

GSMA position on DG COMP's Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

The GSMA welcomes the opportunity to comment on the European Commission's (the "**Commission**") Draft Guidelines on abusive exclusionary conduct by dominant undertakings (the "**Draft Guidelines**").

The GSMA appreciates the extensive preparatory work undertaken by the Commission and the outreach to stakeholders.

However, the GSMA believes that when codifying the case law, it is important for the Draft Guidelines to accurately reflect *all* the nuances of the jurisprudence and ensure they do not go beyond the case law, which does not seem to be the case on several major topics.

The final Guidelines should settle in favour of the Court's case law if there are any discrepancies between the Commission's decisional practice and the EU Courts' ("**CJEU**") rulings. Creating legal certainty and providing efficient tools for self-assessment is extremely important for businesses, and in our view, the only way to achieve that is to codify the case law without departing from it.

Furthermore, in light of the European Court of Justice's recent judgment in the *Intel* case,¹ the GSMA believes that the Commission should not adopt the Draft Guidelines without issuing a second draft that reflects the law established in *Intel II* and allowing third parties to comment on it.

General remarks

We note that the main objective of the Guidelines was to enhance legal certainty by codifying CJEU judgments on recent antitrust cases under Article 102. However, as currently drafted, the Draft Guidelines appear to make changes that lower the bar for Commission intervention and a finding of an infringement in exclusionary abuse cases, without the endorsement of case law. While we understand that one of the aims of the Commission is to accelerate the handling of Article 102 cases, the GSMA would urge the Commission not to be selective in its approach to codifying CJEU judgments, and to be careful not to generalise by codifying very specific cases arising in exceptional circumstances, as this would overly-broaden the application of Article 102 to the detriment of legal security and fair competition.

In particular, the GSMA laments the clear departure from the more economic effects-based approach to assessing exclusionary conduct that the Commission has advocated in the past. As explained in more detail below, some of the changes, such as the introduction of presumptions for certain categories of conduct, establish a more formalistic approach to assessing exclusionary practices and therefore not only falsely shift the burden of proof to the dominant undertakings but also make the ability of undertakings to successfully rebut allegations of abusive conduct more difficult. This shift in approach could lead to situations where the real impact of conduct by dominant companies on the market is disregarded. To avoid that risk, the GSMA's position is that the Commission needs to continue to carry out a

¹ Judgment of 24 October 2024, *European Commission v Intel Corporation Inc.* (Intel II).

case-by-case effects-based analysis of any conduct that could potentially breach Article 102 by abandoning the presumptive approach. This is even more necessary in a context where presumptions and the shift of the burden of proof suggested in the Draft Guidelines are not endorsed anywhere in the case law.

Additionally, in certain markets, the Commission should make the analysis under Article 102 as dynamic as possible to better reflect today's economic realities where market shares and current market structure are not always the only predictors of dominance. On the contrary, potential competitors with the ability to quickly scale, who can leverage their dominance in *other* markets into the relevant market, and future market developments, play an increasingly important role in constraining companies which ostensibly enjoy a degree of market power, and as such should be a part of any Article 102 analysis. Globalisation and the digitalisation of the economy call for a forward-looking perspective in Article 102 assessments.

The GSMA would also draw attention to the absence of the notion of *anticompetitive foreclosure* and the downplaying of the *as efficient competitor principle* (AEC) in the Draft Guidelines. The possible foreclosure of competitors which are “as efficient as” the (allegedly) dominant firm was the central principle underpinning exclusionary effects in the Commission's Guidance Paper on Enforcement Priorities for Exclusionary Abuses (“**2008 Guidance Paper**”). While the two documents have different purposes, it is notable that some of the most crucial enforcement goals and standards of evidence enshrined in paragraphs 19 and 20 of the 2008 Guidance Paper are not to be found anywhere in the Draft Guidelines.²

The absence of the term “anticompetitive foreclosure” in the Draft Guidelines combined with the downplay of the AEC principle ostensibly broadens the scope of Article 102 by applying it to “[...] *all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers, including practices that may harm consumers by undermining an effective structure of competition*”.³ This new standard – if reflected in the final version of the Guidelines – would result in a widening of the scope for intervention under Article 102, as it would not require the Commission to demonstrate that the dominant firm's behaviour resulted in anticompetitive foreclosure of “as efficient” competitors. This would be an unwelcome outcome.

Section 1: Introduction

The analysis of exclusionary abuse in the Draft Guidelines is limited to practices by a dominant undertaking that “[...] *can harm consumers by hindering, through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition*”.

² “19. *The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. [...]*”, “20. *The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. [...]*”.

³ Draft Guidelines, para. 5.

For the sake of legal certainty, we would ask that the Commission clarifies⁴ that "*practices that may harm consumers by undermining an effective structure of competition*" are still subject to the two-step test laid out in paragraph 45.

The GSMA does however support the inclusion of both actual and potential competitors in Paragraph 6 of the Draft Guidelines when defining the scope and purpose of applying Article 102, particularly concerning the definition of exclusionary effects resulting from exclusionary abuses. Any proposal that omits references to actual or potential competitors would give the Commission unreasonable discretion to take enforcement action.

Section 2: General principles applicable to the assessment of dominance

The GSMA has some brief comments on the notions of single and collective dominance, as used in the Draft Guidelines.

Single dominance. In our view, some of the language in the section on the relevant factors for establishing single dominance runs a serious risk of undermining legal certainty in the area. Despite being only stated in a footnote, the 10% market share "safe harbour" that the Draft Guidelines establish is extremely low. Additionally, and worse still, the Draft Guidelines suggest that dominance can be established even below 10% "*in exceptional circumstances*".⁵ However, the one case cited to that effect does not list any of these exceptional circumstances. Furthermore, the case law that is cited did not establish any 10% threshold as a reference to exclude dominance, but the Court simply stated that even if the undertaking in question was the largest in the market, still, its market shares were too low for the undertaking to be considered dominant. Additionally, there is just one decision since 1966 in which the Commission has found dominance below 40% market share.⁶ Consistent with *Hoffmann-La Roche*, where the Court emphasised that "*the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares*"⁷, we urge the Commission to clarify that below 40% market shares there will normally be no finding of dominance. This threshold was also the reference in the 2008 Guidance.

The GSMA welcomes the fact that the Draft Guidelines acknowledge that in fast-growing markets with short innovation cycles, a high market share may be ephemeral,⁸ and so high market shares in themselves may be a less useful or unreliable indicator of market power and less still dominance. We would invite the Commission to give the business more clarity as to the elements that it is likely to give weight to in practice and what other factors may be relevant.

With regards to the second relevant factor for establishing dominance which the Draft Guidelines identify – *the existence of barriers to market expansion and entry* – the GSMA

⁴ Draft Guidelines, para. 5.

⁵ Draft Guidelines, para. 26, footnote 41.

⁶ Judgment of 17 December 2003, *British Airways plc vs Commission*.

⁷ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, para. 39. In *AKZO Chemie BV v Commission*, the Court found that a market share of 50% constituted evidence of the existence of a dominant position; in *Hilti AG v Commission*, a market share of between 70-80% was found in itself to be a clear indication of the existence of a dominant position; in *United Brands Company and United Brands Continentaal BV v Commission*, dominance was established with market shares between 40% and 45% but other factors were also considered.

⁸ Draft Guidelines, para. 28.

believes there is a need to better capture the barriers to entry that are unique to the digital economy. We would encourage the Commission to include in the text a wider set of examples that may result in barriers to expansion and entry, such as closed ecosystems, absence of multi-homing, vertical and conglomerate integration of platforms, existence of bottlenecks, control over essential shareable inputs (such as data) or capabilities (such as computational power or skilled staff), unavailability of alternative routes to reach end-users. Additionally, we would propose for the Commission to widen the scope of the data-driven advantages that may present barriers to expansion and entry, in paragraph 30 of the Draft Guidelines, to include other types of control over data, such as data accumulation and access to non-replicable data.

Collective dominance. The GSMA understands why, in the interest of completeness, the Draft Guidelines include a section on collective dominance. The GSMA believes however that there is a lack of legal certainty as to where and under which circumstances undertakings might engage in conduct that would make them vulnerable to a charge of collective dominance. More guidance on that point is critical.

Specifically, we are concerned that, when saying that *“the assessment of [collective] dominance is based on essentially the same factors that are relevant for single dominance”* and in footnote 74 that *“a collective market share above 50% is, in the absence of evidence to the contrary, a strong indication of the ability of the collective entity to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers”*, the Draft Guidelines are not giving proper weight to the full reasoning of the Court.

In *Atlantic Container Line and Others v Commission*, the Court ruled that collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated, acknowledged that *“a collective entity is of course composed of undertakings [...] whose market shares may be somewhat asymmetrical”*⁹ and determined that these factors might preclude a finding of collective dominance. In *Gencor v Commission*, the Court found that the fact that the parties to the oligopoly hold large market shares does not necessarily mean that those parties are able to act independently of their competitors, their customers and, ultimately, of consumers¹⁰ – the established definition of dominance.

None of these important qualifications are clearly made in the Draft Guidelines. The GSMA therefore urges the Commission to revise paragraph 34 to expressly mention that even though *“collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated”*, it nonetheless requires that *“internal competition is not significant enough to prevent the undertakings from adopting the same course of conduct on the market despite links or factors of correlation existing between them”*.

With respect to assessing the elements that are relevant to establishing collective dominance on the basis of (tacit) coordination, it would also be useful for the Commission to recognize explicitly that it is incumbent upon it to produce convincing evidence of the lack of effective competition between the undertakings alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.¹¹

⁹ Judgment of 30 September 2003, *Atlantic Container Line AB and Others v Commission*, para. 933.

¹⁰ Judgment of 25 March 1999, *Gencor Ltd v Commission*.

¹¹ Judgment of 6 June 2002, *Airtours plc v Commission*, para. 195.

Section 3: General principles to determine if conduct by a dominant undertaking is liable to be abusive

As laid out in paragraph 45, two conditions need to be fulfilled for a conduct to constitute an exclusionary abuse: the conduct must depart from competition on the merits and the conduct must be capable of having exclusionary effects.

Conduct departing from competition on the merits. With regard to conduct that departs from competition on the merits, the GSMA welcomes the principle laid down in paragraph 55 of the Draft Guidelines that “other conduct” (i.e., conduct that does not fall under one of the categories set out in paragraphs 53 and 54) will be assessed on a case-by-case basis and on the basis of relevant factors which are explicitly listed in paragraph 55. However, the GSMA considers it important for the *relevant factors* to serve only as guiding principles in the Commission’s assessment of “other” conduct and not replace a case-by-case assessment. This approach will help guarantee flexibility when dealing with conduct that is likely not to be found harmful to competition. At the same time, the Guidelines could provide some more clarity on the concept of competition on the merits to give more legal certainty.

Capability of conduct to produce exclusionary effects. The Commission identifies three categories of conduct that would, if the current version of the Draft Guidelines were to be adopted, carry different evidentiary burdens. In particular, the Draft Guidelines differentiate between (i) conduct for which it is necessary to demonstrate a capability to produce exclusionary effects; (ii) conduct that is presumed to lead to exclusionary effects¹² and (iii) naked restrictions.¹³ The GSMA cannot support this approach. The introduction of presumptions does not reflect the case law, which is also confirmed with the recent *Google Shopping* and *Intel II* judgments.¹⁴ It is clear that it is incumbent on the Commission to “*adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement*”.¹⁵ Purporting to shift the burden of proof on to the parties with presumptions would not only be in contradiction with case law (as explained in detail below), but also difficult from a procedural perspective, since the effects-based analysis would shift to the period after the reply to the SO. The GSMA also views the wording in paragraph 60 relating to “naked restrictions” as too wide in scope. Particularly in telecommunications, there are several plausible circumstances where it may be justified to dismantle an infrastructure, e.g. if maintaining the infrastructure is not economically viable. Thus, to safeguard legal certainty, the category of naked restrictions should, the GSMA would argue, be interpreted narrowly.

The substantive legal standard to establish a conduct’s capability to produce exclusionary effects. The legal standard that the Draft Guidelines set out for proving a

¹² In particular, the Draft Guidelines identify (i) exclusive supply or purchasing agreements, (ii) rebates conditional upon exclusivity; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying. See para. 60.b of the Draft Guidelines.

¹³ Draft Guidelines, para. 60.c. Examples of naked restrictions include: “(i) *payments by the dominant undertaking to customers that are conditional on the customers postponing or cancelling the launch of products that are based on products offered by the dominant undertaking’s competitors*; (ii) *the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors*; or (iii) *the dominant undertaking actively dismantling an infrastructure used by a competitor*.”

¹⁴ Judgment of 24 October 2024, *European Commission v Intel Corporation Inc. (Intel II)*. Judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*.

¹⁵ *Google Shopping*, para. 224; *Intel II* para. 328.

conduct's capability to produce exclusionary effects¹⁶ lowers the bar for finding an infringement. The Draft Guidelines provide that under the legal standard that is applicable in cases where the evidentiary burden cannot be initially discharged, the Commission needs to demonstrate that conduct is *at least capable* of producing exclusionary effects. The GSMA suggests that the Commission adopts a probability/plausibility/"more likely than not" test as the "at least capable" test is too low a bar, and will be easily satisfied.

Further, paragraph 62 states: *"Moreover, where it is established that a conduct is objectively capable of restricting competition, this cannot be called into question by the actual reaction of third parties"*. We consider that this standard is too far-reaching and that reactions by third parties should be given weight, even if they are not sufficient on their own to completely rebut the allegation that the conduct is capable of restricting competition. We would therefore suggest that the Commission re-draft the sentence in the following way: *"Moreover, where it is established that a conduct is objectively capable of restricting competition, **the actual reaction of third parties is not a sufficient standalone argument to show that a conduct is not capable of restricting competition**"*.

Additionally, as stated in paragraph 66 of the Draft Guidelines, a conduct's capability to produce exclusionary effects ("capability analysis") requires a "counterfactual" comparison with the situation absent the conduct (e.g., by comparing the market situation "before and after" the implementation of the conduct). We would welcome more guidance on the application and suitability of this test, particularly in cases where the conduct is subject to a presumption.

Elements that are not necessary to show the capability to produce exclusionary effects. As already noted, the Draft Guidelines do not include any references to *anticompetitive foreclosure* as a central point in the Article 102 assessment. Nor do the Draft Guidelines endorse the requirement that, for conduct to be found to be capable of having exclusionary effects, the Commission must show that the affected actual or potential competitors are *as efficient as* the dominant undertaking (paragraph 73).¹⁷ Therefore, the Draft Guidelines, by placing the "as efficient competitor" requirement under *elements that are not necessary to show the capability to produce exclusionary effects*, make it clear that the Commission intends to pursue conduct that could exclude less efficient competitors. The protection of less efficient competitors is, in the opinion of the GSMA, likely to have chilling effects on competition as it disincentivises a dominant (or potentially dominant) company from innovating and investing. Article 102's aim is not to ensure that competitors less efficient than the dominant undertaking remain on the market.¹⁸ This is all the more relevant in light of the *Intel II* judgment which once again re-affirms the necessity of the "as efficient competitor" principle for establishing abuse as it states: *"Consequently, in order to find, in a given case, that conduct must be categorised as 'abuse of a dominant position', it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the*

¹⁶ Draft Guidelines, paras. 61-67.

¹⁷ Draft Guidelines, para. 73: "The assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking."

¹⁸ Judgment of 19 January 2023, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, para. 37; Judgment of 12 May 2022, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, para. 73.

market or markets concerned or by hindering their growth on those markets".¹⁹ The wording of paragraph 73 of the Draft Guidelines is also in contradiction with the recent *Google Shopping* judgment which states "*it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.*"²⁰

The undermining of the "as efficient competitor principle" contradicts established case law which considers the principle a critical factor of the assessment of anti-competitive conducts, and the GSMA urges the Commission to concede this point and revise the Draft Guidelines accordingly. If the Commission deems that they must depart from this principle in specific circumstances, they must make very clear the criteria that will guide and justify that choice.

The GSMA would also like to emphasise the crucial role played by the *AEC test* in self-assessment of conduct. The AEC test is a valuable tool for dominant (or potentially dominant) firms to assess their pricing and sometimes also non-pricing practices. Thus, expecting dominant companies to track and benchmark their conduct against less efficient rivals, especially ones whose existence dominant companies may not even be aware of, presents serious practical challenges and risks turning the analysis into a theoretical exercise, rather than a facts-based one, potentially undermining positive investment and innovation outcomes. Therefore, price-based (and sometimes also non-price based) economic assessments should be conducted on a case-by-case basis, using facts-based comparisons between AECs.

Section 4: Principles to determine whether specific categories of conduct are liable to be abusive

The Draft Guidelines introduce a new category of conduct which are presumed to produce exclusionary effects if they meet the conditions set out in a specific legal test. The dominant undertakings may rebut such a presumption which would decide the scope of intervention of the Commission, but which would reflect the fact that the conduct at stake has a high potential to produce exclusionary effects. We recall that the GSMA is not in favour of a presumptive approach to exclusionary effects.

Legal test. There appear to be inconsistencies around the two conditions for finding an exclusionary abuse, namely conduct *departing from competition on the merits* and conduct *capable of having exclusionary effects*.²¹ It is unclear if the intent of the Commission is to consider that if the specific legal test is met for certain types of conduct, both conditions for exclusionary abuse or only one of them should be considered fulfilled. As set out at paragraph 47 of the Draft Guidelines, when a given conduct meets the conditions set out in a specific legal test, such conduct falls outside the scope of competition on the merits and is capable of having exclusionary effects (emphasis added). The following paragraph of the Draft Guidelines however reduces the scope of application of paragraph 47 by stating that "*conduct*

¹⁹ *Intel II*, para. 176; see also para. 130.

²⁰ *Google Shopping* (2024), para. 265.

²¹ Draft Guidelines, para. 47 states: "...Therefore, when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects" (emphasis added). Later, at para. 53 the Draft Guidelines abandon any mention of exclusionary effects, making it unclear which conditions need to be fulfilled for abuse to be demonstrated: "As stated in paragraph 47, conduct fulfilling the requirements of a specific legal test is deemed as falling outside the scope of competition on the merits."

fulfilling the requirements of a specific legal test is deemed as falling outside of the scope of competition on the merits" (paragraph 53) without mentioning exclusionary effects, while paragraph 60b recognises that certain conduct included in section 4.2 has a high potential to produce exclusionary effects and therefore such effects are presumed. The approach is therefore not coherent throughout the Draft Guidelines.

Furthermore, this approach based on legal tests is in contradiction with the case law cited as supportive by the Commission.

Indeed, in its *European Superleague Company* judgment, the Court clearly stated that while there *may be* different analytical templates to be used to demonstrate abuse for different types of conduct, the demonstration "*must be made in light of all the relevant factual circumstances and be aimed at establishing the capability of the conduct to produce exclusionary effects based on specific, tangible points of analysis and evidence*".²² This is confirmed in the *Servizio Elettrico Nazionale* case, where the Court held that "*given that the abusive nature of a practice does not depend on the form it takes or took, but presupposes that that practice is or was capable of restricting competition and, more specifically, of producing, on implementation, the alleged exclusionary effects, that condition must be assessed having regard to all the relevant facts*".²³

Therefore, although case law has suggested a price-cost test for *certain* types of conducts (such as predatory pricing or margin squeeze) and established a several-step test to determine whether given conduct is abusive (for example in the cases of a refusal to supply or margin squeeze), in no instance has case law ruled out an effects-based assessment based on the factual circumstances of the case.

In addition, not only is the approach promoted by the Commission unwarranted according to the existing case law, but it also creates a circular construct when considering the sections dedicated to each type of conduct subject to a specific legal test. For example, in the sections regarding tying and bundling, refusal to supply and margin squeeze, the Draft Guidelines correctly recall established case law that finds that *the capability of conduct to have exclusionary effects* must be established for the legal test to be considered met (see paragraphs 99b, 89d, and 101 (iii)). This means that the Commission simultaneously appears to be claiming that exclusionary effects can be presumed for certain types of conduct, while at the same time requiring that anti-competitive effects must be established in order to rely on the presumption. It is clear, we would submit, that an effects-based assessment is a prerequisite for meeting the conditions of the legal test for certain types of conduct, which aligns with applicable case law.

Types of conduct having a high potential to produce exclusionary effects. Save as regards predatory pricing, the case law cited in the Draft Guidelines does not support the Commission's assertion that certain types of conduct have a high potential to produce exclusionary effects, and therefore, such effects can be presumed.

The Commission considers that **exclusive dealing** by a dominant firm has a high potential to produce exclusionary effects as it is likely to deprive or restrict the customer's or seller's choice of possible sources of supply or demand. Consequently, exclusive dealing is presumed to be capable of having exclusionary effects (paragraph 82 of the Draft Guidelines). Throughout the lengthy judicial saga of the *Intel* case, the Commission's position – that

²² Judgment of 21 December 2023, *European Superleague Company*, paras. 129 - 130.

²³ Judgment of 12 May 2022, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato*, para. 72.

rebates (and exclusivity) are anticompetitive by nature and that it is unnecessary to demonstrate foreclosure capability to establish an infringement of Article 102 was heavily debated. The Commission's stance has not been endorsed by either the General Court or the Court of Justice. The Court of Justice which insisted on the importance of effect-based assessment remarked that *"... it is apparent from paragraphs 133 to 147 of the judgment under appeal that the analysis carried out in the decision at issue, intended to demonstrate that the contested rebates constitute an abuse irrespective of the conclusions drawn by the Commission from the AEC test, is vitiated by an error of law in so far as it starts from the premise that the contested rebates were abusive irrespective of whether they were capable of foreclosing a competitor as efficient as Intel"*.²⁴ The same approach is adopted in the *Unilever* case where the Court clarified that *"it must be held that, although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic"*.²⁵ Furthermore, the Court in *Unilever* stated that *"Article 102 TFEU must be interpreted as meaning that, where there are exclusivity clauses in distribution contracts, a competition authority is required, in order to find an abuse of a dominant position, to establish, in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition"*.²⁶ Therefore, the wording of paragraph 82 should be aligned with applicable case law and presumptions should be abandoned for exclusivities.

Based on *Intel* case law, paragraph 83(d) of the Draft Guidelines should also be amended. In the first *Intel* case, the Court stated that when conducting an effects-based assessment, the Commission should establish the possible existence of a strategy aimed at excluding competitors that *"are at least as efficient as the dominant undertaking"*²⁷ rather than *"actual or potential competitors of the dominant firm"* as stated in paragraph 83(d) of the Draft Guidelines. In the same paragraph, the Draft Guidelines overreach by stating that such an exclusionary strategy is not legally required; this position is not supported by case law.

On **refusal to supply**, the Draft Guidelines do not mention refusal to supply in paragraph 60(b) (which addresses conduct presumed to lead to exclusionary effects), yet it is included in Section 4 – conduct subject to specific legal tests (where meeting the legal test conditions deems the conduct abusive, as per paragraph 47). It is therefore unclear whether the Draft Guidelines categorise refusal to supply as conduct presumed to lead to exclusionary effects or as conduct requiring a demonstration of its capability to produce such effects. In any event, according to established case law, refusal to supply should not be categorized as conduct presumed to lead to exclusionary effects as effect-based assessment is part of the legal test (as explained above). Refusal to supply should therefore be removed from the category of presumptions.

With regard to **margin squeeze**, when reviewing the case law referenced by the Draft Guidelines, it becomes clear that the case law does not suggest a *"high potential to produce exclusionary effects"* where the spread is negative, but rather a *"probability for a potential exclusion"*, which is a subtle yet significant distinction. Indeed, as stated in *TeliaSonera* judgment: *"if the margin is negative, in other words if, in the present case, the wholesale price*

²⁴ Judgment of 24 October 2024, *Intel Corp*, para. 340.

²⁵ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, para. 51.

²⁶ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, para. 62.

²⁷ Judgment of 6 September 2017, *Intel v. Commission*, para. 139, Judgment of 19 January 2023, *Unilever Italia Mkt Operations*.

for the ADSL input services is higher than the retail price for services to end users, an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss"²⁸ which is to be understood as part of a wider analysis that the Commission must carry out taking into account "all the specific circumstances of the case"²⁹. As to the cases where the spread is positive but not sufficient to cover the dominant undertaking's product-specific costs at the downstream level, the Draft Guidelines suggest that *this element can be relevant for the assessment of the capability of the conduct to produce exclusionary effects* (paragraph 129). This should be interpreted as the Commission maintaining the burden to prove exclusionary effects. Indeed, according to *TeliaSonera*, "if ... such a margin remains positive, it must then be demonstrated that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned".³⁰ In both the *Deutsche Telekom* and *TeliaSonera* cases, the Court held that the mere existence of a margin squeeze does not allow the Commission to avoid having to prove anti-competitive effects stating that "in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice".³¹

It follows from above, that paragraphs 128 and 129 need to be revised to align with the mentioned case law. At the other end of the spectrum, guidance is needed from the Commission on the percentage spread or margin required for it to rule out any potential exclusionary effects, providing a safe harbour from this allegation. The GSMA would also welcome clarity on any specific factors the Commission would rely on to determine whether a non-material positive margin is capable of having an exclusionary effect. Regarding paragraph 135 of the Draft Guidelines on granular versus aggregate product assessment, guidance is needed on scenarios where the level of aggregation might be wider than the relevant product market, for example, where other products are sold together under the same contractual framework. This would help to prevent confusion that might lead to an artificial focus on *one* aspect of an offer, rather than considering all the products in an offer collectively. The same applies to cases when the Commission would look at a specific contract when assessing the price-cost test, as opposed to taking into account all of the undertaking's supply contracts.

On **tying and bundling**, paragraph 95 of the Draft Guidelines suggests that, in certain circumstances, it may be possible to conclude that, due to the specific characteristics of the market and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed. In other cases, however, an assessment of exclusionary effects is required. The cases falling under this presumption are not explicitly identified, but the Commission explains in footnote 233 that "*this could be notably the case in the situation where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects*". However, the most recent case law does not support the Commission's assertion. Indeed, in the *Microsoft* case, both the Commission's decision

²⁸ Judgment of 17 February 2011, *TeliaSonera Sverige*, para. 73.

²⁹ Judgment of 17 February 2011, *TeliaSonera Sverige*, para. 68.

³⁰ Judgment of 17 February 2011, *TeliaSonera Sverige*, para. 74.

³¹ Judgment of 14 October 2010, *Deutsche Telekom v Commission*, para. 254, Judgment of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, para. 66.

and the judgment confirm the need for an effects-based assessment, which was conducted by the Commission in that specific case and lead the Court to conclude: "*there are ... circumstances relating to the tying of [Windows Media Player] which warrant a closer examination of the effects that tying has on competition in this case... There are therefore indeed good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition*"³².

On **predatory pricing**, the analysis is slightly different. The AKZO judgment - and based on it, also the Draft Guidelines (paragraph 111) suggests that the *only* case where predatory pricing can be presumed to be abusive is when the prices are below AVC or AAC. If the prices are above AVC or AAC but below ATC or LRAIC, then exclusionary effects need to be demonstrated. Against that backdrop, we would encourage the Commission to clarify the relationship between paragraph 111(b) which states that pricing conduct below ATC or LRAIC can be regarded as predatory *if it is part of a plan to eliminate competition*, and paragraph 112 which says that predatory pricing has a high potential to produce exclusionary effects and is therefore *presumed* to do so. In our view, paragraph 112 may need to be revised to align with the AKZO judgment, establishing that exclusionary effects can only be presumed when prices are below average variable costs (AVC) or average avoidable costs (AAC). It would be also useful to clarify that there is no predatory pricing when the prices are above LRAIC.

Indispensability as a *sine qua non* criterion for specific types of conduct. As regards the criterion of indispensability, the Commission acknowledges the fact that the EU Courts have set up strict conditions for a finding that a **refusal to supply** is liable to be abusive and consequently, it is necessary to prove the indispensability of the input, before mandating access to it in refusal to supply cases.³³ This is because an obligation to give access directly impacts on the freedom of contract of the dominant undertaking.

At the same time, according to the Commission, indispensability is not a requirement for establishing that access restrictions, self-preferencing and margin squeeze conducts are liable to be abusive.³⁴ At the same time, in the case of margin squeeze, the more important the upstream input is to effectively compete downstream, the more likely it is that the conduct is capable of having exclusionary effects, or - in the case of self-preferencing - a finding of indispensability may provide a strong indication that the conduct amounts to an abuse.³⁵

The GSMA believes that protecting businesses' freedom of contract and commercial incentives is crucial in any assessment under Article 102 and should not be compromised based on the type of abusive conduct. Consequently, the Guidelines should adopt the general approach that where it cannot be established that input is essential for another business to compete (i.e., there is no indispensability), access should not be granted to that input. Below, we expand on why the Commission should adopt that approach in the context of access restrictions and margin squeeze cases.

- **Access restrictions.** Paragraph 166 of the Draft Guidelines provides a non-exhaustive list of access restrictions which could be considered contrary to Article 102. However, this list seems problematic as it either tries to generalise one or two isolated cases which arose in a specific context (e.g., paragraph 166(a) - disruption of supply of existing

³² Judgment of 17 September 2007, *Microsoft v. Commission*, para. 977.

³³ Draft Guidelines, paras. 97, 99.

³⁴ Draft Guidelines, para. 165; footnote 336.

³⁵ Draft Guidelines, paras. 127 and 165; footnote 336.

customers) or refers to abusive conduct which is already addressed in a separate section of the Guidelines (i.e., the types of conduct mentioned in paragraphs 166(b), (c) and (d) refer in reality to margin squeeze, refusal to supply or self-preferencing). With such a broad category of abuse, there is a genuine risk of artificially and arbitrarily extending the application of Article 102 to *any* conduct that does not meet the conditions established by case law for different types of abusive conduct (e.g. refusal to supply, margin squeeze, or self-preferencing). This concern is particularly relevant in a context where the Guidelines do not explicitly outline the exclusionary effects that conducts falling under access restrictions may produce, nor do they provide an assessment framework for each type of conduct based on established case law. As a result, there is a risk of creating a situation in which the dominant undertaking would be obliged to provide access to its input, regardless of whether that input is indispensable. If this broad category of abuse were to be maintained, the conditions for granting access could become so restrictive for dominant (and potentially dominant) firms that it would in all likelihood be more advantageous for the dominant undertaking to retain the input for its exclusive use. More generally, such an extensive category of abuse contradicts the principle of freedom of contract, lacks support from established case law, and could negatively impact incentives to invest as well as overall legal certainty.

- **Margin squeeze.** In accordance with paragraph 127 of the Draft Guidelines, *"it is not necessary to establish that the upstream input is indispensable for rivals to compete downstream"*. However, this assertion of the Commission is not fully supported by the case law cited by the Draft Guidelines. The Commission cites the *TeliaSonera* case in support of its position but the reality is that the General Court did not assess the case on its merits, but only responded to the preliminary questions referred by the Swedish Court. In this context, the Court clarified that when the input is indispensable, at least potentially anti-competitive effects of a margin squeeze are probable, but that when the input is not indispensable, it is for the Court to satisfy itself that the practice may be capable of having anti-competitive effects: *"where access to the supply of the wholesale product is indispensable for the sale of the retail product, competitors ... who are unable to operate on the retail market other than at a loss or, in any event, with reduced profitability suffer a competitive disadvantage... In such circumstances, the at least potentially anti-competitive effect of a margin squeeze is probable. However, taking into account the dominant position of the undertaking concerned in the wholesale market, the possibility cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially. Accordingly, it is again for the referring court to satisfy itself that, even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned"*.³⁶

Burden of proof for certain types of conduct meeting a specific legal test. The shift of the burden of proof onto the dominant undertaking and the lightening of the burden on the Commission to conduct a thorough examination in case of a rebuttal set out in the Draft Guidelines directly contradicts settled case law (including case law on exclusive dealing which is supposed to apply by analogy to other conducts as stated by the Draft Guidelines).

In the *Unilever* judgment (regarding exclusive dealing) the Court holds that *"it is for the competition authorities to demonstrate the abusive nature of conduct in the light of all the*

³⁶ Judgment of 17 February 2011, *TeliaSonera Sverige*, paras. 70-72.

*relevant factual circumstances surrounding the conduct in question which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position... That demonstration must, in principle, 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.*³⁷ This effectively repeats the statement of the Court in the *Slovak Telecom* judgment (regarding margin squeeze) "*it must be recalled that it is for the authority alleging an infringement of the competition rules to prove it*"³⁸. In the *Akzo* judgment (regarding predatory pricing), the Court clearly states that when the prices are below ATC or LRAIC but above AVC or AAC, the conduct can be regarded as predatory *if it is part of a plan to eliminate or reduce competition*.

In the *TeliaSonera* and *Deutsche Telecom* judgments (regarding margin squeezes), the Court states that a margin squeeze "*constitutes an abuse within the meaning of Article 102 TFEU, where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned*";³⁹ "*the anti-competitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market.*"⁴⁰

Additionally, the recent judgment of the Court of Justice in *Intel II* confirmed once again and unambiguously that the burden of proof regarding the capability of conduct to have exclusionary effects is borne by the Commission: "*it is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement*".⁴¹

Therefore, and contrary to what the Draft Guidelines claim, based on established case law, it is the Commission's responsibility to prove that conduct is abusive.

Furthermore, the Commission cannot artificially reduce its administrative burden by limiting itself solely to the examination of the arguments and supporting evidence submitted by the dominant undertaking with by default a presumptive stance; it has the obligation to assess all the factual circumstances of the case to demonstrate the abusive nature of the conduct. This is consistent with the *Intel* and *Unilever* case law cited by the Commission which addresses the rebuttal cases stating that "*in a situation where an undertaking in a dominant position submits, during the administrative procedure, with evidence in support of its claims, that its conduct was not capable of restricting competition and, in particular, of producing the alleged exclusionary effects... In that situation, the competition authority is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount, it is also required to assess the possible existence of a strategy aiming to exclude*

³⁷ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, paras. 40 and 42

³⁸ Judgment of 25 March 2021, *Slovak Telecom v. Commission*, para. 72

³⁹ Judgment of 17 February 2011, *TeliaSonera Sverige*, para. 63

⁴⁰ Judgment of 14 October 2010, *Deutsche Telecom v. Commission*, para. 252.

⁴¹ Judgment of 24 October 2024, *Intel Corp*, para. 328

competitors that are at least as efficient as the dominant undertaking from the market.⁴² This is also confirmed in the recent decision of the Court of Justice in *Intel II*: "the fact that that undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing an anticompetitive foreclosure effect means that the Commission is under a specific obligation to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as that undertaking from the market"⁴³, and later "it is apparent ... that the General Court identified a series of shortcomings vitiating the relevant recitals of the decision at issue that led it to find that the Commission had not considered properly the criterion relating to the share of the market covered by the contested rebates or the duration of those rebates as evidence making it possible to determine the capability of those rebates to have an anticompetitive foreclosure effect".⁴⁴

It follows from all of the above that the Commission goes well beyond established case law by introducing in its Draft Guidelines presumptions on effects for certain types of conduct and by granting itself much wider discretion for establishing an abuse of dominance which would potentially lead to over-enforcement, increase legal uncertainty for businesses and increase opportunistic complaints. The GSMA submits that the Commission should abandon the category of conducts that are presumed to lead to exclusionary effect, as this approach violates established case law and creates a significant shift in the burden of proof in favour of the Commission, to the detriment of dominant undertakings.

Section 5: General principles applicable to the assessment of objective justifications

Conduct liable to be abusive escapes the prohibition of Article 102 if the dominant undertaking can demonstrate to the requisite standard that such conduct is objectively justified. According to Section 5 of the Draft Guidelines, this includes proving that the conduct is objectively necessary ("objective necessity defence") or that it produces efficiencies that counterbalance or even outweigh the negative effect on competition ("efficiency defence").⁴⁵

The GSMA welcomes the broader scope of arguments supporting an objective necessity defence.⁴⁶ Specifically, the Commission recognises that an objective necessity defence may include considerations related to public health, safety, or other public interests. For instance, the conduct may contribute to the Union's resilience by reducing dependencies and mitigating shortages and disruptions in supply chains,⁴⁷ in line with Ursula von der Leyen's political guidelines for the next mandate of the Commission (2024 – 2029).⁴⁸ Given the increasing complexity of global markets and the critical role of infrastructure in maintaining stability and security, it is essential that wider considerations, such as **resilience** and **the protection of**

⁴² Judgment of 6 September 2017, *Intel v. Commission*, paras. 138-139; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, paras. 47-48.

⁴³ Judgment of 24 October 2024, *Intel Corp*, para. 130.

⁴⁴ Judgment of 24 October 2024, *Intel Corp*, para. 132.

⁴⁵ Draft Guidelines, para. 167. The GSMA also welcomes the Commission's acknowledgement that the examples of efficiency defences in the Draft Guidelines are not exhaustive.

⁴⁶ Draft Guidelines, para. 168.

⁴⁷ Draft Guidelines, footnote 355.

⁴⁸ See the Political Guidelines for the Next European Commission 2024–2029 (18 July 2024) https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf.

critical infrastructure, are integrated into every efficiency assessment. This would ensure that the long-term benefits to society, including safeguarding of essential services, are fully considered when evaluating justifications for potentially anticompetitive conduct. The GSMA would welcome further guidance regarding the specific types of evidence that would be required by the Commission for a dominant undertaking to substantiate a necessity and efficiency defence to the requisite standard.

With regard to the standard of proof outlined in the Draft Guidelines for demonstrating an objective necessity or efficiency defence by dominant undertakings, the Commission requires “*a cogent and consistent body of evidence*”.⁴⁹ This appears to be a much stricter approach than the one adopted in the assessment of conduct liable to be abusive where only “*specific, tangible points of analysis and evidence*” are needed to conclude that such conduct is capable of having exclusionary effects.⁵⁰ This leads to an asymmetric and arguably arbitrary evidentiary burden in favour of the Commission. The GSMA argues that there should be no differential treatment of evidential burdens based on whether the potential exclusionary effects of conduct are entirely anticompetitive, or they also produce pro-competitive effects. This inconsistency in the Draft Guidelines should be addressed by applying an equal burden of proof standard to both assessments. If it is the case that actions in a company’s legitimate interest are always covered by the objective necessity defence, rather than the competition on the merits defence, we would welcome clear guidance on what constitutes “unfair competition” in these circumstances.

Finally, we propose that the Commission considers adopting an evidentiary burden standard based on the *balance of probabilities* test, which was recently affirmed by the EU Court of Justice in the CK Hutchison case (merger control). We do not see a reason as to why that principle cannot be extended to cases under Article 102.

About the GSMA

The GSMA is a global organisation unifying the mobile ecosystem to discover, develop and deliver innovation foundational to positive business environments and societal change. Our vision is to unlock the full power of connectivity so that people, industry, and society thrive. Representing mobile operators and organisations across the mobile ecosystem and adjacent industries, the GSMA delivers for its members across three broad pillars: Connectivity for Good, Industry Services and Solutions, and Outreach. This activity includes advancing policy, tackling today’s biggest societal challenges, underpinning the technology and interoperability that make mobile work, and providing the world’s largest platform to convene the mobile ecosystem at the MWC and M360 series of events. We invite you to find out more at gsma.com.

⁴⁹ Draft Guidelines, para. 171.

⁵⁰ Draft Guidelines, para. 60.