



31 October 2024

To: The European Commission, Directorate General for Competition

Sub: Comments on the Consultation on the draft Article 102 TFEU Guidelines

Dear Sir/Ma'am,

We have great pleasure in enclosing comments on the draft Article 102 TFEU Guidelines on behalf of the Antitrust Committee of the International Bar Association ("IBA").

Yours sincerely,



**INTERNATIONAL BAR ASSOCIATION**

**ANTITRUST COMMITTEE**

**SUBMISSION TO THE EUROPEAN COMMISSION REGARDING THE COMMENTS ON  
THE  
DRAFT ARTICLE 102 TFEU GUIDELINES**

**31 October 2024**



## INTRODUCTION

1. The International Bar Association's ("IBA") Antitrust Committee ("Committee") would like to thank the European Commission ("Commission") for the opportunity to provide comments on the Consultation on the draft Article 102 TFEU guidelines ("Draft Guidelines").
2. The Committee's Unilateral Conduct and Behavioural Issues Working Group ("Working Group") offers these submissions for the Commission's consideration at it finalizes the Guidelines.

## ABOUT THE IBA

3. The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in assisting the global legal community.
4. The Committee includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including unilateral conduct. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.
5. The Working Group is responsible for monitoring and commenting on a range of competition issues that arise, *inter alia*, from unilateral conduct and abuse of dominance or misuse of market power as well as cooperative/horizontal (non-cartel) and vertical agreements. It aims to encourage best practice in the ongoing development of international laws in these areas by commenting on consultations on proposed new and reformed legislation.

## OVERVIEW

6. The Working Group is grateful for the opportunity to provide its views on Draft Guidelines. The first-ever guidelines for the application of Article 102 TFEU on exclusionary abuses is a very significant development for companies and EU practitioners, and will also have a significant impact at the national level, both in the EU and beyond the EU.
7. At the outset, we would make three general comments.
8. First, we understand that there are likely to be further iterations of the Guidelines, given a number of highly significant judgments of the Court of Justice since the draft was published, which will warrant careful reconsideration of key elements of the Draft Guidelines. We would welcome the opportunity to comment future drafts as the Commission's thinking evolves.
9. Second, we would recommend that the Commission provides concrete examples / hypotheticals of the different types of abuses as it has done extensively in the Horizontal Cooperation and Vertical Restraints Guidelines.

10. Last, we would also invite the Commission considers also issuing guidelines for exploitative abuses. Even though exploitative abuses have traditionally not been an enforcement priority of the European Commission, in recent years the Commission has increasingly shifted its enforcement focus to exploitative abuses, including in the areas of excessive pricing (such as the Aspen case)<sup>1</sup> and the imposition of unfair trading conditions (such as the recent Apple music streaming case)<sup>2</sup>. Therefore, guidance on exploitative abuses would be helpful in terms of providing legal certainty.
11. In Part I, this submission will follow the structure of the Draft Guidelines, and will provide comments from an EU perspective on, (i) the general principles applicable to the assessment of dominance, (ii) the general principles to determine if conduct by a dominant undertaking is liable to be abusive, (iii) the principles to determine whether specific categories of conduct are liable to be abusive; and (iv) The general principles applicable to objective justifications.
12. In Part II, this submission provides an overview of the approach taken by other key jurisdictions, including the U.S., Brazil, Canada, China, Chile, Italy, Singapore, Turkey and South Africa, that provide some useful insights on the approach that these jurisdictions take on certain key aspects of the abuse of dominance enforcement, including the test for dominance, the legal standard to establish dominance, the relevance of the consumer welfare standard, the uniformity of the tests for different types of abuses, the legal standard for anticompetitive foreclosure, the as-efficient competitor test, the approach to refusals to deal and the approach to efficiency justifications. The Working Group is of the view that in an increasingly global enforcement environment, there is potentially much to be taken from a consideration of approaches in other jurisdictions both from a best practice and potential consistency point of view.

## **PART I: COMMENTS FROM AN EU COMPETITION LAW PERSPECTIVE**

### ***Single Firm Dominance***

11. The section on Single Firm Dominance is generally consistent with the analytical framework set out in the case law, as it emphasizes the importance of competitive constraints in the assessment of dominance.
12. However, the Draft Guidelines give a much more prominent role to the role of market shares that could lead to a dominant position.
13. First, while the original Guidance on Enforcement Priorities (“Guidance”)<sup>3</sup> stated that market shares merely provided a “useful first indication” of the market structure and the importance of its competitors, the Draft Guidelines re-introduce presumptions contained in older case law, according to which very large market shares are in themselves, save in exceptional circumstances, evidence of a dominant position, citing in particular to the Akzo judgment, according to which a firm with a market share of 50% or more is presumptively

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<sup>1</sup> Aspen, Case AT.40394, 16 April 2021.

<sup>2</sup> Apple – App Store Practices (music streaming), Case AT.40427, 4 March 2024.

<sup>3</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C45/02), of 24 February 2009, as amended.

dominant.<sup>4</sup> This is a significant departure from the presumption that was created in the Guidance, which focused more on competitive constraints.

14. Second, the Draft Guidelines dropped the presumption contained in the Guidance on Enforcement Priorities according to which “dominance is not likely if the undertaking’s market share is below 40% in the relevant market”. This 40% presumption reflected the Commission’s decisional practice, given that the Commission has never found a dominant position below 39.7%.<sup>5</sup> Instead, the Draft Guidelines replaced that 40% presumption with very open-ended statements that (i) “dominance can also be found in cases where an undertaking has a market share below 50%, and more significantly (ii) that a dominant position is unlikely to exist with shares of 10% or less absent exceptional circumstances.”<sup>6</sup> The latter proviso effectively places all undertakings with a market share of more than 10% in a position of uncertainty.
15. The reintroduction of the presumption contained in the Guidance that dominance is unlikely to be found with shares below 40% would maintain legal certainty for companies, while at the same time not affecting the Commission’s ability to find dominance below that threshold on a case-by-case basis, if there is clear evidence that the company in question does not face any effective competitive constraints.
16. In addition, the Draft Guidelines omit any reference to the for market power to persist for a “significant period of time”, in contrast to the existing guidance. The temporary relevance of dominance should be reflected in the definition of a dominant position in some way.
17. Lastly, footnote 34 of the Guidance states that “Specific characteristics of a market may allow more than one undertaking within the same market to be individually dominant”. The cited decisions provide no explanation as to how it is possible for more than one firm to be dominant in the same market. More guidance in this respect would be welcome.

### ***Countervailing buyer power***

18. Countervailing buyer power can be crucial in showing that a firm, despite having a high market share is not dominant. The Draft Guidelines take a more restrictive view on the scope of countervailing buyer power, by distinguishing it from general bargaining or negotiation power that would enable buyers to favourably influence the outcome of a negotiation, citing to paras 242, 243 and 257 of the Motorola Case (AT.39985). The ability to favourably influence the outcome of a negotiation, notably to lower prices or improve key trading terms, should be viewed as evidence of countervailing buyer power, as power over price or key trading terms by definition is market power (and the inability to unilaterally determine price is evidence of its absence). The Motorola precedent<sup>7</sup> that the Commission relies on is a European Commission decision dealing with the very specific context of Standard Essential Patents (“SEPs”), which is not relevant for situations outside that specific context. It is clear that generally speaking, a licensee who requires an SEP license will not have many alternatives to the SEP.

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<sup>4</sup> Compare para. 13 of the Guidance on Enforcement Priorities and para. 26 of the Draft Guidelines.

<sup>5</sup> See para. 183 of *British Airways v. Commission*, Case T-219/99.

<sup>6</sup> Para. 41 of the Draft Guidelines, citing to *Metro SB v. Commission* judgment, Case 75/84, paras 85-86.

<sup>7</sup> Commission Decision of 29 April 2014, Case AT.39985, paras. 242, 243, and 257.

### ***Collective Dominance***

19. The section on collective dominance is a good summary of the Article 102 TFEU and EU Merger Regulation case law on the issue. However, the combination of this case law is difficult to apply. While some of the older case law refers to the concept of a collective entity, more recent cases, refer to other connecting factors that are akin to the assessment of tacit collusion / coordinated effects in the merger context.
20. In practice, National Competition Authorities have used the concept of collective dominance under Article 102 TFEU to bypass the requirement to show the existence of an agreement under Article 101 TFEU. It would therefore be very useful to provide some concrete recent examples of when companies operating in oligopolistic markets could risk being found to be collectively dominant, and therefore subject to Article 102 TFEU. It is the Working Group's view that collective dominance should not emerge from the mere fact of an oligopoly market.

### **GENERAL PRINCIPLES**

21. The Draft Guidelines now require the Commission to meet a two prong test to establish abuse that: (i) the conduct departs from competition on the merits; and (ii) the conduct must be capable of producing anticompetitive effects (para. 45 of the Draft Guidelines).
22. At the outset, it is interesting to note that there is not a single reference in the entire Draft Guidelines to the consumer welfare standard. Even the recent definition of anticompetitive foreclosure contained in the 2023 update of the Guidance takes into account consumer welfare. In para. 19 of the updated *Guidance on Enforcement Priorities*, anticompetitive foreclosure is defined as a situation where “the conduct of the dominant undertaking adversely impacts an effective competitive market structure, thus allowing the dominant undertaking to negatively influence, to its own advantage and *to the detriment of consumers*, the various parameters of competition, such as price, production, innovation variety or quality of goods or services.” [emphasis added] In addition, the recent *Google Shopping* judgment of the Court of Justice confirmed that the purpose of Article 102 TFEU is to prevent competition from being restricted “to the detriment of the public interest, individual undertakings and consumers”, which restricts competition on the merits, and is thus likely to “*cause direct harm to consumers or causes them harm indirectly by hindering or distorting that competition*”.<sup>8</sup>
23. The consumer welfare standard remains the key parameter for abuse of dominance enforcement in certain key jurisdictions that we discuss in Part II, including the U.S., Brazil, and Canada, and Turkey, while some there are some jurisdictions such as Chile, China, Singapore and South Africa which do not explicitly include a consumer welfare standard in their abuse of dominance enforcement.

### ***Conduct Departing from Competition on the Merits***

24. The Draft Guidelines make clear in paras 53-54 that it will not be necessary to establish that the conduct departs from competition on the merits for (i) abuses for which a specific legal test has been developed by the EU Courts (exclusive dealing, tying and bundling,

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<sup>8</sup> See *Google v. Commission*, Case C-48/22 P, para. 87.

refusal to supply, predatory pricing, and margin squeeze); and (ii) naked restrictions, that is restriction that have no economic rationale other than restricting competition. This bifurcated approach creates an additional layer of complexity and inconsistency, and it is not clear from the recent case law of the EU Courts that this criterion (i.e., departure from competition on the merits) is not required for the abuses for which a specific legal test has been developed.

25. Under the Draft Guidelines a key factor for assessing whether the conduct departs from competition on the merits, is whether the conduct “*violates rules in other areas of law and thereby affects price, quality, innovation or other relevant parameters for competition*”. In the *Meta Platforms*<sup>9</sup> case cited in footnote 122, the Court of Justice held that (i) a competition authority should assess whether a conduct departs from competition on the merits and restricts competition on the basis of “*all the specific circumstances of the case*”;<sup>10</sup> and (ii) that in that particular case, personal data and the ability to process such data was a “significant” parameter of competition between undertakings.<sup>11</sup> The Working Group therefore recommends that in order to be fully compliant with the *Meta Platforms* judgment: (i) para. 55 explicitly refers to “all” the specific circumstances of the case in making the assessment of whether a particular conduct departs from competition on the merits; and (ii) para. 55(c) be amended to state that the violation of other areas of law will be a factor only if that other area of law is a “significant” as opposed to “relevant” parameter of competition in the relevant market. These adjustments are important not only to ensure compliance with the judgment but also to reduce the risk that the mere fact that a company is found in breach of another type of regulation, would automatically lead to a presumption that its conduct departed from competition on the merits.
26. Last, while the Draft Guidelines acknowledge that price-cost tests are required to assess whether certain pricing practices depart from competition on the merits, the Draft Guidelines state that price-costs tests are “generally inappropriate” for non-pricing practices (Draft Guidelines, para. 56). The statement that price-costs tests are generally inappropriate for non-pricing practices appears to be inconsistent with the *Unilever Italia Mkt Operations* judgment, which is in fact quoted in para. 128. In fact that judgment held the opposite, i.e. that a price cost-test might prove useful even for non-pricing practices, particularly when the effects of the practice in question can be quantified (see *Unilever Italia Mkt Operations*, C-680/20, para. 57).

### ***Capability to produce exclusionary effects***

27. At the outset, the Working Group finds that the switch of the evidentiary standard from anticompetitive-foreclosure leading to consumer harm as set out in the Guidance to “capability to produce exclusionary effects” amounts to a significant lowering of the evidentiary burden for Article 102 TFEU enforcement and a worrying departure from an effects-based approach.
28. The extensive use of presumptions and the lack of reference to consumer welfare (para. 60(b)): The use of novel presumptions to establish capability to produce exclusionary effects for certain types of conduct, including (i) exclusive supply or purchasing agreements; (ii) exclusivity rebates; (iii) predation; (iv) margin squeeze in the presence of

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<sup>9</sup> *Meta Platforms and Others*, C-252/21, at paras 47 and 51.

<sup>10</sup> *Meta Platforms and Others*, C-252/21, at para. 47.

<sup>11</sup> *Meta Platforms and Others*, C-252/21, at para. 51.

negative spreads; and (iv) certain forms of tying, signals a radical departure from the effects-based approach that would require some evidence of anticompetitive foreclosure of customers or competitors, and focus more on the preservation of the competitive position of competitors. Indeed, as stated earlier, there is not a single reference to consumer welfare in the Draft Guidelines, even though it was a key element in the definition of anti-competitive foreclosure in the Guidance.

29. Moreover, the introduction of such presumptions goes against established EU case law which requires the Commission to analyse “all of the relevant factual circumstances” surrounding the conduct in question.<sup>12</sup>
30. Such presumptions should be limited to naked restrictions such as those identified in the Draft Guidelines, including: (i) payments by dominant companies to customers to postpone or cancel the launch of competing products; (ii) the swapping of competing products with the dominant company’s product under the threat of withdrawal of discounts; and (iii) the active dismantling of infrastructure used by a competitor (para. 60(c)). See also our comments below under “Objective Justifications.”
31. The standard of proof to show capability to produce exclusionary effects. Even for conduct that does not fall under any of the presumptions or naked restrictions, the Draft Guidelines only identify part of the standard of proof that the Commission must meet to prove capability to produce exclusionary effects. Para. 60(a) relies on the *Unilever Italia Mkt Operations* judgment to state that the Commission is only required to rely on “*specific, tangible points of analysis and evidence*,” citing to para. 41-42 of that judgment. However, para. 42 of the *Unilever Italia Mkt Operations* judgment clearly states that the demonstration of the capacity to exclude must be based on “*tangible evidence which establishes beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice*.” It would be more consistent with the case law if the Draft Guidelines clearly state that the existence of doubt must benefit the undertaking that engages in such a practice, in line with settled case law.
32. The lack of need to show actual exclusionary effects and the counterfactual requirement. Moreover, the statements in paras 71-72 of the Draft Guidelines that the Commission is not required to show actual exclusionary effects, consumer harm or actual influence of competitive parameters seems to contradict the requirement on the Commission to carry out a counterfactual assessment, which would consist with comparing the situation before and after the conduct (see paras 66-67 of the Draft Guidelines). Although the Working Group appreciates that in some circumstances a prospective approach must be taken, where conduct has been ongoing there is evidence available of actual effects, these should be considered and it should not be open to the Commission to side-step such evidence in favour of a wholly theoretical approach.
33. The extent of the allegedly abusive conduct. In connection with market coverage, the statement in para. 70(d) that even conduct affecting a small share of total sales in the relevant market can be capable of having exclusionary effects, for instance where the customers of the market segment targeted by the conduct are of strategic importance, appears contradictory with the *Commission v. Intel* judgment, which reiterated that market coverage is an essential condition that the Commission must take into account in assessing

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<sup>12</sup> See *Unilever Italia Mkt. Operations* srl, Case C-680/20, para. 40.

whether a potentially abusive practice (in that case exclusivity rebates) were capable of having anticompetitive effects.<sup>13</sup>

34. No de minimis threshold. The Draft Guidelines state that there is no de minimis threshold for the purposes of determining whether a conduct infringes Article 102 TFEU, and that “any actual or potential exclusionary effect of a conduct that departs from competition on the merits will constitute a further weakening of competition, and as such will be captured by Article 102 TFEU.” The Draft Guidelines further state that once an actual or potential effect has been established, there is no need to prove that it is of a serious or appreciable nature. The Working Group submits that in line with the *Commission v. Intel* judgement, the “no de minimis” approach should be reserved to naked restrictions, as for all other types of abuse the *Commission v. Intel* judgment has reaffirmed the need to establish sufficient market coverage of the practice in question as discussed in para 32 above.<sup>14</sup>
35. In addition, it would be helpful if this “no de minimis threshold” section could cross refer to the section on objective justification or efficiencies, otherwise, this would be an apparent contradiction with the possibility for the dominant company to put forward the objective necessity of efficiency defences that are discussed at the end of the Draft Guidelines.

## CONDUCT SUBJECT TO SPECIFIC LEGAL TESTS

### *Exclusive Dealing*

36. Exclusive dealing includes all practices that lead to exclusive supply or purchase obligations vis-à-vis a dominant company either contractually or through rebates. The Draft Guidelines take the position that exclusive dealing is presumed to be capable of having exclusionary effects, which means that the Commission is not required to carry out an effects analysis. This approach is inconsistent with the *Commission v. Intel* judgment of 24 October 2024 (Case C-240/22 P), which sets out the following principles:
37. First, conduct affecting a small share of the market is unlikely to be found to have exclusionary effects, as the Commission is clearly required to take into account market coverage in its assessment in line with para. 130 of the *Commission v. Intel* judgment (Case C-240/22 P), that makes clear that “the share of the market covered by the contested duration are among the factors that the Commission must assess” . This appears inconsistent with para. 83(b) of the Draft Guidance, which states that “even conduct affecting a small share of the market can be capable of having exclusionary effects, in particular where the customers or the market segment targeted by the conduct have strategic importance for entry of expansion.”
38. In addition, it should be noted that para. 696 of the Android General Court judgment, which the Draft Guidelines cite in support of para. 83(b), is a judgment under appeal, and states that the foreclosure of an insignificant part of the market would only be problematic if that segment was of such strategic importance that it would lead to the foreclosure of the rivals for the relevant markets.
39. Second, if the undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission is required to take into account all the factors set out

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<sup>13</sup> See para. 180 of *Commission v. Intel*, Case C-240/22 P.

<sup>14</sup> See para. 180 of *Commission v. Intel*, Case C-240/22 P.

in para. 139 of the *Intel v. Commission* judgment. That was clearly reaffirmed in the *Commission v. Intel* judgment of 24 October 2024, which states that in such a scenario, the Commission is required to analyse not only factors such as the extent of the dominant position, the market coverage, the conditions, duration and amount of such rebates, “*but also the existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking.*” (para. 180). This does not appear fully consistent with the statement in para. 83(d) of the Draft Guidelines, which state that “the existence of a possible exclusionary strategy is not legally required to establish the conduct’s capability to produce exclusionary effects.”

40. Third, the Draft Guidelines remain silent on the use of the as-efficient-competitor (“AEC”) test. However, the *Commission v. Intel* judgment makes clear that the foreclosure capability of rebates “*must be assessed, as a general rule*” using the AEC test. The Court of Justice notes that even though the AEC test is “merely one of the ways” for assessing whether an undertaking’s conduct falls within “normal competition” or competition on the merits, this test must be used by the Commission to establish whether the conduct in question comes within competition on the merits (*Commission v. Intel*, para. 181). In light of para. 181 of the *Commission v. Intel* judgment, the Draft Guidelines should introduce an explicit reference to the need to carry out an AEC test at least for rebates.

### ***Tying and Bundling***

41. There are two areas where the section on Tying and Bundling could provide more clarity.
42. First, para. 94(d) refers to the degree of consumer inertia or bias in the tied market as a “plus” factor for the assessment of exclusionary effects. It would be helpful to provide some additional guidance on what type of evidence the Commission will rely upon to assess “consumer inertia” or “bias”, including concrete examples of consumer inertia that the Commission used in practice, as these are concepts that are hard to quantify in practice.
43. Second, para. 95 states that “*in certain circumstances, it may be possible to conclude that due to the specific characteristics of the markets and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed.*”
44. As stated earlier, presumptions are exceptions to the general rule that the Commission should take into account all of the relevant circumstances.<sup>15</sup> But setting aside the question of whether the use of presumptions in this context is justified, the Guidelines should at a minimum provide more clear guidance on when exclusionary effects will be presumed in the context of tying, and the factors that the Commission will rely upon. The notion “certain circumstances” and “specific characteristics of [...] markets” should be taken into account runs contrary to the working of a presumption.
45. In addition, the Hilti and Tetra Pack case law cited in footnote 233 reflect very old case law from the early 1990s and reflects a more formalistic approach that is no longer followed cases such as Microsoft, where the Commission correctly carried out a more extensive effects analysis of the potential of the tying practice to foreclose competition.<sup>16</sup>

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<sup>15</sup> See Unilever Italia Mkt. Operations srl, Case C-680/20, para. 40.

<sup>16</sup> Microsoft v. Commission, T-201/04, paras 1035-1036.

## ***Refusal to Supply***

46. First, generally speaking the EC approach on imposing a duty to deal appears much more expansive compared to other jurisdictions, and notably the U.S.A. In particular, the limitation of the conditions of refusal to deal to only direct refusals to supply, and the exclusion of constructive refusals or access restrictions from the legal test applicable to refusals to deal, while consistent with recent case law in the context of margin squeeze,<sup>17</sup> expands the duty on companies to share their property with third parties.
47. Given the adverse effects that such an expansion of the duty to deal could represent on incentives to innovate, as the Draft Guidelines acknowledge in para. 97, that access restrictions, which in principle are less restrictive than outright refusals to deal, should not be subject to a stricter legal standard.
48. In addition, it would be helpful if the Draft Guidelines could clarify the circumstances in which the “essential facilities” doctrine would apply. The section on Refusal to Supply does not even refer to this doctrine, even though it cites to case law where this doctrine has been recognized as a specific type of abuse in connection with refusals to supply.<sup>18</sup> Other jurisdictions like the U.S., China and Singapore recognize the essential facilities doctrine.
49. Second, in para. 99, it would be helpful to clarify more clearly as a condition (c) that the absence of an objective justification is a third cumulative condition for finding a refusal to supply abusive, in line with the case law. Currently footnote 241 states that the refusal must not be objectively justified, but inserting this in a footnote might give the impression that this condition is less relevant. It would also be helpful to provide concrete examples of what the Commission has considered in the past as an objective justification.

## ***Predatory Pricing***

50. Predatory pricing is one area where traditionally the EC has taken a different approach from other jurisdictions that require recoupment of the losses such as the U.S.A. The Working Group fully appreciates that this is the established case law of the EU Courts.
51. Given the centrality of the price-cost test, it would be helpful if the Guidelines could provide more clarity of when Average Avoidable Costs v. Average Variable Costs would be the relevant benchmark. Given that, as para. 115 acknowledges, AAC may also include fixed costs that can be avoided, including costs that become sunk once incurred, this could make a significant difference for companies seeking to self-assess whether they are compliant with the guidelines based on the price-cost test.
52. The Working Group welcomes the reference in para. 112 that if the dominant undertaking submits evidence that the conduct in question is not capable of producing exclusionary effects, the Commission will assess that evidence. Nevertheless, it would be helpful if the

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<sup>17</sup> TeliaSonera Sverige, C-52/09, where, in the context of a margin squeeze case, the Court of Justice held that the Bronner conditions for refusal to supply did not apply for margin squeeze cases.

<sup>18</sup> Google v Commission, Case T-612/17, at para. 224.

Guidelines could provide more guidance of the parameters of such assessment, in line with the *Intel* and *Unilever* case law cited in footnote 268.

### ***Margin Squeeze***

53. The Draft Guidelines could provide some more guidance on when a margin squeeze will be viewed as capable of producing exclusionary effects. Para. 127 currently states that the capability to produce exclusionary effects is more likely if the upstream input is more important, but more clarity in that respect, for example in terms of the degree of importance, market coverage or other factors would be most helpful.

## **CONDUCTS WITH NO SPECIFIC LEGAL TEST**

### ***Conditional rebates with no exclusivity requirements***

54. The guidance on the possible application of a price-cost test to conditional rebates is very useful, but the Working Group would recommend a worked, numerical example that would illustrate the practical application of the test. In addition, it would be good to clarify why the Draft Guidelines state in para. 150 that the effective price per contestable unit is the normal (list) per unit minus the total value of the rebate the customer loses if it were to switch to a competitor, and not the average sales price as was the case in the *Intel* case.<sup>19</sup>
55. Multi-product rebates. Given the wide-spread use of multi-product rebates by companies, it would be very valuable if the Draft Guidelines could provide some more concrete guidance on the application of the price-cost test to multi-product rebates, beyond the summary explanation of footnote 329, which merely states where a price-cost test is done for multi-product rebates, it consists in comparing “*the incremental price that customers pay for each of the dominant undertaking’s products in the bundle and the cost incurred by the dominant undertaking for including that product in the bundle.*” It would be helpful in that connection if the Draft Guidelines could provide concrete guidance on how the contestable share and the effective price per contestable unit should be calculated to ensure compliance with Article 102 TFEU.

### ***Self-Preferencing***

56. The section on self-preferencing relies heavily on the *Google Shopping* judgment, but the definition of self-preferencing does not correspond to *Google Shopping*.
57. The Draft Guidelines define self-preferencing very broadly, as any preferential treatment by the dominant undertaking to its own products compared to those of its downstream competitors, mainly by means of non-pricing behaviour.
58. The *Google Shopping* case, upon which the self-preferencing section of the Draft Guidelines heavily relies upon, did not only consist of self-preferencing – the more favourable positioning of Google’s own specialized results in its general search results pages compared to competing services - but also the simultaneous demotion of competing comparison shopping sites.<sup>20</sup> In fact the Court of Justice made clear that the proper counterfactual assessment should have taken into account both practices at issue – the discrimination in favour of Google’s own comparison shopping service and the decrease in

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<sup>19</sup> See *Intel v. Commission*, Case T-286/09 RENV at para. 155.

<sup>20</sup> See *Google and Alphabet v. Commission (Google Shopping)* Case C-48/22 P, para. 171 and para. 187.

traffic of competing comparison shopping sites, given that the discrimination in favour of Google's own comparison shopping service by itself (self-preferencing) by itself would not raise any competition issues.<sup>21</sup>

59. Based on the above, the Working Group recommends that self-preferencing should be defined as the granting of preferential treatment to a dominant company's own products/services and the demotion of competing products/services that depend on the dominant company's upstream product/services to remain effective competitors.
60. Otherwise, a very extreme application of the Draft Guidelines to self-preferencing could lead to significant compliance issues and legal uncertainty to many companies that are vertically integrated. In that connection, it would be very helpful if the Draft Guidelines could provide some examples of self-preferencing that would not raise any competition issues under Article 102 TFEU.

### *Access restrictions*

61. Even though the distinction between access restrictions and refusals to supply is based on the existing case law, it makes little economic sense to grant a more lenient treatment to outright refusals to supply for facilities compared to access restrictions.
62. In practice, this distinction is likely to discourage companies from developing platforms or facilities in the EU, and/or discourage them from sharing them with third parties. This might also encourage them to outright refuse to supply, as the legal standard for liability is much stricter for outright refusals.
63. In addition, in several jurisdictions, including the U.S.A. and South Africa, there is no distinction between (i) refusals to supply to facilities developed exclusively for the dominant company's own use and (ii) refusals to supply to facilities not developed for the dominant company's own use or access restrictions. This approach as well might discourage investment in facilities for the purposes of sharing them with third parties.
64. In that regard, the statement in para. 166(d) that an example of an access restriction is where a dominant undertaking develops an input for the declared purpose of sharing it widely with third parties but later does not provide access or restricts access to that output raises at least two questions:
  - (a) First, if the dominant undertaking explicitly refuses to provide access, then this necessarily should be refusal to supply, subject to the refusal to supply criteria. This should be clearly stated, as it appears to be inconsistent with the refusal to supply section.
  - (b) Second, if the dominant undertaking will be liable if it restricts access to the input subsequently, this will deter dominant undertakings from contemplating investing in such an input in the first place, and opt for closed systems. The rationale that the dominant undertaking already has made the business and investment decision to share the input from the outset with third parties does not take into account the impact that such an approach would have on the dominant

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<sup>21</sup> See *Google and Alphabet v. Commission (Google Shopping)* Case C-48/22 P, para 246.

company's initial decision whether to proceed with such an investment in the first place.

## OBJECTIVE JUSTIFICATIONS

65. The Draft Guidelines state that to be objectively justified a conduct liable to infringe Article 102 TFEU must be either (i) objectively necessary (objective necessity defence); or (ii) product efficiencies that counterbalance or outweigh the negative effect of the conduct in question (efficiency defence).
66. At the outset, the section on objective justifications reserves a very stringent standard of proof for the use of objective justifications by dominant companies. Even for conduct for which the Commission is required to show exclusionary effects, the Draft Guidelines only require the Commission to demonstrate “specific, tangible points of analysis and evidence” under para. 60(a). In contrast, dominant undertakings are required to provide a “cogent and consistent body of evidence” to substantiate an objective justification under para. 171 of the Draft Guidelines. This appears to be a higher burden of proof compared to what is required under the *Superleague* case law, which relates to 101(3) exemptions, pursuant to which the undertaking is only required to provide “convincing arguments and evidence”.<sup>22</sup>
67. To demonstrate exclusionary effects, the Guidelines only require the EC to present “specific, tangible points of analysis and evidence”. By contrast, dominant undertakings are required to provide a “cogent and consistent body of evidence” to substantiate an objective justification (para. 171). Para. 205 of the *Superleague* case seem to use a less stringent standard for dominant undertakings, only demanding “convincing arguments and evidence”.
68. The guidance on objective necessity is welcome. While it is established case law that it is not the dominant undertaking's task to take steps on its own initiative to eliminate products that it regards as dangerous or of an inferior quality, it would be helpful if the Draft Guidelines could provide some more guidance on the evidence needed to justify conduct on the basis of (i) sustainability objectives or obligations; (ii) situations where a particular company is required by law to remove some products or services from its platform or its distribution system; and (iii) public interest considerations, including in particular conduct that would reduce dependencies and disruptions in the supply chains.<sup>23</sup>
69. The discussion on the efficiency defence is generally consistent, albeit less detailed, than the Guidance. A particular challenge that defendant companies might face is the ability to quantify the possible efficiencies, particularly when the abusive conduct in question has not produced actual anticompetitive effects, but is merely “capable” of producing anticompetitive effects. Any further guidance that the Draft Guidelines could provide in terms of quantification of the possible efficiencies, as well as the

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<sup>22</sup> *European Superleague Company*, C-333/21, para. 205.

<sup>23</sup> Footnote 355 of the Draft Guidelines.

degree in which qualitative (as opposed to quantitative) evidence of efficiencies would be acceptable, would be most valuable.

70. Additional guidance would be welcome as regards the standard of proof and the evidence that would be required to justify (i) conduct that is presumed to lead to exclusionary effects under para. 60(b); and naked restrictions under para. 60(c). The Working Group submits that it would not be appropriate to place naked restrictions in the same category as conduct that is presumed to lead to exclusionary effects under para. 60(b), as many of these types of conduct for which exclusionary effects are presumed – such as exclusive supply or purchasing agreements, rebates conditional on exclusivity, predatory pricing and tying - could have legitimate pro-competitive justifications that outweigh the competitive harm. The reference to “due weight” being given to these two very different types of conduct – naked restrictions v. presumptively exclusionary conduct - in the balancing exercise create legal uncertainty, and could suggest that the Commission will take a very restrictive approach on objective justifications not only for naked restrictions, but also for the novel presumptions in 60(b), which involve conduct that could have pro-competitive justifications.
71. This section could also usefully include a reference to the State compulsion defence, which also effectively amounts to an objective justification for conduct that may otherwise be abusive. *See*, in particular Case T-136/19, *Bulgarian Energy Holding*, paras 548, 572 and 616). That same judgment should also be cited as an example of circumstances in which conduct was justified as proportionate to protect the dominant company's legitimate commercial interests (paras 547, 616 and 625).

## PART II: COMPARATIVE APPROACH TAKEN IN OTHER KEY JURISDICTIONS

69. The Working Group provides below an overview of the approach taken in relation to abuse of dominance / monopolization in other key jurisdictions. We provide a summary overview of the key features below.

### UNITED STATES

70. Cases handled per year on average: The FTC and the DoJ typically handle 1-2 cases per year.
71. Focus on specific sectors/practices: There is a heavy focus on tech platforms and healthcare. Recently the DoJ started bringing criminal monopolization cases, but these are limited to bid rigging allegations.
72. Selected recent cases / track record. No losses or cases overturned on appeal recently, but several cases are still pending, including:
- (a) Broadcom (FTC): Filed in 2021, settled in November 2021. Broadcom entered into a consent decree prohibiting the company from entering into certain types of exclusivity or loyalty agreements with its customers for the supply of chips for traditional broadcast set top boxes and DSL and fiber broadband internet devices. Broadcom required to stop conditioning access to or requiring favorable supply terms for these chips on customers committing to exclusivity or loyalty for the supply of related chips. Broadcom also prohibited from retaliating against customers for doing business with Broadcom's competitors.
  - (b) Surescripts (Federal Trade Commission): Filed in 2019, settled in 2023. Company provides e-prescribing and prescription routing services. Surescripts entered into a consent decree prohibiting the company from engaging in exclusionary conduct and executing or enforcing non-compete agreements with current and former employees.
  - (c) Google (DOJ): Filed in 2020, went to trial in 2024. DOJ won at the District court level. The court is still considering what remedies to impose. Google plans to appeal the case and those appeals will likely take Years and go up to the Supreme Court.

### Brief overview of legal regime:

73. Test for dominance: A company must possess monopoly power (i.e., the ability to raise prices or exclude competition) in a relevant market and be shown to have wilfully acquired or maintained that power through exclusionary conduct.
74. Collective dominance: Some courts have allowed these types of claims, but most courts have rejected it. The agencies have not brought a collective dominance claim in recent memory.
75. Relevant legal standard to establish abuse of dominance: Civil monopolization cases must be proven by a "preponderance of the evidence". Criminal monopolization charges must be proven beyond a reasonable doubt.

76. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). They are not expressly considered as part of the legal standard for these cases.
77. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? All monopolization cases are subject to the rule of reason standard (i.e., effects-based).
78. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): Consumer welfare standard
79. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? Once the agency establishes that the defendant possesses market power and wilfully acquired or maintained that power through exclusionary conduct, the burden shifts to the defendant to establish a procompetitive business justification for its conduct, and that the procompetitive effects outweigh the competitive harm.
80. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Not under the monopolization statute.
81. Is your authority required to take into account all relevant evidence when reaching an infringement decision? Yes
82. If relevant, please describe the approach to "anti-competitive foreclosure" Usually this is a heavily litigated portion of a Section 2 case—the degree to which exclusionary conduct actually forecloses the ability of competitors to effectively compete or the ability of customers to choose products from other competitors. Typically conduct would have to foreclose 30-40% of the market to provide the basis for a monopolization claim.
83. What role does the "as efficient competitor" test play? Courts consider whether a competitor could have competed more effectively on price absent an exclusive dealing arrangement (or other exclusionary conduct) imposed by a monopolist.
84. What is the approach to refusals to deal or unfair access conditions? Generally companies, including monopolists, have no duty to deal with competitors. There are narrow exceptions that courts have recognized. For example, if the monopolist has previously voluntarily engaged in a profitable course of dealing and the refusal involves the monopolist foregoing short term profits. The essential facilities doctrine has been recognized by some courts, but is rarely applied and viewed sceptically by many courts.
85. What is the approach to efficiency or other justifications? Typically procompetitive justifications consist of a legitimate business goal that enhances consumer welfare (e.g., preventing free riding, improving/innovating on a product, incentivizing distributors, etc.). A defendant needs to not only establish the existence of legitimate business goals, but also that the procompetitive effects of the business goal outweigh any harm.
86. Are there any specific rules or approaches on digital markets? No.

87. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance?  
No.

## **BRAZIL**

88. The EC's forthcoming Guidelines are poised to provide CADE with greater assurance for evaluating exclusionary abuse with a considerably greater degree of nuance than that currently applied. Especially with regards to the provisions and tests for predatory pricing, margin squeeze and self-preferencing, which are either (i) novel and lacking foreseeable tests or (ii) have been neglected by CADE due to the absence of a solid and reliable legal test for ascertaining its existence. CADE's and the EC's enforcement of competition law is similar, with CADE drawing much of the EC's experience to its case law. In that context, the guidelines are a valiant effort for signalling a greater embodiment of Brazilian enforcement of exclusionary practices.
89. Cases handled per year on average: The Brazilian antitrust authority (CADE) is active in the enforcement of abuse of dominance cases. In general, Cade decides an average of three cases per year related to exclusionary abuses of dominance. In 2022, Cade ruled on two cases, in 2023, the number raised to 4 cases, and, in 2024, until October, Cade launched two more cases related to abuse of dominance.
90. Focus on specific sectors/practices: CADE has no sectoral enforcement priorities, but the wider array of its unilateral conduct experience lies with sanctioning exclusivity obligations brought to the authority's attention via complaints lodged by affected parties. Other conducts such as refusal to deal and loyalty discounts have been reviewed on occasion, but CADE is more resistant to sanctioning such conducts in the absence of clear and (preferably) pre-existent harm arising from said conducts, even though the Brazilian competition law authorizes sanctioning against infringements for which only the potentiality of harm has been demonstrated.
91. Selected recent cases / track record. In the last five years (2019 – 2023), Cade has decided 29 investigations related to abuse of dominance cases. Out of all these investigations, Cade has convicted the defendants in 13 cases, and dismissed 16 cases without conviction. The sum of the fines imposed in these convictions is around BRL 1.2 billion (approximately USD 220mm in today's exchange rate).

## Brief overview of legal regime

92. Test for dominance: Brazil's abuse of dominance enforcement structure was heavily based on Article 102 and the European Commission's decisional practice. The Brazilian Competition Law segregated infringements which would be illicit by object and by effects, with abuse of dominance cases being primarily reviewed as an illicit by effects, under a review procedure similar to the rule of reason (evaluation of dominance, materiality, incentives and effects to competition) for the finding of an infringement.
93. Collective dominance: Contrary to European Union applicable regulation, the Brazilian legislation does not expressly cover the concept of collective dominance, however, the law does not rule out the possibility of collective dominance. In the Brazilian jurisprudence, the cases most closely connected to the concept of collective dominance

are related to the imposition of mandatory table of minimum prices by associations and cooperatives.

94. Relevant legal standard to establish abuse of dominance: In Brazilian jurisdictions, in practice, the cases related to abuse of dominance fall under the competence of the administrative legislation and administrative authority. Regarding anticompetitive conducts, the only exception is cartel practices that are covered by both administrative and criminal enforcement, consequently, cartel investigations judged by criminal courts have a higher legal standard, beyond reasonable doubt, following the principle of presumption of innocence. In any case, infringements to competition will entitle harmed parties to seek compensation through civil suits, provided that claimants are able to demonstrate (i) the illicit – which is satisfied by CADE's decision in follow-on claims, (ii) the harm suffered and (iii) the causal link between the infringement and the harm.
95. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). Beyond consumer welfare, the Brazilian System for Protection of Competition is guided by the constitutional principles of free competition, free enterprise, social role of property, and prevention of the abuse of economic power. There is no distinction of which principle would be preferably considered by the Authority, however, in its case law, the Brazilian antitrust authority hardly strays from the consumer welfare standard.
96. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? Traditionally, the Brazilian jurisprudence tends to apply three different standards for different types of abuses, which is: (i) per-se infringements; (ii) by object infringements; and (iii) effects-based infringements. On the per-se infringements, the authority presumes that a particular conduct is already unlawful and economically harmful, such as is the case of hardcore cartels. For these conducts, there is an inversion on the burden of proof, in which, the authority must prove only the authorship and materiality of the conduct. On by object infringements, there is only a presumption of the illegality of a particular conduct, that is, the unlawfulness of the act by itself, and not the presumption of economic damage, such as is the case of setting minimum resale prices and price fixing. For these conducts there is also an inversion on the burden of proof towards the defendant. Finally, regarding the effects-based infringements, the conduct in question is presumably licit, and the burden of proof befalls the competition authority (and the claimant) as to authorship, materiality and potentiality of negative effects to competition. Exclusionary abuses are strictly reviewed under standard (iii) effects based.
97. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): Harm to competition under the consumer welfare standard. Other factors may come into play as ancillary concepts for specific conducts.
98. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? The legal test is potentiality of effects, but CADE has hardly sanctioned recent abuse of dominance cases exclusively based on potentiality. Some element of actual effects harm has been required to support convictions on such cases, either by way of

an overwhelming demonstration of materiality or actual demonstration of harm. That said, CADE stimulates the parties to settle and (in several instances) do not make the accused party to confess, so the potential effects may come into play to justify the signature of the settlement agreement.

99. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? The Brazilian legislation exemplifies some conducts that will amount to infringements to competition, but the materiality of an infringement will be defined by whether the conduct is intended or able to produce one of the following effects, regardless of by which means: (i) to limit, restrain or in any way injure free competition or free enterprise; (ii) to control the relevant market of goods or services – except is as a result of merit-based competition; (iii) to arbitrarily increase profits; and (iv) to exercise a dominant position abusively.
100. Is your authority required to take into account all relevant evidence when reaching an infringement decision? By general Brazilian procedural rules, yes. But CADE, as an administrative body subject to mitigated procedural formality under Brazilian Law, is entitled to considerable discretion in evaluating evidence and the burden (or lack thereof) of providing a reasoned decision as to why certain evidence has or has not been considered relevant for its decision.
101. If relevant, please describe the approach to "anti-competitive foreclosure" There is no overarching distinct approach to anti-competitive foreclosure carried out by CADE that would be distinct from the structure laid out above. An evaluation of foreclosure would be subsumed by the review of incentives and effects, with reference to the response to item '4' of this questionnaire. Regardless of evidence of an actual foreclosure, the structure of incentives and economic rationality behind said foreclosure is paramount before CADE's evaluation of whether said conduct should be convicted.
102. What role does the "as efficient competitor" test play? An ancillary economical tool to evaluate whether the exclusionary conduct under review represents an abuse of dominance or would be a regular exercise of autonomy by the defendant. The AEC test is scarcely mentioned throughout CADE's case law, but when it is mentioned, it serves as a reference to determine whether the defendant holds any special advantages over its competitors that would enable, warrant, justify or hinder the legality of the conduct under review.
103. What is the approach to refusals to deal or unfair access conditions? The same as highlighted above, with CADE having timidly reviewed both conducts throughout its case law. The only more recent examples pertain to unfair access conditions (a recent conviction was handed down in an underground airport fuel pool access case), which underscores the relevance of an essential facility subject to the refusal/unfair access to warrant enforcement by CADE.
104. What is the approach to efficiency or other justifications? Specifically for exclusionary conducts, quite relevant. As all conducts reviewed by effects must go through a test of economic rationality, the existence of justifications and/or efficiencies arising from the conduct is paramount in determining its legality, especially if it comes to an evaluation of net effects to competition (a quasi-balancing test to determine the legality of the conduct following positive findings of dominance, materiality and absence of an economic rationale).

105. Are there any specific rules or approaches on digital markets? No, it is handled with the same parameters as any other case.
106. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance? No, but there is a working group in place for its drafting. No doubt that the EC Guidance and Guidelines will be taken into consideration.

## CANADA

107. Canada's competition law framework is going through a period of change. As mentioned above, Parliament recently approved amendments to the Act which allow for a prohibition order to be issued under section 79 if either an anti-competitive intent or anti-competitive effect can be demonstrated. This is a marked departure from the rule of reason framework which has long applied to reviewable conduct. The Draft 102 Guidance suggests a similar approach.
108. Cases handled per year on average: Canada's antitrust authority, the Competition Bureau (the "Bureau"), is active in the enforcement of abuse of dominance cases under section 79 of the Competition Act (the "Act"). However, most abuse of dominance cases do not proceed to trial and are, instead, resolved through a consent agreement. Further, the duration of abuse of dominance investigations can take years. There are approximately one to two registered consent agreements per year involving abuse of dominance (and Canada has had two abuse of dominance trials over the past decade). With recent amendments to Canada's abuse of dominance test, including new private rights of action, we are expecting more enforcement.
109. Focus on specific sectors/practices: The Bureau has no sectoral enforcement priorities and its investigations and litigation are usually dispersed across sectors. For example, the Bureau is currently investigating online advertising practices in the big tech context and recently entered into consent agreements involving exclusionary contract terms and practices in the health, real estate and travel sectors. The Bureau also investigated alleged refusal to deal and exclusionary practices in the agricultural sector and engaged in a contested trial involving airport in-flight catering services.
110. Selected recent cases / track record. The Bureau's record with respect to contested litigation has been mixed. The Bureau was successful in a contested trial involving alleged exclusionary practices in the real estate sector and unsuccessful in a contested trial involving airport in-flight catering services. Consent agreements in Canada are more common, including the payment of administrative monetary penalties.

## Brief overview of legal regime:

111. Test for dominance: By way of context, before very recent amendments in Canada, it was necessary to establish each of the following three elements to obtain a remedy under the abuse of dominance provisions:
  - (a) Dominance: One or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof.

- (b) Practice of Anti-Competitive Acts: That person or those persons must have engaged in or be engaging in a practice of anti-competitive acts. An anti-competitive act relates to the “intent” or reasonably foreseeable effects of an action and is often referred to as the “anti-competitive intent” element of abuse of dominance.
- (c) Anti-Competitive Effects: The practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a relevant market.

The amendments introduced the following new framework, which applies a different test depending on the remedy being sought:

- (d) Prohibition Order Remedy (i.e., stopping the impugned conduct): In order for a prohibition order to be imposed, it must be established that a firm (either on its own or jointly with another firm) is dominant in a market and has engaged in or is engaging in either (1) a practice of anti-competitive acts, or (2) conduct (that is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. In other words, in this context, the abuse of dominance provisions require either anti-competitive intent or anti-competitive effects.
  - (e) Financial and Other Remedies: In order for any other remedies to be imposed, such as administratively monetary penalties, it must be established that a firm (either on its own or jointly with another firm) is dominant in a market and has engaged in or is engaging in both (1) a practice of anti-competitive acts and (2) conduct (that is not a result of superior competitive performance) that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm has a plausible competitive interest. In other words, in this context, the abuse of dominance provisions require both anti-competitive intent and anti-competitive effects.
112. Collective dominance: Yes. abuse of dominance in Canada contemplates single-firm and joint dominance. In particular, it contemplates that a group of firms may jointly substantially or completely control a market. The Bureau's analytical framework for assessing joint dominance is similar to that employed in examining single-firm dominance, and likewise focuses on the existence of a substantial degree of market power. Similar to single-firm dominance, the Bureau considers the ability of a firm or firms to exercise a substantial degree of market power, taking into account market shares, barriers to entry and expansion, and any other relevant factors.
  113. Relevant legal standard to establish abuse of dominance: Abuse of dominance in Canada is reviewable conduct adjudicated before Canada's Competition Tribunal on a civil standard. Each element of the abuse of dominance test must be demonstrated on a balance of probabilities.
  114. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). Canada applies a consumer welfare standard. However, it bears noting that the purpose provision of Canada's *Competition Act* provides, as a starting premise, that the statute

is meant to ensure that “consumers are provided with competitive prices and product choices”. The provision further states that the Act seeks to “promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy...”

115. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? No. However, and as noted above, recent amendments to Canada’s Competition Act have modified the test for obtaining either the remedy of a prohibition order (i.e., stopping the impugned conduct) or a financial remedy. Significantly, it is no longer necessary to demonstrate effects in order to demonstrate obtain a prohibition order remedy (dominance and a practice of anti-competitive acts will suffice).
116. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): Canada applies a consumer welfare standard. Harm is viewed through whether an anti-competitive act substantially lessens or prevents competition. As noted above, the abuse of dominance elements that need to be demonstrated vary depending upon the remedy sought.
117. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? The applicable standard for determining effects is that the impugned practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in one or more relevant markets.
118. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Yes, a wide range of non-exhaustive anti-competitive acts, defined as any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, are statutorily listed, namely:
  - (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;
  - (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of
  - (c) impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
  - (d) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
  - (e) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

- (f) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (g) buying up of products to prevent the erosion of existing price levels;
- (h) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (i) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;
- (j) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;
- (k) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market; and
- (l) directly or indirectly imposing excessive and unfair selling prices.

The list is non-exhaustive, and the common law interpretation of an anti-competitive act also applies. For example, restrictive conditions in contracts, exclusionary policies and procedures that causes artificial barriers to entry (e.g. narrow removal/return procedures), threatened or sham litigation as against customer to prevent switching, extensions of intellectual property to foreclose competition, denying access to information controlled by the dominant person and the acquisition of competitors.

119. Is your authority required to take into account all relevant evidence when reaching an infringement decision? Yes.
120. If relevant, please describe the approach to "anti-competitive foreclosure". When assessing foreclosure, the Bureau and/or Tribunal will consider the dominant position of the firm in the market, the anti-competitive intent behind the firm's actions, the actual or potential negative effects on competition and any business justifications for the conduct.
121. What role does the "as efficient competitor" test play? This principle/test has historically not been applied in Canada.
122. What is the approach to refusals to deal or unfair access conditions? Refusals to deal can be addressed in Canada's abuse of dominance provision or a specific refusal to deal provision. To succeed in a refusal to deal application using the refusal to deal provision, a complainant generally needs to prove the following:
  - (a) The complainant's business is substantially affected in the whole or part of their business, or they are precluded from carrying on business due to their inability to obtain adequate supplies of the product;

- (b) the supplier is a person who is engaged in business in Canada;
  - (c) The complainant is willing and able to meet the usual trade terms of the supplier or suppliers of the product;
  - (d) The product is in ample supply, and;
  - (e) The refusal to deal has had, is having, or is likely to have an adverse effect on competition in a market.
  - (f) It is important to note that in cases where a refusal to deal is coupled with other anti-competitive acts by a dominant firm in a market, the Bureau is also empowered to pursue an abuse of dominance action under section 79 of the Act. When faced with a refusal to deal scenario, the Bureau may evaluate whether it is more appropriate to pursue a refusal to deal application, an abuse of dominance case, or both, depending on the conduct in question and the competitive effects it generates.
123. What is the approach to efficiency or other justifications? While there is no formal efficiencies defence, legitimate business justifications are embedded into the abuse of dominance analysis. However, proof of the mere existence of some legitimate business purpose underlying the conduct is not sufficient. Generally, a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts.
124. Are there any specific rules or approaches on digital markets? No, at this time the Competition Bureau has not published a specific guidance on digital markets. However, Canada's Competition Act contains a list of non-exhaustive anti-competitive acts, many of which can apply specifically to digital markets. Further, when assessing whether conduct is having or is likely to have the effect of preventing or lessening competition substantially in a market, one may consider the effect of the conduct on barriers to entry in the market, including network effects.
125. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance? Yes, the Bureau published the [Abuse of Dominance Enforcement Guidelines in March 2019](#) and a [bulletin](#) earlier this year following recent legislative amendments. We expect the Guidelines to be updated in the future, as they do not comprehensively reflect the current state of the law. Although Canada's guidelines consider legitimate business justifications and efficiencies in the overall purpose assessment of anti-competitive acts, the draft Article 102 guidance provides a more structured approach to assessing these justifications, including a specific objective necessity and efficiency defense. The draft Article 102 Guidance also offer more detailed legal tests for specific types of conduct, such as tying and bundling, margin squeeze, and refusal to supply. In contrast, the Canadian guidelines provide a broader framework and hypothetical enforcement examples.

## CHILE

126. From the Chilean experience, it is relevant to highlight that the dominant position must be analyzed on a case-by-case basis and in light of the characteristics of the market in question. This is particularly important for more dynamic markets where innovation plays a significant role, as it is necessary to analyze the competitive pressure that the entry of new players into the industry can generate, while also balancing it with the risk that the analyzed behavior is precisely aimed at preventing new players from entering or raising artificial entry barriers.
127. To this end, a second suggestion is not to focus exclusively on a static definition of the relevant market but to properly weigh the elements of competitive proximity that may exist between different actors, as some actors will be closer competitors than others and therefore the competitive pressure they exert may be greater.
128. Regarding the abuse of collective dominant position, it is suggested that clear differences be established between this behavior and possible collusive agreements, in order to have legal certainty about the boundary between one behavior and the other.
129. Cases handled per year on average: Abuse of a dominant position is conduct expressly contemplated in Chilean competition law and which is subject to investigations by the National Economic Prosecutor's Office ("FNE") and trials before the Tribunal de Defensa de La Libre Competencia ("TDLC") and Supreme Court. FNE investigations usually take some years to complete and 2 to 4 years before the TDLC. In 2023, the FNE investigated fifteen abuse of dominance cases, bringing five to the TDLC, one public consultation on operation of liquid fuel storage plants and four consent agreements (FNE Report 2023). From the TDLC, 73% of the total litigation cases are related to behaviors that abuse a dominant position (TDLC Report 2024).
130. Focus on specific sectors/practices: Nor the FNE nor TDLC has sectoral enforcement priorities. FNE investigations are dispersed across sectors. In his last public report, the FNE Head Officer made mention of certain industrial sectors such as ports, payment markets, fuels and digital platforms. On the TDLC side, the most studied sectors have been telecommunications, financial, transportation and electrical market (TDLC Report 2024).
131. Selected recent cases / track record. The latest cases brought by the FNE before the TDLC have resulted in convictions, with some of them being subject to procedural appeals before the Supreme Court that have not yet been resolved; in another case, although there was a conviction in the first instance, the parties later reached a conciliatory agreement before the Supreme Court. Likewise, there have been cases where the Supreme Court has overturned the TDLC's decision.
132. Brief overview of legal regime: Article 3 of Decreto Ley 211 from 1973 ("DL 211") sets a general classification regarding anti-competitive conduct, which translates into executing or celebrating, individually or collectively, any fact, act or convention that prevents, restricts or hinders competition, or that tends to produce such acts effects.
  - (a) One of the expressions of said general conduct is the abuse of a dominant position, contemplated in letter b) of the aforementioned article 3, and which provides as anticompetitive the abusive exploitation by an economic agent, or a

group of them, of a position dominant in the market, setting purchase or sale prices, imposing a sale of another product, assigning areas or market shares or imposing similar abuses on others.

- (b) As can be seen, there is a close approximation with the way in which article 102 in the EU is structured, that is, through a statement that typifies the conduct in a general way, and which then points out some of the most common or typical behaviors and which are a reflection of the abuse of a dominant position, but without limiting it to them. The conducts expressly classified in Article 3 letter b) are practically the same as those indicated in article 102.
133. Test for dominance: The dominance test translates into an economic agent, with substantial market power, being able to act independently of other competitors, clients and suppliers, because there is no effective competitive pressure that can be exerted against it, so that it is in a position to set conditions that could not have been obtained without the existence of that high power market
134. Collective dominance: Yes. Article 3 of DL 211 provides that any anti-competitive conduct may have an individual or collective nature (*“Whoever executes or celebrates, individually or collectively, any event, act or convention that prevents, restricts or hinders free competition”*), as well as letter b) of said provision that expressly contemplates an exploitation abuse of a collective dominant position by an economic agent, or a set of them. According to recent rulings from the TDLC, the abuse of position collective dominant is considered a behavior adopted individually by several competitors in a market, none of which necessarily have dominant position alone, those who, in a scenario of interdependence strategic, now that the result of their collective action will give them the capacity and incentives to generate an anticompetitive effect as a result of abuse, such as erecting a barrier at the entrance, but without an explicit or implicit agreement, nor a concerted practice between them (Ruling No. 189 of December 2023, p. 182)
135. Relevant legal standard to establish abuse of dominance: Civil standard, being that the evaluation of abuse of dominant position is retrospective in nature based on clear and convincing or conclusive evidence.
136. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). In the Chilean case, competition defense has a marked orientation towards total efficiency in the markets, therefore, its objective is to promote an environment that is most conducive to ensuring that the benefits economic agents receive from exchange in a free-market economy are as high as possible. Certainly, this is in harmony with consumer welfare, as in an efficient economy, consumers have access to a greater supply of goods, of better quality, and at a lower cost.
137. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? No, the TDLC applies the same standard for all types of abuse which is the concurrence of two elements: one structural and the other behavioral. The first element is the position of dominance, this is, that the behavior must be carried out by an economic agent that has substantial market power and can act independently of other competitors, (as explained

on question 4.a). On the other hand, the second element implies that the dominant agent engages in abusive behavior which DL 211 refers to as "abusive exploitation" in Article 3, letter b). There have been some theoretical proposals to establish certain thresholds of presumption regarding dominance, as well as to establish some presumptions of objectivity in certain behaviors, but these have not been incorporated into the law.

138. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): The relevant test of harm, according to Article 3 of DL 211, translates into the hypothesis that any fact, act, or agreement that impedes, restricts, or hinders competition, or tends to produce such effects, will be sanctioned according to the measures established by the Law. Thus, the legally protected good is competition understood as an environment that is most conducive to ensuring that the benefits economic agents receive from exchange in a free-market economy are as high as possible.
139. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? The standard is that abusive behavior by the dominant agent, in the relevant market must produce anti-competitive effects or have the potential to do so. This standard has been applied considering an approach based on the effects that the investigated behaviors have had on the market, but not limited to the current effects on the market, also considering potential effects, as the norm contemplates the possibility of behaviors that tend to have a harmful effect on competition.
140. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Yes. Article 3 letter b) provides as anticompetitive the abusive exploitation by an economic agent, or a group of them, of a dominant position in the market, setting purchase or sale prices, imposing on the sale that of another product, assigning areas or market shares or imposing on other similar abuses.
141. Is your authority required to take into account all relevant evidence when reaching an infringement decision? Yes.
142. If relevant, please describe the approach to "anti-competitive foreclosure". When assessing foreclosure, the general approach that has been taken goes along the lines of vertical restraints, which could be considered as tools to raise barriers to entry or the expansion of current or potential competitors, affecting the competitive structure of the markets and, through this, consumers. Various elements have been considered such as the extent of the restrictions, the customers affected by them, and their duration.
143. What role does the "as efficient competitor" test play? This test has not been applied in Chile.
144. What is the approach to refusals to deal or unfair access conditions? The approach of the TDLC in this matter has been to consider it as a practical of abuse of dominant position due to refusal to sell associated with the existence of an indispensable or essential asset to operate in the market (essential input). The application of this conduct, in addition to having to prove the structural and behavioral element, adds the element that it is an essential input (Ruling No. 189-2023, p. 203).

145. What is the approach to efficiency or other justifications? Both the FNE and the TDLC are open to assessing possible efficiencies presented by the parties as a justification for the conduct under review, an analysis that usually requires the concurrence of three requirements for the efficiencies to be understood as a counterbalance to the detected risks:
- (a) First, it will be necessary to establish whether the alleged efficiencies are genuine. They are considered genuine when there is evidence that they are suitable to solve a specific competition problem.
  - (b) Second, once it is established that the efficiencies are genuine, the agencies will conduct a qualitative examination to determine whether these efficiencies effectively counterbalance the anticompetitive risks and/or effects generated by the restriction.
  - (c) The third stage of analysis consists of studying how indispensable the adopted restriction is. This involves verifying whether there are realistic and less restrictive alternatives to competition that do not entail a significant loss of the efficiencies generated by the utilized restriction.
146. Are there any specific rules or approaches on digital markets? There are no specific rules in DL 211. The general approach from the TDLC is that digital markets usually consist of two-sided markets, this is, markets in which there are demand sides or groups of consumers who value the product or service only if it is consumed jointly by both types of consumers. In other words, both groups are interdependent in that the decisions of each group affect the other. This generates an externality of one group over the other – an indirect network externality – whose internalization must be coordinated by an intermediary capable of facilitating the transaction between both sides of the market.
147. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance? FNE does have published a general guidance on vertical restrictions ([Guía-Restricciones-Verticales.pdf \(fne.gob.cl\)](#)). However, these guidelines do not target specific elements of anti-competitive foreclosure but rather a list of certain behaviors such as minimum resale price maintenance, exclusive territories, exclusive or selective distribution, most-favored-customer clause, exclusivity contracts, bundling or tying sales, among others, establishing the general characteristics of the analytical framework but without going into further detail.

## CHINA

148. The legislation in the competition field is very active in China, and if any of the elements of the new Article 102 TFEU Guidelines might be applicable in China, the relevant Chinese authorities might consider new legislation based on China's own legislation structure.
149. Cases handled per year on average: In 2021, a total of 11 cases of abuse of dominance were investigated and punished, with fines and confiscations amounting to 21.847 billion yuan. There were 3 cases (27%) involving unfair high prices, 1 case (9%) of refusal to deal, 3 cases of restrictive dealing (27%), and 4 cases of attaching unreasonable conditions (37%).

- (a) In 2022, a total of 13 cases of abuse of dominance were investigated and punished, with a fine of 166 million yuan. There were 10 cases of restrictive dealing, 7 cases of tying or attaching unreasonable conditions, 2 cases of unfair high prices, and 1 case of differential treatment.
  - (b) In 2023, a total of 11 cases of abuse of dominance were investigated and punished, with a fine of 1.869 billion yuan. There were 4 cases (36%) involving unfair high prices, 2 cases (18%) of restrictive dealing, 1 case (9%) of tying, 4 cases of attaching unreasonable trading conditions (36%), and 2 cases (18%) of differential treatment (2 cases involving two acts). According to the above statistics, the enforcement of abuse of dominance cases are at the same level in the past three years. Attaching unreasonable conditions and restrictive dealing are the most frequently targeted abusive conducts.
150. Focus on specific sectors/practices: Pharmaceutical and public utilities are heavily investigated in the past three years because they are related to people's livelihood and the dominance is easy to prove.
- (a) In 2021, among the cases of abuse of dominance, there were 7 cases (64%) in the fields of people's livelihood such as drugs, water supply and gas supply, 3 cases (27%) in the field of platform economy, and 1 case (9%) in the field of energy.
  - (b) In 2022, there were 9 cases of abuse of dominance in the public utilities such as water supply and gas supply, and 1 case each in the fields of internet platforms, wholesale and retail, logistics, and ports.
  - (c) In 2023, among the cases of abuse of dominance, there will be 5 cases in the pharmaceutical field (accounting for 46%), 4 cases (36%) in the field of public utilities such as water supply, gas supply and heat supply, and 2 cases in the wholesale and retail field (accounting for 18%).
151. Selected recent cases / track record. Most of the reported cases of abuse of dominance were not launched by the authority because of limited enforcement resources or because the evidence from the preliminary investigation did not support the initiation of the case. In addition, because it is not easy to define the relevant market, demonstrate the dominant market position, discover the abusive acts, calculate the illegal gains, determine the amount of the penalty, and refute the legitimate reasons, all of which need to be supported by evidence, expert argumentation, a considerable number of cases of abuse of dominance that have been launched and investigated have not finally reached the penalty stage. There are decisions and fines against abusive conduct are challenged by undertakings through administrative reconsideration and administrative litigation.
152. Brief overview of legal regime: China's Anti-Monopoly Law (the “AML”) covers both offline and online abuses, the AML prohibits undertakings from abusing data and algorithms, technology, capital advantages or platform rules to eliminate or restrict competition. The AML does not explicitly regulate margin squeeze, conditional rebates, multi-product rebates, self-preferencing and access restrictions, but the current provisions under the AML can be used to indirectly restrict the above-mentioned acts.

153. Test for dominance: One or more undertakings may be presumed to have a dominant market position based on their market share: an undertaking has 1/2 or a higher market share, two undertakings have 2/3 or higher market share, or three undertakings have a 3/4 or higher market share in a relevant market
- (a) Market share - Market share is a very important factor to be considered in assessing market dominance, but it is not decisive. The market dominance should be determined on a case-by-case basis.
  - (b) Control of upstream and/or downstream market - If an undertaking has the capability to control a sales market or a raw material procurement market, there are two possible influences: (1) the undertaking may determine prices, volumes, contract terms or other transaction conditions based on the control; and (2) the undertaking may excise input foreclosure by denying, degrading, or raising the price of access to an important input for which there are no close substitutes; or customer foreclosure by shrinking the customer base of upstream rivals.
  - (c) Financial and technical strength - An undertaking's asset size, profitability, financing capability, R&D capability, technical equipment, capability of technology innovation and application, intellectual property rights (IPRs) owned are the basic facts to demonstrate financial and technical strength. For the platform economy, the source of capital, financing capacity, and ability to obtain and process relevant data should also be considered.
  - (d) The degree of reliance of other undertakings - Normally, undertakings may have many suppliers or buyers to choose from. However, if due to reliance on one specific undertaking, they have no other choice but to choose the said undertaking, such reliance may lead to a dominant market position.
  - (e) Market entry - To evaluate market entry, factors such as difficulty of market access and obtaining necessary resources, status of control over procurement and sales channels, scale of capital investment, technical barriers, brand dependence, user switchover cost and consumption habits may be considered. For the platform economy, the scale effect of the platform, the multi-homing of users, and the difficulty of obtaining data can also be considered.
154. Collective dominance: If two undertakings have a two-thirds or higher market share in a relevant market, or three undertakings have a three-quarters or higher market share in a relevant market, they could be presumed to hold dominance in the relevant market. Since the application of collective dominance in a case must meet many conditions, collective dominance is rarely used in China. Article 13 of the *Provisions on Abuse of Dominance* provides that to find market dominance of two or more undertakings, in addition to considering factors such as market share, ability to control sales market or raw material procurement market, financial strength and technical conditions, extent of reliance of other undertakings, difficulty for other undertakings to enter the relevant market, and factors to be considered in the platform economy, factors such as market structure, transparency of the relevant market, homogeneity of related commodities, behavioral consistency of the undertakings, etc., shall also be considered.
155. Relevant legal standard to establish abuse of dominance: Abuse of dominance is adjudicated before the relevant People's Court under the *Civil Procedure Law*.

According to article 108 of the *Judicial Interpretation of the Civil Procedural Law*: “for evidence provided by a litigant who has the burden of proof, where the People’s Court, upon examination and taking into account the relevant facts, confirms that it is highly probable that the facts sought to be proved exist, the People’s Court shall deem that the facts exist. With regard to the evidence provided by a party to contradict the facts claimed by the other party with the burden of proof, where the People’s Court believes that a fact to be provided is unclear upon examination and in light of the relevant facts, it shall affirm that the said fact does not exist.” This is the foundation of the general standard of proof of high degree of probability.

156. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). There is no “consumer welfare standard” in China. If an undertaking holds dominant market position wants to justify its abusive conduct, it can show that (1) the conduct is in line with the business practices (e.g. Price reduction for fresh goods, seasonal goods, or overstocked goods), or improve the productive efficiency, or innovation efficiency, or public interests; (2) the efficiency or public interests are brought about by the abusive conduct; (3) such efficiency or public interests can compensate for the losses caused by the abusive conduct; and (4) such benefits can be passed to consumers.
157. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? No abusive conduct is *per se* illegal. It is very hard to prove abuse of dominance unless the undertaking gives up defenses.
158. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): Article 7 of the AML provides, “undertaking who have a dominant market position shall not abuse that dominant position to eliminate or restrict competition.” In China, the authority only considers whether a conduct eliminates or restricts competition. No other factors will be considered, unless the undertaking provides the justifiable reasons to prove efficiency, public interests.
159. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? If the abusive conduct has had, is having, or is likely to have the effect of eliminating or restricting competition, the anticompetitive effect can be proved. Please be noted that the authority will take into account factors such as the nature, extent and duration of the violation, and the status of the elimination of the consequences of the violation to determine the specific amount of the fine. If the anticompetitive effect can be marginalized, meeting the standard by itself may not lead to fines.
160. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Yes. Article 3 letter b) provides as anticompetitive the abusive exploitation by an economic agent, or a group of them, of a dominant position in the market, setting purchase or sale prices, imposing on the sale that of another product, assigning areas or market shares or imposing on other similar abuses.
161. Is your authority required to take into account all relevant evidence when reaching an infringement decision? Any undertaking under investigation and the interested parties

have the right to voice their views. The authority shall verify the facts, reasons and evidence provided by the undertaking under investigation and the interested parties. However, the authority has discretion to determine which evidence can be given more weight in reaching the decision.

162. If relevant, please describe the approach to "anti-competitive foreclosure". Foreclosure can be found in tying, refusal to deal, restrictive dealing, sometimes attaching unreasonable conditions and unfairly high price. Foreclosure effect could be anti-competitive, but it is not *per se* illegal in China. It has to be evaluated on a case-by-case basis.
163. What role does the "as efficient competitor" test play? The efficient competitor is not a defined term under the AML; however, the theory is used in many antitrust investigations and litigations, especially in a market with dynamic completion.
164. What is the approach to refusals to deal or unfair access conditions? In general, dominant undertakings may choose their dealers. However, refusals to supply may violate the AML, where dominant undertakings act arbitrarily, disproportionately or in the pursuit of anticompetitive purposes, for example, to enforce resale price maintenance. Dominant undertakings may be required to let third parties use their essential facilities in production and business operations under reasonable conditions. To identify essential facilities, the following factors shall be considered: (1) the feasibility of investing in separate construction or making separate development and construction of said facilities with reasonable investment; (2) the degree of dependence of the trading counterpart on said facilities to effectively carry out production and operational activities; and (3) the possibility of said undertaking providing said facilities and the impact on its production and operational activities.
165. What is the approach to efficiency or other justifications? If an undertaking holds dominant market position wants to justify its abusive conduct, it can show that (1) the conduct is in line with the business practices (e.g. Price reduction for fresh goods, seasonal goods, or overstocked goods), or improve the productive efficiency, or innovation efficiency, or public interests; (2) the efficiency or public interests are brought about by the abusive conduct; (3) such efficiency or public interests can compensate for the losses caused by the abusive conduct; and (4) such benefits can be passed to consumers.
166. Are there any specific rules or approaches on digital markets? Article 22 of the AML provides, an undertaking with a dominant market position shall not exploit any data or algorithms, technology or platform rules or other wise to engage in the abusive conducts prohibited by the AML. There are rules for platform economy. In addition to the AML, the *Provisions on the Prohibition of Abuse of Market Dominance*, and the *Provisions on the Review of Concentration of Undertakings*; the *Anti-Monopoly Guidelines in the Field of Platform Economy*, and the *Anti-Monopoly Judicial Interpretation*, all have provisions regulating the competition in the digital economy. In addition, outside the AML legal regime, the *Anti-Unfair Competition Law*, the *E-Commerce Law*, the *Law on the Protection of Consumer Rights and Interests* all regulate competition issues in the digital economy from different aspects.
167. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance?

The *Provisions on the Prohibition of Abuse of Market Dominance* is an important regulation to details the rules on the enforcement of unilateral conduct / abuse of dominance. There are many other regulations and guidelines regulates unilateral conduct / abuse of dominance.

## ITALY

168. In general, the intention to provide a single document summarizing the Commission's practice and the caselaw of the Court is to be welcomed. As a general observation, it is correct that for certain types of price abuse for which a specific quantitative test has been developed to determine whether a company's conduct is abusive (e.g. predatory pricing where prices are below average variable costs), negative effects on competition are presumed. In this scenario, indeed, the conduct itself, having exceeded this threshold, is likely to be abusive. On the contrary, in these cases, the effects play a fundamental role in any damages claims where a company can argue that its conduct has not caused any harm to the claimants.
169. Cases handled per year on average. The Italian Competition Authority ("ICA") has been particularly active in combatting abuses of dominant position that entail violations of Art. 102 of the Treaty on the Functioning of the European Union ("TFEU") and Art. 3 of Law 287/90 ("Italian Competition Law"). More specifically, since 2019 the ICA has concluded 28 proceedings, with an average of 4 cases per year.
170. Focus on specific sectors/practices. The ICA has scrutinised several sectors but has focused most of its enforcement on the transport (taxis, trainlines, etc.), telecommunications and digital sectors.
171. Selected recent cases / track record. Out of the 28 proceedings that the ICA concluded since 2019, 11 were concluded with the ICA's acceptance of the commitments proposed by the undertaking involved and 13 with the ICA imposing a fine. 12 of the cases resulting in fines were challenged: 2 were upheld by the Italian administrative courts, 1 was overturned, 2 were amended with exclusive reference to the fines, and 7 are ongoing.
172. Brief overview of legal regime. Art. 3 of the Italian Competition Law is modelled on Art. 102 TFEU. The ICA – in compliance with Regulation (EC) 1/2003 – applies Art. 102 TFEU in cases involving conduct that affects trade between two or more member states, whereas it applies Art. 3 of the Italian Competition Law when the alleged infringement affects solely the national market. In any case, Art. 1(4) of the Italian Competition Law expressly recognises that national provisions on abuse of dominance must be interpreted in accordance with the principles of EU competition law; therefore, no significant differences exist between the ICA's decision-making practice and that of the EU authorities.
173. Test for dominance: The ICA – in line with the EU courts' well-settled caselaw – considers a dominant position to be a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave independently of its competitors, customers and, ultimately, consumers to an appreciable extent (see, e.g., ICA Decision No. 30086 of 29 March 2022 in Case A541 – *Servizio traghettiamento veicoli stretto di Messina*). Consistent with EU practice, the ICA has held that a dominant position

derives from a combination of factors that, taken separately, do not necessarily constitute a dominant position. The main criterion used to assess the existence of a dominant position is the market share of the undertaking concerned. Broadly speaking, if an undertaking has more than a 50% market share, dominance is presumed to exist. In other scenarios, the ICA considers other factors, e.g.: (a) the market structure; (b) the existence of barriers to entry; (c) the presence of exclusive rights or special powers granted by law (e.g., in the gaming sector or in public transport operations); (d) the access to a great amount of data; (e) IP rights; and (f) the fame of the brands owned by the undertaking involved.

174. Collective dominance: Art 102 TFEU and Art. 3 of the Italian Competition Law both prohibit the abuse of a dominant position by “more” undertakings (also known as collective dominance), but the ICA has not been particularly active in enforcing this type of infringement. In 2007, the ICA opened an investigation into a possible abuse of collective dominance by Telecom Italia, Vodafone and Wind (Italy’s main telecommunications operators) on the wholesale market for access to mobile network infrastructures. The ICA concluded, however, that no evidence of collective dominance existed, as each operator sustained different maintenance costs for its respective network and thus the incentives for collusion were significantly reduced (see ICA Decision No. 17131 of 3 August 2007 in Case A357 – *Tele 2/Tim-Vodafone-Wind*).
175. Relevant legal standard to establish abuse of dominance: The ICA can, according to recent EU caselaw, discharge its burden of proof by merely demonstrating the existence of potential detrimental effects (based on the concrete case) of a dominant undertaking’s conduct. This is a much lower standard of proof than that of criminal liability, which must be proven ‘beyond reasonable doubt’ under Italian criminal law.
176. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). The ICA – in relation to the theory of harm – has given consumer welfare a central role in its practice, as it is generally the most-used criterion for assessing damage to competition. However, the ICA has also given relevance to other criteria, e.g., whether the dominant undertaking’s conduct has the effect of preventing a level playing field.
177. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? Similar approach to the EC.
178. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): Similar approach to the EC.
179. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? Similar approach to the EC.
180. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Similar approach to the EC.

181. Is your authority required to take into account all relevant evidence when reaching an infringement decision? Similar approach to the EC.
182. If relevant, please describe the approach to "anti-competitive foreclosure".
183. What role does the "as efficient competitor" test play? The ICA has applied the 'as-efficient competitor' test in several cases when dealing with exclusionary abuse, especially cases involving margin squeeze abuse (see, e.g., ICA Decision No. 26902 of 13 December 2017 in Case A500 B – *Telecom Italia — SMS Informativi Aziendali* and ICA Decision No. 24339 of 9 May 2013 in Case A428 – *Wind – Fastweb condotte Telecom Italia*). In these cases, the ICA assesses whether the vertically integrated dominant undertaking can operate profitably in the downstream market by taking into account: (a) on the cost side, the price of the intermediate input that it sells to competitors in the downstream market and the other costs it incurs in providing the product/service; and (b) on the revenue side, the price of the product/service sold in the downstream market. According to the ICA, in line with the caselaw of EU courts, when the margin between the wholesale and retail level is negative, at least a potential foreclosure effect is likely because a competitor as efficient as the dominant undertaking would be forced to sell the product/service at a loss in the downstream market.
184. What is the approach to refusals to deal or unfair access conditions?
185. What is the approach to efficiency or other justifications?
186. Are there any specific rules or approaches on digital markets? No specific rules (e.g., guidelines) on digital markets exist. However, in 2020 the ICA, the Italian Communications Authority (*Autorità per le garanzie nelle comunicazioni*) and the Italian Data Protection Authority (*Garante per la protezione dei dati personali*) issued a joint report that analysed – also from a competition law perspective – the role of data and the peculiarity of digital markets. In the report and in the other decisions issued in the sector, the ICA recognises that in digital markets:
- (a) the main competitive lever is the availability of a large amount of data;
  - (b) exclusionary abuses can easily occur when the dominant undertaking uses non-replicable data to the detriment of its competitors;
  - (c) significant barriers to entry exist due to cost structure and direct and indirect network effects; and
  - (d) factors other than market shares (such as property rights and availability of data) need to be considered when assessing whether a dominant undertaking is in a dominant position.
187. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance? The ICA has not published any specific guidance on the enforcement of abuse of dominance.

## SINGAPORE

188. The Draft 102 Guidelines appear problematic in certain respects when compared to the abuse of dominance regime in Singapore and the broader South East Asia region:
- (a) In Singapore, there is no Post Denmak I type conceptual distinction between finding that conduct is not competition on the merits and establishing the conduct's capability to have exclusionary effects.
  - (b) In Singapore, there are not categories of conduct which would give rise to any presumption of an abuse of dominance.
  - (c) In Singapore, there is not a token very low safe harbour of 10%. An artificially low safe harbour arguably creates a more destabilising effect on the assessment of dominance than no safe harbour at all.
189. Cases handled per year on average: Singapore's antitrust authority, the Competition and Consumer Commission of Singapore (the "CCCS") is active in the enforcement of abuse of dominance cases under Section 47 of the Competition Act 2004 (the "Competition Act"). The Section 47 Prohibition is framed by the Competition Act, the CCCS Guidelines on the Section 47 Prohibition and the CCCS Guidelines on Market Definition. The Singapore competition law regime, like that of the European Commission, is administrative rather than prosecutorial. The CCCS's investigation process from commencement of an investigation whether by way of a Section 63 document/information request, a Section 64 scoped dawn raid, to a Section 65 dawn raid by warrant to the issuance of a Provisional Infringement Decision is entirely confidential and non-public. It is only when a Provisional Infringement Decision is issued is a brief press statement released. A Final Infringement Decision in relation to abuse of dominance, if and when eventually released, will be made fully public. For the aforesaid reason, the number of Singapore abuse of dominance cases that the CCCS takes each year is not observable. Anecdotally, it is estimated that the CCCS initiates between 1 to 3 abuse of dominance cases each year, that each investigation lasts for at least 2 years, and that 80% of cases are settled with commitments and undertakings without resulting in a Provisional or a Final Infringement Decision. The last five years have not been reflective of the previous five-year periods. This is because pandemic restrictions delayed investigative procedures and because of structural changes in demand fulfilment and supply pipelines over the lockdown period. Singapore is unique in that it is a net importer. It imports 90% of goods it consumes. Abuse of dominance investigations have started to gain traction again in the second half of 2024.
190. Focus on specific sectors/practices: The CCCS does not specify sectors, industries or practices which it targets. Markets that it has investigated for abuse of dominance and has resulted in infringements and/or commitments include soft drinks (Coca-Cola for its exclusivity conditions and conditional rebates with on-premises retailers), draught beer (outlet-exclusivity practice), healthcare (exclusivity of health care provider with trade fair organisers), elevator servicing (constructive refusal), ticketing (exclusivity conditions). On 10 September 2020, the CCCS published its E-commerce Platforms Market Study which observed that e-commerce platforms in Singapore may seek to engender greater platform loyalty through both price and non-price strategies. In relation to price strategies, e-commerce platform operators may use financial incentives such as discounts or cashback schemes, or reward programmes and subscription-based

benefits to build user loyalty. In relation to non-price strategies, e-commerce platform operators may leverage data collected from platform users in the first market segment to better understand customers' preferences and 7 deliver better quality products/services in the second and subsequent market segments. E-commerce platform operators may also leverage on a trusted brand to gain customers in the second or subsequent market segment or gain economies of scope as it produces more types of products/services. Anecdotally, the CCCS is currently focusing its attention on digital markets such as online travel booking, and super-apps focused on Singapore and the region.

#### Brief overview of legal regime

191. As a general note, Turkey adopted its competition law in 1994 as part of its Customs Union integration with the EU. Accordingly, competition rules in Turkey closely follow the EU acquis, despite certain disparities. This is also valid for the wording and application of Article 6 of the Competition Act, the provision corresponding to Article 102 TFEU in the EU. Changes in EU competition rules are usually reflected in the Turkish legislation in the following years.
192. Test for dominance: There is a two-step test to assess whether the Section 47 Prohibition applies: whether an undertaking is dominant in a relevant market, either in Singapore or elsewhere, and if it is, whether it is abusing that dominant position in a market in Singapore. Both physical and geographic markets are relevant. Dominance is established, like in Europe, by probative possession of substantial market power. Market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Both buyers and sellers can have market power.
193. Collective dominance: Singapore recognises collective dominance. The Section 47 Prohibition extends to conduct on the part of two or more undertakings, where there is an abuse of a collective dominant position. A collective dominant position may be held when two or more legally independent undertakings, from an economic point of view, present themselves or act together on a particular market as a collective entity. Essentially, undertakings holding a collective dominant position are able to adopt a common policy on the market and, to a considerable extent, act independently of their competitors, customers and consumers. It is not necessary that they adopt identical conduct on the market in every respect.
  - (a) In order to assess whether the undertakings concerned together constitute a collective entity, the CCCS will examine whether there are probative links or factors that give rise to a connection between the undertakings concerned.
  - (b) The CCCS may find that an agreement between undertakings, or the way in which an agreement is implemented, leads the undertakings concerned to present themselves or act together as a collective entity. For example, the undertakings may have entered into cooperation agreements that lead them to adopt a common policy on the market. Connecting factors may also be

structural, i.e. they may arise from ownership interests and other links in law that lead the undertakings concerned to coordinate their conduct on the market. That said, the existence of an agreement or of other links in law is not indispensable to a finding that the undertakings concerned constitute a collective entity.

- (c) The structure of the market as well as the way in which the undertakings concerned interact on the market may also lead to a finding that the undertakings concerned constitute a collective entity. For instance, there might be a relationship of interdependence between firms in an oligopolistic market, where those parties become aware of common interests and consider it economically rational to adopt a common policy that might protect, enhance or perpetuate their collective position in the market.
194. Relevant legal standard to establish abuse of dominance: Abuse of dominance in Singapore is reviewable conduct adjudicated by the CCCS on a civil standard. Each element of the abuse of dominance test must be demonstrated on a balance of probabilities.
195. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). The Singapore competition law regime is based on the economics of a 'total welfare' standard rather than a 'consumer welfare' standard. The concept of abuse is focused on exclusionary conduct rather than exploitative conduct. Such conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market.
196. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? No, there are no object infringements or presumptions of abuse of dominance under Singapore law. Such object infringements and presumptions only apply in relation to the anti-competitive agreements third of the prohibited trifacta (the trifacta being anti-competitive agreements, abuse of dominance and mergers that give rise to an SLC).
- (a) In conducting an assessment of an alleged abuse of dominance, the CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition. The process of competition may be adversely impacted, for instance, by conduct which would be likely to foreclose, or has foreclosed, competitors in the market.
  - (b) The CCCS considers factors such as: the position of the allegedly dominant party and its competitors; the structure of, and actual competitive conditions on, the relevant market; and the position of customers and/or input suppliers. If the conduct has, or is likely to have, an adverse effect on the process of competition, CCCS would typically consider if the dominant undertaking is able to objectively justify its conduct. The suite of objective justifications is nothing specific or novel to Singapore: they are the objective justifications that are universally recognized in abuse of dominance jurisprudence.

197. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): The primary relevant test of harm is foreclosure of competitors. Consumer welfare standards such as a fair-and-level playing field and effects on innovation and small business are not considered in abuse of dominance analyses. The CCCS has started to focus on killer acquisitions in the merger control space, but there is no such attention in the abuse of dominance space.
198. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? The applicable standard for determining effects is whether the allegedly abusive conduct would be likely to foreclose, or has in fact foreclosed, competitors. In practice, the CCCS has been open to receiving submissions that conduct which appears to fall into a category of abuse has not in practice had the effect of foreclosing competition
199. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Yes, but the forms are not exhaustive. Nor do any of the forms of abuse give rise to an infringement by object. The said forms of non-exhaustive abuse are customary in global competition law:
- (a) Predatory behaviour
  - (b) Discount schemes
  - (c) Price discrimination
  - (d) Margin squeezes
  - (e) Vertical restraints
  - (f) Exclusive purchasing requirements
  - (g) Tying and bundling
  - (h) Preferential leveraging of market power
  - (i) Refusals to supply
  - (j) Constructive refusals
  - (k) Essential facilities.
200. Is your authority required to take into account all relevant evidence when reaching an infringement decision? There is no express requirement for the CCCS to take into account all relevant evidence. In practice, the CCCS will not refuse any probative evidence offered to it, but it is not estopped from reaching a decision on the basis that not all relevant evidence has been considered.
201. If relevant, please describe the approach to "anti-competitive foreclosure". When assessing an alleged abuse of dominance, the CCCS will take into account conduct which would be likely to foreclose, or has foreclosed, competitors in the market. The

CCCS considers factors such as: the position of the allegedly dominant party and its competitors; the structure of, and actual competitive conditions on, the relevant market; and the position of customers and/or input suppliers. If the conduct has, or is likely to have, an adverse effect on the process of competition, CCCS would typically consider if the dominant undertaking is able to objectively justify its conduct. The suite of objective justifications is nothing specific or novel to Singapore: they are the objective justifications that are universally recognised in abuse of dominance jurisprudence.

202. What role does the "as efficient competitor" test play? This principle has only been applied, in practice in predatory pricing investigations.
203. What is the approach to refusals to deal or unfair access conditions? Refusals to deal or constructive refusals may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified. A refusal to supply may constitute an abuse, for example, where a dominant undertaking stops supplying an existing buyer, withholds supplies from a new buyer, or refuses to supply or provide access to key inputs (including physical assets, proprietary rights or data), with the result of (likely) substantial harm to competition. For example, the refusal by a standard essential patent holder to license its technology on FRAND terms may give rise to competition concerns. A refusal to supply could result from a refusal to allow access to an essential facility. It may also be possible for a dominant undertaking to engage in a constructive refusal to supply. For example, the dominant undertaking may do so by engaging in a margin squeeze.
204. What is the approach to efficiency or other justifications? Objective justifications might include the buyer's poor creditworthiness, or capacity constraints. There is no codified efficiencies defence to alleged abuses of dominance.
205. Are there any specific rules or approaches on digital markets? Yes, the CCCS has published a market study on E-Commerce Platforms and on the Online Travel Booking Sector. Neither of the market studies raise clear red flags on the way abuses of dominance are traditionally analyzed.
206. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance? Yes, the CCCS is guided by its CCCS Guidelines on the Section 47 Prohibition and the CCCS Guidelines on Market Definition. There are notable differences to the draft Article 102 Guidance which I will explain in the answer to the next question.

## TURKEY

207. Cases handled per year on average: The Turkish Competition Authority ("TCA") actively enforces abuse of dominance cases per its mandate under Article 6 of the Act No. 4054 on the Protection of Competition ("**Competition Act**"). In general, the TCA oversees all sectors and all practices detrimental to competition. As of 2019 until the first half of 2024, it has rendered 107 abuse of dominance cases and additional 45 cases that were a mix of both abuse of dominance and anti-competitive agreements, making a total of 152 cases in 5 years. Until 2022, abuse of dominance cases accounted for 30% of the annual cases, while recently the number of cases has dropped, accounting to 10-15%. Apart from administrative fines, the TCA is entitled to conclude abuse of dominance cases with commitments or settlement.

208. Focus on specific sectors/practices: Through not each case concluded with an infringement finding, in the last 5 years, the TCA has overseen different abuse of dominance cases relating to predatory pricing, discrimination, exclusivity, refusal to deal and excessive pricing. Yet, we observe that the TCA now has a more focused approach regarding exclusionary abuse of dominance cases, especially against practices in digital markets. Indeed, it published a sector inquiry report on e-marketplaces in 2022, identifying potentially exclusionary practices such as MFN clauses, exclusivity, non-compete clauses, loyalty programs etc. Moreover, it published a report on “The Impact of Digital Transformation on Competition Law” in 2023, identifying data-related concerns, self-preferencing, tying and bundling and exclusive dealing as predominant concerns in digital markets.

#### Brief overview of legal regime

209. As a general note, Turkey adopted its competition law in 1994 as part of its Customs Union integration with the EU. Accordingly, competition rules in Turkey closely follow the EU acquis, despite certain disparities. This is also valid for the wording and application of Article 6 of the Competition Act, the provision corresponding to Article 102 TFEU in the EU. Changes in EU competition rules are usually reflected in the Turkish legislation in the following years.
210. Test for dominance: The Competition Act defines dominant position as “*the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers*”. In determining whether an undertaking (or undertakings) hold this power, the TCA considers several factors. Examples of such include market shares (of the investigated undertaking and its close competitors) and their durability, number of competitors, entry and expansion barriers and countervailing buyer power. A market share exceeding 40% would lead to a presumption of dominance, yet undertakings can always prove otherwise.
211. Collective dominance: Yes, TCA recognizes collective dominance in its definition of dominant position whereby it refers to the power of one or more undertakings. However, in practice there is only a handful of old cases where collective dominance is discussed. In early 2000s, the TCA initiated several investigations against pharma, media, transportation, and telecommunications sectors as to whether the undertakings operating therein abused their collective dominance and fined all sectors but pharma. Later on, the concept of collective dominance was more often encountered in TCA’s merger and acquisition decisions prior to 2020, while the test for merger control was still the dominance test.
212. Relevant legal standard to establish abuse of dominance: Turkish competition law is not of criminal nature. Accordingly, abuse of dominance is considered a misdemeanour and the liability arising from it is purely administrative (i.e. administrative fine worth 0.5-3% of undertakings’ annual gross turnover). Hence, it is sufficient for the TCA to establish dominance and the potential anti-competitive effects of the investigated practices beyond reasonable doubt.
213. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). Consumer welfare is the north star of the TCA. In its 2014 Guidelines on the

Exclusionary Practices of Dominant Undertakings, consumer welfare acts as the focal point in establishing an abuse. That said, especially when investigating into e-marketplaces or platforms, a repeating pattern seems to be TCA's interest on the welfare of small and medium sized enterprises ("SMEs") as seen in Yemeksepeti and Sahibinden abuse of dominance cases. The same emphasis can also be found in TCA's sector inquiry report on e-marketplaces, underscoring SMEs being significantly impacted from anti-competitive practices of platforms.

214. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? The Competition Act makes a distinction between by-object and by-effect infringements in the analysis of anti-competitive agreements under Article 4. This does have an impact on the burden of proof as in case of a by-object infringement the TCA is only obliged to prove the existence of an anti-competitive agreement beyond reasonable doubt. It is then on the undertaking to prove that such agreement is not anti-competitive or has countervailing pro-competitive effects. For the case of by-effect infringing agreements the TCA is also burdened to establish said anti-competitive effects. Yet, Article 6 of the Competition Act, which governs the abuse of dominance has no such distinction. The test in abuse of dominance is effects-based and it is on the TCA to establish the anti-competitive effects (potential or actual) associated with a unilateral conduct.
215. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): Currently the relevant test of harm in Turkey is consumer welfare. Other factors may be taken into consideration if the specific case calls for it.
216. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? In assessing exclusionary conduct, the TCA can consider both the actual and potential effects of the conduct under question. These effects can come in play in the market where the undertaking is dominant or in a nascent market. In implementing this standard, the TCA aims to understand whether the investigated conduct forecloses the market (actually or potentially) to competitors through complicating their access to resources, markets or customers/consumers.
217. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Article 6 of the Competition Act exemplifies conduct constituting abuse of dominance as preventing market entry, discrimination, tying and bundling and leveraging. Furthermore, it additionally recognizes refusal to deal, predatory pricing, margin squeeze, exclusivity and rebate systems as abusive behaviour in its Guidelines on the Exclusionary Practices of Dominant Undertakings.
218. Is your authority required to take into account all relevant evidence when reaching an infringement decision? The TCA acts as the prosecutor of investigations and is obliged to present its opinion on a case to its independent decision-making body, Turkish Competition Board ("TCB") upon reviewing all findings in favour and against undertakings. Accordingly, it is legally required to take into account all relevant evidence when reaching an infringement decision. Moreover, the TCA engages its Economic Analyses and Research Department in the econometric analysis of the theories of harm stipulated in Article 6 cases. The department prepares opinions on the

arguments presented by the case-handlers, undertakings, or both based on the data at hand regarding the investigated conduct

219. If relevant, please describe the approach to "anti-competitive foreclosure". In assessing anti-competitive foreclosure, the TCA considers numerous factors, including:
- (a) The position of the dominant undertaking, its competitors and customers/suppliers,
  - (b) conditions in the relevant market,
  - (c) scope and duration of the conduct in question,
  - (d) possible foreclosure evidence,
  - (e) evidence of exclusionary strategy.
220. Each factor carries a different weight in the analysis, depending on the facts of the individual case.
221. What role does the "as efficient competitor" test play? The TCA recognizes the “as efficient competitor” test in price-related exclusionary abuses, i.e., predatory pricing and margin squeeze. However, this test is not definitive. In case TCA’s analysis in a given case shows that the dominant player’s conduct threatens as efficient competitors out of the market, it takes this into its holistic analysis along with other qualitative and quantitative evidence at hand. For predatory pricing analysis, in its 2012 Kale Kilit Decision (12-62/1633-598) it underscored that pricing below-AAC itself demonstrates the intention to foreclose competitors since it is not possible for as efficient competitors to survive, whereas pricing below-LRAIC must be accompanied by the intention to foreclose the market to an as efficient competitor to render an infringement decision. In the same decision, the TCA referred to the “as efficient competitor” test as one that guarantees a clear, understandable, and foreseeable distinction between competitive pricing and predatory pricing.
222. What is the approach to refusals to deal or unfair access conditions? In analysing refusal to deal cases, the TCA aims to seek a balance between not unnecessarily restricting undertakings’ freedom to contract and not allowing exclusionary conduct. In this framework, the following conditions shall be met cumulatively for a finding of infringement under refusal to deal:
- (a) Refusal should concern a product/service indispensable (i.e. objectively necessary) for downstream competition,
  - (b) Refusal should likely lead to the elimination of effective competition downstream,
  - (c) Refusal should likely harm consumers.
223. What is the approach to efficiency or other justifications? Undertakings are entitled to present justifications in response to the abuse of dominance allegations against them. These justifications can be in the form of objective necessity or efficiency grounds. The

burden of proof lies with the undertakings with respect to justifications. In their justifications the undertakings shall meet all the conditions below:

- (a) Efficiencies should arise as a result of the investigated conduct,
- (b) The conduct should be indispensable to achieve said efficiencies,
- (c) Likely efficiencies outweigh anti-competitive effects,
- (d) Competition is not eliminated significantly or entirely.

224. Are there any specific rules or approaches on digital markets? To date, the TCA only issued reports and sector inquiries relating to digital markets and identified competitive concerns rooting from the dynamic nature of these markets as well as the challenges faced with tackling these concerns with traditional competition rules. Furthermore, the TCA ran a public consultation for a potential amendment to the Competition Act, introducing an ex-ante regime for undertakings with significant market power (i.e., powerful in the market yet not dominant) that are operating in core platform services. Inspired by the Digital Markets Act in the EU, the legislation foresees to restrict the playing field of “gatekeepers” in the procurement of their respective core platform services to ensure there is no impediment to effective competition. However, the legislation is yet to be enacted.
225. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance? Yes. In 2014, the TCA published its Guidelines on the Exclusionary Practices of Dominant Undertakings. It mainly follows the current (not amended) version of the Article 102 Guidance.

## **SOUTH AFRICA**

226. Overview .In general, abuse of dominance in South Africa is assessed according to the rule of reason test (effects on competition, as well as efficiencies). Similar to the EU, this typically requires a threat to consumer welfare, either directly or through foreclosure that affects the structure of a market limiting consumer choice.

There is a presumption of dominance based on market shares (35% rebuttably presumed dominant; 45% deemed dominant). Although a residual test based on "market power" can defeat the presumption (both to show dominance below the 35% market share threshold, or to rebut a presumption of dominance between 35% and 45%) in practice this has rarely been invoked.

There is a separation of power in terms of investigation and decision-making: The Competition Commission of South Africa ("CCSA") investigates complaints and prosecutes matters before an independent Competition Tribunal ("CTSA"). Decisions of the CTSA can automatically be appealed to the Competition Appeal Court. This process has served to maintain a level of rigor and ensures that the CCSA discharges its evidentiary burden in seeking to secure a prosecution.

Properly speaking, no "presumptions" exist and the Commission as investigator and prosecutor bears a considerable to onus to prove "substantial foreclosure" as being likely, based on all available evidence, facts and circumstances. That said, amendments

to the Competition Act have sought to somewhat lower the threshold for conduct by dominant that can be shown to limit the extent to which small, medium or black-owned firms (the "designated class") can "effectively participate" in a market. This shift means that certain conduct (unfair monopsony conduct – or buyer power abuses - as well as price discrimination) does not require a showing of anticompetitive harm but an effect on the designated class's competitive position.

In the context of the Draft Guidelines, worth noting is that South African case law does not easily admit of "refusals to deal" cases (outside of essential facilities and refusing to supply a scarce resource) and the prevailing view is that a refusal is problematic only if it serves to preserve or extend the market power of the dominant firm.

Although it may do so, the Commission has not sought to publish general guidelines on abuse of dominance. One reason is that the Competition Act sufficiently codifies the relevant requirements.

227. Cases handled per year on average. The investigation of abuse of dominance is a focus area of the CCSA. Although it is difficult to say with certainty how many cases are investigated each year, the CCSA has reported that in its 2022/2023 Annual Report that 17 investigations into the abuse of dominance had been initiated in its priority sectors and 7 abuse of dominance cases were in the process of being prosecuted. Due to the complicated nature of assessment, it often takes time for the CCSA to advance complaints from the investigation to prosecution stages, however complainants have the option to seek urgent interim relief in the CTSA.
228. Focus on specific sectors/practices. The CCSA will investigate every complaint regardless of the sector within which it falls. In terms of its own enforcement agenda, the CCSA conducts work in 8 priority sectors, namely: Agriculture, Food and Agro processing; ICT and Digital Markets; Healthcare; Construction services, Property and Infrastructure; Energy; Transport and Automotive; Banking and Financial Services and Intermediate Industrial Input Products. There is also a sense that the CCSA is inclined to investigate alleged abuses by State owned entities that may have historically benefitted from statutory monopolies.

In relation to the ICT and Digital Markets sector specifically, there have not been any prosecutions of individual firms, but the CCSA conducted a market inquiry which drew conclusions based on the relative size of digital platforms. The CCSA's findings and remedies have been the subject of litigation, some of which were settled on the basis of agreed remedies.

229. Selected recent cases / track record. According to what is reported in the CCSA's 2019 to 2023 Audit Reports, the CCSA has had the following track record in abuse of dominance cases: (i) 4 referrals, (ii) 44 settlement agreements (some of which included the imposition of a fine);<sup>24</sup> (iii) 3 successful prosecutions which resulted in a fine; (iv) 5 appeals (one was later withdrawn) and (v) 4 non-referrals following CCSA

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<sup>24</sup> Although it should be noted that the majority of these were brought under ad hoc regulations to counter so-called "price gouging" during the Covid19 pandemic, and were subject to stricter enforcement and sui generis approach on market definition and dominance (informed by the peculiar situation of lockdown restrictions).

investigation. It is noteworthy that although the CCSA might have not had much success in the prosecution of abuse of dominance cases, from a practitioner view, the fact that there have been a number of investigations has certainly led to a greater compliance culture.

230. Brief overview of legal regime. Sections 8 and 9 of the Competition Act prohibit abuse of dominance. Section 8 includes both specific abuses and a catch-all provision prohibiting any exclusionary act by a dominant firm.

Section 8 also contains buyer power provisions, but these are only applicable to specific sectors, namely (i) grocery wholesale and retail, (ii) agro-processing, and (iii) ecommerce and online services.

Section 9 prohibits price discrimination by dominant firms as sellers and is specifically honed (but not exclusively) to protect small, medium, and black-owned businesses.

231. Test for dominance: As in the EU, market share for dominance purposes is defined in terms of both product and geography. The Competition Act contains statutory presumptions for whether a firm is dominant, if:

- It has at least 45% market share – this is an irrebuttable presumption;
- It has at least 35%, but less than 45%, market share, unless it can be shown that it does not have market power; or
- It has less than 35% market share, but has market power.

232. Collective dominance: Collective dominance is not recognised. Circumstances that might result in collective action would need to be prosecuted under cartel provisions. Although amendments have been proposed to cover "conscious parallel conduct" these have not been enacted.

233. Relevant legal standard to establish abuse of dominance: Exclusionary abuse is subject to a rule of reason test – i.e. with reference to proven anti-competitive effect not outweighed by efficiencies or pro-competitive gains. A threshold test is not set out in the Act, but the prevailing caselaw states that the test is whether the alleged conduct would likely give rise to substantial foreclosure against competitors – however, evidence of actual effects cannot be ignored.

Abuse of dominance is prosecuted as a civil offence, proven on a balance of probabilities. Criminal prosecution is not possible with abuse of dominance cases.

234. To what extent are considerations other than the consumer welfare standard applied (such as fairness and level playing field, innovation, effect on small businesses). The Act is concerned with "exclusionary acts", which means an act that impedes or prevents a firm from entering, participating in, or expanding within a market. As indicated above, section 9 (dealing with discriminatory pricing) as well as the buyer power provisions are aimed at protecting small and black-owned businesses. In these situations, the test shifts from an overall impact on competition or consumer welfare to assessing the impact of conduct on the competitive ability (their ability to participate effectively) of the designated class (i.e., small/medium or black-owned firms).

235. Does your authority apply different standards for different types of abuses (e.g. is the test purely effects-based or are there object infringements or conduct which is presumed to be an abuse of dominance)? Is there an impact on the burden of proof? All exclusionary abuses of dominance must be proven on the standard set out above, namely a balance of probabilities on the rule of reason. Although a "substantial lessening of competition" is not required, case law has indicated that the anticompetitive effect should not be trivial. In the case of exclusion, the likelihood of substantial foreclosure needs to be shown.
236. What is the relevant test of harm in your jurisdiction (e.g., consumer welfare, or others, such as such as fairness and level playing field, innovation, effect on small businesses?): The test is whether the act/harm is exclusionary by impeding or preventing a firm from entering, participating in, or expanding within a market. As indicated above, the effect on small or black-owned business is a consideration in buyer power and price discrimination matters.
237. For effects, what is the applicable standard (e.g., likely/potential effects, potential vs actual effects; likelihood of exit vs impediment) and how has this standard been applied? The standard is "likely effects", but actual effects may not be ignored. Likely effects include an element of foreseeability.
238. Are there any specific forms of abuse covered (e.g. margin squeeze, predatory pricing)? Specific abuses listed in the Act are –
- Excessive pricing
  - Refusal to give access to essential facility
  - Inducement not to deal (customer foreclosure)
  - Refusal to supply (input foreclosure)
  - Tying and bundling
  - Predatory pricing
  - Buying up scarce supply
  - Margin squeeze
239. Is your authority required to take into account all relevant evidence when reaching an infringement decision? Yes. Decisions of the CTSA (and prosecuted by the Commission) have been overturned on the basis that the CTSA failed to take into account economic evidence.
240. If relevant, please describe the approach to "anti-competitive foreclosure". To qualify as exclusionary, substantial foreclosure is required.
241. What role does the "as efficient competitor" test play? This test has been relied on in abusive pricing cases, but has been treated with scepticism by the Constitutional Court (the apex court in South Africa), which as stated that the Act protects small and medium businesses and it would be inappropriate for a predatory pricing complaint to fail simply because it would not exclude an equally efficient competitor.
242. What is the approach to refusals to deal or unfair access conditions? It is specifically prohibited for a dominant firm to (i) refuse to give a competitor access to an essential facility (being infrastructure or resources) when it is economically feasible to do so, or (ii) refuse to supply scarce goods or services to a competitor or customer when

supplying those goods or services is economically feasible. The buyer power and price discrimination provisions also apply.

An accused firm is not entitled to raise an efficiency defence in respect of refusal to give access to an essential facility (although it could prove that it is not economically feasible). To date, an essential facility case has not been successfully brought.

243. What is the approach to efficiency or other justifications? Accused firms can raise an efficiency defence in respect of all forms of abuse of dominance, except for (i) excessive pricing, (ii) refusal to give access to an essential facility, and (iii) abuse of buyer power (note sector-specificity above). A general efficiency defence is not available with pricing discrimination, but there are other statutory defences available (e.g. differences in cost due to differing locations of delivery).
244. Are there any specific rules or approaches on digital markets? No, but the buyer power provisions of the Act apply specifically to ecommerce and online services.
245. Does your authority have published guidance on the enforcement of unilateral conduct / abuse of dominance? If so, is this similar / different to the draft Article 102 Guidance? The CCSA does not have general abuse of dominance guidelines but has published buyer power guidelines which set out the general principles that will be followed in assessing whether alleged conduct by a dominant firm as a buyer amount to a contravention of Section 8(4) of the Competition Act. In terms of section 8(4), it is prohibited for a dominant firm as buyer in designated sectors, to require from or impose unfair prices or trading conditions on small and medium businesses ("SMEs") or firms controlled or owned by historically disadvantaged persons ("HDPs"). Section 8(4) also prohibits the avoidance or refusal to purchase from SMEs and HDPs by a dominant firm as a buyer in designated sectors, if designed to evade the provisions. The factors that will be considered when assessing a contravention of the above are (i) whether firms in dominant; (ii) whether supplier is an SME or HDP; (iii) the price or trading condition must be required from or imposed on the supplier by the buyer firm and (iv) the price or trading condition must be unfair.

The Department of Trade, Industry and Competition ("DTIC") has published Price Discrimination Regulations, which list factors that should be considered when determining whether conduct by a dominant firm as a seller amounts to price discrimination in contravention of the Competition Act – (i) whether firm is dominant; (ii) there is differential treatment between a purchaser in a designated class versus one that falls outside of that class; (iii) the differential treatment in price relative to other purchasers is likely to impede the effective participation of a firm or firms in the designated class of purchase; and (iv) the differential treatment does not make reasonable allowance for differences in costs of supply on differing places or methods of supply, does not constitute an act of good faith to meet a competitor's price or is not a legitimate response to market conditions.