

## RESPONSE TO THE PUBLIC CONSULTATION

### Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

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#### **1. Executive summary**

Telefónica welcomes the European Commission's ("Commission") efforts to adopt draft Guidelines on exclusionary abuses of dominance ("Guidelines") as well as the opportunity to express views in a public consultation.

The following lines express Telefónica's views on the Guidelines, based on its experience operating in different markets of the European Union. Telefónica's views are also reflected in the responses of Connect Europe and GSMA, which have served as a source for elaborating this response. In a nutshell:

- Telefónica welcomes the preparatory work and the Guidelines' aim to reflect the EU courts' case law in order to increase legal certainty to the benefit of consumers, businesses, authorities and courts. However, in Telefónica's views, the Guidelines do not satisfy such aims.
- As currently drafted, the Guidelines appear to move away from an economic-based analysis to a presumption-based analysis, thereby lowering the bar for the Commission to intervene in exclusionary abuse cases without the necessary endorsement of all available case law. Telefónica urges the Commission to reconsider its approach to the Guidelines.
- As regards the general principles for the assessment of dominance, Telefónica considers that the Commission places too much emphasis on market shares and fails to explicitly recognise that -in certain markets- companies may have very large market shares without this necessarily being an indication of dominance. Therefore, Telefónica requests the

Commission to further develop this assessment and to explicitly recognize that there are other methods besides market shares that can equally be indicators of dominance.

- Telefónica asks the Commission to move away from the concept of "competition on the merits", as it is not a category that can be defined in abstract and introduces confusion and legal uncertainty into the analysis. There are unlimited ways of "competing on the merits" and this, together with the references to "effective competition structure", seems to give the Commission the ability to decide how a particular market works -which is contrary to the rules of free competition as laid down in the Treaties-.
- Far from increasing legal certainty, the reliance on categories and presumptions prevents companies such as Telefónica to self-assess its conduct on a day -to-day basis. This turn to a formalistic approach shifts the burden of proof to the dominant undertakings and makes it more difficult for them to successfully rebut allegations of abusive conduct. Telefónica considers that the Courts have not ruled out an effects-based assessment of conducts based on all factual circumstances of a specific case and that therefore, the Commission should re-think this approach.
- Telefónica also wishes to express its concerns about the Section 3.3.4 regarding the elements that are not necessary to show the capability to produce anticompetitive effects. The Commission is diluting the probative value of (i) effects; (ii) consumer harm; and (iii) foreclosure to actual or potential competitors which are as efficient as the dominant undertaking, thereby diluting the necessary legal certainty that is required to prove an infringement. Thus, Telefónica urges the Commission to review this section.
- Telefónica also wishes to express its disagreement with the section on conducts with no specific legal test. The introduction of less demanding standards of proof creates legal uncertainty. In addition, the absence of a specific test may make it even more difficult for companies to assess whether certain conduct falls within these categories, which may lead to an overly broad interpretation of these categories. Overall, this new approach will inevitably make life more difficult for in-house counsel.
- In particular, point 166 of the Guidelines provides a non-exhaustive list of access restrictions which could be considered contrary to Article 102. This list tries to generalise one or two isolated judgments which arose in a specific context. With such a broad category of abuse, there is a genuine risk of artificially and arbitrarily extending the application of Article 102 to *any* conduct that does not meet the conditions established by case law for different types of abusive conduct (e.g. refusal to supply, margin squeeze, or self-preferencing. Telefónica asks the Commission to delete this point.
- Last, Telefónica would urge the Commission not to be selective in its approach to codifying CJEU judgments, and to be careful not to generalise by codifying very specific cases arising in exceptional circumstances, as this would overly-broaden the application of Article 102 to the detriment of legal security and fair competition.

## 2. General principles applicable to the assessment of dominance

Telefónica welcomes and shares the Commission's assertion that Article 102 does not prevent an undertaking from acquiring on its own merits, in particular on account of its skills and abilities, a dominant position on a given market. It only prohibits abuse of such a dominant position.

### Single dominance

Telefónica considers that the Commission places too much emphasis on market shares (**points 26-28**) and fails to explicitly recognise that in certain markets companies may have very large market shares without this necessarily being an indication of dominance.

For example, in wholesale telecommunications markets, companies may have high market shares simply because they have taken the commercial decision to provide wholesale services to other operators, while other competitors in the wholesale market may decide to keep all their capacity for themselves. In such a scenario, Operator A may have a share of 80% while Operator B has a share of 20%, and C and D have a share of 0%, a situation that may change from the moment Operator C or D decide to start providing wholesale services. In these markets, shares are calculated on the basis of revenues per access and self-provision is not excluded from market share calculations. Therefore, in these types of situations market shares do not reflect market power of telecommunications companies and Telefónica asks the Commission to explicitly recognise this.

Similarly, in bidding markets, companies might have a very high market share due to the fact that they have been successful in a tender. Thus, to assess the existence of dominance, the contestability of the market is much more relevant than the market share during a certain period of time. Another key parameter to assess the value of market shares as an indicator of market power is regulation. In highly regulated markets, such as wholesale telecommunications markets, the existing regulatory obligations (e.g. access to infrastructure at a fair price or pricing replicability) can prevent a company with high market shares from being dominant.

In addition, there is just one decision since 1966 in which the Commission has found dominance below 40% market share.<sup>1</sup> Consistent with *Hoffmann-La Roche*, where the Court emphasised that “*the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares*”<sup>2</sup>, we urge the Commission to clarify that below 40% market shares there will normally be no finding of dominance. This threshold was also the reference in the 2008 Guidance.

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<sup>1</sup> Judgment of 17 December 2003, *British Airways plc vs Commission of the European Communities*, T-219/99, EU:T:2003:343.

<sup>2</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 39. In *AKZO Chemie BV v Commission of the European Communities* (C-62/86), the Court found that a market share of 50% constituted evidence of the existence of a dominant position; in *Hilti AG v Commission of the European Communities* (T-30/89), a market share of between 70-80% was found in itself to be a clear indication of the existence of a dominant position; in *United Brands Company and United Brands Continental BV v Commission of the European Communities* (Case 27/76), dominance was established with market shares between 40% and 45% but other factors were also considered.

Therefore, Telefónica requests the following wording for **point 26** of the Guidelines.

26. ~~One~~ **An** important factor is the existence of very large market shares, which ~~are in themselves—save in exceptional~~ **some** circumstances— **are** evidence of the existence of a dominant position **which, however, should be assessed in light of other factors of dominance**. ~~This is the case in particular where an undertaking holds a market share of 50% or above.~~ **Dominance is not likely if the undertaking's market share is below 40% in the relevant market.**  
~~Dominance may also be found in cases where an undertaking has a market share below 50%. Generally, both the value of sales or purchases and the volume of sales or purchases provide useful information for assessing market power.~~  
Typically, market shares based on sales value are the most appropriate indicator, but in other instances, sales volumes or other indicators may better reflect the competitive strength of undertakings.

Despite being only stated in a footnote, Telefónica disagrees with the 10% market share “safe harbour” that the Guidelines establish. Additionally, the Guidelines suggest that dominance can be established even below 10% “*in exceptional circumstances*”.<sup>3</sup> The case law that is cited did not establish any 10% threshold as a reference to exclude dominance but the Court simply stated that even if the undertaking in question was the largest in the market, still, its market shares were too low for the undertaking to be considered dominant. This is not appropriate and Telefónica requests the Commission to delete that reference.

### **3. General principles to determine if conduct by a dominant undertaking is liable to be abusive**

#### **Conduct departing from competition on the merits**

First of all, Telefónica asks the Commission to move away from the concept of “competition on the merits”, as it is not a category that can be defined in abstract and introduces confusion and legal uncertainty into the analysis. There are unlimited ways of “competing on the merits” and this, together with the reference to “effective competition structure” in **point 5**, seems to give the Commission the ability to decide how a particular market works - which is contrary to the rules of free competition as laid down in the Treaties.

**Point 49** rightly establishes that the fact that an undertaking is in a dominant position does not disqualify it from protecting its own commercial interests. In the same line, Telefónica considers that reinforcing dominance is legitimate to the extent the dominant company does not abuse it and that the Commission should explicitly recognise this. Therefore, the following is proposed.

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<sup>3</sup> Point. 26, footnote 41.

49. Dominant undertakings have a special responsibility not to allow their conduct to impair effective competition on the internal market. At the same time, the fact that an undertaking is in a dominant position does not disqualify it from protecting its own commercial interests, if they are attacked. Such an undertaking may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to abuse its dominance ~~strengthen its dominant position or to abuse it~~

**Point 55** sets out a list of factors which, according to the Commission, are relevant to the assessment of competition on the merits. The Commission misses the point of providing legal certainty and predictability for the self-assessment of exclusionary conduct. This list makes it even more difficult for in-house counsel to self-assess and provide guidance to business units, as the day-to-day problems of companies cannot be subsumed in these examples. Moreover, the extrapolation of certain case law available to assess competition on the merits is also reductionist, as the Court of Justice has never provided a list of factors that are relevant for the assessment of competition on the merits, but only assessed this concept with regards to the relevant circumstances of specific cases. Therefore, Telefónica asks the Commission to re-think this point.

In addition, in **point 57** the reference to the fact that some conduct that at first sight does not depart from competition on the merits but can nevertheless be found to depart from competition on the merits in “specific circumstances” causes concern as it allows for a large margin of discretion and uncertainty, it should therefore be deleted or clear guidance should be provided in which specific circumstances this would apply.

### Capability to produce exclusionary effects

The Commission identifies three categories of conduct that would carry different evidentiary burdens to show “capability to produce exclusionary effects”. In particular, the Guidelines differentiate between i) conduct for which it is necessary to demonstrate a capability to produce exclusionary effects; ii) conduct that is presumed to lead to exclusionary effects<sup>4</sup> and iii) naked restrictions.<sup>5</sup>

- First category: *i) Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects*

In cases where the evidentiary burden cannot be initially discharged, the Commission needs to demonstrate that conduct is *at least capable* of producing exclusionary effects. Telefónica cannot support this approach as it considers that the legal standard that the Guidelines set out in **points 61-67** for proving a conduct’s capability to produce exclusionary effects lowers the bar for finding an infringement. Telefónica asks the Commission to at least rely on a

<sup>4</sup> In particular, the Guidelines identify (i) exclusive supply or purchasing agreements, (ii) rebates conditional upon exclusivity; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying. See point. 60.b of the Guidelines.

<sup>5</sup> Guidelines, point. 60.c. Examples of naked restrictions include: “(i) payments by the dominant undertaking to customers that are conditional on the customers postponing or cancelling the launch of products that are based on products offered by the dominant undertaking’s competitors; (ii) the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors; or (iii) the dominant undertaking actively dismantling an infrastructure used by a competitor.”.

probability/plausibility/”more likely than not” test as the “at least capable” test is too low a bar, and will be easily satisfied.

In addition, some points in this Section seem to contradict the principle that the Commission needs to discharge the evidentiary burden. Telefónica proposes the following suggestions:

**Point 64.** However, the fact that a conduct has failed to produce actual exclusionary effects cannot in itself disprove its capability to produce exclusionary effects. (...) ~~The undertaking concerned must supplement such indicia by evidence showing that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects.~~

**Point. 65.** The actual or potential exclusionary effects identified in the analysis need to be attributable to the conduct at issue. However, the conduct does not need to be the sole cause of those exclusionary effects. ~~It is sufficient to establish that the conduct contributes to increasing the likelihood of the exclusionary effects materialising on the market.~~

- Second category: ii) *conduct that is presumed to lead to exclusionary effect*

First of all, Telefónica would like to express its rejection to the use of presumptions. The case law does not explicitly establish presumptions, and this is confirmed by the most recent jurisprudence in the *Google Shopping* and *Intel* judgments.<sup>6</sup> See for example para. 132 of *Google Shopping* or 328 of *Intel* which clearly sets out that it is for the Commission to prove infringements and to adduce evidence capable of demonstrating an infringement to the requisite legal standard:

*132. In addition, it is apparent from the case-law of the Court of Justice that, in the field of competition law, where there is a dispute as to the existence of an infringement, **it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.** Where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement (judgments of 22 November 2012, *E.ON Energie v Commission*, C-89/11 P, EU:C:2012:738, paragraphs 71 and 72, and of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb v Commission*, C-90/15 P, not published, EU:C:2017:123, paragraphs 17 and 18).*

*328. In the first place, **it must be borne in mind that it is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement** (see, to that effect, judgments of 6 January 2004, *BAI and Commission v Bayer*, C-2/01 P and C-3/01 P, EU:C:2004:2, paragraph 62, and of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb v Commission*, C-90/15 P, EU:C:2017:123, paragraph 26).*

In *European Superleague*, the Court clearly stated that while there *may be* different analytical templates to be used to demonstrate abuse for different types of conduct, the demonstration *must*

<sup>6</sup> Judgment of the Court of 24 October 2024, *European Commission v Intel Corporation Inc. (Intel II)*, Case C-240/22 P, EU:C:2024:915. Judgment of the Court of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, Case C-48/22 P, EU:C:2024:726.



be made in light of all the relevant factual circumstances and be aimed at establishing the capability of the conduct to produce exclusionary effects based on specific, tangible points of analysis and evidence<sup>7</sup>.

This is confirmed in the *Servizio Elettrico Nazionale* case, where the Court held that "given that the abusive nature of a practice does not depend on the form it takes or took, but presupposes that that practice is or was capable of restricting competition and, more specifically, of producing, on implementation, the alleged exclusionary effects, that condition must be assessed having regard to all the relevant facts".<sup>8</sup>

After assessing available jurisprudence, Telefónica has concluded that the case law does not rule out an effects-based assessment based on the factual circumstances of the case.

Telefónica observes that the Commission is reinterpreting certain legal tests in case law as presumptions, but there are no grounds for doing so. This is also somehow acknowledged by the Commission in footnote 131, which states that while "*the Union Courts have not always made explicit use of the term "presumption" for each one of these practices*", nevertheless the Commission considers that "*the case law has developed tools which can be broadly described and conceptualised*". The Guidelines further explain that the expression of presumptions is used for the purposes of "*allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts*".

To conclude this section, the case law cited in the Guidelines does not support such a broad conceptualisation by the Commission which would allow to assert that certain types of conduct have a high potential to produce exclusionary effects, and therefore, such effects can be presumed. Furthermore, such broad conceptualisation is by principal contrary to legal certainty. Such case law does not support either a shift of burden of proof from the Commission to the dominant undertaking for certain types of conduct as suggested by the Commission (being the only exception predatory pricing).

**Telefónica asks the Commission to abandon the category (ii) conduct that is presumed to lead to exclusionary effects should be eliminated from the Guidelines** (with implications in point 60 and section 4.2) as it corresponds to an approach that does not find support in case law and shifts the burden of proof to the dominant undertaking without sufficient basis.

- Third category: iii) *naked restrictions*

Telefónica also views the wording in **point 60** relating to “naked restrictions” as too wide in scope. Additional guidance would be welcome as regards the evidence needed to justify the third category, naked restrictions, as the way it stands in point 60c) - "*while it is in principle open to the dominant undertaking to seek to show that the naked restriction is justified on the basis of an objective justification it is highly unlikely that such behaviour can be justified in this way*" it seems that in practice there would be no acceptable evidence to justify such conduct.

<sup>7</sup> Judgment of 21 December 2023, *European Superleague Company*, C-333/21, para. 129- 130

<sup>8</sup>Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato*, paragraph 72.

### Specific mention to section 3.3.4. Elements that are not necessary to show the capability to produce anticompetitive effects

Telefónica wishes to express its concerns about the Section 3.3.4 regarding the elements that are not necessary to show the capability to produce anticompetitive effects. **Points 71 to 75** dilute the probative value of (i) effects; (ii) consumer harm; and (iii) foreclosure to actual or potential competitors which are as efficient as the dominant undertaking, thereby diluting the necessary legal certainty that is required to prove an infringement. Therefore, Telefónica urges the Commission to review this section.

By placing the “as efficient competitor” requirement under *elements that are not necessary to show the capability to produce exclusionary effects*, the Guidelines make it clear that the Commission intends to gain the ability to sanction conduct that could exclude less efficient competitors. Article 102’s aim is not to ensure that competitors that are less efficient than the dominant undertaking remain on the market.<sup>9</sup>

The *Intel II* judgment which once again re-affirms the necessity of the “as efficient competitor” principle for establishing abuse as it states: “*Consequently, in order to find, in a given case, that conduct must be categorised as ‘abuse of a dominant position’, it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market or markets concerned or by hindering their growth on those markets*”.<sup>10</sup> The wording of point 73 of the Guidelines is also in contradiction with the recent *Google Shopping* judgment which states “*it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market*.”<sup>11</sup>

Last, the AEC test plays a very relevant role in the self-assessment of conduct, especially in pricing practices. Thus, expecting dominant companies to track and benchmark their conduct against less efficient rivals, especially ones whose existence dominant companies may not even be aware of, presents serious practical challenges and risks turning the analysis into a theoretical exercise, rather than a facts-based one, potentially undermining positive investment and innovation outcomes. Therefore, price-based economic assessments should be conducted on a case-by-case basis, using facts-based comparisons between AECs and only subsidiarily, relying on different tests.

## 4. Principles to determine whether specific categories of conduct are liable to be abusive

This section provides guidance to the types of conduct subject to specific legal tests and those with no specific legal test.

<sup>9</sup> Judgment of the Court (Fifth Chamber) of 19 January 2023, Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0680>, para. 37; Judgment of the Court (Fifth Chamber) of 12 May 2022 Case C-377/20 *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0377>, para. 73.

<sup>10</sup> *Intel II*, para. 176; see also para. 130.

<sup>11</sup> *Google Shopping* (2024), para. 265.



### Types of conduct having a high potential to produce exclusionary effects.

As established above, Telefónica considers that the Courts have not ruled out an effects-based assessment of conducts based on all factual circumstances of a specific case.

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

❖ **Exclusive dealing** is presumed to be capable of having exclusionary effects (point 82 of the Guidelines). However, throughout the lengthy judicial saga of the *Intel* case, the Commission's position—that rebates (and exclusivity) are anticompetitive by nature and that it is unnecessary to demonstrate foreclosure capability to establish an infringement of Article 102 was heavily debated<sup>12</sup>. Telefónica suggests deleting or amending the wording of point 82 to align it with applicable case law and presumptions should be abandoned for exclusivities.

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<sup>12</sup> The Commission's stance has not been endorsed by either the General Court or the Court of Justice. The Court of Justice which insisted on the importance of effect-based assessment remarked that "... it is apparent from paragraphs 133 to 147 of the judgment under appeal that the analysis carried out in the decision at issue, intended to demonstrate that the contested rebates constitute an abuse irrespective of the conclusions drawn by the Commission from the AEC test, is vitiated by an error of law in so far as it starts from the premise that the contested rebates were abusive irrespective of whether they were capable of foreclosing a competitor as efficient as Intel".<sup>12</sup>

The same approach is adopted in the *Unilever* case where the Court clarified that "*it must be held that, although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic*".<sup>12</sup> Furthermore, the Court in *Unilever* stated that "*Article 102 TFEU must be interpreted as meaning that, where there are exclusivity clauses in distribution contracts, a competition authority is required, in order to find an abuse of a dominant position, to establish, in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition*".<sup>12</sup> (emphasis added)

Point 82 **should be deleted or modified:**

« Exclusive dealing by a dominant firm **may be characterised as a restriction of competition, since, they may have restrictive effects on competition** ~~has a high potential to produce exclusionary effects as it is likely to~~ **by depriving or restricting** the customer's or seller's choice of possible sources of supply or demand. **However, their ability to exclude competitors is not automatic and the Commission should conduct an assessment of their capability to produce exclusionary effects taking into consideration all factual circumstances of the case.** ~~As such, exclusive dealing is presumed to be capable of having exclusionary effects..»~~

Based on *Intel* case law, **point 83(d)** of the Guidelines should also be amended. *Intel* states that when conducting an effects-based assessment, the Commission should establish the possible existence of a strategy aimed at excluding competitors that "*are at least as efficient as the dominant undertaking*"<sup>13</sup> rather than "actual or potential competitors of the dominant firm" as stated in point 83(d) of the Guidelines. In the same point, the Guidelines overreach by stating that such an exclusionary strategy is not legally required; this position is not supported by case law.

d) the possible existence of a strategy aimed at excluding ~~actual or potential competitors of the dominant firm~~ **as efficient competitors as the dominant firm.**  
~~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.~~

❖ On **refusal to supply**, it is unclear whether the Guidelines categorise refusal to supply as conduct presumed to lead to exclusionary effects or as conduct requiring a demonstration of its capability to produce such effects. In any event, according to established case law, refusal to supply should not be categorized as conduct presumed to lead to exclusionary effects as effect-based assessment is part of the legal test.

**Point 98** of the Guidelines states that for a refusal to supply to be considered abusive, "*it is sufficient that a potential market or even a hypothetical market for the input can be identified, which may be the case when there is demand for the input from potential purchasers*". However, according to the cited case law<sup>14</sup>, an abusive refusal occurs only when there is an actual demand for the input (rather than potential) *on the part of undertakings which seek to carry on the business for which they are indispensable*. This point should be aligned with the case law, eliminating references to potential and hypothetical markets or purchasers.

<sup>13</sup> Judgment of 6 September 2017, *Intel v. Commission*, paragraph 139, Judgment of 19 January 2023, *Unilever Italia Mkt Operations*.

<sup>14</sup> Judgment of 29 April 2004, *IMS v. NDC Health*, recital 44

Point 98 should be modified:

~~To find that a refusal to supply is abusive, when there is an actual demand for the input on the part of undertakings which seek to carry on the business for which they are indispensable, it is sufficient that a potential or even a hypothetical market for the input can be identified, which may be the case when there is demand for the input from potential purchasers.~~

Regarding the test for refusal to supply set out in **point 99**, the conditions that must be met are focused on the elimination of the competitor requesting access and not on the elimination of effective competition. Point 101 iii) expresses the same idea (unlike the Guidance 2008, 81). Telefónica considers that competition enforcement should protect the competition in the markets rather than the competitors (as also confirmed by established case law<sup>15</sup>) and as a consequence the wording of these provisions should be adjusted accordingly.

Point 99 should be modified:

*99. A refusal to supply is liable to be abusive where the following conditions are met:*

*a) the input is indispensable ~~for the undertaking requesting access to compete with the dominant undertaking to be able to compete effectively~~ in a downstream market; and*

*b) the refusal is capable of having exclusionary effects, which in this specific context means the capability to eliminate ~~all competition on the part of the requesting undertaking~~ **effective competition in the downstream market.***

Additionally, when defining the indispensability of the input, the Guidelines assert that one condition is that "access to the input is necessary for the requesting firm to remain viably on the market and exert an effective competitive constraint" (point 101 (iii)). None of the cited case law support this criterion, in particular there are no mentions of viability or effective competitive pressure and therefore, it should be removed.

Point 101 should be modified:

101. iii. access to the input is necessary ~~for the requesting firm to remain viably on the market to be able to compete effectively on the market and exert an effective competitive constraint.~~

❖ With regard to **margin squeeze**, the case law does not suggest a "high potential to produce exclusionary effects" where the spread is negative, but rather a "probability for a potential exclusion". Indeed, as stated in *TeliaSonera* judgment: "*if the margin is negative, in other words if, in the present case, the wholesale price for the ADSL input services is higher than the retail price for services to end users, an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell*

<sup>15</sup>Judgment of 9 September 2009, *Clearstream v Commission*, recital 148; Judgment of 17 September 2007, *Microsoft v Commission*, recital 563.

at a loss"<sup>16</sup> which is to be understood as part of a wider analysis that the Commission must carry out taking into account "*all the specific circumstances of the case*"<sup>17</sup> (emphasis added).

As to the cases where the spread is positive but not sufficient to cover the dominant undertaking's product-specific costs at the downstream level, the Guidelines suggest that *this element can be relevant for the assessment of the capability of the conduct to produce exclusionary effects* (point 129). This should be interpreted as the Commission maintaining the burden to prove exclusionary effects. Indeed, according to *TeliaSonera*, "*if ... such a margin remains positive, it must then be demonstrated that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned*".<sup>18</sup> (emphasis added) In both the *Deutsche Telekom* and *TeliaSonera* cases, the Court held that the mere existence of a margin squeeze does not allow the Commission to avoid having to prove anti-competitive effects stating that "*in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice*".<sup>19</sup>

It follows from above, that points 128 and 129 need to be revised to align with the mentioned case law.

Point 128: In addition, in circumstances, where the price-cost test indicates a negative spread, **a potential exclusionary effect is at least probable but which should be assessed based on the factual circumstances of the case.** ~~the margin squeeze has a high potential to produce exclusionary effects and those effects can be presumed.~~ If the dominant undertaking submits evidence that the conduct is not capable or producing exclusionary effects, the Commission will assess that evidence.

Point 129: In circumstances where the spread is positive but not sufficient to cover the dominant undertaking's product-specific costs at the downstream level, this element can be relevant for the assessment of the capability of the conduct to produce exclusionary effects. **The Commission shall demonstrate that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.**

At the other end of the spectrum, guidance is needed from the Commission on the percentage spread or margin required for it to rule out any potential exclusionary effects, providing a safe harbour from this allegation. Telefónica would also welcome clarity on any specific factors the Commission would rely on to determine whether a non-material positive margin is capable of having an exclusionary effect. Regarding point 135 of the Guidelines on granular versus aggregate product assessment, guidance is needed on scenarios where the level of aggregation might be wider than the relevant product market, for example, where other products are sold together under the same contractual framework. This would help to prevent confusion that might lead to an artificial focus on *one* aspect of an offer, rather than considering all the products in an offer

<sup>16</sup> Judgment of 17 February 2011, *TeliaSonera Sverige*, paragraph 73.

<sup>17</sup> Judgment of 17 February 2011, *TeliaSonera Sverige*, paragraph 68.

<sup>18</sup> Judgment of 17 February 2011, *TeliaSonera Sverige*, paragraph 74.

<sup>19</sup> Judgement of 14 October 2010, *Deutsche Telekom v Commission*, paragraphs 254, Judgement of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, paragraph 66.

collectively. The same applies to cases when the Commission would look at a specific contract when assessing the price-cost test, as opposed to taking into account all of the undertaking's supply contracts.

❖ On **tying and bundling**, point 95 of the Guidelines suggests that, in certain circumstances, it may be possible to conclude that, due to the specific characteristics of the market and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed. In other cases, however, an assessment of exclusionary effects is required. The cases falling under this presumption are not explicitly identified, but the Commission explains in footnote 233 that *this could be notably the case in the situation where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects*. However, the most recent case law does not support the Commission's assertion. Indeed, in the *Microsoft* case, both the Commission's decision and the judgment confirm the need for an effects-based assessment, which was conducted by the Commission in that specific case and lead the court to conclude: "*there are ... circumstances relating to the tying of [Windows Media Player] which warrant a closer examination of the effects that tying has on competition in this case... There are therefore indeed good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition*"<sup>20</sup>.

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

### Conducts with no specific legal test

Telefónica also wishes to express its concerns about the section on conducts with no specific legal test. First, it is questionable whether the conducts pertaining to this section, which do not have a specific legal test should be treated any different from the conducts where effects need to be demonstrated, i.e. the conduct referred to in point 60 a). It is particularly serious that the requirement of the indispensability of the input, which is mandatory in the refusal to supply, has been waived. This means defining new types of abuse.

The introduction of less demanding standards of proof generates legal uncertainty. Beyond that, given that there is no specific test it may be even more difficult for companies to judge whether a

<sup>20</sup> Judgment of 17 September 2007, *Microsoft v. Commission*, paragraph 977.

certain conduct would fall into these categories, which can lead to these categories being interpreted too wide and which will necessarily make the lives of in-house counsels more difficult.

Telefónica believes that protecting legal certainty and businesses' freedom of contract and commercial incentives is crucial in any assessment under Article 102 TFEU. Consequently, the Guidelines should adopt the general approach that where it cannot be established that an input is essential for another business to compete (i.e., there is no indispensability), access to that input should not be required.

### Specific request to eliminate the Access restrictions section

**Point 166** of the Guidelines provides a non-exhaustive list of access restrictions which could be considered contrary to Article 102. This list tries to generalise one or two isolated cases which arose in a specific context (e.g., point 166(a) - disruption of supply of existing customers) or refers to abusive conduct which is already addressed in a separate section of the Guidelines (i.e., the types of conduct mentioned in points 166(b), (c) and (d) refer in reality to margin squeeze, refusal to supply or self-preferencing).

With such a broad category of abuse, there is a genuine risk of artificially and arbitrarily extending the application of Article 102 to *any* conduct that does not meet the conditions established by case law for different types of abusive conduct (e.g. refusal to supply, margin squeeze, or self-preferencing). This concern is particularly relevant in a context where the Guidelines do not explicitly outline the exclusionary effects that conducts falling under access restrictions may produce, nor do they provide an assessment framework for each type of conduct based on established case law.

As a result, there is a risk of creating a situation in which the dominant undertaking would be obliged to provide access to its input, regardless of whether that input is indispensable. If this broad category of abuse were to be maintained, the conditions for granting access could become so restrictive for dominant (and potentially dominant) firms that it would in all likelihood be more advantageous for the dominant undertaking to retain the input for its exclusive use. More generally, such an extensive category of abuse contradicts the principle of freedom of contract, lacks support from established case law, and could negatively impact incentives to invest as well as overall legal certainty.

This new category introduces an additional difficulty for in-house counsels to provide advice to the business units. Therefore, due to the huge legal uncertainty and lack of proportionality that this section introduces, Telefónica asks the Commission to delete **point 166** of the Guidelines.

## 5. General principles applicable to the assessment of objective justifications

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

With regard to the standard of proof outlined in the Guidelines for demonstrating an objective necessity or efficiency defence by dominant undertakings, the Commission requires "a cogent



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