



## ICLA's Consultation Submission on the Draft Guidelines on the Application of Article 102 TFEU

29 November 2024

### 1 Introduction

The In-House Competition Lawyers' Association (**ICLA**) welcomes the publication of the draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (**DGL**) as an important milestone in the European Commission's (**EC**) efforts to provide further clarity and guidance with respect to its enforcement of Article 102 TFEU. The DGL have as a laudable aim to increase legal certainty to the benefit of consumers and businesses, as well as national competition authorities and courts. They represent an impressive exercise by the EC to reflect the extensive experience it has gained in enforcing Article 102 TFEU, and provide the EC's interpretation of the EU Courts' case law on exclusionary abuses.

ICLA appreciates the opportunity to comment on the DGL. ICLA's comments are made from the perspective of in-house lawyers responsible for competition law in their own company.<sup>1</sup> This submission seeks to capture a few key considerations based on the experience that in-house lawyers have in advising their companies on a day-to-day basis. It does not intend to be exhaustive or represent the views of each member individually but includes some key recommendations for the EC to consider in the framework of the consultation.

Throughout this submission ICLA emphasizes the importance of legal certainty for in-house lawyers to advise companies on guardrails within which they can shape and pursue compliant business models and strategies. However, the principle of legal certainty needs to be balanced against the risk of overenforcement in relation to commercial behaviour that does not give rise to anticompetitive effects. Such overenforcement would hinder companies from innovating and achieving their legitimate business goals, which would ultimately impact the competitiveness of the European economy. ICLA recognizes that the DGL make great strides in increasing legal certainty, but has the following key concerns:

- **Market shares.** ICLA considers that the DGL currently provide legal uncertainty in suggesting that only companies with market share of 10% or less can generally escape

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<sup>1</sup> ICLA is an informal association of in-house competition lawyers with more than 500 members across the globe. ICLA does not represent companies but individual experts in competition law matters who work in-house.

the scope of Article 102 TFEU. ICLA finds that this makes it exceedingly difficult to advise companies on when they have a dominant position. This could mean that as soon as a company exceeds a market share of 10% it would be discouraged from pursuing its commercial goals out of fear of being caught by Article 102 TFEU. A more administrable option would be for the DGL to include a rebuttable presumption that market shares below 40% do not give rise to a dominant position unless the EC can demonstrate that certain “plus factors” are present (see Section 2 below).

- **Two factors to find abuse.** The DGL seemingly interpret the case law as requiring only two factors to be present for the finding of an exclusionary abuse of a dominant position, firstly, that conduct departs from competition on the merits and, secondly, that it is capable of having exclusionary effects. While the case law does refer to both elements, ICLA considers it important to stress that that it does not “as such” provide for a two-step test. First, the DGL do not provide a comprehensive definition of what is meant by “competition on the merits”, which leaves significant uncertainty. Second, the DGL may lead to overenforcement if the burden of proof shifts to the defendant when the EC finds that one factor is fulfilled (rather than both). ICLA recommends that the DGL clarify that the EC needs to demonstrate both factors to find an abuse (see Section 3.1 below).
- **Presumptions.** ICLA is concerned that the EC may be moving back to a more formalistic approach with the introduction of presumptions regarding the proof of exclusionary effects. ICLA does not agree that the case law supports the introduction of presumptions, which essentially shift the burden on defendants to show that conduct is not capable of restricting competition. ICLA finds that the evidentiary burden to show anticompetitive effects is, and should remain, on the EC. Instead of presumptions, the DGL could introduce the idea of a sliding scale regarding the amount of evidence that the EC should produce to demonstrate effects in any given case: for the most egregious conduct, for which experience tells us that it will in general lead to anticompetitive effects, the burden on the EC to provide evidence of effects would be lighter (but not shifted) compared to conduct whose effects on competition may be more ambiguous (see Section 3.2 below).
- **Exclusionary effects.** ICLA finds that the DGL appear to set a lower bar for exclusionary effects than reflected in the case law of the EU Courts. The DGL seem to step away from requiring anticompetitive competitor foreclosure and instead refer to an unqualified reference to effect on competition. The DGL also do not include any “de minimis” as to the intensity and likelihood of exclusionary effects (regardless of whether the conduct takes place on the dominated market or a neighbouring one). This overly broad definition of exclusionary effect risks capturing legitimate business practices that do not have a negative effect on the competitive process (see Section 3.3 below).

- **As efficient competitor principle / test.** ICLA finds that the DGL do not give sufficient importance to the principle that Article 102 TFEU is not meant to protect less efficient competitors. The DGL also seem to downplay the EC's obligation to demonstrate effects on as efficient competitors, including through as efficient competitor (price-cost) tests. This is not supported by the case law. In fact, the most recent case law, such as *Intel Renvoi* emphasize the importance of this principle. We would like to stress how important the as efficient competitor principle is for in-house counsel advising their business operations on a daily basis. By not giving sufficient weight to this principle, the DGL create more legal uncertainty for companies seeking to assess the legality of their behaviour (contrary to the stated purpose of the DGL). If behaviour can be found illegal even if it is not capable of excluding as efficient competitors, companies might refrain from engaging in otherwise pro-competitive and innovative behaviour due to the fear that marginalising less efficient competitors is seen as abusive. Furthermore, companies face significant uncertainty if they cannot rely on their own price/cost information to determine whether their conduct is potentially abusive and instead need assess the competitive position of third parties for this analysis (see Section 3.4 below).
- **Efficiencies.** ICLA finds that the introduction of presumptions which shift the burden of proof on defendants to demonstrate that their conduct was either necessary or gives rise to efficiencies and the EC's proven reluctance to accept efficiencies leads to an overenforcement bias. ICLA recommends that the DGL give more importance to efficiencies and adopt a broader approach by explicitly accepting efficiencies beyond price and quality, such as an increase in innovation, sustainability and investment. ICLA would generally welcome more guidance on the objective necessity defence and the efficiency defence (see Section 4. below).

Overall, ICLA observes that many of its concerns are driven by the fact that the DGL's attempt to *systematize* the case law is instead *generalizing* it. This is particularly apparent in relation to the factors supposedly relevant to find that conduct is *not* competition on the merits. Typically, the findings of the EU Courts are highly facts and case specific. Generalizing such findings without due regard to the specific circumstances of the case risks leading to an unnuanced (or even incorrect) application of the law.

While ICLA would like to re-emphasize that we support the DGL's aim of bringing more legal certainty and see the DGL as a welcome step in expanding the body of EU competition regulation, we are of the opinion that substantial revisions to the DGL are required (including in light of recent case law such as the *Intel Renvoi*). We would therefore encourage the EC to reopen a consultation on the text of a revised version, to which ICLA would very much appreciate to further contribute.

## 2 Determining dominance

Section 2 of the DGL set out the general principles applicable for the assessment of dominance, for single dominance as well as collective dominance.

As a key point ICLA recommends the DGL to include a presumption that a company is not dominant if it holds a below 40% market share (see 2.1 below). In addition, we recommend that the DGL are clarified and refined on a few points such as: out-of-market constraints (Section 2.2 below), digital markets (Section 2.3 below), aftermarkets (Section 2.4 below) and collective dominance (Section 2.5 below).

### 2.1 **Presumption of non-dominance for below 40% market shares**

The DGL state that “*market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances*” and that for shares under 45% certain “plus factors” are required to find dominance, whereas market shares of more than 70% are considered a clear indication of a dominant position.<sup>2</sup>

The DGL seem to hold that there is no “minimum” market share as even companies with below 10% shares could be found dominant save for in exceptional circumstances. This interpretation of Case 75/84 *Metro SB-Großmärkte v Commission* suggests there is some significance of a 10% market share. The Court noted Saba’s market share of 10% could not be evidence of a dominant position. There is no suggestion from the judgment that 10% is a relevant threshold when assessing dominance. Indeed, the only time that the Commission has found a company to have a dominant position with a market share below 40% was in Decision 2000/74/EC, *Virgin/British Airways*, where British Airways had a market share of 39.7%.

ICLA finds that this makes it exceedingly difficult to advise companies on when they have a dominant position making their behaviour subject to Article 102 TFEU. This could mean that as soon as a company exceeds a market share of 10% it would be discouraged from pursuing its commercial goals out of fear of being to abuse a dominant position.

A more administrable option would be for the DGL to include a rebuttable presumption that below 40% market shares do not give rise to a dominant position unless the EC can demonstrate that certain additional factors are present (such as the strength and number of competitors). This would be fully in line with existing case law<sup>3</sup> and still allow the EC to pursue cases where in exceptional circumstances a company is dominant despite a below 40% market share.

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<sup>2</sup> DGL, footnote 41.

<sup>3</sup> Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, 27/76, EU:C:1978:22, paras 108 and 109; judgment of 17 December 2003, *British Airways v Commission*, T-219/99, EU:T:2003:343, paras 211 and 224, and judgment of 15 December 1994, *Gøttrup-Klim u.a. Grovvareforeninger / Dansk Landbrugs Grovvareselska*, C-250/92, EU:C:1994:413, para 48.

## 2.2 Taking account of “out-of-market” constraints

In the introductory section, the DGL state that the assessment of dominance generally requires the definition of a relevant market.<sup>4</sup> It states that “[m]arket definition involves identifying in a systematic way the competitive constraints exerted on the undertakings concerned when they offer products in a certain area” (Ibid.). We agree that market definition generally forms an integral part of a dominance assessment. Companies can draw on the principles set out in the recently revised Market Definition Notice<sup>5</sup> for this assessment.

However, as noted in the Market Definition Notice (see paragraphs 8 and 17), the substantive competitive assessment and analysis of market power should not be confined solely to the relevant geographic and product market. It should – where relevant – also take account of “out-of-market” factors. In this regard, two types of “out-of-market” factors are relevant:

- 1) Competitive advantages drawn from out-of-market activities, such as scale economies, network effects, ecosystem advantages, access to specific assets and inputs, etc.
- 2) Competitive constraints faced from outside the market, such as a single-service firm facing competition from a multi-product firm or ecosystem, the possibilities of imports from a neighbouring geographic market, etc.<sup>6</sup>

Whereas the relevant market only includes the most effective and immediate competitive constraints, we recommend that the DGL clarify that the EC has to take account of all competitive constraints, including out-of-market constraints (whether effective and immediate or not) in its competitive assessment and the analysis of market dominance. This would reflect more accurately the commercial reality of the companies ICLA members advise.

## 2.3 Digital / platform markets

We welcome the DGL’s statement that market shares should be interpreted in light of the relevant market conditions and dynamics, and the extent to which products are differentiated, in particular in “fast-growing markets with short innovation cycles” where market shares in themselves may be less accurate indicators of market power.<sup>7</sup> The DGL specifically refer to certain characteristics of digital / platform markets that are relevant to a dominance assessment. We consider that these could be further specified:

- 1) Multi-sided platforms. The substantive dominance assessment of multi-sided platforms largely depends on how the market is defined. As set out in the Market Definition Notice, a multi-sided platform can be found to operate on one relevant market including both

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<sup>4</sup> DGL, para 20.

<sup>5</sup> Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024.

<sup>6</sup> See [https://competition-policy.ec.europa.eu/system/files/2021-07/evaluation\\_market-definition-notice\\_en.pdf](https://competition-policy.ec.europa.eu/system/files/2021-07/evaluation_market-definition-notice_en.pdf), page 7.

<sup>7</sup> DGL, para 28.

sides of the platform or it could be seen as operating on separate markets for products offered on each side of the platform.<sup>8</sup>

The DGL find that *“in the context of multi-sided platforms, with two different user groups, constraints on the market power of the platform operator vis-à-vis one side can also come from the user group on the other side of the platform”*.<sup>9</sup>

The DGL however do not specify whether this is relevant irrespective of whether two separate sides of the market are defined or whether one relevant market including both sides is defined. It also does not elaborate on whether a platform can be found dominant on one side of the market if it experiences strong competition on the other side of the market, in particular if the market in which it experiences strong competition drives the monetisation of the platform.

- 2) Zero-price markets. In relation to zero-price markets, the DGL set out that *“other measures such as the numbers of users, transactions, or indicators of the intensity of usage may provide a better basis for analysing dominance”*.<sup>10</sup>

In this regard, we recommend that the DGL clarify that a comparison of alternative metrics can only be relied on to the extent this does not lead to an apples-to-oranges comparison. Different platforms offer different features, functionalities, and user experiences that may not be comparable like for like.

By comparing metrics that are of varying significance to distinct platforms with distinct user experiences, the EC may over- or underestimate the relative competitive significance of those platforms.

- 3) Network effects. Third, the DGL find that network effects can create barriers to entry and expansion and explain how direct and indirect network effects can make it more difficult for users to switch and attract a sufficient number of users.

The DGL however do not elaborate on whether different types of network effects (direct versus indirect) amount to different degrees of user lock-in and barriers to entry/expansion. For example, it can be more difficult to convince users to switch if this entails losing their ability to interact with their direct network, whereas indirect network effects are more similar to scale effect that are not linked to personal connections.

The DGL indicate that network effects are exacerbated if users “single-home”. However, we recommend for the DGL to also explicitly recognise the opposite, i.e. that “multi-homing” may reduce possible barriers to entry and expansion.

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<sup>8</sup> DGL, para 95.

<sup>9</sup> DGL, footnote 37.

<sup>10</sup> DGL, footnote 42.

ICLA would furthermore welcome guidance on the EC's approach to ecosystems in the assessment of dominance.

## 2.4 Aftermarkets

The DGL make reference to the concept of aftermarkets in a footnote. However, given that the purpose of the DGL is to enhance legal certainty and help undertakings self-assess whether their conduct is prohibited under Article 102 TFEU, ICLA would find it helpful in this respect if the DGL provided additional clear and effective guidance based on existing case law.

In such context, we recommend that for dominance (and abuse) assessments in aftermarkets the DGL include the following:

- 1) The first step should consist of defining the relevant market either as (i) a systems market, (ii) multiple markets or (iii) dual markets according with the principles contained in paragraphs 99-102 of the Market Definition Notice.
- 2) In case a separate aftermarket is defined (either because of defining multiple markets or dual markets), then the second step should be to assess whether competition in the primary product market may constrain potential market power in the secondary product market. For such purpose, it should be assessed (i) whether there is competition in the primary market and (ii) whether the primary and secondary markets are closely linked, which depends on meeting the four conditions set in the so-called EFIM test.<sup>11</sup>

According with the EFIM test, dominance in the aftermarket (secondary product) can be excluded to the extent that *“a customer (i) can make an informed choice including lifecycle pricing; that he (ii) is likely to make such an informed choice accordingly, and that (iii) in case of an apparent policy of exploitation being pursued in one specific aftermarket, a sufficient number of customers would adapt their purchasing behaviour at the level of the primary market (iv) within a reasonable time.”*<sup>12</sup>

- 3) Moreover, for the assessment of dominance in the aftermarket, in addition to the existence of a close link with the primary market, it is necessary to consider whether competition on the secondary market may also operate as a competitive constraint on the allegedly dominant undertaking (for example, whether compatible accessories exercise price pressure that limits ability of manufacturers of original accessories to increase prices).
- 4) Finally, where aftermarket dominance is found, the EC should assess whether the practice constitutes an abuse in the relevant market. Some of the considerations

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<sup>11</sup> Commission decision of 20 May 2009 rejecting the complaint in Case C-3/39.391 – *EFIM* (paras 13 and ff.); confirmed in Case T-296/09 – *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commission*, EU:T:2011:693, paras 60, 90 and 91 and Case C-56/12, EU:C:2013:575, paras 12 and 36 et seq.

<sup>12</sup> *Ibid.*

relevant in the analysis of interdependence of primary and secondary markets may need to be taken into account in the competitive assessment, even if the interdependence is not sufficient to conclude on the absence of aftermarket dominance. In addition, there may be acceptable efficiency justifications for the conduct on the secondary market by the manufacturer of the primary goods.<sup>13</sup>

## 2.5 Collective dominance

The DGL provide that collective dominance can be established even in the absence of an agreement or structural links between undertakings. It finds that collective dominance can be found based on (tacit) coordination between undertakings in question if the criteria set out in *Airtours* are met.<sup>14</sup>

We recognise that the General Court has in *Laurent Piau* endorsed the general principle that collective dominance can be established based on *Airtours* criteria in abuse of dominance scenarios.<sup>15</sup> However, the General Court in *Laurent Piau* did not only refer to the *Airtours* criteria, but more heavily relied on the existence of structural links between parties in line with *Compagnie Maritime Belge* to justify the finding of collective dominance under Article 102 TFEU.<sup>16</sup>

It is therefore untested whether the EC could find collective dominance without any structural links between the parties. Hence, ICLA believes that the *Laurent Piau* case cannot be generalised as set out in the DGL. In any event, the burden of proof on the EC to find collective dominance based on (tacit) collusion in Article 102 TFEU cases must be very high (at least be as high as set out in *Airtours* for merger cases) for several reasons:

- 1) First, it will be extremely difficult for companies to self-assess whether they hold a position of collective dominance if no structural links are required.
- 2) Second, even if companies manage to self-assess that they hold a position of collective dominance, it is much more difficult to determine whether they abuse this collective position than in the scenario of single-firm dominance. This is because such an

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<sup>13</sup> See Section 4 of “Competition Issues in Aftermarkets – Note from the European Union” 13 June 2017 submitted by the European Commission for the 127th OECD Competition Committee on 21-23 June 2017.

<sup>14</sup> DGL, paras 36-42.

<sup>15</sup> See para 111: Three cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy (Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, para 62, and Case T-374/00 *Verband der freien Rohrwerke and Others v Commission* [2003] ECR II-0000, para 121).

<sup>16</sup> Judgment of 26 January 2005, *Laurent Piau v Commission*, T-193/02, EU:T:2005:22, paragraph 113: “A decision like the FIFA Players’ Agents Regulations may, where it is implemented, result in the undertakings operating on the market in question, namely the clubs, being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers (*Compagnie maritime belge transports and Others v Commission*, para 44)”.



assessment will necessarily require an analysis not only of its own behaviour but also that of its competitors. A commercial strategy that reflects legitimate commercial interests may be found dominant by virtue of others engaging in the same conduct.

- 3) Third, unlike in merger cases the consequences of being found to abuse a collectively dominant position can involve severe penalties.

In sum, ICLA recommends that the DGL clarify that collective dominance under Article 102 TFEU can only in exceptional circumstances be established based on the Airtours criteria in the absence of structural links between the parties.

### **3 The two factors: competition on the merits and capability of producing exclusionary effects**

#### **3.1 General considerations**

The DGL place a lot of emphasis on two factors in the assessment of potentially abusive conduct, namely that the dominant firm adopts conduct that is (i) incompatible with competition on the merits and (ii) capable of having exclusionary effects.<sup>17</sup> Before examining each of these factors individually, ICLA wishes to make a few general comments on this somewhat new approach by comparison to the 2008 Guidance Paper.<sup>18</sup>

Firstly, ICLA recognizes that the two factors have appeared prominently in recent case law of the Court of Justice, such as *SEN*, *Unilever*, *European Super League*, *Google Shopping*, *Intel Renvoi*). However, the Court of Justice never stated that these two factors constitute a “two-prong test”, and ICLA considers that it is very important not to characterize them as such. The DGL indeed do not do that, but many commentaries since the publication of the DGL have done so. The manner in which a legal “test” operates is by setting out a number of conditions which, when met, lead to a legal conclusion (i.e. the conditions are both necessary and sufficient).<sup>19</sup> It is clear from the case law that, while the presence of these two factors is necessary to find an abuse, it is not *sufficient*.

To just take one example, as regards abusive refusals to supply, the mere capability to foreclose competition is not *sufficient* to characterize an abusive refusal. To be found *abusive*, the refusal must lead to the elimination of *all effective competition* on a downstream market. In other words, and more generally, for certain conduct the EC will need to show more than the mere capability of anticompetitive effects to be found abusive (for example if the prohibition impinges on fundamental rights), while this may not be required for other (more egregious) conduct (see, e.g., the conduct at stake in *AstraZeneca*). In all cases, the assessment of whether a conduct is abusive

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<sup>17</sup> DGL, paras 45 et seq.

<sup>18</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009/C 45/02.

<sup>19</sup> Ritter, Cyril, Presumptions in EU Competition Law (July 10, 2017), page 3.

must be made “*in the light of all the relevant factual circumstances ... irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s).*”<sup>20</sup>

Secondly, and for similar reasons, ICLA also cautions against an overly simplistic two-steps approach, consisting of assessing firstly whether a conduct reflects competition on the merits, and then assessing whether it is capable of restricting competition, without also taking account of other potentially relevant factual circumstances. ICLA is afraid that such an approach, if not correctly implemented, may lead to over-enforcement, especially if it means minimizing the required exclusionary effects in the second step (or worse, shifting the burden of proof in that second step, as the DGL indeed suggest in para 58 *in fine* – see below Section 3.3.1.). It is important to bear in mind that *competition off the merits* and *capability to produce exclusionary effects* are both necessary but not always sufficient in an overall assessment of whether there is an abuse.

*Intel Renvoi* provides a useful example of how the two factors should be considered and applied (and that they are cumulative – see paragraphs 179 and 181 of *Intel Renvoi*). Likewise, in *SEN*, the Italian court was asking whether the finding of abuse could only be based on the (potential) effects of that conduct in the market. The reply of the CJEU was (following settled case law) that, to be abusive, conduct should produce anti-competitive effects on the market and depart from competition on the merits (*SEN*, para 103). This aspect will be further discussed below in relation to the introduction of presumption of effects by the DGL.

Overall, ICLA recommends that the DGL make it clear that the finding of an abuse requires an overall analysis that establishes both that a conduct is inconsistent with competition on the merits and that it has *at least* the capability of restricting competition. The DGL should also make clear that this analysis is not a rigid two-step approach and that it must be done by reference to all relevant factual circumstances. Finally, the DGL must make clear that the findings in relation to the nature of the conduct also inform the intensity of anticompetitive effects required to find an abuse.

### 3.2 The concept of “competition on the merits”

The 2008 Guidance Paper placed little emphasis on the notion of competition on the merits, and proposed no definition of it. It was merely mentioned twice, at paragraphs 1 and 6, in which the Guidance Paper also noted that “*what really matters is protecting an effective competitive process and not simply protecting competitors*”. In contrast, “competition on the merits” is mentioned 40 times in the DGL and considered a cornerstone of the assessment of potentially abusive conduct.

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<sup>20</sup> ESL, para 130.

Regardless of whether this reflects the state of the case law, ICLA is concerned that the DGL do not offer sufficient guidance as to what is competition on the merits. Conversely, ICLA is concerned that the DGL make overly broad generalization regarding what may not constitute competition on the merits.

### 3.2.1 Little guidance as to what is competition on the merits

Indeed, paragraph 51 simply says that competition on the merits covers “*conduct within the scope of normal competition on the basis of the performance of economic operators*”. ICLA believes that in order for companies to be able to effectively self-assess their behaviour, it would be useful for the DGL to provide more detailed indications as to what would normally constitute competition on the merits. At a minimum, the DGL could for example refer to paragraph 85 of *SEN*, second sentence, which states that: “*conduct which has the effect of broadening consumer choice by putting new goods on the market or by increasing the quantity or quality of the goods already on offer must, inter alia, be considered to come within the scope of competition on the merits*”.

The DGL could also refer to the opinion of AG Rantos in *SEN*, paragraph 69: “*the case-law of the Court, in my view, confirms that exclusionary conduct of a dominant undertaking which can be replicated by equally efficient competitors does not represent, in principle, conduct that may lead to anticompetitive foreclosure and therefore comes within the scope of competition on the merits*”.

As an additional example, from UK case law, ICLA also refers to the Court of Appeal judgment in *Royal Mail*,<sup>21</sup> paragraph 18: “*The concept of “normal competition” (or, as it is more usually termed nowadays, “competition on the merits”) means competition on price, quality, choice and innovation. Thus there is nothing wrong with a dominant undertaking competing with other undertakings on price, and a dominant undertaking may maintain or even increase its market share by doing so. But it is unlawful for dominant undertakings to adopt pricing practices which are anti-competitive, and in particular to adopt differential prices which place other undertakings at a competitive disadvantage*”.

### 3.2.2 Generalization of what does not constitute competition on the merits

While the DGL do not offer much definition of what competition on the merits is, they set out a list of conducts or practices which are deemed to fall outside competition on the merits:

- The types of conduct set out in Section 4.2 of the DGL, namely exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze, which satisfy the applicable specific legal test;
- Naked restrictions listed in paragraph 60(c) of the DGL.

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<sup>21</sup> *ROYAL MAIL PLC v. Ofcom and WHISTL UK*, [2021] EWCA Civ 669, Case No: C3/2020/0151.

At paragraph 55, the DGL also provide a list of factors allegedly found by the EU Courts relevant to the assessment of whether a conduct departs from competition on the merits. ICLA invites the EC to be very cautious making generalizations from very specific cases, which often reached certain conclusions in light of the specific circumstances of those cases.

For example, at para 55(a), the DGL draw a broad conclusion which does not appear supported by the cases cited in footnote. *Microsoft* was a very specific case, which is hard to generalize in the manner the DGL do (especially on the basis of paragraphs 1046 and 1047, cited in footnote 119). Likewise the paragraphs of *VaBF* cited in footnote 119 do not support the generalization made in the DGL (in particular, two paragraphs cited by the DGL refer to the arguments of the parties, and not the Court's findings).

Likewise, paragraph 55(b) attempts to generalize a finding of the Court in the *Meta Platform* case, which was very nuanced:

*"In that respect, the compliance or non-compliance of that conduct with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition and to assess the consequences of a certain practice in the market or for consumers".<sup>22</sup>*

Similarly, the DGL draw a very broad conclusion at paragraph 55(d) from *SEN*, which concerned a very specific set of facts in the Italian electricity market, namely the unfair exploitation of data obtained under a legal monopoly. In addition, paragraphs 96-99 in *SEN*, cited by the DGL, do not appear to refer to competition on the merits specifically. The conclusion drawn from *SEN* – that a dominant company's conduct consisting of discriminating in its favour is not competition on the merits (without further context) – is also hard to reconcile with the position that self-preferencing is not problematic in itself.<sup>23</sup>

ICLA believes that there are obvious merits in referring to the case law of the EU Courts to illustrate what was found not to be competition on the merits in past cases. However, the manner in which paragraph 55 is currently drafted (i.e. by means of generalizing) is not appropriate. There is a risk of national competition authorities, national courts and/or plaintiffs applying the generalization set out in the guidelines by analogy, rather than the cases themselves. This creates an undesirable risk of "jump" further away from the *actual* case law, and of over-enforcement. In addition, such generalizations are very unhelpful for in-house counsel self-assessing the conduct of the companies they represent, and will likely lead to type II errors (pro-competitive conduct not being implemented for fear of breaching the rules).

Instead, ICLA considers that it would be better to include short summaries (e.g. in the form of boxes) explaining what precisely was found not to be competition in the merits by reference to

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<sup>22</sup> C-252/21, *Meta Platforms and Others* (General terms of use of a social network), EU:C:2023:537, para. 47.

<sup>23</sup> DGL, para 156-157; *Google Shopping*, para 186.

the case specifics. For example: “*in the Meta case, the Court found that the violation by Meta of the GDPR did not constitute competition on the merits because A, B, C, D*”. This would also be more in line with the purpose of the guidelines, as understood by ICLA, which is to restate the case law, not extrapolate on it. More generally, the DGL could provide hypothetical case examples (“box examples”), as in other guidelines from the EC, to help companies self-assess.

Finally, at paragraph 49, the DGL indicate that a dominant company is free to protect its commercial interests, provided however that “*its purpose is not to strengthen its dominant position or abuse it*” (we underline). The use of the conjunction “or” is questionable, as it implies that strengthening once dominant position can be abusive in itself. A dominant company should be able to seek to strengthen its dominant position, e.g. gain market share, by competing on the merits.<sup>24</sup> What should be unlawful is strengthening its dominant position as a result of abusing such a position, i.e. by using means that are not competition on the merits (and the conduct having the capability to produce exclusionary effects). The DGL should therefore use the conjunction “and” in paragraph 49, as the Court in fact did in the cases cited in footnote 104 (e.g., *Generics UK* or *France Telecom*).

### 3.3 Capability to produce exclusionary effects

In Section 3.3, the DGL first discuss the evidentiary burden to demonstrate the capability of exclusionary effects (Section 3.3.1) before discussing the substantive legal standard (Section 3.3.2) and finally the elements relevant to prove exclusionary effects (3.3.3) and those “not necessary” to prove such effects (3.3.4).

#### 3.3.1 Burden of proof

As regards the burden of proof, the DGL introduce the idea that certain types of conduct are subject to presumptions of anticompetitive effects. In conferences, EC officials have referred to “soft” and “hard” presumptions.

The soft presumption appears to relate to conduct identified in Section 4.2, i.e. conduct subject to specific legal tests. According to the DGL, these types of conduct are generally recognised as having a high potential to produce exclusionary effects and will be presumed to lead to such effects (Article 60(b)). The dominant company can however rebut such presumption, on the basis of “supporting evidence”.

The hard presumption relates to naked restrictions. These types of conduct are said to be “by their very nature capable of restricting competition”. According to the DGL, only in exceptional circumstances will this conduct be found incapable of restricting competition.

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<sup>24</sup> See para 37 in case C-680/20 *Unilever Italia*, where the ECJ stated that “*That said, it is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, on account of its skills and abilities in particular, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market*”.

ICLA considers that the use of presumptions in this context is not supported by the case law and, additionally, unhelpful.

*First*, the case law of the Court does not support the use of presumptions in this context. Indeed, at footnote 131, the DGL appear to recognize that the Courts have not made use of presumptions in this context.

*Footnote 131: “While the Union Courts have not always made explicit use of the term “presumption” for each one of these practices, the Commission considers that the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as “presumptions”. Therefore, these Guidelines make use of the expression “presumption” (or “presumed”) for allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts”.*

In *Intel Renvoi*, the Court made it very clear that the EC must demonstrate that the conduct has actual or potential effects “*in all cases, in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market or markets in question or the functioning of competition on that market or those markets*” (paragraph 179). It is hard to reconcile that statement with the idea of presumptions (and the notion of presumption is markedly absent from all recent judgments of the Court of Justice, including *Google Shopping* and *Intel Renvoi*)<sup>25</sup>.

In addition, the existence of a presumption may also be in conflict with the fundamental right of defence and presumption of innocence, given the quasi-criminal nature of competition law fines. This is why the Grand Chamber again recently reaffirmed that it is for the EC to prove all constituent of an infringement (*Google Shopping*, paragraph 224).

*Second*, it is unclear how useful such presumptions would really be. In most cases, the defendant will argue that its conduct was incapable of restricting competition. Therefore, in most cases the EC will have to demonstrate such effects, but this demonstration will have to be postponed until after the Statement of Objections (SO) Response (which is generally when the defendant puts forward substantiated submissions). This will raise process questions: if the EC needs to raise new arguments and facts in response to the arguments raised by the defendants regarding the lack of effects, the EC will likely have to hear the defendant again. The efficiencies potentially gained at the beginning of the proceedings (lighter SO) will be lost at the back of proceedings (need for Supplementary SO, second hearing and/or Letter of Facts). It is unclear whether the net effect will be positive or negative. And it seems more natural for the EC to put forward evidence of effects in the SO, which then the dominant company can try to rebut in its response.

*Third*, it is good hygiene for the EC to build, early in the life of a case, a credible and convincing theory of harm including evidence of anticompetitive effects. It also seems necessary for the EC

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<sup>25</sup> As far as ICLA is aware, only in relation to predatory pricing did the Court introduce the idea of a presumption, namely that pricing below average variable cost is abusive (see recently in case T-671/19, *Qualcomm (predatory pricing)*, para 521).

to prioritize cases: as noted in the Guidance Paper, the EC will normally intervene against conduct “likely to lead to anti-competitive foreclosure”. Unless the EC has decided to change its prioritisation objectives (which it has not said), it is difficult to reconcile the new approach with the need to prioritize conduct having the most egregious effects on competition.

*Fourth*, if the EC does not sufficiently demonstrate effects in the SO and fails to fully rebut the evidence put forward by the defendant, the decision may be weaker. The recent annulment of the EC decision in *Google Ad Sense* gives an example of how the EC can insufficiently refute arguments brought by the defendant and put its case at risk. Had the EC built a stronger case of anticompetitive effects in its SO, it may perhaps not have lost the case (or may not have adopted a decision if it were incapable of showing exclusionary effects).

While ICLA considers that introducing presumptions is inappropriate, it does not dispute that the level of evidence which the EC should adduce to show anticompetitive effects can vary from case to case. As regards naked restrictions or well-known theories of abuse, the EC should not be required to substantiate as much the likelihood and intensity of the anticompetitive effects than as regards novel cases, for which the EC should be required to provide convincing and cogent evidence of anticompetitive effects to find an abuse. ICLA submits that the idea of a sliding scale in discharging the burden of evidence could usefully replace that of presumptions. This would also be consistent with other areas of competition law, such as merger control<sup>26</sup>.

### 3.3.2 [Standard of proof](#)

In relation to the standard of proof of exclusionary effects, ICLA considers that there are three relevant questions:

- What are anti-competitive exclusionary effects?
- What is the required intensity of such effects?
- What is the likelihood of such effects?

On a side note, ICLA considers that it would be useful if the DGL dealt with these three fundamental questions more clearly/systematically in the section on the standard of proof.

#### 3.3.2.1 [What effects?](#)

The DGL first refer to the concept of exclusionary effects at paragraph 6 (see also footnote 143 cross referring to paragraph 6<sup>27</sup>):

*“Such behaviour, if not objectively justified, is hereinafter referred to as “exclusionary abuse” and its effects are hereinafter referred to as “exclusionary effects”. Those effects*

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<sup>26</sup> The Commission must adduce particularly cogent evidence in cases relating to vertical or conglomerate judgment, by comparison to horizontal mergers (see, for example, case C-12/03, *Commission v. Tetra Laval*, para.39).

<sup>27</sup> Footnote 143 also refers to *SEN*, *Telia* and *Tomra*, but none of the paragraphs referred to actually define the concept of “exclusionary effects”. They merely discuss the required “likelihood” of such effects.

*refer to any hindrance to actual or potential competitors' ability or incentive to exercise a competitive constraint on the dominant undertaking, such as the full-fledged exclusion or marginalisation of competitors, an increase in barriers to entry or expansion, the hampering or elimination of effective access to markets or to parts thereof or the imposition of constraints on the potential growth of competitors".*

At paragraph 62, the DGL also indicate that, in order to prove exclusionary effects, *"it is sufficient to show that the conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors that existed at the time of the conduct's implementation"*. This is apparently based on the judgment in *Lundbeck*<sup>28</sup> (a case applying Article 101 TFEU).

ICLA notes, first, that such a definition provides for a very low standard and, secondly, that some of the case law references cited in the DGL do not seem to support the conclusions drawn from them.

The words in paragraph 6 (*"any hindrance to actual or potential competitors' ability or incentive to exercise a competitive constraint on the dominant undertaking"*) can be contrasted with paragraph 19 of the 2008 Guidance Paper which defined "anticompetitive foreclosure" as follows:

*"'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices (14) to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence".*

The 2008 Guidance Paper makes reference both to effective competition (i.e., implicitly, that the conduct of the dominant firm must affect efficient competitors) but also likely consumer harm. By contrast, several parts of the definition in paragraph 6 of the DGL seem unqualified by reference to effective competition or consumer harm, e.g., "increase in barriers to entry or expansion", or "imposition of constraints on the potential growth of competitors".

ICLA is concerned that the low standard endorsed by the DGL is not firmly grounded in case law:

- Footnote 12 refers to paragraph 117 of *Astra Zeneca*, in which the CJEU merely describe a factual conclusion of the General Court. It deals with a very specific set of facts which cannot be generalized in such a manner (i.e. that any hindrance of competitors would be enough).

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<sup>28</sup> C-591/16 P, *Lundbeck v. Commission*, ECLI:EU:C:2021:243.



- Footnote 13 refers to paragraph 154 of *Astra Zeneca*, which likewise does not support that the mere increase of barrier to entry or expansion would be enough, as suggested by the DGL.<sup>29</sup>
- Footnote 15 refers to *European Superleague Company* (paragraph 131), which while referring to preventing the growth of competition, adds an important qualifier: “*to the detriment of consumers, by limiting production, product or alternative service development or innovation*”.

ICLA also notes that, at paragraph 72, the DGL indicate that it is “*not necessary to prove that the conduct resulted in direct consumer harm, in other words that the dominant undertaking has effectively influenced, to the detriment of consumers, prices or other parameters of competition such as output, innovation, variety or quality of goods or services*”. The DGL refer to *SEN* (footnote 178) in support of this statement. However, that paragraph made this statement only to add that a conduct may *also* be abusive if it caused “*indirect harm*” to consumers. Thus, the point in *SEN* was not that it is not necessary to show consumer harm, but that such harm can be *direct or indirect*. This is a very different proposition than the one put forward by the DGL. ICLA considers that, in order to achieve a sound and economic-based enforcement of Article 102 TFEU, the EC must show potential consumer harm (whether direct or indirect) in all cases.<sup>30</sup>

At paragraph 70(c), the DGL state that the existence of exclusionary effects cannot be called into question by the actions that competitors may have taken, or could have taken, to limit the effect of the conduct. While this may be true in some specific cases (e.g., as it was in *AstraZeneca*), ICLA is concerned that such a statement could be read as implying that the reaction of competitors to a particular conduct is *generally* irrelevant to assessing foreclosure effects. If so, this would be misguided. The exclusionary effects of a particular conduct must often be assessed by reference to how competitors could react, and compete against the dominant firm. This is indeed the idea behind the as efficient competitor principle. It is also reflected in some legal test, for example refusal to supply: to put it simply, if a competitor could source the litigious input from another undertaking, then there is no issue. ICLA would like to stress that it is fundamental, to achieve legal certainty, to have benchmarks against which to assess the legality of a certain behaviour. The likely reaction of as efficient competitors, and their ability to respond, is definitely one.

Finally, as regards paragraph 62 of the DGL (cited above), ICLA considers that there is no support in the case law to apply *Lundbeck* and the case law regarding Article 101 TFEU in the context of demonstrating exclusionary effects under Article 102 TFEU. Considering that merely “*removing*

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<sup>29</sup> Para 154, *AstraZeneca*: “*that conduct, considered objectively, has the sole purpose of rendering the abridged procedure provided for by the legislator in point 8(a)(iii) of the third paragraph of Article 4 of Directive 65/65 unavailable and therefore of excluding the producers of generic products from the market for as long as possible and of increasing the costs incurred by them in overcoming barriers to entry to the market, thereby delaying the significant competitive pressure exerted by those products*”.

<sup>30</sup> This is also consistent with the case law – see for example *ESL*, para 124.

*the commercial uncertainty relating to the entry or expansion of competitors*” can characterize anticompetitive effects will create significant legal uncertainty, lower the threshold to show effect beyond reasonableness, and should in our view be abandoned.

### 3.3.2.2 *The intensity and likelihood of exclusionary effects*

In line with the case law, the DGL reflect that exclusionary effects must be more than hypothetical (paragraph 61), but that the EC does not have to show actual effects but only potential effects, i.e. that the conduct was capable of having exclusionary effects.

At paragraph 67, the DGL also indicate that, in the demonstration of potential anticompetitive effects, and when making a counterfactual analysis, “[i]t is sufficient to establish a plausible outcome amongst various possible outcomes”. ICLA notes that footnote 159 does not appear to support such a conclusion. In any case, ICLA considers that it would be unfortunate if the EC merely had to show a “plausible outcome” with more competition than the conduct of the dominant firm. This stands in stark contrast with the 2008 Guidance Paper’s indication that the EC would focus on conduct with likely anticompetitive effects and consumer harm. It is also difficult to reconcile with legal tests for abuse behaviour mentioned in the DGL, for example the refusal to supply. It is clear that the standard of proof regarding anticompetitive effects in such a case is higher: the EC must prove that all effective competition on the downstream market would be eliminated absent the obligation to supply.<sup>31</sup>

The DGL also recall the case law from *Post Danmark* that there is no *de minimis* effect under Article 102 TFEU (DGL, paragraph 75). However, ICLA would like to remind the EC that the Court’s conclusion in *Post Danmark* concerns effects on the market on which dominance is established. The rationale is that in a market where competition is already weakened, any further weakening is damaging. However, as the DGL also note, an abuse may be found not only on the dominated market, but also on a neighbouring market. In such a case, it would seem reasonable to require the effects on competition to be significant (in line with the standard under Article 101 TFEU).<sup>32</sup>

In sum, ICLA is concerned that the DGL appear to lower the bar both as regards the burden and standard of proof. Exclusionary effects are no longer grounded in the concept of “effective competition” or consumer harm (direct or indirect) but often defined in abstract terms. The likelihood of occurrence of effects is low (potential / plausible vs likely) and any effect (even *de minimis*) will be sufficient. This creates a potential risk of over enforcement or, said differently, or dominant firms being wary of competing against even less efficient competitors by fear of being fined for any exclusionary effects. While it is reasonable to not require significant foreclosure effects when conduct is egregious (mere *capability* should be sufficient), it should not be the case when conduct is closer to competition on the merits.

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<sup>31</sup> See DGL, para 103 and case law cited.

<sup>32</sup> For a discussion on a similar point, ICLA refers to the judgment of the High Court in *Streetmap vs Google (Streetmap.EU v Google Inc., Google Ireland Limited and Google UK Limited* [2016] EWHC 253 (Ch), para 92 et seq.)

### 3.4 Reduced importance of the AEC principle and test

The DGL include several references to the concept of competitors as efficient as the dominant undertaking (AEC). However, as a preliminary point, we note that the DGL seem to somewhat mix two interrelated but distinct concepts:

- **The “as efficient competitor” principle** is the general principle that Article 102 TFEU is not meant to protect competitors that are less efficient than the dominant company. The Court of Justice has repeatedly confirmed this principle with respect to all type of conduct, both pricing and non-pricing practices:<sup>33</sup>

*“[I]t is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, a dominant position on one or more markets or to ensure that competitors less efficient than the undertaking with such a position should remain on the market. Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, output, choice, quality or innovation”.*<sup>34</sup> (emphasis added)

The Court has furthermore “as a rule” established that for all types of conduct it is necessary to demonstrate that equally efficient competitors are impacted by the conduct:

*“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 market or markets concerned or by hindering their growth on those markets”.*<sup>35</sup> (emphasis added)

- **“As efficient competitor” (price costs) tests** are various tests to determine whether the conduct at issue has the ability to exclude as efficient competitors, typically based on a

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<sup>33</sup> In relation to pricing conduct see judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, and judgment of 24 October 2024, *Commission v Intel*, C-240/22 P, EU:C:2024:915, para 175; in relation to non-pricing conduct see judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, para 37, EU:C:2023:33, judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, para 126, judgment of 10 September 2024, *Google Shopping*, C-48/22 P, EU:C:2024:726; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, para 73.

<sup>34</sup> Judgment of 24 October 2024, *Commission v Intel*, C-240/22 P, EU:C:2024:915, para 175; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 126 and 127 and the case-law cited.

<sup>35</sup> Judgment of 24 October 2024, *Commission v Intel*, C-240/22 P, EU:C:2024:915, para 176; Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 129 and the case-law cited.

price-cost comparison.<sup>36</sup> The Court's case law provides that the application of these types of tests may vary depending on the type of conduct and evidence provided by the parties.

The DGL in our view do not ascribe sufficient importance to both the "as efficient competitor" principle and "AEC (price-cost)" tests in the assessment of whether conduct deviates from competition on the merits or whether it is capable of having exclusionary effects. The DGL seem to apply limitations on the relevance of these concepts that are not supported by the case law of the Court.

By reducing the relevance of the "as efficient competitor" principle and "AEC (price-cost)" tests, the DGL bring legal uncertainty for companies seeking to assess the legality of their behaviour. If behaviour can be found illegal even if it is not capable of excluding as efficient competitors, companies might refrain from engaging in otherwise pro-competitive and innovative behaviour due to the fear that marginalising less efficient competitors is seen as abusive. Furthermore, companies face significant uncertainty if they cannot rely on their own price/cost information to determine whether their conduct is potentially abusive and instead need to assess the competitive position of third parties for this analysis.<sup>37</sup>

#### 3.4.1 ["As efficient competitor" principle](#)

In this section we recommend that the DGL give more weight to the "as efficient competitor" principle.

##### 3.4.1.1 *General rule – competition on the merits*

The DGL mention that *"Article 102 TFEU does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of among other things, price, choice, quality and innovation"*.<sup>38</sup>

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<sup>36</sup> Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para 56: "As regards the 'as efficient competitor' test, to which the referring court expressly referred in its request, it should be noted that that concept refers to various tests which have in common the aim of assessing the ability of a practice to produce anti-competitive exclusionary effects by reference to the ability of a hypothetical competitor of the undertaking in a dominant position, which is as efficient as the dominant undertaking in terms of cost structure, to offer customers a rate which is sufficiently advantageous to encourage them to switch supplier, despite the disadvantages caused, without that causing that competitor to incur losses. That ability is generally determined in the light of the cost structure of the undertaking in a dominant position itself".

<sup>37</sup> Judgment of 10 April 2008, *Deutsche Telekom v Commission*, T-271/03, EU:T:2008:101, para 192: "It must be added that any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure – information which is generally not known to the dominant undertaking – the latter would not be in a position to assess the lawfulness of its own activities".

<sup>38</sup> DGL, para 51.

The DGL, however, do not include the general rule set by the Court that Article 102 TFEU is not meant to protect less efficient competitors, irrespective of the type of conduct.<sup>39</sup>

Instead, the DGL seem to implicitly suggest at paragraph 56 that the relevance of the “as efficient competitor” principle should be limited to instances where a specific “AEC (price-cost)” test is required.

In order to avoid any confusion in this respect, we suggest the inclusion of more explicit language acknowledging that Article 102 TFEU is not meant to protect less efficient competitors for conduct both related and unrelated to price.

ICLA would like to stress how important that principle is for in-house counsel advising their business operations on a daily basis: when confronted with a question relating to the legality of a particular course of action, a key (and *administrable*) question is whether as efficient competitors are able to react / respond to the course of action. If the answer is yes, then it is likely that the conduct represents “competition on the merits” and does not lead to anticompetitive foreclosure. This principle should not be limited to pricing conduct.

#### *3.4.1.2 General rule – exclusionary effects*

The DGL state at paragraph 73 that *“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.”*

However, as demonstrated in several recent cases from the Court, the “as efficient competitor” principle is relevant in all types of cases, stating that as a rule it is necessary to demonstrate that the conduct *“has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market”*.<sup>40</sup> Granted, there are some limited exceptions where the impact on “as efficient competitors” can exceptionally be assumed (e.g. where the emergence of as efficient competitors is effectively excluded by the structure of the market)<sup>41</sup> or if specific circumstances of the case and (lack of) evidence provided by the parties make an “as efficient competitor” assessment by the EC unnecessary.<sup>42</sup> But these exceptions confirm the general rule establishing the importance of the “as efficient competitor” principle.

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<sup>39</sup> Judgment of 24 October 2024, *Commission v Intel*, C-240/22 P, EU:C:2024:915, para 175; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 126 and 127 and the case-law cited.

<sup>40</sup> Judgment of 24 October 2024, *Commission v Intel*, C-240/22 P, EU:C:2024:915, para 176; Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, para 129 and the case-law cited.

<sup>41</sup> See Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011; Judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, para 59: “On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, *inter alia*, by that undertaking’s statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible”.

<sup>42</sup> In judgment of 10 September 2024, *Google Shopping*, C-48/22 P, EU:C:2024:726, para 268, the Court confirmed that the EC has to respond to an AEC assessment provided by the dominant firm but indicated that the dominant firm had only made

The DGL moreover in several instances indicate that exclusionary effects need to be assessed with respect to *“actual or potential competitors of the dominant firm, rather than in relation to hypothetical competitors”*.<sup>43</sup>

We find this general statement difficult to reconcile with case law from the Court which has held that the assessment of the impact on “as efficient competitors” should be considered “in abstracto” rather than by reference to actual or potential competitors of the dominant firm.<sup>44</sup>

We therefore recommend the inclusion of more explicit language acknowledging that the EC is required to assess the impact on equally efficient (hypothetical) competitors, irrespective of the type of conduct.

#### *3.4.1.3 Specific factors to assess whether competition is on the merits*

The DGL mention that the EC can take account of the fact that *“a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct”*<sup>45</sup> to determine that conduct deviates from competition on the merits.

The DGL however do not recognise the inverse, namely that evidence showing that “as efficient competitors” are able to adopt the same behaviour as the dominant firm, can support the finding that conduct does not deviate from competition on the merits. We recognize that dominant companies are not necessarily exonerated if as efficient non-dominant companies are able to adopt the same conduct,<sup>46</sup> but believe that it should constitute strong evidence that the conduct falls within competition on the merits that the EC must take into account.

The DGL also do not include, as a relevant factor for showing that conduct constitutes existence of competition on the merits, evidence that the conduct does not impact equally efficient competitors. We believe that evidence showing that as efficient competitors are not impacted by the conduct should carry particular significance in the assessment whether conduct deviates from competition is on the merits. We recommend that this is stressed in the DGL.

#### *3.4.2 “AEC (price-cost)” tests*

In this section we recommend that the DGL give more weight to the application of “AEC (price-cost)” tests.

The DGL mention that “AEC (price-cost)” tests as being relevant only for a limited number of pricing practices (predatory pricing, margin squeeze, and conditional rebates),<sup>47</sup> but are generally

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*“allegations in principle, that it would not have been possible for the Commission to obtain objective and reliable results concerning the efficiency of Google’s competitors in the light of the specific conditions of the market in question”*. It found that the EC did not need to respond to that.

<sup>43</sup> DGL, footnote 325.

<sup>44</sup> Judgment of 24 October 2024, *Commission v Intel*, C-240/22 P, EU:C:2024:915, para 181.

<sup>45</sup> DGL, para 55 f.

<sup>46</sup> DGL, para 52.

<sup>47</sup> DGL, Sections 4.2.4 and 4.2.5, and paras 143-144.

inappropriate for assessing whether non-pricing practices depart from competition on the merits.<sup>48</sup>

We believe that the limited importance the DGL adhere to the “AEC (price-cost)” tests is not supported by case law on conduct both related and unrelated to price, and in some instances contradicts this case law.

#### 3.4.2.1 “AEC (price-cost)” tests relevant to all pricing practices

In *Intel I* and *Intel Renvoi*, the Court has found that “*in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects,*” the EC is 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*”.<sup>49</sup> In *Intel Renvoi*, the Court clarified that for this assessment the EC, as a general rule, needs to carry out an AEC test.<sup>50</sup>

*Intel Renvoi* can furthermore be read as extending this requirement beyond the conduct at issue in *Intel* (loyalty rebates) to any pricing practices, because it concludes at paragraph 202 that “*Thus, the result of the AEC test is liable to indicate whether a pricing practice, such as loyalty rebates, adopted by an undertaking in a dominant position, with sufficiently pronounced characteristics in terms of the share of the market covered, the conditions and arrangements for granting those rebates, their duration and their amount, is capable of foreclosing a competitor as efficient as that undertaking and thus of being detrimental to competition as protected by Article 102 TFEU.*” (emphasis added)

At the very least, it follows from the Court’s case law, that to the extent a dominant firm provides an AEC test as evidence that its conduct was not capable of restricting effective competition, the EC needs to consider the probative value of this evidence.<sup>51</sup>

We recommend that the DGL clarify for all pricing practices (including for exclusivity rebates such as at stake in *Intel*) that where a dominant undertaking submits evidence substantiating that its conduct is not capable of producing anticompetitive effects, the EC is required to carry out an “AEC (price-cost)” test. At a minimum, the EC needs to assess the probative value of an “AEC (price-cost)” test provided by a dominant firm. In this respect, any deviations from this principle (e.g. those listed at paragraph 144 b) of the DGL) should form an exception to the rule.

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<sup>48</sup> DGL, para 56.

<sup>49</sup> See judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paras 138-139, and Judgment of 24 October 2024, *Commission v Intel*, C-240/22 P, EU:C:2024:915, paras 330-331.

<sup>50</sup> Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para 181: “*The capability of such rebates to foreclose a competitor as efficient as the dominant undertaking, which competitor is supposed to meet the same costs as those borne by that undertaking, must be assessed, as a general rule, using the AEC test*”.

<sup>51</sup> Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paras 138-139.



### 3.4.2.2 “AEC (price-cost)” tests relevant to non-pricing practice

The Court has found that for practices unrelated to price, the use of “AEC (price cost)” tests is optional. However, it found that the EC needs to assess the probative value of the results of “AEC (price-cost)” tests if these are provided by dominant undertakings seeking to substantiate that their conduct was not capable of producing anticompetitive effects (e.g. in circumstances where effects can be quantified).

In relation to self-preferencing, the Court held that the EC is required to assess the impact of the conduct on as efficient competitors, if the company provided evidence that its conduct was not capable of restricting competition.

*“The assessment of the capability of the conduct at issue to foreclose an as-efficient competitor, referred to by Google as the principle underlying the application of Article 102 TFEU, appears, in particular, to be relevant, where the dominant undertaking submitted, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. In such a case, the Commission is not only required to analyse the extent of the undertaking’s dominant position on the relevant market, but 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 (see, to that effect, judgment of 6 September 2017, Intel v Commission, C-413/14 P, EU:C:2017:632, paragraphs 138 and 139)”*.<sup>52</sup> (emphasis added)

In *Google Shopping*, the Court held that the EC did not have to carry out an “AEC (price-cost)” test, because of the specific circumstances of the case, i.e. that competitors’ ability to compete was highly dependent on traffic generated through Google and that it would not have been possible for the EC to demonstrate the efficiency of Google’s competitors in light of the specific market conditions, and because Google had made only “allegations in principle” to invalidate this finding.<sup>53</sup>

In relation to exclusive dealing, the Court held that the EC is required to assess the probative value of an “AEC (price-cost)” test if the dominant firm submits such evidence:

*“[...] 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. The use of an ‘as efficient*

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<sup>52</sup> Judgment of 10 September 2024, Case C-48/22 P *Google Shopping*, EU:C:2024:726, para 265.

<sup>53</sup> Judgment of 10 September 2024, Case C-48/22 P *Google Shopping*, EU:C:2024:726, paras 268-269.



*competitor test’ is optional. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results.”<sup>54</sup>*

We recommend that the DGL clarify for all non-pricing practices (including for exclusive dealing such as at issue in *Unilever* and *Intel* and self-preferencing) that where dominant undertakings submit “AEC (price-cost)” tests, the EC needs to assess the probative value.

ICLA stresses the importance for the EC to consider “AEC (price-cost)” tests as evidence that conduct does not deviate from competition on the merits and cannot produce anticompetitive effects for pricing and non-pricing conduct. The task for in-house antitrust counsel to advise on company behaviour becomes exceedingly difficult if companies cannot rely on their own price-cost information to assess whether their conduct constitutes an abuse.<sup>55</sup>

## **4 Specific categories of conduct**

In this section we set out ICLA’s considerations in relation to the section on principles to determine whether specific categories of conduct are liable to be abusive.

### **4.1 Conduct subject to specific legal tests – Exclusive Dealing (Section 4.2.2. DGL)**

The way exclusive dealing is currently approached in the DGL does not help in-house competition counsels form a clear judgment as to when such behaviour is allowed and justified, and when instead it should be avoided. In particular, paragraphs 82 and 83 should rather focus on the potential justifications and cases in which exclusive dealing does not have a capability to foreclose. This should cover more detailed guidance on, for example, the percentage of the individual customer’s demand covered by the obligation, the percentage of the overall demand and the type of customers covered by the obligation, the protection of significant relation-specific investments, the behaviour of competing firms, the ability of an as efficient competitor to address the consumers covered by the exclusivity.

As the EC suggests a rebuttable presumption should be in place, clarifications as to when that presumption does not apply or can be considered rebutted in light of the circumstances and evidence provided, should be the focus of the chapter.

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<sup>54</sup> Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para 62.

<sup>55</sup> Judgment of 10 April 2008, T-271/03 *Deutsche Telekom v Commission*, EU:T:2008:101, para 192: “It must be added that any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure – information which is generally not known to the dominant undertaking – the latter would not be in a position to assess the lawfulness of its own activities”.

## 4.2 Conduct subject to specific legal tests – Tying and bundling (Section 4.2.2. DGL)

The DGL<sup>56</sup> provide that tying is liable to be abusive where several conditions are met, including that the undertaking concerned must be dominant in the market for the “tying product”.

However, it further provides that *“in the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied aftermarket”*.

This statement may be read as providing that a tying abuse may be found where the undertaking is dominant in the “tied aftermarket” but not in the “tying primary product”. ICLA believes this position is not supported by existing case law or economic thinking.

The existing case law and economic literature refer to leveraging a dominant position in the “tying market” to acquire market power in the “tied market”. Dominance in the “tying market” is thus essential.

- In *Hilti*, the EU Courts<sup>57</sup> upheld the EC findings based on Hilti’s dominance in the primary product, leverage to tie the aftermarket, by refusing to supply the tied products separately. Even if Hilti was also found to be dominant in the aftermarket, the finding of abusive tying conduct was built under the premise that the undertaking was dominant in the tying primary product, where it held a 55% market share and benefitted from strong IP protection.
- Similarly, in *Tetra Pak II*, the EC and the Court<sup>58</sup> found tying by leveraging dominance in the aseptic markets (the tying product) to restrict competition also in the non-aseptic markets (the tied product).<sup>59</sup> Dominance in the tying market was a pre-requisite for the finding of an abusive tying conduct in those other (tied) markets.

Given that the purpose of the DGL is to set out principles to assess whether certain conduct constitutes an abuse in the light of the case law of EU Courts, the absence of case law providing that in the special case of tying in after-markets, the condition is that the undertaking is dominant either in the “tying market” or the “tied aftermarket”, should be sufficient to exclude such specific reference to aftermarkets from the DGL.

Moreover, economic competition literature about tying supports that no different requirements are set for tying in general than for tying in aftermarkets. All economic models showing that tying can be anticompetitive require considerable market power in the tying market. Furthermore,

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<sup>56</sup> DGL, para 89 and footnote 209.

<sup>57</sup> Case T-30/89, *Hilti AG v Commission* [1991] ECR II-1439.

<sup>58</sup> Case T-83/91, *Tetra Pak International SA v Commission* [1994] ECR II-755.

<sup>59</sup> The Commission argued that Tetra Pak had “used the association which exists between the four markets in question to commit abuses on the non-aseptic markets, abuses which it could not have committed in the absence of its dominant position on the aseptic markets” (penultimate paragraph of recital 104 of the Decision). In para 121, the Court ruled that “the Commission was entitled to find that the abovementioned links between the two aseptic markets and the two non-aseptic markets reinforced Tetra Pak’s economic power over the latter markets”.

dominance in the tied market is not required, but the tied market must be subject to imperfect competition.

In such context, economist Jorge Padilla recognizes<sup>60</sup> that among the conditions required to substantiate a tying abuse, the first one is that the firm engaging in the tying practices is dominant in the tying product market and that in the case of aftermarket *“the usual principles should apply”*.

Importantly, Jorge Padilla also indicates that this is the position set out in OECD, Competition Issues In Aftermarkets, Background Note by the Secretariat, 21-23 June 2017, paragraphs 72 and 73: *“prerequisites for establishing an illegal tying would be similar to other tying cases that do not involve an aftermarket”*.<sup>61</sup>

In this document, the OECD Secretariat specifically provides that an unlawful tying arrangement in aftermarkets would include several elements, including *“proof that the seller had market power in the tying product market, or in the case of aftermarkets, in the market for the primary product”*.

This is different than being dominant only in the tied aftermarket but not in the tying primary product, which is the product that is generally assumed to be leveraged as “tying product” in the case of aftermarkets.

Therefore, in consistency with above, ICLA recommends that the position provided in the DGL which makes a specific reference to aftermarkets is either removed or replaced by a reference providing that the same general principles apply in the case of aftermarkets.

#### **4.3 Conduct subject to specific legal tests – Refusal to Supply (Section 4.2.3. DGL)**

An additional area in which we believe the DGL could be refined refers to the specific legal test described to establish whether a refusal to supply by a dominant undertaking may infringe Article 102 TFEU.

This section could be clearer by providing a better definition of the markets affected by a refusal to supply, which is not the market for the inputs themselves but an “adjacent market” for goods manufactured making use of such inputs. Even if some references are made to a “downstream market” (at paragraph 99.a) or a “secondary market” (at paragraph 106) the DGL do not provide a clear general distinction between the inputs market where the undertaking refusing to supply

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<sup>60</sup> Jorge Padilla, “The Law and Economics of Article 102 TFEU”. See also Chapter 11, Section 11.4 (Tying in Aftermarkets).

<sup>61</sup> The document is available at [https://one.oecd.org/document/DAF/COMP\(2017\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)2/en/pdf). The OECD specifically refers to the position by the European Commission: *“It is generally acknowledged that the supplier needs to be dominant in the primary market for the tying to be considered illegal. European Commission (2009) states that “[i]n the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied aftermarket”. This is consistent with the idea that the theory of harm from tying is leverage, namely, tying would be harmful if a dominant company distorts competition in the tied product market (i.e. in the context an aftermarket, the secondary market), by leveraging its market power in the tying product market (i.e. the primary market)”*.

is dominant and the adjacent market for which the input is sought. The importance of such distinction is expressed in *Microsoft*, where it is stated that:

*“it is appropriate to add that, in order that a refusal to give access to a product or service indispensable to the exercise of a particular activity may be considered abusive, it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service”.<sup>62</sup> (emphasis added)*

Moreover, paragraph 106 of the DGL states that “A refusal can limit technical development on the market if, for instance, it prevents the requesting undertaking from producing new products that are not offered by the dominant undertaking and for which there is a potential consumer demand (limitation of production or markets), even if such goods or services are in competition with those of the dominant undertaking”. The emphasized sentence (“even if such goods or services are in competition with those of the dominant undertaking”) should be deleted.

In *IMS Health*, a refusal to supply may be regarded as abusive “where the undertaking which requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand”.<sup>63</sup> The same results from *Magill* and *Ladbroke*.<sup>64</sup>

Furthermore, for the sake of clarity, when the DGL refer to the refusal to license intellectual property rights as a special case of refusal to supply (para 104 *et seq*), which is subject to the additional requirement of limiting technical development on the (adjacent) market, the same requirement is also applicable to the provision of interoperability related information. Thus, even if the *Microsoft*<sup>65</sup> case is mentioned, it should be very clear that the requisites that apply for the supply of intellectual property rights (paragraph 105) also concern the supply of interoperability-related information.

#### **4.4 Conduct subject to specific legal tests – Predatory Pricing (Section 4.2.4. DGL)**

When it comes to low prices, public intervention should be targeted and avoid disincentivizing the passing on of efficiencies and lower margins to consumers. Therefore, we propose that the EC amends the DGL in relation to ‘predatory pricing’ in Section 4.2.4 taking account of the following.

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<sup>62</sup> General Court T-201/04 *Microsoft*, para 335. Moreover, *Commercial Solvents* is another example where the CJEU considered that the conduct in question in the market in which *Commercial Solvents* was dominant was likely to eliminate all competition in the adjacent market.

<sup>63</sup> CJEU C-418/01 *IMS Health*, para 49.

<sup>64</sup> CJEU C-241/91 P and C-242/91 P *Magill*, paras 30 and 54; General Court T-504/93 *Tiercé Ladbroke SA*, para 131.

<sup>65</sup> General Court T-201/04 *Microsoft*, paras 647-656.

- Prices below Average Total Cost (ATC) or Long Run Average Incremental Cost (LRAIC) but above Average Variable Cost (AVC) or Average Avoidable Cost (AAC), as a general rule, are more likely to correspond to procompetitive rationales. It should be reflected that there is therefore no presumption that such pricing is capable of leading to anticompetitive foreclosure. Such pricing may be deemed abusive only if the legal and economic context makes anticompetitive foreclosure likely, and in particular if it is part of a plan to eliminate or reduce competition in the relevant market.<sup>66</sup>

ICLA also recommends to clearly acknowledge that prices above ATC/LRAIC are presumed to not be capable of leading to anticompetitive foreclosure as such prices should not foreclose rivals from sustainably remaining in the market. This appears to be consistent with the EC's position given the statement in paragraph 107 that "*Predatory pricing refers to below-cost pricing strategies*" but could be expressly identified as a safe-harbour.

- The division of the burden of proof between the EC and the company requires clarification and should be distributed more evenly and reasonably in line with the case law of the EU Courts. Hence, we suggest amending paragraphs 112 and 113 of the DGL to make it clear that whenever the assessment of the EC is based on a presumption, the presumption can be rebutted by the dominant undertaking submitting evidence that the conduct is not capable of producing exclusionary effects, corresponds to a plausible procompetitive rationale,<sup>67</sup> or is objectively justified e.g. in case of state coercion or price discounts imposed by law, regulation or other forms of government price control. The justifications should include free units provided for trials and promotion and fire sale below AVC of physical goods already produced (where incremental costs are clearly lower than AVC), among others. While it is not necessary to demonstrate that it is possible for the dominant undertaking to recoup its losses and the possibility of recoupment is presumed,<sup>68</sup> we recommend clarifying that this presumption can be rebutted by evidence showing that the dominant company is unlikely to be able to recoup any potential profit sacrifice.

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<sup>66</sup> Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, para 72; judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, para 41; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, para 109; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, para 27.

<sup>67</sup> See, by analogy, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para 138; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paras 5052 and 60.

<sup>68</sup> Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, para 44; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paras 37, 110 and 113. That interpretation does not preclude the Commission from finding such a possibility of recoupment of losses to be a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists. See judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, para 111.

- We suggest clarifying in paragraph 117 of the DGL that only foreclosure of equally efficient competitors can be presumed to be anticompetitive.
- With respect to paragraph 118, we submit that the following statement creates confusion: *“it may be appropriate to account for opportunity costs of the dominant undertaking”* in relation to the price-cost test. This statement seems to imply that predatory pricing can also be found if a dominant undertaking prices above its actual costs. This statement creates profound uncertainty and it is not supported by the case law of the EU Courts.
- In relation to scope and reference period, clarification is required in order to ensure that the DGL correctly reflect the case law of the EU Courts. We would recommend clarifying in paragraph 119 of the DGL, that when low prices are selective, the pattern of these low prices needs to clearly reflect a strategy to predate or leverage for the conduct to be abusive. When the pattern of selective prices does not reflect such a strategy or when it is plausible that this pattern corresponds to procompetitive rationales.

#### 4.5 Conduct subject to specific legal tests – Margin Squeeze (Section 4.2.5. DGL)

With respect to margin squeeze, ICLA’s recommendations are targeted at guidance in relation to the level of product aggregation. The DGL rightfully indicate that several factors and metrics may influence the results of a price-cost test to establish margin squeeze, in particular the price and costs benchmarks, and the level of product aggregation. However, we suggest clarifying the factors and metrics in relation to the level of product aggregation in paragraphs 135 and 136 of the DGL.

The price-cost test should generally be applied at a level of aggregation which corresponds to the relevant product market, which is not *per se* the most granular level. The logic of this is that an as-efficient competitor must be able to profitably replicate the dominant undertaking’s product pattern.<sup>69</sup> It is important that the DGL acknowledge that anti-competitive foreclosure is unlikely to occur if there is a negative retail margin in a narrow segment of a relevant market when an aggregate margin squeeze test is showing healthy margins overall. The question of the relevant level of aggregation is therefore closely related to the coverage of negative margins. Margin squeeze is only likely to lead to anticompetitive foreclosure if it covers most of the relevant market or segments that are particularly strategic for the rivals of the dominant company.

Therefore, it is not normally useful to run a price-cost test against each individual offer, or each individual product falling within a relevant product market.<sup>70</sup> Such granular computation of margins is only useful in very specific circumstances, for instance where a dominant undertaking

<sup>69</sup> See, for example, Commission decision of 15 October 2014 in Case AT.39523 - *Slovak Telekom*, para 832.

<sup>70</sup> Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, paras 200-211.

launches a new offer at a negative margin that is likely to lead to a substantial number of sales in the future.

#### **4.6 Conduct with no specific legal test – Conditional rebates that are not subject to exclusive purchase or supply requirements (Section 4.3.1. DGL)**

Conditional rebates are a common business practice and therefore used by many companies in many sectors. The DGL should provide a reasonable description of the criteria that determine when conditional discounts can lead to an abuse of a dominant position and an equitable distribution of the burden of proof between the EC and the company in line with the case law of the EU Courts and the principle of legal certainty.

As indicated in paragraph 141 of the DGL, conditional rebates are a common business practice. However, the guidance does not clarify that non-linear prices can have discontinuities, jumps, kinks and other features that create different marginal incentives in different circumstances. Undertakings may offer such rebates to attract more demand and, as a result, they may stimulate demand and benefit consumers. Conditional pricing can also be used to align the incentives of all parties in situations where the lack of coordination can be welfare reducing (e.g. when there exist significant relation specific investments).

The proposed guidance omits to emphasize that conditional pricing can be motivated by procompetitive rationales. A continuum of effects exists between various forms of conditional pricing. Hence, it is not the classification of a conduct that justifies a different assessment, but rather the different balance of probabilities and likely effects of any given conduct based on economic analysis and experience. A “substance over form” approach in combination with detailed case-by-case assessments is therefore required. It is important that the enforcement of Article 102 TFEU does not lead to a fundamentally different treatment of practices that could have the same effects.

ICLA generally observes that the DGL rely too easily and heavily on presumptions that are often not in line with the recent case law. We believe that where the legal and economic context raises doubts as whether conduct is capable of having a net negative impact on competition, leading to anticompetitive foreclosure or if it is plausible to have a procompetitive rationale, the conduct cannot be presumed to be abusive. We recommend that the EC explicitly acknowledges this in the DGL.

The approach should for example be applied to the price-cost test. To demonstrate that a conditional rebate scheme departs from competition on the merits, a price-cost test may be appropriate,<sup>71</sup> in particular to assist the assessment of the existence of a profit sacrifice.

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<sup>71</sup> Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paras 57 and 61; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paras 58 and 62; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, para 81; judgment of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/183, EU:T:2022:541, para 643.

However, it is less useful in the case of horizontal foreclosure without profit sacrifice, or when the inducements offered by the dominant undertaking are not monetary and cannot easily be converted into a quantified monetary amount.<sup>72</sup>

The size of the rebate as a percentage of the total price, or the value of the non-price advantages, and the threshold triggering the rebate are all relevant factors to assess profit sacrifice<sup>73</sup>. All things equal, all-unit discounts have a higher capability to produce exclusionary effects, as the amount at stake when considering switching sourcing to a rival is larger than for an incremental discount of the same nominal amount.<sup>74</sup> The usefulness of the price-cost test is therefore to provide a metric that is informative on the magnitude of the inducement, and hence on the existence of a profit sacrifice. However, it is very difficult to assess whether a discount or a rebate is “large” or “small” out of context and without considering all these elements together, as well as the normal margins in the industry. These circumstances should also be taken into consideration by the EC when assessing whether a conditional discount scheme is potentially abusive or not.

In addition, ICLA feels it is important that the guidelines acknowledge that strong countervailing buyer power can be relied on under certain circumstances to rebut a presumption of abusive conduct, in particular in circumstances whereby the buyer (e.g. a strong central public buyer) insists on lower prices to level below ATC or even below AVC (for a part of the total volume) in the absence whereof no sales would take place.

The assessment of conditional pricing will depend on the main competition concern. This assessment will normally require the performance of a price-cost test aimed at establishing the likelihood of a profit sacrifice by the dominant undertaking, unless the EC already has evidence that the conduct is unlikely to correspond to profit sacrifice. In case the likely existence of a profit sacrifice has been established, the EC will assess all the legal and economic circumstances of the case. In addition to the elements mentioned in paragraph 145 of the DGL, we recommend adding the following elements:

- The transparency of the conditions governing the rebate;<sup>75</sup>
- The share of the market that is affected by the conduct: in general terms, the larger the share of the market covered by the exclusivity obligations (in terms of share of

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<sup>72</sup> Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para 57.

<sup>73</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paras, 97100; judgment of 7 October 1999, *Irish Sugar v Commission*, EU:T:1999:246, T-228/97, paras 207-214.

<sup>74</sup> Judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission (Michelin I)*, Case 322/81, EU:C:1983:313, para 81; judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, para 32.

<sup>75</sup> For example, a lack of transparency can put pressure on customers and make it less attractive to switch to a competitor where the effects of complying or failing with the conditions that govern the rebate scheme are uncertain. Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, EU:C:1983:313, paras 83 and 84.



customers covered and in terms of share of demand by each customer)<sup>76</sup>, the more likely the conduct is to produce exclusionary effects.<sup>77</sup> However, 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 or expansion;<sup>78</sup> and

- The possible existence of a strategy aimed at excluding actual or potential competitors of the dominant firm.<sup>79</sup> Such exclusionary strategy is not legally required to establish the conduct's capability to produce exclusionary effects, but may play an important role in the assessment in those cases where it is established.

In case the likelihood of profit sacrifice has not been established (or has been rebutted), the finding of an abuse requires the delineation of a clear mechanism through which the conduct is nevertheless capable to lead to anticompetitive foreclosure, and cogent evidence supporting this theory of harm, based on economic analysis and experience.

#### **4.7 Conduct with no specific legal test – Multi-product rebates (Section 4.3.2. DGL)**

The proposed guidance related to multi-product rebates (i.e. the two products are available for purchase on a standalone basis and are also sold jointly, typically at a discount compared to the sum of the standalone prices) is very general and does not articulate in a clear manner in which the potential anticompetitive effects of such rebating practices need to be assessed case by case and based on robust economic evidence. ICLA recommends that the DGL are clarified on this point.

### **5 Objective justifications**

ICLA believes there should be more guidance on the criteria for objective justification of the conduct, i.e. the objective necessity defence or the efficiency defence. It would be especially helpful if the EC would provide some more examples on efficiencies that would be acceptable.

It seems that under the DGL the standard of proof for the parties to prove efficiencies is higher than the standard for the EC to prove the capability to produce exclusionary effects. Such an asymmetry in standards of proof cannot be justified economically and is also not merited on the

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<sup>76</sup> Similarly, for exclusive supply obligations, the relevant element would be the share of suppliers and the overall share of supply covered by the obligation.

<sup>77</sup> Judgment of 19 April 2012, *Tomra and Others v Commission*, EU:C:2012:221, C-549/10 P, paras 43-46; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para 139. See also Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paras 366, 385-389; Commission decision of 20 March 2019, Case AT.40411 – *Google Search (AdSense)*, paras 381-385.

<sup>78</sup> Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, para 696.

<sup>79</sup> Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para 139; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paras 48 and 50. See also Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paras 293, 368 and 370.

basis of case law. There needs to be a balanced approach, meaning the same standard of proof should be applied to demonstrating abusive conduct as demonstrating efficiencies. Currently the wide discretion for the EC to not accept efficiencies leads to a bias that results in over-enforcement.

In addition, ICLA proposes that there needs to be a broader approach to efficiencies beyond price and quality, to make sure that efficiencies in relation to innovation, sustainability and investment can be recognised (including out-of-market efficiencies). We recommend that the DGL elaborate on this by giving concrete guidance on which evidence will be satisfactory, including in relation to out-of-market efficiencies.

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