

Contribution by



**EUROPEAN COMPETITION
LAWYERS ASSOCIATION**

in response to the European Commission's consultation on

Draft Guidelines on the application of Article 102 of the Treaty
on the Functioning of the European Union to abusive
exclusionary conduct by dominant undertakings

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Chapter I – Introduction & general remarks

Introduction

- 1) On 1 August 2024, the European Commission (the “**Commission**”) launched a public consultation on its draft Guidelines on exclusionary abuses of dominance (the “**Guidelines**”).
- 2) By way of this submission, the European Competition Lawyers Association (“**ECLA**”) wishes to contribute to the Commission’s work and completion of the Guidelines.
- 3) ECLA welcomes the Commission’s initiative of publishing guidelines on exclusionary abuse and supports the objectives as set forth in the Commission’s note on Call for Evidence in March 2023, which are:
 - providing greater **legal certainty** in the enforcement of Article 102 TFEU at Commission level and across the EU;
 - **helping businesses** and other stakeholders better assess if particular practices comply with Article 102 TFEU; and
 - fostering **consistent enforcement** across the Commission, national competition authorities, and national courts when applying Art. 102 TFEU.
- 4) ECLA provides its general remarks in this Chapter (immediately below) and provides its comments to particular sections of the Guidelines in Chapter II. Moreover, ECLA has listed forms of exclusionary abuse that the Guidelines currently omit but should include in Chapter III.
- 5) This submission has been drafted through joint and collaborative efforts by the ECLA members listed on page 2 of this submission based on frank and candid discussions. For good measure, ECLA notes that no single opinion in the submission necessarily reflects the opinion of all contributors.

General remarks to the Guidelines

- 6) As the Guidelines are to reflect the case-law of the Union Courts, ECLA urges the Commission to make express reference to certain fundamental principles that Union Courts have recognised. These principles serve as overarching notions that govern the interpretation and application of Art. 102 TFEU when it comes to exclusionary abuse.
- 7) The fundamental principles include the following which the Commission can aptly reference in the introductory part of the Guidelines:
 - Recognition of the ‘**effects based approach**’ as an integral part of Art. 102 TFEU. The CJEU has endorsed in clear and absolute terms an ‘effects based approach’ when applying Art. 102 TFEU. As the Commission states in Section 1 of its Policy Brief of March 2023:

“The effects-based approach promoted by the Commission is clearly reflected in these developments and is now firmly enshrined in the Union Courts’ case law.”

- Recognition of the distinction between '**foreclosure**' and '**anti-competitive foreclosure**': The CJEU has recognised — as recently as on 24 October 2024 in *Intel II* — the distinction between the two and asserted that Art. 102 TFEU serves to prevent only the latter.¹
 - Recognition of the principle that anti-competitive foreclosure under Art. 102 TFEU is determined on the basis of whether the behaviour is capable of foreclosing '**as efficient competitors**'. Again, the CJEU re-iterated this recently in *Intel II*.²
 - Recognition of the principle of **legal certainty** and **predictability** as a fundamental principle of EU law.³
- 8) ECLA considers, respectfully, that in a number of significant places in the Guidelines, the Commission presents the case-law in a manner that grants far more discretion to the Commission than the case-law warrants and justifies. ECLA urges the Commission to remedy this when finalising the Guidelines and to adopt a principle that the Guidelines must remain strictly loyal to the findings of the Union Courts.
- 9) Enforcer discretion that does not have clear and express basis in case-law means uncertainty when undertakings do self-assessment. Uncertainty, in turn, means that undertakings may decide to refrain from certain behaviour that is pro-competitive and consumer welfare enhancing as the undertaking has no way of ruling out that the enforcer will exercise its discretion in a manner that exposes the undertaking. Accordingly, enforcer discretion with insufficient basis in case-law results in less well functioning markets and, ultimately, less consumer welfare.
- 10) As to general, practical suggestions, ECLA urges the Commission to consider:
- including case-examples in the Guidelines similar to those included in the Commission's Horizontal, Vertical, and TTBER Guidelines. Such case-examples provide further clarity and understanding of the Commission's interpretation of the case-law and thus facilitate the undertaking's self-assessment.
 - systematically including hyperlinks to curia.europa.eu when referencing judgments.

Chapter II – Comments to specific parts of the Guidelines

2..1 Single dominance

Separate consultation and work-product on notion of dominance

- 11) As a general note, the Guidelines' entire section 2 (on assessment of dominance) is not strictly necessary to include, as the purpose of the Guidelines is to present case-law on exclusionary abuse. The notion of dominance – which is applicable also to abuse forms beyond these Guidelines, i.e., exploitative abuse – arguably deserves its own, separate consultation process and work product. ECLA therefore urges the Commission to consider taking section 2 out entirely and launching a separate consultation procedure on guidelines for assessing dominance.

¹cf. e.g. *Intel II*, para. 175.

²cf. e.g. *Intel II*, para. 176.

³cf. e.g. *Berlington Hungary*, para. 77.

Relationship between 'dominance' and 'market power'

- 12) Unlike the Guidance on Enforcement Priorities (the "**2009 Guidance**"),⁴ the Guidelines' discussion of dominance does not establish an explicit link between the legal concept of dominance and the economic concept of market power. Since the CJEU has explicitly recognized the link between these two concepts,⁵ so should the new Guidelines. In this regard, ECLA notes that the 2009 Guidance⁶ already makes it clear that the assessment of market power does not only relate to the power to maintain prices above the competitive level, but also includes other parameters of competition such as output, innovation and the variety and quality of products.

Market share indicators

- 13) In para 26. of the Guidelines, the Commission highlights that, save exceptional circumstances, very large market shares above 50% are in themselves evidence of the existence of a dominant position. Pursuant to case-law, this inference, however, is only justified if the undertaking holds a very large market share for some time,⁷ i.e., if its market shares are sustained over time.
- 14) By contrast, the Guidelines provide only very limited guidance on the circumstances under which a low market share may be indicative of the absence of dominance. This question is only addressed in footnote 41, pursuant to which market shares below 10% exclude the existence of a dominant position, save in exceptional circumstances. This is a substantial departure from the 2009 Guidance, which considers that dominance is *unlikely* if the undertaking's market share is below 40%.⁸
- 15) Further, the Commission's practice since 2009 focused on cases where the market share of the undertaking concerned was above 50%.⁹ In view of this, ECLA considers that there is no apparent reason for the proposed departure from the 2009 Guidance. Furthermore, the proposed 10% threshold is inconsistent with the Horizontal Guidelines which recognize that the degree of market power normally required for a finding of an infringement under Article 101(1) TFEU is less than the degree of market power required for a finding of dominance under Article 102 TFEU.¹⁰ Effectively, the 10% threshold - which is well below any previous market shares at which dominance has been found - therefore does not provide undertakings with meaningful guidance on whether or not they may be found to be dominant. ECLA therefore suggests deleting (at least) the respective reference in footnote 41 of the Guidelines.

2.2 Collective dominance

- 16) Section 2.3 of the Guidelines aims at providing guidance on collective dominance. ECLA welcomes the initiative of providing such guidance. However, for the reasons below, ECLA considers that the information provided in this section of the Guidelines is likely to be of limited assistance to undertakings for purposes of assessing their compliance with Art 102 TFEU.

⁴European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/2009, p 7.

⁵See in particular *AstraZeneca v Commission*, para. 177.

⁶2009 Guidance, para. 11.

⁷*Hoffmann-LaRoche*, para 41, and *Cisco v Commission*, para 69; This may not be the case, e.g., where the undertaking concerned only held a market share of more than 50% for one year: *Crown*, para 92.

⁸2009 Guidance, para. 14.

⁹In a few cases, the market share of the undertaking concerned was below 50%, but still in the 40-50% range, e.g. *Mondelez Trade Restrictions*.

¹⁰European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259/2023, p 1, FN 40.

- 17) At the outset, ECLA notes that section 2.3 of the Guidelines follows and expands on section 4.3 of DG Competition's 2005 discussion paper. This section was, however, ultimately not included in the 2009 Guidance.
- 18) ECLA notes that the additional experience with collective dominance cases under Art 102 TFEU since 2009 appears to be limited, and complaints in this regard have largely been rejected by the Commission.¹¹ As such, the uncertainties which characterised the discussion of collective dominance in 2005 still persist today.
- 19) These uncertainties concern, notably, the conditions for establishing collective dominance.

More detailed guidance for determining collective dominance

- 20) In para. 36 of the Guidelines, the Commission states the following:

"However, the existence of an agreement or structural links between undertakings is not indispensable to establish collective dominance. Collective dominance may also be established based on other connecting factors, or on an economic assessment of the structure of the market in question and the way in which the undertakings in question interact on the market. Where the characteristics of the market facilitate the adoption of a common policy by the undertakings concerned, collective dominance can also be established without there being an agreement or structural links."
- 21) While this is fully in line with the CJEU's judgment in *Compagnie Maritime Belge*,¹² the discussion of tacit coordination which follows in para. 37 *et seqq* is almost exclusively based on case-law regarding the EUMR. As far as ECLA is aware, the only judgment applying the *Airtours* criteria to the notion of collective dominance under Art 102 TFEU is *Piau*,¹³ where the General Court confirmed the Commission's rejection decision.
- 22) Moreover, while there are good reasons to consider that the substantive requirements for a finding of collective dominance under Art 102 TFEU and under the EUMR may be identical, the procedural requirements are not. As highlighted by the CJEU in *CK Telecoms*,¹⁴ the prospective analysis carried out by the Commission under the EUMR is necessarily more uncertain than the *ex post* analysis under Art 102 TFEU. Moreover, in procedures relating to infringements of the competition rules which may result in the imposition of fines, the presumption of innocence requires that the benefit of the doubt must be given to the undertaking concerned.¹⁵ In view of this, the Commission's margin of discretion when applying the substantive rules of the EUMR cannot simply be transposed to proceedings under Regulation 1/2003, and the standard of proof under the EUMR (more likely than not) is also lower than under Regulation 1/2003. The discussion in the Guidelines, however, appears to follow the prospective analysis undertaken by the Commission in EUMR cases.
- 23) Finally, should the Commission decide to retain a section on collective dominance in the final version of the Guidelines, it would be helpful to undertakings and their advisers if the Guidelines could provide additional details on the evidence which the Commission may take into account for purposes of establishing dominance under Art 102 TFEU.

More detailed guidance for determining collective abuse

¹¹*Irish certification bodies*, para. 77 *et seqq*; *BASF*, para. 59; *EMC*, upholding the Commission's rejection decision in *EMC and EFIM*,

¹²*Compagnie Maritime Belge*, para. 45.

¹³*Piau*, para. 111.

¹⁴*CK Telecoms*, paras. 82 and 87.

¹⁵*NKT* para. 237.

- 24) The Guidelines' discussion of conduct which may constitute an abuse of a collective dominant position offers little guidance to companies and their advisers. It merely consists of a reference in para. 34 to the *Irish Sugar*¹⁶ judgment, pursuant to which it is sufficient that the action amounting to abuse "*can be identified as one of the manifestations*" of a joint dominant position. That judgment indeed makes it clear that the abuse of a dominant position does not necessarily have to be the action of all the undertakings in question.
- 25) From the perspective of companies and their advisers, this gives rise to the practical problem that, on the face of it, it will be difficult to distinguish potentially abusive from legitimate behaviour. This issue has mostly been discussed in academic writing regarding exploitative abuses of a collective dominant position,¹⁷ but also applies with regard to conduct which may be qualified as an exclusionary abuse.
- 26) By way of illustration, the fact that an alleged oligopolist sells at a price below the relevant cost benchmarks equally may be an expression of pro-competitive deviation or of a strategy to exclude new or expanding rivals.¹⁸ Several solutions have been proposed in academic writing, such as limiting the scope of abuse of a collective dominant position to facilitating practices (like MFN clauses, English clauses, or price signalling), retaliation practices, or anti-disruption practices.¹⁹ Each of those policy choices, however, comes with its own trade-offs and – from the perspective of companies and their advisers – substantive and evidentiary requirements. Moreover, the choice between these solutions cannot be made based on the CJEU's case-law, which so far is silent on this matter.
- 27) Should the Commission decide to retain the section on collective dominance, ECLA therefore hopes that the Commission could provide companies with additional legal certainty by including further details on the circumstances under which unilateral conduct may be qualified as an exclusionary abuse of a collective dominant position.

3.2. Conduct departing from competition on the merits

3.2.1 The concept of conduct departing from competition on the merits

Introductory comments

- 28) The OECD's discussion paper "*Competition on the Merits*" (DAF/COMP(2005)27) aptly notes:

"when courts and practitioners have referred to „competition on the merits" in their efforts to delineate which behavior is lawful, which is not, and why, they have tended to do so in a manner that presumes a common understanding of what the phrase means. In other words, it has served too often as a shortcut that glosses over the difficult work of defining clear principles and standards that embody sound competition policy. This has led to inconsistent interpretations of what competition on the merits is (both within and between jurisdictions), and therefore to unpredictable results, which has undermined the term's legitimacy along with policies that purport to be based on it."

¹⁶*Irish Sugar*, para. 66.

¹⁷As pointed out by *Monti*, it would not make sense to fine oligopolists for intelligently adapting to each other's behaviour: *Monti*, The Scope of Collective Dominance under Article 82 EC, 37 CMLR [2001] 131 (145); see also *Vecchi*, Unilateral Conduct in an Oligopoly according to the Discussion Paper on Art. 82: Conscious Parallelism or Abuse of Collective Dominance?, 31 World Competition [2008], 385 (395).

¹⁸Thus giving rise to the risk of Type I errors, see *Petit*, The "Oligopoly Problem" in EU Competition Law, available at: <https://orbi.uliege.be/bitstream/2268/142785/1/The%20Oligopoly%20Problem.pdf>, p 66. For an overview of the relevant error cost framework see *Petit*, Re-Pricing through Disruption in Oligopolies with Tacit Collusion: A Framework for Abuse of Collective Dominance, 39 World Competition [2016], 119.

¹⁹See *Petit*, The "Oligopoly Problem" in EU Competition Law, 67 et seqq.

29) This observation, made in 2005, remains relevant today. Recent discussions on the exact meaning of 'competition on the merits' confirm that a clear definition is still elusive, if it is even achievable at all.

30) In this context, it is disappointing that the Commission asserts (in para. 45 of the Guidelines) that...

"to determine whether conduct by dominant undertakings is liable to constitute an exclusionary abuse, it is generally necessary to establish whether the conduct departs from competition on the merits (see section 3.2 below) and whether the conduct is capable of having exclusionary effects (see section 3.3 below),"

...yet chooses to discuss this notion only briefly, in general terms, and often by merely reproducing fragments of CJEU judgments. This approach diminishes the practical significance of the Guidelines, allowing 'competition on the merits' to remain a vague concept, a *"shortcut that glosses over the difficult work of defining clear principles and standards that embody sound competition policy"*.

31) It is also noteworthy that the Commission seems to place more emphasis on the exclusionary effects of dominant firms' behaviour. This shift suggests that exclusionary effects may become the central focus of the analysis (as hinted by some recent CJEU judgments). If this is the case, the Commission should further clarify the relationship between the two elements of the analysis.

32) Beyond these general remarks, there are several specific points that merit attention.

Restrictive approach to competition on the merits

33) As noted, the Guidelines frequently reproduce relevant excerpts from CJEU judgments without providing additional explanations or context. This practice risks promoting an overly restrictive interpretation of what it means for dominant firms to 'compete on the merits'. Paragraphs 49 and 50 of the Guidelines may imply that dominant firms can only defend their commercial interests when "attacked" by competitors, suggesting that competition by dominant firms is acceptable only as a reactive measure, rather than as part of regular, proactive competition.

34) This interpretation is fundamentally flawed. Dominant firms should be free to engage in competition by offering lower prices, improving quality, or innovating, not solely in response to competitive threats. The notion that dominant firms can only defend their market position reactively unduly restricts their ability to engage in normal competitive behaviour, and is to the detriment of consumers.

Over-reliance on the 'Consumer Benefits Test'

35) Over the years, significant efforts have been made to suggest and evaluate various tests for determining the legality of DomCos' conduct. The OECD discussion paper *"Competition on the Merits"* (DAF/COMP(2005)27) lists several such tests, including: (1) The Profit Sacrifice Test, (2) The No Economic Sense Test, (3) The Equally Efficient Firm Test, (4) The Consumer Welfare Test, and (5) The Elhauge Efficiency Test.

36) Two key issues arise in this context. First, it is surprising that the Commission makes no attempt to clearly identify or explain the tests it will apply to distinguish competition on the merits from abusive behaviour. Furthermore, the Commission does not even use the term "test" in its Guidelines. Second, the Commission seems to rely too heavily on the Consumer Benefits (or Consumer Welfare) test (para. 51 of the Guidelines), however by

only suggesting that competition on the merits should lead to lower prices, better quality, or greater consumer choice.

- 37) The Commission should address these concerns in more detail, clarifying both which tests it will use to define conduct as 'competition on the merits' and how those tests will be applied in practice (especially as those tests, even if not explicitly, are recognized in courts' judgments).

3.2.2. Relevant factors to establish that conduct departs from competition on the merits

Introductory comments

- 38) The Commission claims that this part of the Guidelines lists and explains the "factors" used to establish when certain conduct departs from "competition on the merits." In practice, however, the Commission merely provides examples of abusive behaviour identified in case-law. The casuistic nature of this "list of examples" offers little practical value to businesses seeking to understand the boundary between legal and illegal conduct.

Formal approach to 'per se' abuses

- 39) In para. 53 of the Guidelines, the Commission identifies specific types of conduct—exclusive dealing, tying and bundling, refusal to supply, predatory pricing, and margin squeeze—as scenarios where abuse is "very likely" or assumed. This effectively creates a category of *per se* abuses. The issue with this approach is that it shifts the focus to the form of the conduct, rather than its actual effects on competition. By treating these forms of behaviour as automatically illegal, the Commission goes far beyond the case-law and bypasses the proper effects-based analysis, which is central to modern competition law.
- 40) Indeed, in *Intel II*, the CJEU (at least indirectly) rejects the Commission's idea of a '*per se*'-like category of abuses:

"In so far as the Commission relies on Intel's dominant position, on the conditional nature of the rebates and on the existence of a strategy aiming to exclude a competitor of Intel from the market, irrespective of whether that competitor is as efficient as Intel, the arguments thus relied on in support of that complaint are based, implicitly but necessarily, on the idea that the contested rebates are abusive per se."²⁰ (Underlining added)

Lack of detail on the 'No Economic Sense Test'

- 41) In para. 54, the Guidelines briefly mention "naked" restrictions, stating that conduct with no economic rationale other than restricting competition cannot be considered competition on the merits. While this statement is straightforward, the Commission misses the opportunity to provide deeper insights or clearer guidance on applying this concept (or test) in practice.

Little substantive guidance for other conduct

- 42) For conduct not categorized as presumptively abusive or as a naked restriction, the Guidelines offer little explanation, merely reiterating (in para. 55) that "*it needs to be shown that the conduct departs from competition on the merits based on the specific circumstances of the case*." This generic statement adds no practical value, as it repeats the basic standard of analysis without clarifying how to assess such circumstances.

²⁰*Intel II*, para. 136.

- 43) This lack of practical guidance is particularly problematic in complex cases where it is not immediately clear whether a particular business practice is abusive. By citing only case-law, without offering further context or clarification (in para. 55), the Guidelines leave dominant firms uncertain about how their conduct will be judged. The reliance on vague and discretionary principles, without practical examples and clear limiting principles, renders the Guidelines ineffective as a compliance tool.

No safe harbor for dominant undertakings

- 44) In para. 57, the Commission states:

“Conduct that at first sight does not depart from competition on the merits (e.g. pricing above average total costs (“ATC”)) and therefore does not normally infringe Article 102 TFEU may, in specific circumstances, be found to depart from competition on the merits, based on an analysis of all legal and factual elements, notably: (i) market dynamics; (ii) the extent of the dominant position; and (iii) the specific features of the conduct at stake.”

- 45) While it is accepted that behaviour common in the market may, in certain circumstances, be considered abusive if undertaken by a dominant firm, para. 57 goes a step further by focusing on conduct that is generally viewed as non-controversial and still asserting that it may be challenged in specific situations. The reference to factors such as “market dynamics” or the “specific features of conduct” grants the Commission broad discretion, leaving businesses with no clear safe harbour and creating significant legal uncertainty.

3.3. Capability to produce exclusionary effects

3.3.1. The evidentiary burden to demonstrate a conduct’s capability to produce exclusionary effects

- 46) In this section, the Commission introduces the concept of evidentiary “presumptions” while recognizing the following in 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.”

Urging the Commission to reconsider introduction of ‘presumptions’

- 47) The topic of presumptions should be approached with great care and caution, also because the Guidelines are intended to give guidance to national authorities and courts. As the CJEU recently held in *Intel II*, the burden of proving an infringement of 102 TFEU rests on the party or the authority alleging the infringement:

“[I]t is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement”²¹

- 48) For the following reasons, ECLA urges the Commission to reconsider the introduction of the label (evidentiary) presumption in para. 60b of the Guidelines:

- EU competition law does expressly operate with evidentiary presumptions both legislatively – such as with the ‘presumption’ of harm in Art. 17(2) of the Damages

²¹ *Intel II*, para. 328.

Directive – and as developed through case-law – such as the ‘presumption’ of parent liability in cartel infringements. Thus, the Union Courts have had decades of opportunity to introduce the express notion of a presumption as the Commission does in para. 60 b) of the Guidelines. The Union Courts have chosen not to do so.

- In a similar vein, it is entirely open to the Commission at the next opportunity before the CJEU to request that the CJEU expressly introduce the presumption label. If the Commission succeeds in persuading the CJEU to do so, the Commission would have legal basis to introduce the label in its Guidelines and without needing the footnote ‘disclaimer’.
- The Commission’s distinction in para. 60 between conduct that is presumed to have exclusionary effects (Para. 60b) and conduct for which it is necessary to demonstrate capability of effects (Para. 60a) seems to be modelled on the Art. 101 TFEU distinction between ‘by object’ and ‘by effect’ restrictions. However, even with ‘by object’ restrictions, the Commission cannot adopt a ‘presumption’ of certain conduct falling under Art. 101(1) without first looking at the legal and economic context of the behaviour. And the burden of proof for analysing the legal and economic context remains with the Commission. Accordingly, by introducing the concept of ‘presumption’, the Commission is creating a low standard of evidence and reversal of burden of proof that does not even apply to hardcore cartels.
- The Commission’s introduction of a presumption (of illegality) seems hard to square with the CJEU’s statements made in:
 - *Intel II*, in which the CJEU stated that the finding of abuse:

“must be made, 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. That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects[.]”²² (Underlining added)
 - *Unilever*, in which it established a clear principle akin to the *in dubio pro reo* doctrine that any uncertainty as to the facts must be resolved in favour of the investigated undertaking:

“However, that demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice[.]”²³ (Underlining added)
- The Commission’s introduction of such ‘presumptions’ seems contrary even to the Commission’s own submission during the proceedings in *Intel II*. When summarising the Commission’s arguments, the CJEU recalled the Commission submitting the following:

“The capability of a dominant undertaking’s practice to restrict competition is assessed on the basis of contextual elements that are not exclusively linked to the conduct of that undertaking.”²⁴ (Underlining added)

²²*Intel II*, para. 179.

²³*Unilever*, para. 42.

²⁴*Intel II*, para. 171.

- In the same vein, introducing a presumption of illegality without express legislative or judicial basis may be offensive to the presumption of innocence guaranteed in Art. 48 of the Charter.

- 49) For a better understanding of the analytical framework for the use of 'presumptions', it would be helpful to change the order of the chapter and first address the starting point in all cases: i.e., what must (and what need not) be established to find that certain conduct is "capable of having exclusionary effects". This would include a detailed discussion of the legal tests developed in the case-law of the CJEU. This is relevant to (i) determine what hindrance to effective application of Article 102 TFEU²⁵ is overcome by introducing a presumption; and subsequently (ii) assess whether the benefit of a presumption outweighs the rights of defence.
- 50) This should be considered in light of the case-law that has already lowered the burden of proof for the Commission shifting from a focus on actual effects to potential effects and from a 'likelihood' standard to a 'capability' standard, that arguably does not even require that the negative effect be more likely than not on the balance of probabilities. Close scrutiny is warranted as the Guidelines already impose an asymmetric evidentiary burden of proof on the authority or claimant alleging an infringement (for demonstrating anti-competitive effects) and on dominant companies (for demonstrating efficiencies and/or pro-competitive effects).²⁶

More clarity if the Commission keeps the 'presumption' label

- 51) It is of great importance for practitioners and courts to have a clear understanding under what circumstances a presumption can or must be applied, considering not only the legitimate aims of such presumption but also Union law principles such as the presumption of innocence and the right to a fair trial as guaranteed by Article 47 of the Charter.
- 52) If the Commission retains the label 'presumption', ECLA urges the Commission to leave no doubt as to *what* exactly is presumed: the "capability" of certain conduct to have exclusionary effects, or "its exclusionary effects".²⁷ In ECLA's view, the Guidelines do not yet provide the required clarity on what is presumed, when and why.
- 53) Article 60(b) is not clear as to what facts should be established to 'trigger' the presumption, nor on what exactly is presumed.²⁸ The Guidelines only provide some relevant elements to be established based on economic considerations. Is the concept of a presumption used to meet the already lowered legal threshold to establish an infringement or does the presumption relate to actual effects? The current wording in paragraph 60(b) implies the latter:

²⁵Guidelines, para 4.

²⁶Guidelines, paras. 60(a) and 171 (underlining added): "*as a general rule, in order to conclude that a conduct is liable to be abusive, it is necessary to demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects*" versus "*In addition, proving an objective necessity or efficiency defence requires a cogent and consistent body of evidence, especially where the dominant undertaking is naturally better placed than the Commission to disclose its existence or demonstrate its relevance, which is typically the case in the context of the application of Article 102 TFEU.*"

²⁷See the current wording in paragraph 60(b) (underscore added): "*Conduct that is presumed to lead to exclusionary effects*:" and "*Once the factual existence of the relevant conduct is established, if need be under the conditions established in the specific legal test, its exclusionary effects can be presumed.*" And arguably the 'presumption' also covers the requirement that the conduct departs from competition on the merits. See, e.g., Guidelines paras. 53 and 54.

²⁸E.g., the fact that a company holds 100% of the shares in its subsidiary is evidence of the possibility to control the subsidiary triggers the presumption that decisive influence has actually been exerted.

“Conduct that is presumed to lead to exclusionary effects:” [...] and “Once the factual existence of the relevant conduct is established, if need be under the conditions established in the specific legal test, its exclusionary effects can be presumed.” (Underlining added)

- 54) This interpretation may exceed what the Commission is required to establish, but may be helpful for plaintiffs in proceedings before national courts. If the final wording of the Guidelines is not clear on the function of the presumption, ECLA foresees that these paras. in the Guidelines will give rise to substantial debate in court and therefore increase uncertainty instead of contributing to the effective application of Article 102 TFEU.
- 55) Moreover, paragraphs 60(b) lists (different) types of conduct that are “presumed to lead to exclusionary effects”: (i) exclusive supply or purchasing agreements; (ii) rebates conditional upon exclusivity; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying. What these types of conduct have in common is that they are subject to specific legal tests developed in the decisional practice and case-law of the CJEU. However, as follows from the discussion of the relevant chapters, the legal tests are distinctive and should not be mixed up.²⁹
- 56) The Commission should consider not treating all abuses as one single category for the purpose of discussing presumptions in this paragraph 60(b), but to allow for more nuance in dedicated chapters for presumptions applying to each type of conduct. For instance, there seems to be considerably less margin for presumptions in tying practices, that are often the way innovation occurs to the benefit of consumers, as the Commission itself acknowledges.³⁰ Therefore, the Guidelines should set out how the Commission intends to conduct its assessment of every potential abuse category. A differentiated approach would further the stated aim of the Guidelines, namely, to increase predictability, as the current wording of paragraph 60(b) may only raise more questions.

Guidance on how the presumption can be rebutted

- 57) The effect of the use of a presumption is that a relevant fact is considered to be established without the competition authority having to produce any further evidence.³¹ It shifts the evidentiary burden and, importantly, the associated risk from the Commission (or plaintiff) to the alleged infringer. In paragraph 60(b) the Commission notes that the DomCo can:
- “attempt to overturn the presumption by submitting evidence showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption is based, to the point of rendering any potential effect purely hypothetical”.
- 58) The scope of the arguments would determine the scope and nature of any further analysis required by the Commission. This is only acceptable if a presumption is truly rebuttable.
- 59) To this end, the standard applicable to the rebuttal of a presumption should be modulated on the solidity of the presumption – the stronger the facts, the higher the rebuttal standard. As to the former, the strength of the facts should be spelled out in terms of the appreciability of any effects, i.e., in terms of market share or the coverage rate of a given practice.
- 60) This point is fortified by the fact that market shares up to 10% are no proper basis to trigger a presumption, and there are no “exceptional circumstances” to justify another view (contrary to footnote 41 of the Guidelines, cf. paras. 14 et seqq above). Likewise,

²⁹E.g. in the chapter on predatory pricing the Commission refers to case-law on exclusivity.

³⁰Guidelines, para. 37.

³¹*Servizio Elettrico Nazionale*, para. 114.

the lack of a *de minimis* threshold for exclusionary effects (Guidelines para. 74) seems difficult to justify, considering that consumers often benefit from such effects, the potential harm being the prevention of market entry. Conversely, the Guidelines should set out what efficiencies the Commission is prepared to accept, providing examples, notably regarding exclusive dealing, predation and margin squeezes. Ideally, the Guidelines should also provide guidance on the practical set-up, even though the EU courts will do so eventually.

On naked restrictions under para. 60 c)

- 61) As it stands, it appears that the Guidelines go beyond what the case-law requires, placing too high a burden on the DomCo. In its recent decision in the *Google AdSense* case, the General Court did not assess whether the evidence submitted by Google was '(in)sufficient' to call a presumption into question. The General Court recognized that exclusivity clauses by their nature give rise to legitimate competition law concerns, but that their ability to exclude competitors is not automatic.³² The Court notes that Google "disputed with supportive evidence" that the conduct was capable of having exclusionary effects and that Google '*had maintained*' that the clause was objectively justified. It ruled that in response to (either one of) these arguments, it was for the Commission to demonstrate that the conduct was capable of restricting competition taking into account all the relevant circumstances of the case.³³
- 62) In case of the types of conduct listed under 60(c), the basic principles are no different. In these circumstances it would be more straightforward for the Commission to demonstrate the conduct was capable of restricting competition, which should require a solid theory of harm, and the chances of DomCos to show that the conduct was unable to produce such effects and/or could be objectively justified are more slim.

3.3.2. The substantive legal standard to establish a conduct's capability to produce exclusionary effects

The Guidelines borrowing from Art. 101 case-law

- 63) Para. 62 of the Guidelines provides the following:
- "62. The assessment of whether a conduct is capable of having exclusionary effects is based on the facts and circumstances existing at the time when the conduct was implemented. In this regard, 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. Moreover, where it is established that a conduct is objectively capable of restricting competition, this cannot be called into question by the actual reaction of third parties. " (Underlining added)
- 64) In support of the underlined part above, the Commission refers in a footnote to the General Court's judgment in *Lundbeck*.³⁴ As *Lundbeck* is a 'by object' case under TFEU Art. 101 and not one of abuse of dominance, the Commission should explain why it considers the findings are fully transferable. In particular, it is not entirely clear why the game-theory based notions of 'strategic uncertainty' in cases of collusion under Art. 101 TFEU are fully transferable to the distinct theory of harm of 'capability to foreclose'. ECLA does not consider it a given that the legal standard of removing commercial uncertainty under Art. 101 TFEU is one in the same as that of capability to produce anti-competitive effects under Art. 102 TFEU.

³²*Unilever*, para. 51.

³³*Google AdSense* paras. 382-390.

³⁴*Lundbeck*, para. 363.

- 65) In any case, the Commission should qualify its statement to reflect the actual wording of the General Court's statements in *Lundbeck*, i.e. those '*realistic prospects*', '*real concrete possibilities*', and '*real chances*' of competitive pressure. These statements referenced by the General Court emphasise an element of counterfactual analysis and inclusion of legal & economic context that is not reflected in the Commission's statement in para. 62 of the Guidelines.

Standard of counterfactual analysis

- 66) Paras. 66-67 correctly express a requirement to look at the 'counterfactual scenario', i.e. the market structure 'but for' the conduct under investigation. The Commission states the following in para. 67 of the Guidelines:

"Given the difficulty to develop credible assumptions, it is not necessary to account for all possible changes and combinations of outcomes and circumstances that could have arisen absent the conduct. It is sufficient to establish a plausible outcome amongst various possible outcomes." (underlining added)

- 67) ECLA urges the Commission to clarify that it should be the '*most plausible*' or '*reasonably plausible*' outcome based on an objective balance of probabilities. And not simply one of many plausible outcomes to be determined at the Commission's discretion. Accordingly, para. 67 should provide for a plausibility check threshold and for some minimum requirements of likelihood and size of possible harm.

Otherwise, in the same vein, the same standard of proof should be applied with respect to objective justifications / efficiencies; i.e., it should suffice to demonstrate that the conduct is merely capable / likely to contribute to certain plausible efficiencies amongst various possible outcomes.

The Commission, moreover, states the following in para. 67 of the Guidelines:

"In any event, such comparison may not be required in particular where the conduct of the undertaking has made it very difficult or impossible to ascertain the objective causes of observed market developments."

- 68) The Commission's language here leaves (too) much subjective discretion with the Commission. It is unclear and does not meet the standards of legal certainty. The Commission must present any exception to the requirement to carry out counterfactual analysis with clear boundaries and based on CJEU case-law. In particular, in *Google Shopping*,³⁵ the General Court speaks of an 'arbitrary or even impossible exercise' not the lower standard of '*very difficult*'. In addition, the Commission should clarify it is in fact suggesting a reversal in the burden of proof since the Commission would no longer need to demonstrate a causal link in such a scenario.

3.3.3. Elements that may be relevant to the assessment of a conduct's capability to produce exclusionary effects

Standard of proof & *in dubio pro reo*

- 69) The Commission states the following in para. 69 of the Guidelines:

"The assessment of whether a conduct is capable of having exclusionary effects must take into account all the facts and circumstances that are relevant to the conduct at issue. That assessment should aim to establish, on the basis of specific, tangible points of analysis and evidence, that the conduct is at least capable of producing exclusionary effects:"

³⁵*Google Shopping*, para. 377.

- 70) The Commission's language reflects a lower (less strict) standard of proof than the one set forth by the CJEU. By way of example, the CJEU stated the following in *Unilever*³⁶:

"However, that demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice[.]" (Underlining added)

- 71) By way of the underlined statement cited above, the CJEU has established a clear principle akin to the *in dubio pro reo* doctrine that any uncertainty as to the facts must be resolved in favour of the investigated undertaking. ECLA urges the Commission to have this reflected in the Guidelines.
- 72) Also to be included is the fact that the CJEU has identified other elements to be taken into account when determining whether behaviour has the capability of producing exclusionary effects, e.g. capacity constraints on suppliers of raw materials, or whether DomCo is an unavoidable trading partner.

Presumption of no capability of effects

- 73) In para. 70 d) of the Guidelines, the Commission states the following as to a relevant factor to be taken into account when determining whether the behaviour is capable of producing restrictive effects:

"*The extent of the allegedly abusive conduct.* In general, the higher the share of total sales in the relevant market affected by the conduct, the longer the duration of the conduct, and the more regularly it has been applied, the greater is the capability of the conduct to produce exclusionary effects. At the same time, even conduct affecting a small share of total sales in the relevant market can be capable of having exclusionary effects, for instance where the customers or the market segment targeted by the conduct are of strategic importance for entry or expansion (see point (e) below)."

- 74) ECLA urges the Commission to clarify that this, in practical terms, implies an evidentiary (rebuttable) presumption against the capability of effects in situations where the share of affected total market sales is limited. If indeed the Commission is keen to frame the CJEU's case-law as rebuttable presumptions – as the Commission does in para. 60 d) – despite the CJEU not using that express language, the Commission should extend that courtesy here.

Subjective intent (and absence thereof) as relevant evidence

- 75) In para. 70 f) of the Guidelines, the Commission states the following as to a relevant factor to be taken into account when determining whether the behaviour is capable of producing restrictive effects:

"*Evidence of an exclusionary strategy.* Although the abuse of dominance is an objective concept, for which it is not necessary to establish exclusionary intent (see paragraph 44 above), evidence of such intent may still be relevant for the purposes of establishing an abuse."

- 76) ECLA urges the Commission to clarify that this works both ways. While subjective intent is not as such necessary to demonstrate abuse of dominance, the absence of a deliberate strategy should *ceteris paribus* be considered an exculpatory element in the overall assessment of '*all the relevant circumstances*'.

³⁶*Unilever*, para 42.

3.3.4. Elements that are not necessary to show the capability to produce exclusionary effects

Duty to consider the AEC-test *ex officio*

- 77) ECLA agrees with the Commission's assertion that the CJEU has not established a strict duty for it to roll out the 'as efficient competitor' test (the "**AEC-test**") in any & all cases concerning exclusionary abuse. However, ECLA urges the Commission to provide some necessary nuance and qualification to its statement in para. 73 and invites the Commission to consider the following, in particular:
- 78) The CJEU held in *Post Danmark II*³⁷ that a competition authority must carry out its assessment under Article 102 TFEU based on "*all relevant circumstances*". The CJEU, moreover, held the following:³⁸
- "The as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position[.]"
- 79) In a similar vein, the CJEU stated the following in *Servizio Elettrico Nazionale*:³⁹
- "Admittedly, [the AEC-test] is merely one of the ways to show that an undertaking in a dominant position has used means other than those that come within the scope of 'normal' competition, with the result that competition authorities do not have an obligation to rely always on that test in order to make a finding that a price-related practice is abusive[.]
- Nonetheless, the fact remains that the significance generally given to that test, when it can be carried out, shows that the inability of a hypothetical as-efficient competitor to replicate the conduct of the undertaking in a dominant position constitutes, in respect of exclusionary practices, one of the criteria which make it possible to determine whether that conduct must be regarded as being based on the use of means which come within the scope of normal competition."
- 80) Accordingly, ECLA considers that CJEU case-law supports that the Commission is required to consider *ex officio* whether the AEC test is a suitable tool for the particular case. This also accords with para. 55 d) of the Guidelines in which the Commission recognises that the AEC-test is a relevant factor for establishing conduct that departs from competition on the merits. If the Commission finds, in a particular case, that the AEC-test is not a suitable tool to assess anti-competitive foreclosure, the Commission should be required to present its reasons for believing so, cf. the procedural duty to state reasons.

Duty to engage with AEC test when invoked by undertaking under investigation

- 81) In *Intel I*, the CJEU clarified that the Commission is required to engage with evidence such as the AEC-test when invoked by the investigated party. This duty applies with respect to:
- a) the analysis of whether the conduct in question is capable of excluding competitors that are at least as efficient as the DomCo from the market;⁴⁰ and
 - b) the analysis of whether the conduct may be objectively justified.⁴¹
- 82) In *Intel II*, the CJEU labelled this duty a "special obligation" when stating:

³⁷*Post Danmark II*, para. 68.

³⁸*Post Danmark II*, para. 61.

³⁹*Servizio Elettrico Nazionale*, paras. 81-82.

⁴⁰*Intel I*, para. 139.

⁴¹*Intel I*, para. 140.

"[T]he fact that that undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing an anticompetitive foreclosure effect means that the Commission is under a specific obligation to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as that undertaking from the market."⁴² (Underlining added)

- 83) In the same judgment, the CJEU further cemented this duty or special obligation in paras. 181 where it specifically referenced the AEC-test:

"The capability of such [loyalty] 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. Even though that test is merely one of the ways of assessing whether an undertaking in a dominant position has used means other than those that come within the scope of 'normal' competition, it seeks specifically to assess whether such an as-efficient competitor, considered *in abstracto*, is capable of reproducing the conduct of the undertaking in a dominant position and, consequently, whether that conduct must be considered to come within the scope of normal competition, that is to say, competition on the merits[.]"

- 84) The Commission's duties as presented above are now an integral part of the analysis on whether an undertaking has infringed Art. 102 TFEU and should therefore be reflected in the Guidelines.
- 85) Importantly, the Guidelines (in ECLA's opinion, wrongly) reference the AEC-test as relevant only in the narrow category of situations under section 4.3.1. '*Conditional rebates that are not subject to exclusive purchase or supply requirements*'. As explained above, the CJEU case-law does not support excluding the application of the AEC-test beyond this narrow category.

Tension between para. paras. 75 and 70(d) of the Guidelines

- 86) The Guidelines provide:
- in para. 70, d), that the extent of the allegedly abusive conduct is a relevant factor in assessing whether that behaviour is capable of producing exclusionary effects. In other words, the scale & scope of the behaviour is relevant for determining whether the behaviour is abusive.
 - and in para. 75, that there is no *de minimis* threshold for the purposes of determining whether certain conduct infringes art. 102 TFEU.
- 87) ECLA accepts that both these assertions reflect statements made by the CJEU. Nevertheless, ECLA urges the Commission to expressly address the seemingly contradictory implications of the two statements. To illustrate, imagine the following example:

DomCo has a market share of 55% reflecting 55 customers out of a total of 100 customers in the market. DomCo enters into an exclusivity agreement with a single customer that is not deemed a strategic customer in the market.

Question: Can DomCo, with reference to para. 70, d), successfully claim that the exclusivity agreement is not abusive due to the limited extent, i.e. lack of 'scale & scope', of the behaviour (covering just a single, non-strategic customer)? Or is DomCo prevented from succeeding in this argument due to there being no *de minimis* threshold as stated in para. 75?

⁴²Intel II, para. 330.

- 88) ECLA urges the Commission to explain how it proposes reconciling this tension based on the CJEU case-law.

4.2. Conducts subject to specific legal tests

4.2.1. Exclusive dealing

Resolving key language discrepancy

- 89) When defining the term 'exclusive dealing' in para. 78 of the Guidelines, the Commission refers to *Hoffmann-La Roche*⁴³ and perpetuates the linguistic difficulties already encountered since that judgment from 1979. The Commission states in footnote 184:

"All references to 'exclusive', 'exclusivity' or 'exclusively' in this section equally apply to situations where the purchase or supply obligation or the incentive schemes relate to most rather than all of a customer's demand or supplier's supply". (Underlining added)

- 90) The wording in various language versions of *Hoffmann-La Roche* and also at various places in other language versions of the Guidelines, however, refer to significantly lower thresholds than "all or most". For example, the Danish, German, French, Greek, Italian, Portuguese, Spanish, and Finnish versions of *Hoffmann-La Roche* translate rather into "all or a large/considerable/substantial/significant part of". Similarly, in the Guidelines, the Bulgarian, Danish, German, French and Swedish versions translate into "all or a considerable/substantial/significant part of".
- 91) To illustrate the significance of the language discrepancy, imagine a self-assessment situation in which DomCo is considering offering a discount conditional on a customer placing 40 % of his demand with DomCo. 40% could well be seen as a *considerable/substantial/significant part* of the customer's demand, but it would not qualify as "most of".
- 92) This language discrepancy is particularly significant since:
- i. the Guidelines do not take into account whether a certain share of the market is (potentially) covered by an exclusive dealing obligation; and
 - ii. the Guidelines, in their current draft form, subject 'exclusive dealing' to the evidentiary presumption of capability of effects.
- 93) Therefore, ECLA urges the Commission to disclose in the Guidelines how it proposes to resolve the material language discrepancy. ECLA urges the Commission to do so by stating that exclusive dealing cannot reasonably be interpreted as comprising a situation in which the customer places less than half of his demand with DomCo. Accordingly, the CJEU's reference to 'a considerable part of' (and similar) should be interpreted in conformity with 'all or most of' – meaning that 'a considerable part' would not comprise the example presented above of the customer placing 40% of his demand with DomCo.
- 94) This alignment on what does (and does not) constitute 'exclusive dealing' is also supported by how the term is defined elsewhere in the EU competition law framework. Art. 1(f) in the VBER adopts a threshold of 80% for the proportion of the purchaser's demand when determining what constitutes a non-compete or exclusivity obligation. While *Hoffmann-La Roche* itself did concern an obligation of 75%, the interest of consistency and uniformity supports not letting the term 'exclusivity' include a situation of a customer placing less

⁴³See Guidelines, footnote 184.

than half his purchases with DomCo. This is further supported by the fact that the 'theory of harm' of exclusivity agreements are the same under both Art. 101 & 102 TFEU, i.e. input or customer foreclosure.

Missing temporal aspect of 'exclusive dealing'

- 95) While in footnote 184 the Guidelines explicitly refer to the 75% purchasing requirement from *Hofmann-La Roche*, there is unfortunately no reference to the term of such an exclusive purchase obligation. It is clear that a long-term exclusive or quasi-exclusive dealing obligation can have exclusionary effects. For short-term agreements as well as for agreements that can be terminated at any time with a short notice, this is to be doubted even for a 100% dealing obligation. For example, the German Federal Court of Justice has questioned whether "*contracts for the exclusive purchase of certain services from a supplier that can be terminated at any time with a short notice period are to be regarded as a restriction of competition at all.*"⁴⁴ The relationship between volume and duration is crucial for the assessment of an exclusive dealing obligation and they need to be considered together. This aspect should thus be addressed in the Guidelines, especially since the 'exclusivity threshold' is not set at 100 % but much lower cf. the point on language discrepancy made above.

Reflecting the CJEU's statements in *Unilever & Intel II*

- 96) The Guidelines' narrative on exclusive dealing appears to be attempting to return to the old form-based approach even though the CJEU made clear in *Unilever*⁴⁵ that exclusivity obligations are "*not automatically capable of foreclosing competitors*".
- 97) This is further supported by the CJEU's statements made in *Intel II* in which the CJEU refers to the following factors that are mandatory in the Commission's analysis:

"[T]he Commission is required to analyse not only factors such as the extent of the dominant position of the undertaking in question, the share of market covered by the contested rebates and the conditions and arrangements for granting the rebates in question, their duration and their amount, but also the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market[.]

[...]

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."⁴⁶ (Underlining added)

4.2.2. Tying and bundling

Vague guidance on the presumption of exclusionary effects

- 98) According to para. 60 (b) of the Guidelines, "certain forms of tying" are presumed to lead to exclusionary effects (while other forms of tying are not subject to this presumption and require a full analysis of their capability to produce exclusionary effects). This also applies to pure bundling as its assessment is subject to the same legal requirements as tying.⁴⁷
- 99) The specification of these "certain forms of tying" (and pure bundling) subject to the presumption is set out in para. 95 and footnote 233:

⁴⁴VBL-Versicherungspflicht, paras. 39 and 43.

⁴⁵Unilever, para. 51.

⁴⁶Intel II, paras. 180 & 181.

⁴⁷Guidelines, para. 88.

"The depth of the analysis required to show that the tying is capable of having exclusionary effects depends on the specific circumstances of the case. In certain circumstances, it may be possible to conclude that, due to the specific characteristics of the markets and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed.[FN 233] In other circumstances, a closer examination of actual market conditions may be warranted. This is typically the case when (i) the tied product is available for free and (ii) it is easy to obtain alternatives to the tied product ..." (underlining added)

100) And footnote 223 then contains the following:

"This is notably the case in situations where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects: ..." (underlining added)

101) ECLA believes that this specification is very vague and creates significant legal uncertainty for DomCos because:

- It is unclear which '*specific characteristics of the market and products*' trigger the presumption of exclusionary effects.
- The example in footnote 233 does not provide a sufficient specification of these '*specific characteristics of the market and products*', as it only discusses one specific scenario (and it is not exhaustive, given the use of the term 'notably'). Moreover, the example refers to two older cases⁴⁸ which were examined by the courts at a time before the *Michelin*⁴⁹ case clearly established the capability to restrict competition as a generally applicable condition for establishing the existence of an abusive practice and before the Commission introduced the more economic approach in the 2008 Guidance Paper. The cases were also dealt with mostly in relation to Article 82(d) of the EC Treaty (now Article 102(e)) with its specific wording.
- Further uncertainty is created by the vague definition of the "other circumstances" (without the presumption) in the second part of para 95, also given the use of the term '*typically*'.
- It is also unclear how both '*certain circumstances*' (with presumption) and "*other circumstances*" (without presumption) in para 95 relate to the situations considered in para. 93.

102) ECLA urges the Commission to provide a clearer identification of the circumstances which trigger the presumption of exclusionary effects and those which do not.

4.2.3. Refusal to supply

Distinction between refusal to supply and access restrictions

103) The Guidelines make a crucial distinction between refusal to supply (section 4.2.3) and access restrictions (section 4.3.4).

104) The Commission defines refusal to supply in para. 96 and access restrictions in para 163 of the Guidelines as follows:

⁴⁸*Tetra Pak and Hilti*.

⁴⁹*Michelin*, para. 237.

"A refusal to supply refers to situations where a dominant undertaking has developed an input exclusively or mainly for its own use and, when requested access by a party (typically, an actual or potential competitor), refuses to give access."

"Access restrictions" refer to the imposition by a dominant undertaking of restrictions on access to an input that are different from a refusal to supply."

- 105) The decisive factor in distinguishing refusal to supply from access restrictions is whether the input has been developed 'exclusively or mainly' for DomCo's own use.
- 106) ECLA urges the Commission to provide clarification on how borderline cases are to be assessed, such as those where the input is developed partly for the DomCo's use and partly for third parties, or where there is no clear intent.

Indispensability criterion

- 107) Para. 102 of the Guidelines states:

"Should there be a real or potential substitute to the input in question, even if access were less advantageous for the requesting undertaking, the input cannot normally be considered as indispensable"

- 108) However, there are instances where an alternative exists but is significantly less advantageous. For instance, transporting oil by truck instead of by pipeline may be technically feasible but considerably less efficient and cost-effective.
- 109) ECLA urges the Commission to provide further guidance on how it intends to handle such borderline cases where a substitute exists but is markedly less advantageous in practice.

Refusal to supply a non-competitor

- 110) Para. 96 of the Guidelines refers to requests for access from '*typically, an actual or potential competitor*'.
- 111) ECLA urges the Commission to provide clarification on whether refusal to supply could be deemed abusive when access is requested by a non-competitor.

4.2.4. Predatory pricing

- 112) Para. 108 of the Guidelines states the following with respect to selective price cuts:

"Below cost pricing that is selectively applied to specific customers can also infringe Article 102 TFEU. In fact, pricing practices that target certain markets, market segments or specific customers can be an effective means of predation from the point of view of the dominant undertaking. This is because, as compared with a general policy of low prices, selective predation allows the dominant undertaking to limit the negative impact of the below-cost pricing on its profits."

- 113) ECLA urges the Commission to draft a separate section under section 4 that addresses such price discrimination, cf. Chapter III below.

4.2.5. Margin squeeze

- 114) ECLA has no comments to this section. However, please see the somewhat related issue of '*Treatment of consolidators & intermediary pricing arbitrage*' as presented below under Chapter III below.

4.3. Conducts with no specific legal test

4.3.1. Conditional rebates that are not subject to exclusive purchase or supply requirements

Relevance of the AEC-test

- 115) In this section, the Commission refers to those rebates which are conditional, but not conditional on the customer placing 'all or most of' his demand with DomCo. As explained under section 4.2.1. on 'Exclusive dealing', the discrepancy in the language versions contribute to the uncertainty of whether a rebate conditional on the customer purchasing, e.g., 40 % of his volume from DomCo, falls under section 4.2.1. or section 4.3.1.
- 116) Except for discounts and similar incentives granted in return for exclusivity, the Guidelines generally consider the granting of discounts to be a practice that does not fall under any specific legal test.⁵⁰ Conditional rebates are permissible as quantity-based incremental rebates if they do not result in below-cost pricing⁵¹ which needs to be verified by a price-cost test. However, the Commission considers this to be unnecessary if the incentives granted are not monetary or if the specific market context effectively excludes an equally efficient competitor⁵², so that a 'less efficient competitor' could also exert important competitive pressure.
- 117) The Guidelines then list a number of criteria that are important for assessing the exclusionary effect of a discount system. The AEC-test is only mentioned last in para. 145 f), as if the five preceding elements of the consideration were more important or preferred. While this appears to correspond to the Commission's inclination to downplay the significance of the AEC-test, the CJEU stated with remarkable clarity in *Google Shopping* that the Commission *must* indeed apply the AEC-test:

"where that test is relevant, its assessment of the relevance of such a test being, where appropriate, subject to review by the EU judicature"⁵³

- 118) In ECLA's view, the Commission's move away from the AEC-test is therefore problematic.

Consistency & allowing for operational self-assessment

- 119) Already in its Policy Brief of March 2023, the Commission mentioned that there could be 'market challengers', i.e., competitors that offer interesting niche products, for example. However, if every activity that can contribute to increasing competitive pressure is worthy of protection, it is almost impossible to estimate the degree of efficiency at which pricing through discounts turns abusive. This applies even more if non-tariff practices are not quantified in order to then subject them to the AEC-test.⁵⁴
- 120) In footnote 325 of the Guidelines, the critical statement is hidden that DomCo should not be able to defend itself by claiming that:
- "a hypothetical equally efficient competitor would be able to offset the loss of the rebates"
(Underlining added)"
- 121) The Commission continues by saying that the suitability of behaviour to have an exclusionary effect is:

⁵⁰Guidelines, para. 145.

⁵¹Guidelines, para. 144.

⁵²Guidelines, para. 144 lit. b)

⁵³*Google Shopping*, para. 266.

⁵⁴*Unilever*, para. 59.

“to be assessed in relation to the existing actual or potential competitors of the dominant undertaking and not in relation to hypothetical competitors”.

- 122) This approach is not convincing for several reasons: In *Superleague*⁵⁵ and *Google Shopping*⁵⁶, the CJEU recalled that there is nothing objectionable about achieving and maintaining a dominant position for efficiency reasons, and that Art. 102 TFEU is not intended to ensure that competitors who are less efficient than the DomCo continue to operate on the market. Furthermore, DomCo must also be able to assess its pricing behaviour in the abstract.
- 123) The requirements for self-assessment become unreasonably excessive if DomCo is required to apply ‘potential competitor’ as a benchmark when that is to its detriment and denied the right to do so when it is to its benefit.
- 124) Operational self-assessment is further bedevilled if DomCo has to take into account not only the equally efficient competitor but also the not-so-efficient (potential, but not hypothetical) and the not-yet-as-efficient competitor. For a (dominant or not) company, it is not possible to sufficiently evaluate the position of actual and potential competitors in the market without access to very specific market intelligence – which Art. 101 TFEU would not allow it to obtain. In absence of that sensitive market information, DomCo cannot carry out meaningful self-assessment.
- 125) In this context, the Guidelines thus pushes the boundaries of the relevant case-law and ECLA urges the Commission to remedy the Guidelines accordingly.

4.3.2. Multi-product rebates

Unclear principles of assessment and missing link to tying and bundling

Para. 155 of the Guidelines provides the following:

“Multi-product rebates that are not conditional on customers buying all or most of their requirements of at least one of the products from the dominant undertaking are liable to be abusive if such conduct departs from competition on the merits and is capable of producing exclusionary effects. This is typically the case where the multi-product rebate enables the dominant undertaking to leverage a dominant position from one market into one or more other markets and where this is capable of producing exclusionary effects, for instance, by strengthening or protecting the dominant position. The guidance set out in section 4.3.1 can be relevant.”

- 126) The reference to the conditional rebates in Section 4.3.1 could make the assessment of mixed bundling too complex compared to the rather simple price-cost test in the 2009 Guidance. Moreover, this is a typical practice for the application of the AEC test - see para. 59 of the 2009 Guidance. The Commission should at least describe under which circumstances the test is relevant and under which circumstances it is not, and how the test is assessed (what is its probative value) in relation to other factors in the assessment.
- 127) Section 4.3.2 also disregards the natural link between multi-product rebates (mixed bundling) and tying and bundling.

Missing considerations of the bundle-to-bundle competition

The section also fails to take into account bundle-to-bundle competition, contrary to the 2009 Guidance. Although there appears to be no case-law of the Union Courts and/or the

⁵⁵*Superleague*, para. 124.

⁵⁶*Google Shopping*, para. 164.

Commission on the infringement of Art. 102 TFEU, the Commission has explicitly recognised the principle, for example in its merger decision *Deutsche Boerse / LSE*:⁵⁷

"In view of the foregoing, the Commission concludes that the Transaction would lead to a significant impediment of effective competition in the market for single stock equity derivatives, regardless of the precise market definition as the Transaction would eliminate the horizontal bundle-to-bundle competition between Eurex and Euronext."

- 128) ECLA urges the Commission to provide at least some basic consideration of bundle-to-bundle competition in this section.

4.3.3. Self-preferencing

Quasi-general non-discrimination obligation

- 129) Para. 160 of the Guidelines indicates that self-preferencing may constitute an abuse if two conditions are met: (i) the conduct departs from competition on the merits; and (ii) it is capable of producing exclusionary effects. Paras 161 and 162 expand upon these conditions but largely provide general considerations and indicative elements, without offering specific guidance for DomCos. In practice, this could lead to what is effectively a quasi-general non-discrimination obligation for DomCos.
- 130) It is noteworthy that in *Google Shopping*⁵⁸ the CJEU affirmed that there is no general obligation of 'equal treatment'. Even DomCos are not required to treat their own affiliates the same as third parties. Self-preferencing can only constitute an abuse of dominance when specific market characteristics and circumstances are identified⁵⁹, and where differential treatment is arbitrary⁶⁰.
- 131) ECLA would welcome a clearer framework for assessing self-preferencing practices.

4.3.4. Access restrictions

Problematic incentives for DomCos

- 132) Para. 102 of the Guidelines states that:
- "Access restrictions can be liable to be abusive even if the input at stake is not indispensable, as the need to protect the undertaking's freedom of contract and incentives to invest does not apply to the same extent as in a refusal to supply setting."
- 133) Thus, refusal to supply is subject to a higher threshold for intervention than access restrictions, as the stringent *Bronner* criteria - particularly indispensability - only apply where an input has been developed exclusively or mainly for the DomCo's own use.
- 134) Although this interpretation is supported by recent case-law⁶¹, it creates problematic incentives for DomCos. Consider a scenario where a DomCo is contemplating developing an input (which is not indispensable) and offering it to third parties for the first time. Paradoxically, from a competition compliance perspective, it would be safer for the DomCo not to offer the input at all, rather than to risk future restrictions or price increases being deemed anticompetitive.

⁵⁷*Deutsche Boerse / LSE*, para. 844.

⁵⁸*Google Shopping*, para. 186.

⁵⁹*Google Shopping*, para. 187.

⁶⁰*Google Shopping*, para. 182.

⁶¹*Google Shopping*, and opinion of Advocate General Medina in *Android Auto*.

- 135) The wording of para. 106 (d) - '*declared purpose of sharing it widely with third parties*' - could inadvertently incentivise DomCos to refrain from making any public statements regarding the potential future availability of an input under development to third parties.

5. General principles applicable to the assessment of objective justifications

Meeting Competition Defence missing as 'objective justification'

- 136) The Guidelines recognise that conduct that is liable to be abusive may escape the prohibition of Article 102 TFEU if the DomCo can demonstrate that such conduct is objectively justified. It lists the 'objective necessity defence' and the 'efficiency defence'.
- 137) ECLA urges the Commission to include the 'Meeting Competition Defence' as an equally recognised example of objective justification. While it has been expressly recognised both by the Commission itself and the CJEU (see further below), it is only mentioned indirectly and in passing in paras. 49 and 171 of the Guidelines.
- 138) The CJEU has confirmed the principle in several judgments.⁶²
- 139) Moreover, the Commission itself has expressly stated that the Meeting Competition Defence should be considered as one form of objective justification for an otherwise abusive conduct if such conduct is actually a loss minimising reaction to competition from others. By way of example, see the following statement from DG COMP's EC Competition Policy Newsletter:

"The second type of objective justification is where the dominant company is able to show that the otherwise abusive conduct is actually a loss minimising reaction to competition from others ('meeting competition defence'). The Community Courts have considered that defending its own commercial and economic interests in the face of action taken by certain competitors may be a legitimate aim. This automatically implies that an objective justification is not possible if the dominant company is not able to show that its conduct is only a response to low pricing by others or if the Commission, for instance through documents seized at the company, has been able to demonstrate that the objective aim of the conduct is to directly foreclose competitors. The meeting competition defence is only applicable in relation to behaviour which otherwise would constitute a pricing abuse. The dominant company will have to show that its reaction is suitable, indispensable and proportionate."⁶³

- 140) As recognised by the Commission in this statement, the Meeting Competition Defence is a justification of a practice undertaken by a DomCo in response to a third party's practice, the purpose of which is to protect the commercial interests of the DomCo. Availability of this defence ensures a level playing field among all players on the market. In particular, it allows the DomCo to compete effectively, which has the effect of preserving rather than harming the competition on the market.
- 141) Application of Meeting Competition Defence allows the DomCo to effectively compete against other market participants when they engage in aggressive conduct which could, if left unanswered, have a negative impact on the competition on the market. Indeed, a DomCo's response to a third-party conduct to protect its commercial interests increases efficiency and intensifies competition on the market, in fact it contributes to the core

⁶²*United Brands*, para. 189; *BPB Industries*, para. 69; *Irish Sugar*, para. 112; and *Atlantic Container Line*, para. 1114.

⁶³EC Competition Policy Newsletter, 2006, Number 1, Spring; Luc Peeperkorn: Commission publishes discussion paper on abuse of dominance, pg. 6.

purpose of competition law: to ensure that consumers can obtain the best products at the lowest prices (cf. para. 1 of the Guidelines).

Chapter III – Exclusionary abuse types missing from the Guidelines

A) Structural abuse of dominance & killer acquisitions

- 142) The Guidelines make reference to *Towercast* and the CJEU's ruling that Regulation 139/2004 does not preclude national competition authorities from applying Article 102 TFEU to concentrations that fall below the notification thresholds of both national and EU merger control regimes 'in the light of the structure of competition which is national in scope'.⁶⁴ Since the Commission's publication of the Guidelines in August 2024, the CJEU has delivered its Grand Chamber ruling in *Illumina Grail* where it reiterates this finding, referring to its ruling in *Towercast*. Moreover, in *Illumina Grail*, the CJEU emphasises the need to guarantee the effectiveness, predictability and legal certainty to the parties to a concentration.⁶⁵
- 143) Given that the CJEU also establishes that Article 22 of Regulation 139/2004 may not be applied to concentrations that fall below the notification thresholds of both national and EU merger control regimes, it may be expected that Member State authorities will apply Article 102 TFEU in at least some of the cases where the Commission would otherwise have welcomed an Article 22 referral.
- 144) To ensure the required effectiveness, predictability, and legal certainty, it is not only crucial that there is a clear understanding of how and when Article 102 TFEU may be applied to concentrations, but also that the provision is applied with caution to ensure coherence with national and/or EU merger control rules.
- 145) While Art. 21(1) of the EUMR prevents the Commission from intervening based on *Towercast*, the Guidelines will serve as guidance to Member State authorities as well as undertakings and their advisors. ECLA therefore urges the Commission to provide guidance, through reference to any jurisprudence from EU or national courts, on the situations where a concentration affecting the structure of competition may constitute an exclusionary abuse contrary to Article 102 TFEU.

B) Price discrimination

- 146) Through two seminal judgments, the CJEU has provided much clarity as to when a DomCo's price discrimination constitutes (exclusionary) abuse. ECLA therefore urges the Commission to have this reflected in the Guidelines and, to this end, ECLA provides the following observations.

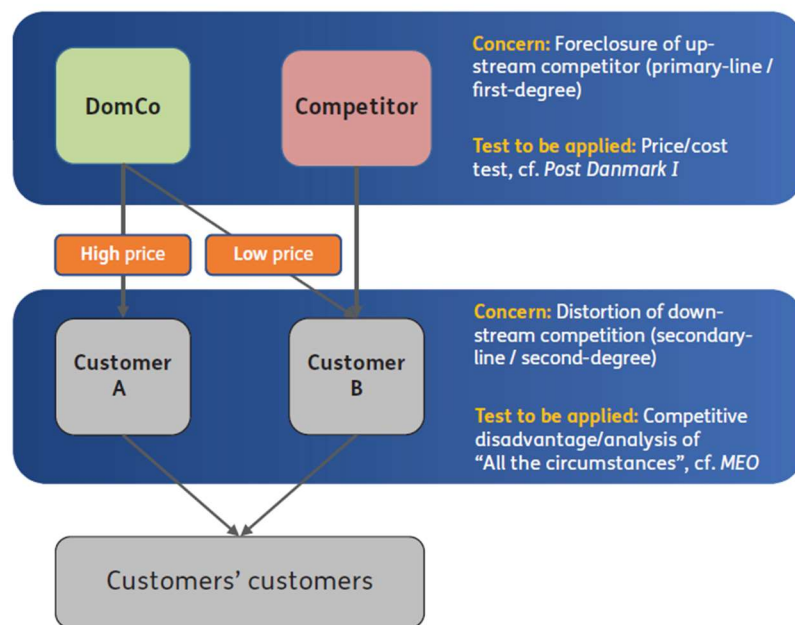
Legal test based on theory of harm

- 147) A useful short-hand distinction within price discrimination has developed based on which theory of harm to competition the enforcer is looking at.
- 148) If the enforcer's concern is that the DomCo is making use of price discrimination to foreclose the company's own (upstream) competitors from the market, abuse is determined based on the price/cost test as provided for in *Post Danmark I*. This category is often labelled primary-line or first-degree discrimination.

⁶⁴Footnote 18 of the Guidelines.

⁶⁵*Illumina Grail*, para. 206.

- 149) If, on the other hand, the theory of harm is distortion of (downstream) competition between two customers, the DomCo has to pass the test expressed in Article 102(2)(c) TFEU itself. Abuse under this provision requires that the DomCo has placed a trading partner at a competitive disadvantage by applying dissimilar conditions to equivalent transactions. The notion of a competitive disadvantage is determined by analysing '*all the circumstances*', as the CJEU held in *MEO*. This category is often labelled secondary-line or second-degree discrimination.
- 150) The primary & secondary-line dichotomy is endorsed expressly by Advocate General Wahl in his Opinion in *MEO*⁶⁶ and is illustrated in the figure below:⁶⁷



Legal tests under *Post Danmark I* & *MEO*

- 151) In its judgment in *Post Danmark I*, the CJEU essentially converted primary-line discrimination case-law into a price/cost test by holding that if DomCo prices at a level covering '*the great bulk of the costs attributable to the supply of the goods or services in question*'⁶⁸, anti-competitive foreclosure is unlikely.
- 152) As for secondary line discrimination, the CJEU held in *MEO* that to find abuse under Article 102(2)(c) TFEU, price discrimination must be capable of distorting competition between the trading partners being discriminated. Determining whether discrimination results in the necessary '*competitive disadvantage*' does not require proof of actual quantifiable deterioration in the competitive situation. It must, however, be based on analysis of:

"...all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that conduct is such to affect that situation."⁶⁹ (emphasis added)

⁶⁶Advocate General Wahl's Opinion in *MEO*, paras. 71 et seq.

⁶⁷Sam Baldwin & Anikó Keller: '*Positive (price) discrimination - The state of play in EU antitrust*' Competition Law Insight • December 2018 • Volume 17 Issue 12.

⁶⁸*Post Danmark I*, para. 38.

⁶⁹*MEO*, para. 28.

C) Treatment of consolidators & intermediary pricing arbitrage

- 153) Since the liberalisation of the postal sector, there have been a number of cases before NCAs dealing with the incumbent postal operators' granting of rebates to so-called consolidators.⁷⁰ While the cases concern the postal sector, the subject-matter is relevant for all industries in which DomCo's price to a customer decreases significantly as volume increases due to economies of scale. The cases concern to what extent DomCo can legitimately refuse an intermediary to leverage or exploit 'arbitrage' advantages by purchasing high volume and then reselling in competition with DomCo.
- 154) Several of these cases have concerned adjustments to rebate schemes where rebates, which were previously calculated on the basis the total volume of mailings coming from all clients of the consolidators, are instead calculated on the basis of the volume of mailings generated individually by each of the consolidators' clients. This has effectively led to lower rebates, without necessarily amounting to price discrimination or a margin squeeze.
- 155) While the facts appear to be basically the same in the various cases throughout the EU, the NCAs appear to have taken diverging views on how Article 102 TFEU should be applied to these changes in the rebate schemes. Decisions from the Belgian and Swedish NCAs could serve to illustrate this. In Belgium, the Belgian Competition Authority took the view that this practice by the Belgian postal incumbent constituted an abuse contrary to both national competition rules and Article 102 TFEU, declaring that it had an exclusionary effect on consolidators and the incumbent's potential competitors and a loyalty building effect on its main clients that would increase barriers to entry to the market. The Belgian incumbent bpost was fined EUR 37 million for that abuse.⁷¹ In Sweden, the Swedish Competition Authority assessed the same practice by the Swedish incumbent PostNord without finding an infringement of either the Swedish competition rules or Article 102 TFEU.⁷²
- 156) While an abuse of Article 102 TFEU should only be established following an assessment of the actual or potential effects on competition in the individual case, and while there may thus be factors justifying some of the different outcomes,⁷³ much suggests that there are diverging views throughout the EU on how Article 102 TFEU should be applied to this kind of behaviour from an incumbent firm. This is unfortunate and ECLA urges the Commission to provide further guidance on if and how the Commission considers that this type of practice can have exclusionary effects contrary to Article 102 TFEU.

⁷⁰Consolidators supply senders with routing services upstream from the postal distribution service. Those services can include the preparation of mail before handing it on to the postal operator - such as sorting, printing, placing in envelopes, labelling, addressing and stamping - and the delivery of the mailings - such as collection from the senders, sorting and packaging of the mailings in mailbags, transport and delivery to sites designated by the postal operator.

⁷¹bpost, para. 12.

⁷²Mailword Office and 21 Grams.

⁷³See also, e.g., Österreichische Post AG (2021-AT) and Edipost et al v. La Poste (2009-FR). The former decision reported on by Heinrich Kühnert in the publication CoRe, issue 1/2022, with an article entitled *Discriminatory Rebates in the Postal Sector*

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Who is ECLA?

The European Competition Lawyers Association (ECLA) promotes scientific and practical discussions about competition law & policy. The association connects, unites and assembles dedicated competition law professionals (lawyers & economists) in private practice as well as in in-house legal departments throughout Europe and beyond.

ECLA regularly organizes specialized high-level conferences on current topics which are of relevance for the practice of competition law. The conferences allow its participants to discuss the newest developments and learn from experiences of their international colleagues.

ECLA is a non-profit and autonomous non-governmental organization. Membership is open for all lawyers and economists with a strong interest in competition law developments. We welcome all lawyers and in-house counsels as well as legal and economic experts in specialized consulting firms to participate and become a supporting member of the association.

ECLA has the following mission:

- To organize specialized competition law conferences, allowing the exchange of views on legal developments and practical topics;
- To promote the scientific and practical legal discussion about important competition law developments;
- To allow the exchange of national and international practical experiences in competition law procedures and advocacy;
- To connect dedicated competition lawyers from Europe and beyond in order to allow continuing professional and social relationships;
- To provide a forum to meet and discuss with specialized colleagues and friends