general test for exclusionary abuses – taking into account all the circumstances as set out in the *Intel* case – necessarily implies that the importance of the dominant position in the leveraging market is a crucial factor in assessing the conduct.** For self-preferencing practices, this implies that the dominant undertaking’s actions should not be deemed abusive if the leveraging market is not a significant source of business for competitors, or if competitors can easily find alternative business sources on the leveraged market.
69. Hence, **ICC France respectfully recommends that the EC clarifies that paragraph 161 (i) of the Draft Guidelines is not just an illustrative factor among others, but is decisive in most cases. ICC France suggests that footnote 336 of the Draft Guidelines be amended in line with this clarification.** The current version of the Draft Guidelines appears to draw general conclusions from highly specific cases in the digital sector. Therefore, the exceptional nature of these cases should be better reflected to prevent an undue expansion of this theory of harm.

3.2.2 Refusal to grant access

70. The requirement to grant access should remain an exceptional measure and should be interpreted restrictively. Both the EC⁵⁴ and the ECJ⁵⁵ recognize, that requiring a dominant firm to grant access or to modify the conditions for access to an “open infrastructure” restricts its freedom to contract, but to a lesser extent than the refusal of supply to a “closed infrastructure”.
71. As the freedom to contract – or to not contract – is a cornerstone of EU law, any qualification of a restriction of access as an abuse should be limited to clearly defined and predictable situations. It seems to ICC France that the Draft Guidelines do not specifically define what this category of access restriction covers, fail to provide guidance on how to apply the general principles of

⁵¹ ECJ, 10 September 2024, *Google and Alphabet v EC (Google Shopping)*, C-48/22 P, paras. 165-166.

⁵² *Ibid*, para. 186.

⁵³ *Ibid*, para. 141.

⁵⁴ Draft Guidelines, para. 165.

⁵⁵ ECJ, 10 September 2024, *Google and Alphabet v EC (Google Shopping)*, C-48/22 P, paras. 112.

Article 102 TFEU to access restrictions, and offer examples that are inconsistent with existing case law.

- First, the final version of the Guidelines should clearly define what constitutes a restriction of access.
72. Currently, it is unclear which category of abuse of dominance this notion corresponds to. In paragraphs 163 and 165, the EC defines this category by contrasting it with “*refusal of supply*” as outlined in the *Bronner* case. Nevertheless, it does not provide a clear definition for access restriction itself nor explain why this distinct category is necessary in the Draft Guidelines.
73. The EC mentioned several precedents such as the *Commercial Solvents* case (refusal to supply to benefit the dominant firm’s downstream activity), the *IBM* case (imposition of unreasonable supply conditions), the *Google Shopping* case (self-preferencing), and the *Slovak Telekom* case (margin squeeze). These cases involve different types of abuse and do not collectively constitute a new and distinct category.
74. Moreover, ICC France considers it is sometimes unclear whether access restrictions pertain to exclusionary or exploitative abuses.
- Second, the EC should offer more comprehensive guidance on applying the general principles of Article 102 TFEU to access restrictions.
75. The Draft Guidelines, supplemented by the *Google Shopping* case, states that a restriction of access may be deemed abusive under three conditions: (i) the conduct departs from competition on the merits, (ii) the conduct may produce exclusionary effects, and (iii) there is causation between the conduct and the anticompetitive effects.
76. The EC does not specify the factors it will consider when assessing whether access restrictions depart from competition on the merits. The examples listed in paragraph 166 of the Draft Guidelines offer some context but lack a general analytical framework.
77. In the absence of more concrete guidance, **ICC France seeks to understand why this section is necessary if it only reiterates the general principles of Article 102 TFEU without elaborating on their application to access restrictions.** ICC France fears that this lack of clarity may create considerable legal uncertainty.
- Third, the examples provided in paragraph 166 of the Draft Guidelines appear debatable and introduce new and uncertain legal concepts.
78. The EC seems to consider new types of abuse and rely on emerging legal concepts that may raise practical issues. For instance, paragraph 166(d) of the Draft Guidelines does not reference specific precedents, except by analogy to the *Google Shopping* case, questioning whether these examples have been thoroughly analysed in practice. The example appears related to the ECJ’s case law on “*open infrastructures*”, yet the ECJ has not indicated an intent to mandate broad sharing of these infrastructures.
79. The Draft Guidelines do not clarify the meanings of “*declared purpose*” or “*shared widely*”, making it difficult for undertakings to determine the legal standard for this new category of potential abuses. The strategy of an undertaking, dominant or not, may change accordingly.
80. **In summary, ICC France respectfully suggests that the EC clearly define what constitutes a restriction of access and provide comprehensive guidance on applying the general principles of Article 102 TFEU to access restrictions. This level of clarity is essential to prevent legal uncertainty and ensure that the requirements for imposing access obligations are limited to clearly identified and foreseeable circumstances.**