

**GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU TO ABUSIVE
EXCLUSIONARY CONDUCT****OBSERVATIONS IN THE CONTEXT OF THE COMMISSION'S PUBLIC
CONSULTATION****1. Introduction**

- 1.1 Freshfields Bruckhaus Deringer LLP (the **Firm** or **we**) welcomes the opportunity to respond to the European Commission's public consultation on the draft guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union (**TFEU**) to abusive exclusionary conduct by dominant undertakings (the **Draft Guidelines**).
- 1.2 This response is based on our significant experience in advising on issues relating to Article 102 TFEU and similar regimes in other jurisdictions. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients, which comprise a wide range of companies active in a variety of sectors.
- 1.3 This submission is structured as follows:
- **Section 2** provides general observations on the Draft Guidelines.
 - **Section 3** comments on the Draft Guidelines' general principles to assess dominance.
 - **Section 4** discusses the Draft Guidelines' general principles to determine whether conduct by a dominant undertaking is liable to be abusive.
 - **Section 5** addresses the Draft Guidelines' principles to determine whether specific categories of conduct are liable to be abusive.
 - **Section 6** comments on the Draft Guidelines' discussion of objective justifications.
 - **Section 7** concludes.

2. General observations

- 2.1 We welcome the new guidance provided in the Draft Guidelines in light of the Commission's extensive experience in applying Article 102 TFEU and the EU Courts' case-law. The final guidelines could be a helpful step towards providing greater legal certainty and predictability for undertakings operating in the Union.
- 2.2 At the same time, the Draft Guidelines seek to move away from key legal principles underpinning Article 102 TFEU in a way that is not always supported by the EU Courts' case-law (or relies on a selective reading thereof) and carries significant risks as a matter of policy.

- Certain aspects of the Draft Guidelines suggest a retreat from the **effects-based** approach originally spearheaded by the Commission, including in its 2009 guidance paper on its enforcement priorities (the **Guidance Paper**),¹ and subsequently endorsed by the EU Courts.²
- The Draft Guidelines appear to depart from the **anti-competitive foreclosure standard** put forward in the Guidance Paper to capture exclusionary conduct (“foreclosure”) leading to consumer harm (“anti-competitive”)³ and repeatedly affirmed by EU Courts.⁴ However, the role of consumer welfare is rather unclear and sidelined in the Draft Guidelines.⁵
- The Draft Guidelines adopt an inconsistent view of the well-established principle – which has been repeatedly affirmed by the EU Courts – that Article 102 TFEU does not protect competitors that are less efficient and so less attractive to consumers for example in terms of price, choice, quality or innovation (the **As Efficient Competitor (AEC) principle**).⁶

2.3 This submission includes our suggestions for more closely aligning the Draft Guidelines with the EU Courts’ case-law and identifies areas where further elaboration by the Commission would be welcomed to support undertakings in their self-assessment exercise. As set out in further detail in this submission:

¹ Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance), OJ C 45, 24.2.2009, p. 7–20.

² See e.g., Communication from the Commission Amendments to the Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) 2023/C 116/01, paras. 5 and 7.

³ Guidance Paper, para. 19.

⁴ Judgment of the Court (Fifth Chamber) of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20 (**the judgment in Servizio**), para. 73; judgment of the Court (Fifth Chamber) of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20 (**the judgment in Unilever Italia**), para. 37; judgment of the Court (Grand Chamber) of 6 September 2017, *Intel v Commission*, C-413/14 P (**the judgment in Intel**), para. 134.

⁵ The Draft Guidelines’ introductory section references consumer welfare but seems to treat it as one (among several) interests protected by competition rules.

⁶ See e.g., judgment in *Intel*, paras. 133-134, and the case-law cited there; judgment of the Court (Grand Chamber) of 21 December 2023, *European Superleague Company*, C-333/21 (**the judgment in European Superleague**), paras. 126-127 and the case-law cited; judgment of the Court (Fifth Chamber) of 24 October 2024, *Commission v Intel*, C-240/22 P, (**the ECJ judgment in Intel (RENV)**), para. 175.

- The Draft Guidelines should preserve the **effects-based approach** to assessing exclusionary conduct. The introduction of broad **presumptions** of exclusionary effects is inconsistent with the EU Courts' case law, as well as fundamental rights of defence and the presumption of innocence of investigated firms. The Draft Guidelines should instead recognise that the Commission is required to establish that the dominant firm's conduct is at least capable of restricting competition, having regard to all the relevant circumstances of the case, which includes the type of conduct, but also other elements such as the actual or likely reactions of rivals of the dominant firm, the impact on their market position as a result of the alleged conduct, the share of the market affected by the alleged conduct, as well as its duration.
- The Draft Guidelines should re-introduce the concept of **anticompetitive foreclosure** and acknowledge the importance of **consumer welfare** in line with the Commission's revised guidelines for horizontal co-operation agreements⁷ and vertical restraints.⁸ Competition law does not protect competition for its own sake; as the Court of Justice explained in *Servizio*, consumer welfare "*must be regarded as the ultimate objective*" of Article 102 TFEU.⁹
- The Draft Guidelines should state that the Commission will assess as part of all relevant circumstances of the case (including where relevant evidence is submitted by the investigated undertaking) whether the allegedly abusive conduct is capable of excluding **equally efficient competitors**.
- The Draft Guidelines should provide further guidance on how the Commission will establish causation between the dominant firm's conduct and its alleged effects on the basis of a before-after comparison, and recognise that in many cases it will be appropriate for the Commission to conduct a **counterfactual** analysis.
- The Draft Guidelines should provide additional guidance on the types of arguments and evidence the Commission will expect the dominant undertaking to submit to establish that its conduct is **objectively justified**.
- The Draft Guidelines should include concrete examples (e.g., case studies) illustrating the Commission's approach to assessing conduct under Article 102 TFEU to help undertakings in their self-assessment

⁷ Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C/2023/4752, para. 9.

⁸ Communication from the Commission – Commission Notice Guidelines on vertical restraints 2022/C 248/01, C/2022/4238, para. 5.

⁹ Judgment in *Servizio*, paras. 46 and 84. See also para. 85, noting that competition on the merits relates to a competitive situation "*in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services*".

exercise, similar to the approach in the guidelines for horizontal co-operation agreements and the guidelines for vertical restraints.¹⁰

3. General principles applicable to the assessment of dominance (Section 2 of the Draft Guidelines)

Single dominance – market shares

- 3.1 The Draft Guidelines provide helpful guidance on the Commission's approach to assessing dominance. However, there are certain elements that should be reconsidered.
- 3.2 First, the Draft Guidelines place great reliance on market shares insofar as they consider that very large market shares are "*in themselves*" evidence of the existence of a dominant position "*save in exceptional circumstances*".¹¹ This is the case "*in particular*" where the undertaking holds a market share of 50% or above.¹² Yet while market shares may provide a useful indication as to the competitive position of the investigated firm and its rivals, they cannot constitute conclusive evidence of the existence of a dominant position. This is all the more so considering that the calculation of market shares ultimately depends on the (correct) definition of the relevant market. Market definition is an imperfect tool for measuring the competitive constraints an undertaking faces, insofar as it draws a bright line between in-market and out-of-market constraints.¹³ Assessing the constraints an undertaking faces necessarily involves an examination of factors such as the existence of barriers to entry and expansion and countervailing buyer power.
- 3.3 **Suggestion:** Similar to the Guidance Paper, the Draft Guidelines should recognise that market shares are a preliminary indication of the existence of a dominant position, but as a general rule the Commission will not come to a final conclusion without examining all the factors which may be sufficient to constrain the behaviour of the investigated undertaking.¹⁴
- 3.4 Second, the Draft Guidelines consider that dominance may also be found in cases where an undertaking has a market share below 50%, and state that an undertaking with a market share as low as 10% (or even lower) may be found dominant "*in exceptional circumstances*".¹⁵ This approach should be reconsidered as it introduces a considerable degree of legal uncertainty, including for undertakings with low market shares.

¹⁰ See footnotes 7-8.

¹¹ Draft Guidelines, para. 26.

¹² Draft Guidelines, para. 26.

¹³ Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, paras. 8 and 16-17.

¹⁴ Guidance Paper, para. 15.

¹⁵ Draft Guidelines, para. 26 and footnote 41.

- 3.5 **Suggestion:** Similar to the Guidance Paper, the Draft Guidelines should recognise that low market shares are generally a good proxy for the absence of substantial market power, and dominance is not likely if the undertaking's market share is below 40%.¹⁶

4. General principles to determine if conduct by a dominant undertaking is liable to be abusive (Section 3 of the Draft Guidelines)

Competition on the merits

- 4.1 The Draft Guidelines list a number of factors that are relevant for assessing whether conduct departs from competition on the merits. While this is a welcome effort to clarify the concept of competition on the merits, certain parameters fall short of providing predictability, and further guidance and concrete examples of the Commission's expectations would be welcomed. Further, certain factors listed in the Draft Guidelines do not capture the case-law of the EU Courts.
- 4.2 First, the Draft Guidelines list as a relevant factor "*whether the dominant undertaking's conduct consist of, or enables, biased or discriminatory treatment that favours itself over its competitors*".¹⁷ However:
- This is at odds with the ruling of the Court of Justice in *Google Shopping* that favouring as such is not in itself proof that conduct departs from competition on the merits.¹⁸
 - The authorities cited in the Draft Guidelines (*Servizio* and *European Superleague*) do not support a different conclusion, as they do not take an explicit position as to whether favouring as such departs from competition on the merits.¹⁹

¹⁶ Draft Guidelines, para. 14.

¹⁷ Draft Guidelines, para. 55, point d), citing the judgment in *Servizio*, paras. 96-99 and the judgment in *European Superleague*, paras. 131 and 135.

¹⁸ Judgment of the Court (Grand Chamber) of 10 September 2024, *Google and Alphabet v Commission (Google Shopping)*, C-48/22 P, (**the ECJ judgment in Google Shopping**), para. 186; judgment of the General Court of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17 (**the General Court judgment in Google Shopping**), paras. 162-164 and 175. The Draft Guidelines acknowledge this, insofar as they state in para. 161 that, to establish whether self-preferencing is liable to be abusive, it is necessary among others to assess whether it departs from competition on the merits.

¹⁹ For completeness, the passages from the judgment in *Servizio* cited in the Guidelines do not apply beyond the circumstances of the case. As explained below in para. 4.27 these passages concerned the specific circumstances of the case involving a former monopoly in the process of liberalisation. While the Court took issue with the conduct at issue (consisting in discriminatory treatment), it did so on the basis that such conduct relied on the use of resources available to the dominant undertaking on account of its former monopoly (as opposed to holding in general that favouring as such departs

- The position of the Draft Guidelines is also not justified from a policy perspective given that a company favouring its own products can be part of the normal competitive process.
- 4.3 **Suggestion:** The Draft Guidelines should be amended to remove point d) from para. 55.
- 4.4 Second, the Draft Guidelines list as a relevant factor “*whether the dominant undertaking changes its prior behaviour in a way that is considered as abnormal or unreasonable in light of the market circumstances at stake...*”²⁰
- 4.5 The Draft Guidelines rely on the General Court’s judgment in *Google Shopping* which referred to Google’s conduct as involving an “*abnormality*”. However, the General Court’s considerations on the “*abnormality*” of Google’s conduct do not have precedent value; on appeal the Court of Justice confirmed these considerations did not derive from the Commission’s decision and were set out for the sake of completeness.²¹ The concept of “*abnormality*” is also vague and may therefore reduce rather than increase legal certainty.
- 4.6 **Suggestion:** The relevant statement in the Draft Guidelines should be removed. In the alternative, the Draft Guidelines should at least provide further guidance as to how the Commission will assess whether conduct is “*abnormal*” (or “*normal competition on the basis of the performance of economic operators*”²² – given the material differences between operators’ business models) and what the Commission would expect an undertaking to demonstrate to “*escape*” such characterisation.²³ The Commission should be subject to a sufficiently high evidentiary bar to prove that an undertaking’s behaviour is “*abnormal*”.
- 4.7 Third, the Draft Guidelines list as a relevant factor whether “*a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market.*”²⁴ The reference to the dominant undertaking using resources or

from competition on the merits). This is made clear in paras. 91-92 of the judgment, where the Court refers to specific case-law pertaining to statutory monopolies, “[h]aving regard” to the specific circumstances of the case, set out in paras. 88-90.

²⁰ Draft Guidelines, para. 55, point e), citing the General Court judgment in *Google Shopping*, paras. 179 and 616. The Draft Guidelines refer to the example of an “*unjustified termination of an existing business relationship*”, on which see para. 5.17 below.

²¹ ECJ judgment in *Google Shopping*, paras. 195-196; see also Opinion of Advocate General Kokott of 11 January 2024, *Google and Alphabet v Commission (Google Shopping)*, C-48/22 P (**the Opinion in Google Shopping**), paras. 149 and 152.

²² Draft Guidelines, para. 51.

²³ Similar considerations apply to the statement in para. 161, point (iii) of the Draft Guidelines.

²⁴ Draft Guidelines, para. 55, point f), citing the judgment in *Servizio*.

means “*inherent to the holding of the dominant position*” does not seem appropriate:

- This goes against the well-established principle that holding a dominant position is not in itself abusive.
- A hypothetical non-dominant competitor by definition lacks the “*resources or means inherent to the holding of the dominant position*”.
- The Draft Guidelines should not rely on principles established in a case pertaining to a former legal monopolist to derive general principles for the application of Article 102 TFEU, as these are unlikely to be representative in many cases. For example, a company which has achieved a dominant position through private investment and innovation will typically have a fundamentally different cost basis compared to a former state-subsidised entity in a dominant position.

4.8 **Suggestion:** The reference to the dominant undertaking using resources or means “*inherent to the holding of the dominant position*” should be removed from the Draft Guidelines.

Conduct presumed to lead to exclusionary effects

4.9 The Draft Guidelines note that, as a general rule, for conduct to fall within the scope of Article 102 TFEU, it is necessary to show that such conduct is capable of having exclusionary effects.²⁵ The Draft Guidelines nevertheless consider that certain types of conduct are subject to a “*presumption*” concerning their capability of producing exclusionary effects, which allegedly reflects their high potential to produce such effects.²⁶ As soon as the factual existence of the relevant conduct is established, its exclusionary effects are presumed.²⁷ The investigated undertaking may seek to rebut such presumption by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects.²⁸ The Draft Guidelines consider that the capability to produce exclusionary effects can be established in two different ways:

- First, the Commission shows that “*the arguments and supporting evidence submitted by the dominant undertaking are insufficient to call into question the presumption*”, for instance because of the “*insufficient probative value of the evidence*”; or
- Second, the Commission provides evidentiary elements demonstrating the capability of the conduct to have exclusionary

²⁵ Draft Guidelines, para. 60, point a).

²⁶ Draft Guidelines, para. 60, point b). See also Section 5 below concerning tying.

²⁷ Draft Guidelines, para. 60, point b).

²⁸ Draft Guidelines, para. 60, point b).

effects.²⁹ Even in that case, the evidentiary assessment should give “*due weight*” to the probative value of the presumption reflecting the fact that the conduct at stake “*has a high potential to produce exclusionary effects*”.³⁰

- 4.10 In other words, the Draft Guidelines consider that the Commission may dispense with an analysis of the conduct’s capability to produce exclusionary effects on the basis that the undertaking’s arguments and evidence “*are insufficient to call into question*” the alleged “*presumption*”.
- 4.11 The Draft Guidelines do not cite any relevant authority to support this novel interpretation.³¹ In fact, the case-law does not confirm (a) the existence of such “*presumptions*”, let alone (b) that the Commission may dispense with an effects analysis by limiting itself to dismissing the undertaking’s arguments and evidence to rebut such “*presumption*”:
- Introducing broad presumptions results in a reversal of the burden of proof. This is contrary to the principle that it is for the Commission to prove that conduct infringes Article 102 TFEU, and is inconsistent with the fundamental rights of defence and the presumption of innocence of investigated firms (without going through any democratic legislative process).³² The EU Courts have inferred from the presumption of innocence that any doubt in the mind of the court operates to the advantage of the undertaking in question.³³
 - In its seminal *Intel* judgment (delivered in 2017) the Court of Justice held that where the investigated undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, the

²⁹ Draft Guidelines, para. 60, point b).

³⁰ Draft Guidelines, para. 60, point b), points (i)-(ii).

³¹ The only authority cited in the Draft Guidelines is the General Court’s judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18 (**the judgment in Google Android**), para 428. This authority is irrelevant: in that case the Commission had sought to establish the conduct in question had *actual* exclusionary effects; the cited passage in para. 428 concerned the applicant’s arguments seeking to call into question the Commission’s effects analysis. See judgment in *Google Android*, paras. 290-299 and 304-312.

³² Undertakings subject to proceedings relating to infringements of competition rules that may result in the imposition of fines or periodic penalty payments benefit from the presumption of innocence, which is a general principle of EU law and is currently enshrined in Article 48(1) of the Charter of the Fundamental Rights. On antitrust proceedings having a quasi-criminal nature (and therefore subject to the safeguards for criminal proceedings), see e.g., judgment of the European Court of Human Rights of 27 September 2011, *A. Menarini Diagnostics S.r.l. v. Italy*, 43509/08.

³³ See judgment of the General Court (Fourth Chamber, Extended Composition) of 26 January 2022, *Intel Corporation v Commission*, T-286/09 RENV (**the General Court judgment in Intel (RENV)**), para. 161, and the case-law cited there.

Commission is required to analyse the conduct's capability to produce exclusionary effects.³⁴

- In *Unilever Italia* the Court of Justice reiterated that competition authorities are required to demonstrate that the dominant undertaking's conduct is capable of excluding equally efficient competitors. All the more in two circumstances: (a) where the undertaking disputes, during the administrative procedure, with supporting evidence, the specific capacity of its conduct to exclude equally efficient competitors; or (b) where the undertaking, during the administrative procedure, "*without formally arguing that its conduct was incapable of restricting competition, maintains that there are justifications for its conduct*".³⁵ Most importantly, the Court of Justice indicated that "*the existence of doubts [on the Commission] in that regard must benefit the undertaking which engages in such practice*", which is inconsistent with the proposed approach of using presumptions whereby the burden of proof is shifted on undertakings.³⁶
- Most recently in *Intel (RENV)* the Court of Justice emphasised that "*the fact that [an undertaking in a dominant position] submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects requires the Commission to carry out an analysis to determine the existence of that capability*".³⁷

³⁴ Judgment in *Intel*, paras. 138-140. The Court further held in para. 140 that the balancing of the favourable and unfavourable effects of the practice on competition can be carried out in the Commission's decision "*only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least efficient as the dominant undertaking*". See also judgment in *Servizio*, para. 51.

³⁵ Judgment in *Unilever Italia*, paras. 52-53, clarifying the judgment in *Intel*, discussed in paras. 47-51. See also para. 51, noting that the "*ability [of exclusivity clauses] to exclude competitors is not automatic, as, moreover, is illustrated by the [Guidance Paper] (OJ 2009 C 45, p. 7, paragraph 36)*".

³⁶ See also ECJ judgment in *Google Shopping*, para. 166 (noting the Commission's analysis must be aimed at "*establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct [of the dominant undertaking], at the very least, is capable of producing exclusionary effects*"); and judgment of the General Court (Tenth Chamber, Extended Composition) of 18 September 2024, *Google and Alphabet v Commission (Google AdSense for Search)*, T-334/19 (**the judgment in Google AdSense**), para. 109.

³⁷ ECJ judgment in *Intel (RENV)*, para. 330 (emphasis added). See also paras. 130 and 291 (holding that the Commission was required to examine whether Intel "*had implemented a strategy aiming to exclude competitors that were at least as efficient as it from the market*" and therefore the Commission had to demonstrate "*that the strategy in question had such a capability*").

- The above principles have been applied by the General Court in the *Intel RENV* proceedings,³⁸ in *Qualcomm (exclusivity payments)*³⁹ and most recently in *Google AdSense*.⁴⁰ In that case the General Court stressed that where the dominant firm disputes, during the administrative procedure, the capability of exclusivity clauses to restrict competition, it is for the Commission to demonstrate that such clauses were capable of restricting competition, taking into account all the relevant circumstances of the case.⁴¹
- 4.12 Relatedly, the reference to the need to give “*due weight*” to the “*probative value*” of the presumption during the overall evidentiary assessment is problematic.
- The Draft Guidelines do not provide any clarity as to the alleged “*probative value*” of the presumption, nor do they explain how the dominant undertaking can rebut it. This lack of guidance limits the ability of dominant undertakings to effectively self-assess and ensure compliance with Article 102 TFEU on day-to-day basis and/or defend themselves against any Article 102 TFEU investigation, impacting the fundamental rights of defence and the presumption of innocence.
 - In any case, the EU Courts have refused to attach any specific probative value to the alleged presumptions referred to in the Draft Guidelines.⁴²
- 4.13 **Suggestion:** The Draft Guidelines should be amended to reflect the EU Court’s case law accurately. Specifically:
- The use of presumptions for certain types of conduct should be removed. Point b) in para. 60 of the Draft Guidelines should therefore be deleted. The Draft Guidelines should also specify that where the investigated undertaking, during the administrative procedure, without formally arguing that its conduct was incapable of restricting competition, maintains that there are justifications for its conduct (including on the basis of efficiencies), the Commission needs to establish that such conduct is capable of having exclusionary effects.⁴³

³⁸ General Court judgment in *Intel (RENV)*, para. 125.

³⁹ Judgment of the General Court (Sixth Chamber, Extended Composition) of 15 June 2022, *Qualcomm v Commission*, T-235/18 (**the judgment in Qualcomm (exclusivity payments)**), paras. 354-355 and para. 424.

⁴⁰ Judgment in *Google AdSense*, paras. 379 et seq.

⁴¹ Judgment in *Google AdSense*, paras. 388-389. See also ECJ judgment in *Intel (RENV)*, paras. 330-331.

⁴² Judgment in *Unilever Italia*, para. 51; ECJ judgment in *Intel (RENV)*, para. 330.

⁴³ Judgment in *Unilever Italia*, para. 53; judgment in *Google AdSense*, para. 386.

Scope of the Commission's examination obligation for conduct presumed to have exclusionary effects

- 4.14 The Draft Guidelines consider that the Commission's examination obligation for conduct presumed to have exclusionary effects is delineated by the submissions and evidence put forward by the investigated undertaking. According to the Draft Guidelines, the scope and nature of the Commission's analysis "*will necessarily depend on the scope and nature of the arguments and evidence submitted by the dominant undertaking*".⁴⁴
- 4.15 This position is contrary to the case-law and inconsistent with general principles of EU law. In addition to the general principle that it is up to the Commission to prove a breach of competition law (as set out above), the EU Courts have held that where the investigated undertaking submits arguments and evidence during the administrative procedure, respect for the right to be heard, which is a general principle of EU law, requires the Commission to carefully and impartially examine "*all the relevant aspects of the individual case, and in particular, the evidence submitted by that undertaking*".⁴⁵ Accordingly, whereas the Commission is required to assess the evidence and arguments of the investigated undertaking, its analysis is not limited to the submissions of the undertaking in question, but extends to all the relevant circumstances of the case.^{46 47}
- 4.16 **Suggestion:** The Draft Guidelines should specify that the Commission is required to carefully and impartially examine all the relevant aspects of the individual case, including but not limited to the evidence submitted by the investigated undertaking during the administrative procedure.

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

⁴⁴ Draft Guidelines, para. 60, point b). The Draft Guidelines also state that the submissions put forward by the dominant undertaking during the administrative procedure "*determine the scope of the Commission's examination obligation...*"

⁴⁵ Judgment in *Unilever Italia*, para. 54 (emphasis added); judgment in *Servizio*, para. 52, and the case-law cited there.

⁴⁶ There is settled case-law on the Commission's obligation to assess conduct under Article 102 TFEU in light of all the relevant circumstances. See e.g., judgment of the Court (Fourth Chamber) of 30 January 2020, *Generics (UK) and Others*, C-307/18, para. 154 (***the judgment in Generics***) and the case-law cited there; ECJ judgment in *Intel (RENV)*, para. 179; and the case-law cited in footnote 163 of the Draft Guidelines.

⁴⁷ Consistent with the above, the EU Courts have held with respect to exclusivity rebates that, where the investigated undertaking submits during the administrative procedure that its conduct was not capable of foreclosing equally efficient rivals, the Commission is required to analyse the conduct's foreclosure capability by applying the five criteria laid down in the judgment in *Intel*, regardless of whether the undertaking's arguments concern all of these criteria. See judgment in *Intel*, paras. 138-139; General Court judgment in *Intel (RENV)*, para. 125; ECJ judgment in *Intel (RENV)*, paras. 130, 180, and 331.

- 4.17 The Draft Guidelines consider that, to establish that conduct is abusive, the Commission needs to demonstrate that such conduct “*is at least capable of producing exclusionary effects*”.⁴⁸ While the effects must be more than “*hypothetical*”, there is no requirement to show that the conduct has produced “*actual*” exclusionary effects.⁴⁹
- 4.18 The reference to conduct being “*capable*” of producing exclusionary effects should not be understood to mean the Commission can merely show that conduct has some possibility to produce exclusionary effects. The EU Courts have repeatedly stated that conduct is abusive only if it is likely to produce exclusionary effects.⁵⁰ This reflects the principle that the existence of doubt as to the conduct’s capability to exclude rivals must benefit the investigated undertaking, as recognised most recently in *Unilever Italia*.⁵¹ In that case the Court of Justice further noted that the Commission “*cannot rely on the effects that that practice might produce, or might have produced, if certain specific circumstances had arisen, but which were not prevailing on the market at the time when that practice was implemented and which did not, at the time, appear likely to arise*”.⁵²
- 4.19 **Suggestion:** The Draft Guidelines should clarify that for conduct to be abusive it should be at least likely to produce exclusionary effects.
- 4.20 Further, the Draft Guidelines consider that “*it is sufficient to show that the conduct [of the dominant undertaking] was capable of removing the commercial uncertainty relating to the entry or expansion of competitors*

⁴⁸ Draft Guidelines, para. 61.

⁴⁹ Draft Guidelines, para. 61.

⁵⁰ See e.g., judgment of the Court (Grand Chamber) of 27 March 2012, *Post Danmark*, C-209/10 (**the judgment in Post Danmark I**), para. 44 (referring to conduct producing “*an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers’ interests*”); judgment of the Court of 6 October 2015, *Post Danmark*, C-23/14 (**the judgment in Post Danmark II**), para. 69; Opinion of Advocate General Kokott of 21 May 2015, *Post Danmark*, C-23/14, para. 82 (“According to settled case-law, it is necessary but also sufficient that the rebates in question can produce an exclusionary effect. This is the case where, on the basis of an overall assessment of all the relevant circumstances of the individual case, the presence of the exclusionary effect appears more likely than its absence”); Opinion of Advocate General Wahl of 20 October 2016, *Intel v Commission*, C-413/14 P, paras. 115, 117 (“The aim of the assessment of capability is to ascertain whether, in all likelihood, the impugned conduct has an anticompetitive foreclosure effect. For that reason, likelihood must be considerably more than a mere possibility that certain behaviour may restrict competition. Contrariwise, the fact that an exclusionary effect appears more likely than not is simply not enough”); Opinion of Advocate General Wathelet of 21 February 2018, *Orange Polska v Commission*, C-123/16 P, para. 98.

⁵¹ Judgment in *Unilever Italia*, para. 42. Therefore, when referring to conduct capable of producing exclusionary effects throughout this submission, we refer to conduct that is likely to produce such effects.

⁵² Judgment in *Unilever Italia*, para. 43 (emphasis added).

that existed at the time of the conduct's implementation".⁵³ However, this statement is based on the General Court's ruling in *Lundbeck* where it was held that, by concluding certain patent settlement agreements, the undertakings involved agreed to remove the commercial uncertainty relating to the entry into the market of the generic manufacturer, thus eliminating all competition between them in breach of Article 101 TFEU.⁵⁴ There is no basis for extending this statement to Article 102 TFEU, which applies to the unilateral conduct of dominant undertakings. It is also unclear how this would apply in the context of an Article 102 TFEU case, so risks decreasing rather than increasing legal certainty.

- 4.21 **Suggestion:** The Draft Guidelines should be amended to remove the above-mentioned statement. If this statement is maintained, then in the alternative the Draft Guidelines should provide further guidance on how the Commission will assess whether a dominant undertaking's unilateral conduct is "*capable of removing the commercial uncertainty*" over the entry or expansion of existing rivals and in which instances this could be relevant.

Causal link and counterfactual

- 4.22 The Draft Guidelines consider that, while the exclusionary effects need to be attributable to the conduct at issue, the conduct does not need to be "*the sole cause of these exclusionary effects*", it being sufficient to establish that the conduct "*contributes to increasing the likelihood of the exclusionary effects materialising on the market*".⁵⁵ This approach should be reconsidered – at its extreme, this suggests the investigated undertaking would need to demonstrate that its conduct has no effect at all on other market players.
- 4.23 **Suggestion:** The Draft Guidelines should specify that the allegedly abusive conduct should be at least one of the determinant drivers of the alleged exclusionary effects.
- 4.24 Further, the Draft Guidelines state that the analysis of the capability of the conduct to produce exclusionary effects "*requires a comparison of the situation where the conduct was implemented with the situation absent the*

⁵³ Draft Guidelines, para. 62 (emphasis added), citing the judgment of the General Court (Ninth Chamber) of 8 September 2016, *Lundbeck v Commission*, T-472/13 (***the judgment in Lundbeck***), para. 363.

⁵⁴ Judgment in *Lundbeck*, para. 363. As Advocate General Kokott explained in para. 141 of her Opinion on the subsequent appeal before the Court of Justice (C-591/16 P): "*if it is established that an agreement seeks to eliminate that uncertainty, it may be concluded that it constitutes a restriction of competition by object, since it substitutes a concerted situation that is the result of practical cooperation between the parties for a situation in which the parties independently manage the risks and opportunities arising from that uncertainty. It was precisely by means of an analysis of that point that the General Court reached the conclusion that the agreements at issue in the present case constituted restrictions of competition by object.*"

⁵⁵ Draft Guidelines, para. 65. In its judgment in *Google Shopping*, the ECJ confirmed in para. 224 that the causal link between the (allegedly abusive) conduct and the alleged effects "*is one of the essential constituent elements of an infringement of competition law which it is for the Commission to prove...*"

conduct”.⁵⁶ The Draft Guidelines consider that, given the difficulty in developing credible assumptions, it is sufficient to establish “a *plausible outcome amongst various possible outcomes*”.⁵⁷ The Draft Guidelines nevertheless suggest that such a 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*”.⁵⁸ This provides insufficient guidance for companies to understand how the Commission would seek to assess whether there is a causal link. In addition, merely showing a “plausible” outcome is insufficient and fails to take into account whether the outcome is realistic and likely. This is an assessment that the Commission should undertake in order to determine whether a sufficient causal link exists; otherwise, the assessment would fail to consider all the relevant circumstances of the case.

4.25 **Suggestion:** The Draft Guidelines should be revised to provide further guidance and properly reflect the case-law of the EU Courts. In particular:

- The Draft Guidelines should provide more guidance on how the Commission will determine based on a before-after comparison that the alleged exclusionary effects are due to the alleged conduct. A simple before-after comparison may capture market developments that are unrelated to the allegedly abusive conduct and may thus wrongly attribute exclusionary effects to the dominant firm’s conduct.
- A before-after comparison is liable to confuse the success of a dominant undertaking competing on the merits with exclusionary effects. The decline in market position or even exit from the market of a competitor could be the consequence of that competitor being less attractive to consumers (e.g., in terms of quality or innovation) compared to the dominant undertaking.
- The Draft Guidelines should also recognise that in many cases it will be appropriate for the Commission to undertake a counterfactual analysis to establish a causal link between the alleged exclusionary effects and the dominant firm’s conduct. For instance, the counterfactual was a crucial part of the General Court’s judgment in *Qualcomm (exclusivity payments)*.⁵⁹

⁵⁶ Draft Guidelines, para. 66.

⁵⁷ Draft Guidelines, para. 66, citing the General Court judgment in *Google Shopping*, paras. 377-378.

⁵⁸ Draft Guidelines, para. 67, citing the judgment in *Servizio*, paras. 98-99 and the judgment in *Google Android*, para. 893.

⁵⁹ Judgment in *Qualcomm (exclusivity payments)*, paras. 411 et seq. and in particular para. 414. In that case the Commission had concluded that Qualcomm’s exclusivity payments were capable of producing anticompetitive effects, in that they reduced Apple’s incentive to switch to Qualcomm’s competitors to source LTE chipsets for its iPhones and iPads. The General Court annulled the Commission’s decision, among others on the ground that the Commission failed to take into account as part of “all

- The Draft Guidelines should state the Commission must take into account and properly assess evidence put forward by the investigated undertaking, including any counterfactual analysis and why any outcome being considered by the Commission is not likely or realistic.⁶⁰
- The reference to a “*plausible*” outcome is too low a threshold. Consistent with the case-law, the Draft Guidelines should state the counterfactual scenario put forward by the Commission needs to be “*realistic*”.⁶¹ The Draft Guidelines should further acknowledge that the Commission cannot seek to include developments in its counterfactual scenario that did not exist or were unlikely to arise at the time of the alleged infringement, i.e., the Commission “*cannot rely on the effects that [a] practice might produce, or might have produced, if certain specific circumstances had arisen, but which were not prevailing on the market at the time when that practice was implemented and which did not, at the time, appear likely to arise*”.⁶²

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

- 4.26 The Draft Guidelines rightly note that the assessment of whether a conduct is capable of producing exclusionary effects must take into account “*all the facts and circumstances*” that are relevant to the conduct and should aim to establish “*on the basis of specific, tangible points of analysis and evidence*” that the conduct is at least capable of having exclusionary effects.⁶³ Yet, while recognising that the “*relevant facts and circumstances*” may include, amongst others, the conditions on the relevant market, the share of the market affected by the conduct in question as well as actual market developments,⁶⁴ the Draft Guidelines unduly downplay the relevance of third parties and in particular of the dominant undertaking’s competitors.

the relevant factual circumstances” that Apple could not switch to any other supplier to fulfil its technical requirements for a very large part of its LTE chipset demand. In other words, even in the absence of the conduct in question, there was no alternative to which Apple could switch for a very large part of its demand.

⁶⁰ ECJ judgment in *Google Shopping*, paras. 227-228.

⁶¹ Judgment of the Court (Third Chamber) of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, para. 166. See also the case-law cited by Advocate General Kokott in the Opinion in *Google Shopping*, footnote 96. For completeness, the passages from the General Court judgment in *Google Shopping* cited in the Guidelines do not state it is sufficient for the Commission to establish “*a plausible outcome amongst various possible outcomes*”.

⁶² Judgment in *Unilever Italia*, para. 43; judgment in *Servizio*, para. 70. Internal documents prepared in the ordinary course may show what market developments the dominant undertaking considered likely, which in turn may help assess what market developments were likely to arise.

⁶³ Draft Guidelines, para. 69.

⁶⁴ Draft Guidelines, para. 70.

4.27 Specifically, the Draft Guidelines consider that “*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*”⁶⁵. The Draft Guidelines further state that “*the finding of capability to produce exclusionary effects cannot be called into question by the actions that competitors may have taken – or could have taken – to limit the effects of the conduct of the dominant undertaking*”.⁶⁶ This position, which departs from the Commission’s approach under the Guidance Paper,⁶⁷ is problematic:

- The Draft Guidelines are internally inconsistent, in that they adopt an asymmetric approach to assessing the relevance of competitors. On the one hand, the Draft Guidelines consider the Commission can rely on the position of competitors to establish a conduct’s capability to produce exclusionary effects.⁶⁸ At the same time, the Draft Guidelines ignore the reactions of rivals when this is potentially favourable to the dominant undertaking. This asymmetric approach is arbitrary and self-contradictory.
- Assessing the exclusionary effects of a firm’s conduct includes assessing the conduct’s effects on the ability and incentive of rivals to compete against the investigated undertaking.⁶⁹ Such an assessment necessarily encompasses the likely reactions of rivals; if rivals are likely to continue competing effectively against the investigated undertaking, its conduct is unlikely to be capable of having exclusionary effects. Indeed, it is for this reason that, when assessing the ability of a merged entity to foreclose competitors under vertical or conglomerate theories of harm, the Commission examines whether rivals could react by deploying counterstrategies to defeat the alleged foreclosure strategy.⁷⁰

⁶⁵ Draft Guidelines, para. 62, citing the judgment of the General Court of 1 July 2010, *AstraZeneca v Commission*, T-321/05 (**the judgment in AstraZeneca**), para. 360.

⁶⁶ Draft Guidelines, para. 70, point c), citing the judgment in *Servizio*, para. 102.

⁶⁷ Guidance Paper, para. 20, third indent: “*...In its assessment, the Commission may also consider in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy*”.

⁶⁸ Draft Guidelines, para. 70, point c) noting that a specific competitor may play a “*significant competitive role*” even if it only holds a small market share, for example because it is a close competitor to the dominant undertaking, is particularly innovative or has the reputation of systematically cutting prices.

⁶⁹ This is acknowledged by the Draft Guidelines in para. 6.

⁷⁰ See e.g., Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paras. 39 and 67 (for vertical mergers) and para. 103 (noting among others that “*rivals may decide to price more aggressively to maintain market share, mitigating the effect of foreclosure*”).

- Not considering the likely or actual reactions of third parties, including the investigated firm's rivals, is likely to result in an abstract reasoning and hypothetical assessment detached from the circumstances of the case. This would be contrary to the Commission's obligation to assess conduct under Article 102 TFEU by reference to all the relevant circumstances of the case.⁷¹
- The passage from the judgment in *Servizio* cited in the Guidelines does not support a different conclusion. This passage is taken from the part of the judgment where the Court of Justice provided further guidance to the referring court in light of the specific facts of that case,⁷² which included a former energy monopoly in the process of liberalisation and sector-specific regulation to prevent the incumbent operator from enjoying a competitive advantage in the liberalised market.⁷³ There is no basis for extending the Court of Justice's statement to cases not featuring these particular elements.

4.28 **Suggestion:** The Draft Guidelines should be amended to be consistent with the EU Courts' case-law and preserve the approach put forward in the Guidance Paper, according to which "*[i]n its assessment, the Commission may also consider in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy*".⁷⁴

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

4.29 The Draft Guidelines list a number of elements which are supposedly not necessary to establish a conduct's capability to produce exclusionary effects. Among others, the Draft Guidelines argue it is not necessary to show that (a) the competitors affected by the conduct are as efficient as the dominant undertaking; or that (b) the conduct's effects are appreciable. Neither of these positions is confirmed by the case-law and should be reconsidered.

(a) Effects on as efficient rivals – the AEC principle

4.30 The Draft Guidelines adopt an inconsistent approach with respect to the AEC principle established by the case-law of the EU Courts. On the one hand, when discussing competition on the merits, the Draft Guidelines rightly note that "*Article 102 TFEU does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive*

⁷¹ On which see footnote 46 above.

⁷² Judgment in *Servizio*, paras. 87-102.

⁷³ Judgment in *Servizio*, paras 87 et seq. and in particular paras. 88 and 91-93. It should be noted that, following the Court's preliminary ruling, the referring court (Consiglio di Stato) upheld the appeal of *Servizio* and annulled the decision of the Italian competition authority for lack of evidence and reasoning over the conduct's capability to produce exclusionary effects.

⁷⁴ Guidance Paper, para. 20.

to consumers from the point of view of, among other things, price, choice, quality or innovation”.⁷⁵ On the other hand, the Draft Guidelines appear to dismiss the AEC principle, insofar as they consider that “[t]he assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking”.⁷⁶ This position is problematic:

- The AEC principle has been long recognised by the EU Courts in a number of rulings concerning both pricing and non-pricing practices, including *Post Danmark I*,⁷⁷ *Intel*,⁷⁸ *Servizio*,⁷⁹ *Qualcomm (exclusivity payments)*,⁸⁰ *Unilever Italia*,⁸¹ *European Superleague*,⁸² *Google Shopping*,⁸³ *Google AdSense*,⁸⁴ and *Intel (RENV)*.⁸⁵ The AEC principle captures the important insight that not every exclusionary effect is necessarily detrimental to competition; competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers.⁸⁶ The Court of Justice therefore considers that for conduct to be considered abusive “it is necessary, as a rule, to demonstrate [...] that that conduct has the actual or potential effect of restricting [...] competition by excluding equally efficient competing undertakings from the market or markets concerned or by hindering their growth on those markets”.⁸⁷
- The Court of Justice has recognised that in certain exceptional cases the AEC principle may not apply to its full extent. In *Post Danmark II*, the Court held that in the circumstances of the case, which involved a dominant undertaking with a very large market share and benefiting from structural advantages linked to its statutory monopoly and from high barriers to entry, the structure of the

⁷⁵ Draft Guidelines, para. 51.

⁷⁶ Draft Guidelines, para. 73, citing the General Court judgment in *Google Shopping*, paras. 540-541.

⁷⁷ Judgment in *Post Danmark I*, para. 22.

⁷⁸ Judgment in *Intel*, paras. 133-134.

⁷⁹ Judgment in *Servizio*, paras. 45, 71 and 73.

⁸⁰ Judgment in *Qualcomm (exclusivity payments)*, paras. 351 and 416.

⁸¹ Judgment in *Unilever Italia*, para. 37.

⁸² Judgment in *European Superleague*, paras. 126-127 and 129.

⁸³ ECJ judgment in *Google Shopping*, paras. 163-167 (and the case-law cited there) and para. 263.

⁸⁴ Judgment in *Google AdSense*, para. 105.

⁸⁵ ECJ judgment in *Intel (RENV)*, para. 175.

⁸⁶ Judgment in *Intel*, para. 134. See also judgment in *European Superleague*, paras. 126-127; and ECJ judgment in *Intel (RENV)*, para. 175.

⁸⁷ ECJ judgment in *Intel (RENV)*, para. 176.

market made the emergence of an as efficient competitor practically impossible.⁸⁸ In such exceptional circumstances, the Court held that even the presence of a less efficient competitor might still contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.⁸⁹ The Draft Guidelines do not put forward any reason why such case-law should extend beyond the exceptional circumstances of a statutory monopoly,⁹⁰ nor does there appear to be a sound economic basis for doing so.

- The AEC *principle* should not be confused with the AEC price-cost *test*, (which can be thought of as a specific application of the AEC principle). The fact that the AEC *test* may not be suitable in certain cases (e.g., because of practical difficulties in quantifying the consequences of a practice) does not mean the AEC *principle* does not apply in such cases. For this reason, the General Court's judgment in *Google Shopping* does not support the Draft Guidelines' position; the cited passages from the judgment concern the AEC *test* and do not contain a general rejection of the AEC *principle*.⁹¹ On appeal the Court of Justice affirmed the AEC *principle*,⁹² but held that in the specific circumstances of the case and in light of the lack of objective and reliable evidence on the efficiency of rivals, the Commission was not obliged to conduct an AEC *test*.⁹³
- In *Google AdSense* the General Court distinguished between the AEC price-cost test and the AEC principle. In that case the Commission had not conducted an AEC test; still, the General Court examined whether the Commission had proved that Google's conduct was capable of excluding a hypothetical as efficient competitor.⁹⁴
- In any case, in *Google Shopping* the Court of Justice also held that where the AEC test is relevant, the Commission is obliged to apply it.⁹⁵ In *Intel (RENV)* the Court of Justice re-affirmed the importance

⁸⁸ Judgment in *Post Danmark II*, paras. 59-60.

⁸⁹ Judgment in *Post Danmark II*, para. 60.

⁹⁰ For completeness, the judgment in *Unilever Italia* recognised in para. 57 that the AEC *test* (as opposed to the AEC *principle*) may not be appropriate where the relevant market is protected by significant barriers.

⁹¹ General Court judgment in *Google Shopping*, paras. 540-541. See also paras. 538-539, referring repeatedly to the use of the "as-efficient-competitor test".

⁹² ECJ judgment in *Google Shopping*, paras. 163-167 and 263.

⁹³ ECJ judgment in *Google Shopping*, paras. 267-270.

⁹⁴ Judgment in *Google AdSense*, paras. 666, 882, and 980.

⁹⁵ ECJ judgment in *Google Shopping*, para. 266 (noting that the Commission "must establish the existence of an abuse of a dominant position in the light of various criteria, by applying, inter alia,

of the AEC test, noting that the capability of loyalty rebates to foreclose a competitor as efficient as the dominant undertaking “*must be assessed, as a general rule, using the AEC test*”.⁹⁶ The Court of Justice has separately held that even in the case of non-pricing practices (such as exclusivity clauses), the relevance of the AEC test “*cannot be ruled out*”, and the results of such test “*may nevertheless constitute an indication of the effects*” of a dominant undertaking’s conduct and therefore may be relevant in assessing conduct under Article 102 TFEU.⁹⁷

4.31 **Suggestion:** The Draft Guidelines should state that the Commission should assess as part of all the relevant circumstances of the case (including where relevant evidence is submitted by the investigated undertaking) whether the allegedly abusive conduct is capable of excluding equally efficient competitors. The Draft Guidelines should recognise that the circumstances in which this is not an important consideration are exceptional (e.g., when because of the characteristics of the market in question the emergence of an equally efficient competitor is practically impossible).

4.32 The Draft Guidelines should also clarify that the AEC test, even when not mandatory, is relevant for assessing the effects of a conduct, and the Commission should carefully assess any AEC analysis submitted by the investigated firm during the administrative procedure. The Draft Guidelines should clarify the Commission cannot exclude the relevance of such an analysis without setting out the reasons why it considers such analysis does not contribute to demonstrating that the practice in question was incapable of restricting competition and, consequently, without at the very least giving the investigated undertaking the opportunity to determine the evidence which could be substituted for that analysis.⁹⁸

(b) Appreciability / de minimis threshold

4.33 The Draft Guidelines consider there is no *de minimis* threshold for the purposes of determining whether a conduct infringes Article 102 TFEU, such that once an actual or potential effect has been established, there is no need to provide that it is of a serious or appreciable nature.⁹⁹ This position is based on the ruling of the Court of Justice in *Post Danmark II*.¹⁰⁰ In that case the Court of Justice explained that where “*the structure of competition on the market has already been weakened by the presence of the dominant undertaking, any further weakening of the structure of competition may*

the as-efficient competitor test, where that test is relevant, its assessment of the relevance of such a test being, where appropriate, subject to review by the EU judiciary”).

⁹⁶ ECJ judgment in *Intel (RENV)*, para. 181.

⁹⁷ Judgment in *Unilever Italia*, paras. 59 and 61. See also judgment in *Google AdSense*, para. 662.

⁹⁸ Judgment in *Unilever Italia*, paras. 54-55 and 60.

⁹⁹ Draft Guidelines, para. 75.

¹⁰⁰ Judgment in *Post Danmark II*, paras. 72-74.

*constitute an abuse of a dominant position...*¹⁰¹ In other words, the Court of Justice accepted there is no appreciability requirement where the market affected by the conduct is dominated (in which case the structure of competition is already weakened).¹⁰²

- However, the same observation does not apply to cases where the conduct's alleged exclusionary effects arise in non-dominated markets (e.g., in leveraging cases). In such cases, and to ensure consistency with the approach under Article 101 TFEU,¹⁰³ the conduct's effects should be appreciable (i.e., not *de minimis*).¹⁰⁴
- At any rate, assessing whether conduct produces an (actual or potential) exclusionary effect necessarily involves an appreciability assessment; if the impact of a conduct is insignificant, there can be no effect in the first place. The case-law confirms that for conduct to be abusive it must affect a "*substantial*" share of the market, which likewise suggests that conduct with insignificant impact on the market is not abusive.¹⁰⁵

4.34 **Suggestion:** The Draft Guidelines should specify that, for conduct to be capable of producing exclusionary effect, it must be capable of having an appreciable impact on the market.

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

Exclusive dealing

5.1 The Draft Guidelines provide helpful guidance on the Commission's approach to exclusive dealing. However, certain aspects of the Draft Guidelines do not reflect the EU Courts' case-law.

¹⁰¹ Judgment in *Post Danmark II*, para. 72.

¹⁰² This is further confirmed in para. 73: "*It follows that fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates.*" (emphasis added)

¹⁰³ See e.g., Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice).

¹⁰⁴ Of the same view Whish, R., & Bailey, D. (2021). *Competition Law* (10th ed.). Oxford University Press, p. 208; Faull, J., & Nikpay, A. (2014). *Faull and Nikpay: The EU Law of Competition* (3rd ed.). Oxford University Press, para. 4.929.

¹⁰⁵ See e.g., judgment in *Google AdSense*, paras. 596, 621, (referring to the foreclosure of a "*substantial part of the market*"). See also ECJ judgment in *Intel (RENV)*, para. 202 (referring to a pricing practice "*with sufficiently pronounced characteristics in terms of [among others] the share of the market covered*").

- 5.2 First, while the Draft Guidelines assert that there is a presumption recognised by the case-law,¹⁰⁶ the Court of Justice has in fact refused to recognise any such presumption, noting that the ability of exclusive dealing to exclude competitors is not automatic.¹⁰⁷ Further, the Draft Guidelines do not recognise that exclusive dealing may have pro-competitive effects, for instance by encouraging the dominant undertaking to undertake relationship-specific investments, as acknowledged in the Guidance Paper.¹⁰⁸
- 5.3 Second, the Draft Guidelines consider that, where the dominant undertaking submits evidence that its conduct is not capable of producing exclusionary effects, the Commission may reject such evidence as being insufficient to call into question the probative value of the presumption, without assessing the conduct's capability to produce exclusionary effects.¹⁰⁹ This position is at odds with the case-law, as explained above,¹¹⁰ including the ruling of the Court of Justice in *Intel (RENV)*¹¹¹ and the General Court's judgment in *Google AdSense*.¹¹²
- 5.4 Third, the Draft Guidelines ignore consistent case-law requiring the Commission to demonstrate that exclusive dealing is capable of excluding as efficient rivals.¹¹³
- 5.5 **Suggestion:** The Draft Guidelines should specify that the Commission is required to examine whether exclusive dealing is capable of excluding as efficient rivals. The Draft Guidelines should further clarify that where the investigated undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct is not capable of producing exclusionary effects, or maintains that there are justifications for its

¹⁰⁶ Draft Guidelines, para. 82.

¹⁰⁷ Judgment in *Unilever Italia*, para. 51 ("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, as, moreover, is illustrated by the [Guidance Paper] (OJ 2009 C 45, p. 7, paragraph 36)"). In relation to exclusivity rebates, see ECJ judgment in *Intel (RENV)*, para. 330.

¹⁰⁸ See Guidance Paper, para. 46. With respect to rebates, the Draft Guidelines acknowledge in para. 141 the pro-competitive potential of conditional rebates not subject to exclusivity. There is no reason why this observation should be limited to such rebates; see Guidance Paper, para. 37, containing a similar statement applying to all conditional rebates (including those subject to exclusivity).

¹⁰⁹ Draft Guidelines, paras. 60, point b) and 81.

¹¹⁰ See para. 4.11 above.

¹¹¹ ECJ judgment in *Intel (RENV)*, paras. 179-181 and 330-331.

¹¹² Judgment in *Google AdSense*, paras. 388-390.

¹¹³ Judgment in *Intel*, paras. 133-134, 136, and 139, and ECJ judgment in *Intel (RENV)*, paras 176-177 and 181 (for exclusivity rebates); judgment in *Qualcomm (exclusivity payments)*, para. 354 (for exclusivity payments); judgment in *Unilever Italia*, para. 52 (for exclusivity clauses); judgment in *Google AdSense*, para. 112 (for exclusivity clauses).

conduct,¹¹⁴ the Commission is required to establish that such conduct was capable of having exclusionary effects having regard to all the relevant circumstances of the case.

5.6 The Draft Guidelines should be further revised to reflect recent rulings and in particular:

- *Intel (RENV)*, where the Court of Justice confirmed that the foreclosure capability of loyalty rebates must be assessed, as a general rule, using the AEC test;¹¹⁵ and
- *Google AdSense*, where the General Court stressed that when assessing an exclusivity obligation, the Commission is required to examine (as part of all the relevant circumstances of the case) the duration of such obligation as well as its legal and economic context.¹¹⁶

Tying and bundling

5.7 The Draft Guidelines provide helpful guidance on the Commission's approach to tying and bundling. However, certain aspects of the Draft Guidelines do not reflect the EU Courts' case-law.

5.8 First, the Draft Guidelines note that tying may be capable of resulting in exclusionary effects if it is used to leverage dominance in the tying market into the tied market.¹¹⁷ This may be the case "*if the tying confers a significant competitive advantage on the dominant company in the tied market that is unrelated to the quality of the tied product, where that advantage is unlikely to be offset by competitors*".¹¹⁸ This position conflates the concepts of competitive advantage and exclusionary effects, as the EU Courts have consistently stated that a competitive advantage of itself does

¹¹⁴ See paras. 4.11 and 4.13 above.

¹¹⁵ ECJ judgment in *Intel (RENV)*, para. 181.

¹¹⁶ Judgment in *Google AdSense*, paras. 695 and 697. The General Court held that where over time the dominant firm enters into several agreements with its customers (including in the form of extensions), the Commission cannot limit itself to examining the cumulative duration of the agreements; rather, it must assess the duration of each agreement individually, as well as the actual conditions and the terms under which such agreement have been extended (if at all), to ascertain whether customers have the option of sourcing from rivals at the term of each agreement. The Commission also needs to assess the substance of any clauses providing for unilateral termination rights for the dominant firm's customer and the conditions under which such rights can be exercised. See judgment in *Google AdSense*, para. 698-700 and 714-715.

¹¹⁷ Draft Guidelines, para. 93.

¹¹⁸ Draft Guidelines, para. 93, citing the judgment in *Google Android*, paras. 559 and 1087, and the judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, *Microsoft v Commission*, T-201/04 (***the judgment in Microsoft***), paras. 1036-1039.

not mean the conduct is capable of having exclusionary effects.¹¹⁹ The Draft Guidelines should thus be amended by deleting this reference and reaffirming that a competitive advantage is insufficient on its own to establish exclusionary effects.

5.9 Second, the Draft Guidelines consider that “[i]n 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”.¹²⁰ This is “notably” the case “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”.¹²¹ This position is not consistent with the EU Courts’ case-law (which has not set out any such presumption) and also lacks legal certainty (which is problematic from a self-assessment perspective):

- The EU Courts have moved away from the early formalistic approach of *Hilti* and *Tetra Pak* (both judgments delivered in early 1990s) to recognise that, for tying conduct to be considered abusive, the Commission needs to establish that it is capable of foreclosing competition.¹²² This analytical change was spearheaded by the Commission itself, first in its *Microsoft* decision,¹²³ and then in the Guidance Paper¹²⁴ and subsequent decisions, such as *Rio Tinto Alcan*¹²⁵ and *Google Android*.¹²⁶ There is no reason why the Draft

¹¹⁹ See judgment in *Google Android*, para. 564: “...it is apparent that it [the contested decision] establishes, first, the existence of an advantage linked to the MADA pre-installation conditions that cannot be offset by competitors, and, second, the anticompetitive effects of that advantage”.

¹²⁰ Draft Guidelines, para. 95.

¹²¹ Draft Guidelines, footnote 233, citing the judgment of the Court of First Instance (Second Chamber) of 12 December 1991, *Hilti v Commission*, T-30/89 (**the judgment in Hilti**); the judgment of the Court of First Instance (Second Chamber) of 6 October 1994, *Tetra Pak v Commission*, T-83/91 (**the judgment in Tetra Pak**); and the judgment in *Microsoft*, paras. 1035-1036.

¹²² Judgment in *Microsoft*, para. 867; judgment in *Google Android*, para. 284, 285 (“...in paragraph 867 of [the judgment in *Microsoft*], the Court recalled the substance of the earlier case-law according to which, ‘in principle, conduct will be regarded as abusive only if it is capable of restricting competition’”), and 290. The judgment in *Google Android* therefore does not endorse the formalistic approach of *Hilti* and *Tetra Pak*.

¹²³ Commission decision of 24 March 2004 in case COMP/C-3/37.792 – *Microsoft*.

¹²⁴ Guidance Paper, para. 50 (“The Commission will normally take action under Article [102] where [...] the tying practice is likely to lead to anti-competitive foreclosure”).

¹²⁵ Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, para. 59.

¹²⁶ Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paras. 741 and 749 (“Article 102 TFEU does not require demonstration of actual or potential anti-competitive effects in classical tying cases. Indeed, in *Hilti* and *Tetra Pak II*, it was sufficient to assume that the tying of a specific product has by its very nature a foreclosure effect. In *Microsoft*, however, the General Court explained

Guidelines should retreat to early (formalistic) case-law, which has been superseded by more recent EU Court case-law on tying and bundling practices (such as *Microsoft* and *Google Android*). This risks stifling competition and innovation.

- The above evolution of the case-law reflects the understanding that tying is a practice that non-dominant companies regularly engage in, and – according to the economic literature – can produce pro-competitive effects and benefit consumers,¹²⁷ which the Draft Guidelines appear to acknowledge.¹²⁸
- The Draft Guidelines do not provide workable guidance as to how to identify situations where tying is alleged to have a high potential to produce exclusionary effects such that these can be presumed – instead referring to “*certain circumstances*” and “*specific characteristics of the markets and products*”.¹²⁹ This introduces a considerable degree of legal uncertainty and makes it difficult for undertakings to understand how to self-assess tying and bundling practices.

5.10 **Suggestion:** The Draft Guidelines should be amended to remove the reference to certain tying practices being subject to a presumption of exclusionary effects.¹³⁰ If this reference is maintained, the Draft Guidelines should provide clear guidance based on concrete examples so undertakings can determine in which circumstances tying practices are presumed to have exclusionary effects.

5.11 Third, the Draft Guidelines consider that in some circumstances “*a closer examination of actual market conditions may be warranted*” – this is typically the case when the tied product is available for free and it is easy to obtain alternatives to the tied product.¹³¹ Such examination aims to identify “*any evidence confirming the capability of the tying to have exclusionary effects, such as the actual marginalisation or exit of*

that while it is true that Article 102 TFEU as a whole does not contain any reference to the anti-competitive effect of bundling, the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition” (emphasis added).

¹²⁷ See e.g., DS Evans and M Salinger, Quantifying The Benefits Of Bundling And Tying, Working Paper (2002); P Seabright, Tying And Bundling: From Economics To Competition Policy, Edited Transcript of a CNE Market Insights Events (19 September 2002).

¹²⁸ Draft Guidelines, para. 87. See also judgment in *Google Android*, para. 283, noting that tying “*is a common practice in the course of trade which is normally intended to provide customers with better products or offerings in more cost-effective ways.*”

¹²⁹ Draft Guidelines, para. 95. The example in footnote 233 is meant to be illustrative (as suggested by the opening statement “*This is notably the case in situations...*”) and in any case it is vague.

¹³⁰ This should also include the reference to that effect in para. 60, point b) of the Draft Guidelines.

¹³¹ Draft Guidelines, para. 95, citing the judgment in *Google Android*, paras. 292-295.

*competitors in the tied market or an actual increase in the barriers to entry and expansion on the market”.*¹³²

5.12 This statement does not fully reflect the judgment in *Google Android*. In that case the General Court held that, in the circumstances of the case,¹³³ the Commission was required to show that the tying had actual effects and could not limit itself to showing the tying was capable of producing exclusionary effects.¹³⁴ This approach can be traced back to the ruling of the Court of First Instance in *Microsoft*, where the Court examined, in line with the approach in the contested decision, whether Microsoft’s tying conduct “foreclose[d] competition”.¹³⁵

5.13 **Suggestion:** The Draft Guidelines should specify that, in certain circumstances (e.g., when the relevant conduct has been in place for a significant period of time), the Commission is required to establish that, and place significant weight in its assessment on whether, the tying had actual exclusionary effects.

Conditional rebates not subject to exclusive purchase or supply requirements

5.14 The Draft Guidelines rightly state that conditional rebates are a common business practice and may stimulate demand and benefit consumers.¹³⁶ The Draft Guidelines are also correct to consider that, in assessing whether a conditional rebates scheme is capable of having exclusionary effects, a relevant consideration is the fact that a hypothetical as efficient competitor would be unable to compensate the loss of the rebates on the basis of a price-cost test.¹³⁷ However, the Draft Guidelines consider that, conversely, “the fact that a hypothetical as-efficient competitor would be able to compensate the loss of the rebates is not necessarily a relevant factor showing that the rebates scheme is incapable of producing exclusionary

¹³² Draft Guidelines, para. 95.

¹³³ Namely, the tied product was available for free and it was easy to obtain alternatives to it. The General Court also took into account that the practices at issue took place over a long period, such that the Commission could establish a restriction of competition by finding that those practices have eliminated or hampered sources of competition which would otherwise have taken place or developed. See judgment in *Google Android*, paras. 296-298.

¹³⁴ Judgment in *Google Android*, paras. 291, 293, and 295 (referring to the need for “close examination of the actual effects”).

¹³⁵ Judgment in *Microsoft*, paras. 868 (noting that in the contested decision and in light of the specific circumstances of the case, the Commission had “therefore examined more closely the actual effects which the bundling had already had on the [relevant] market and also the way in which that market was likely to evolve”) and 869 (holding that the question of the bundling had to be assessed by reference to the conditions set out in the contested decision, including the condition relating to the fact that the practice in question “foreclose[d] competition”).

¹³⁶ Draft Guidelines, para. 141.

¹³⁷ Draft Guidelines, para. 145, point f).

effects". This is allegedly because "*the conduct's capability to have exclusionary effects needs to be assessed in relation to the existing actual or potential competitors of the dominant firm, rather than in relation to hypothetical competitors*".¹³⁸ This position is not confirmed by the case-law:

- As explained above, when assessing the foreclosure capability of exclusivity rebates under Article 102 TFEU, it is necessary to examine the effects of such rebates on as efficient competitors, which must be assessed, as a general rule, using the AEC test;¹³⁹
- *A fortiori* the same applies to conditional rebates not subject to exclusivity, which according to the Draft Guidelines are less problematic than exclusivity rebates (and are not subject to any presumption of exclusionary effects).¹⁴⁰

5.15 **Suggestion:** The Draft Guidelines should specify that, where a hypothetical as efficient competitor would be able to compensate the loss of the rebates, this is a factor showing that the rebates scheme is incapable of producing exclusionary effects. The Draft Guidelines should further specify that, regardless of whether a price-cost test is applied, the Commission will assess whether the rebates scheme is capable of excluding as efficient competitors and place due weight on this when determining whether there are exclusionary effects.

Refusal to supply

5.16 The Draft Guidelines rightly note that the EU Courts have set up strict conditions for finding that a refusal to supply is liable to be abusive.¹⁴¹ This strict legal test reflects the fact that imposing an obligation on a dominant undertaking to supply rivals impinges on its freedom of contract and its right to property and may affect the incentives of both the dominant undertaking and its rivals.¹⁴² However, certain aspects of the Draft Guidelines do not appear to reflect the case-law of the EU Courts.

5.17 First, the Draft Guidelines unduly limit the scope of cases that have to meet the legal test for refusal to supply. In particular, the Draft Guidelines consider that such test only applies to situations of *de novo* refusal to supply and does not apply to situations of disruption of previous supplies to competitors.¹⁴³ The Draft Guidelines consider that "*dominant undertakings cannot cease supplying existing customers who are competing with them in a downstream market, if the customers abide by regular commercial*

¹³⁸ Draft Guidelines, footnote 325.

¹³⁹ See paras. 5.4 and 5.6 above.

¹⁴⁰ Holding otherwise would mean conditional rebates not subject to exclusivity would be treated more strictly under Article 102 TFEU compared to exclusivity rebates.

¹⁴¹ Draft Guidelines, para. 97.

¹⁴² Draft Guidelines, para. 97.

¹⁴³ Draft Guidelines, para. 166, point a). This departs from the position in the Guidance Paper, para. 84.

practices and the orders placed by them are in no way out of the ordinary".¹⁴⁴ However:

- The case-law suggests there is a single legal test for *de novo* refusal to supply cases and cases involving disruption of previous supplies to competitors.¹⁴⁵
- The authorities cited in para. 166 point a) do not state that a dominant undertaking is under an obligation to continue supplying rivals if they abide by regular commercial practices and do not place orders that are out of the ordinary. The judgment in *Sot. Lélos* concerned the different scenario of a dominant undertaking ceasing to supply *customers* (not competitors) *to restrict parallel trade*.¹⁴⁶
- In any case, there may be good reasons for a dominant undertaking to terminate its business relationships, e.g., there may be instances where existing business relationships, due to evolving market conditions, are not profitable anymore, or where an undertaking's commercial strategy or business model has evolved requiring it to switch-off "old" infrastructure and cease certain business relationships. It would be unreasonable to impose on dominant undertakings a duty to deal in perpetuity. This would also encroach on the freedom to contract and right to property.
- From a policy perspective, applying a lower standard for cases involving disruption of previous supplies is undesirable. It would arguably incentivise dominant undertakings to refuse to deal with downstream competitors in the first place since, the moment they start supplying such competitors, they run the risk of having the duty to supply such rivals in perpetuity. As currently worded, the Guidelines would therefore achieve the opposite of what seems to have been intended, i.e., a *reduction* in access to the dominant undertaking's assets or products for its competitors.

¹⁴⁴ Draft Guidelines, para. 166, point a).

¹⁴⁵ See e.g., judgment of the Court (Fifth Chamber) of 3 October 1985, *CBEM v CLT and IPB (Télémarketing)*, Case 311/84, para. 26; judgment of the Court of 6 April 1995, *RTE and ITP v Commission*, Joined cases C-241/91 P and C-242/91 P, para. 56 (citing the judgment of the Court in *Commercial Solvents*, Joined cases 6/73 and 7/73); General Court judgment in *Google Shopping*, para. 216 (citing *Commercial Solvents* and *Télémarketing* alongside *Bronner* and *Microsoft* to note that on numerous occasions "the Courts of the European Union, guided by the doctrine of essential facilities, have used the criteria of indispensability and of the risk of eliminating all competition to characterise or to rule out the existence of an abuse in cases concerning the possibility of a dominant undertaking reserving to itself an activity on a neighbouring market"). See also Commission decision of 21 December 1993 in case IV/34.689 – *Sea Containers v. Stena Sealink – Interim measures*, para. 66, footnote 3 (citing *Commercial Solvents* and *Télémarketing*).

¹⁴⁶ Judgment of the Court (Grand Chamber) of 16 September 2008, *Sot. Lélos kai Sia*, joined cases C-468/06 to C-478/06.

- 5.18 **Suggestion:** The Draft Guidelines should recognise that cases involving disruption of previous supplies to competitors of the dominant undertaking are subject to same legal test as cases of *de novo* refusal to supply.
- 5.19 Second, the Draft Guidelines do not refer to the recent ruling of the General Court in *Bulgarian Energy Holding*.¹⁴⁷ In that case the General Court held that, in order to prove that the refusal to supply is capable of producing exclusionary effects that are not purely hypothetical, the Commission is required to establish that the potential competitor requesting access “*has, at the very least, a sufficiently advanced project to enter the market in question within such a period of time as would impose competitive pressure on the operators already present*”.¹⁴⁸ The General Court further noted the Commission needed to show that the undertaking requesting access “*had the firm determination and the very capacity to enter those markets and that, inter alia, it had taken sufficient preparatory steps to enable it to enter those markets within such a period of time as would impose competitive pressure on [the dominant undertaking]*”.¹⁴⁹ The Commission also had to prove that “*the request for access reflects that project sufficiently precisely for the dominant undertaking to be in a position to assess whether it is required to respond to it*”, a purely “*exploratory approach*” not amounting to a request for access.¹⁵⁰
- 5.20 **Suggestion:** The Draft Guidelines should be amended to reflect the judgment in *Bulgarian Energy Holding*.

Access restrictions

- 5.21 Certain aspects of the Draft Guidelines’ discussion on “access restrictions” do not reflect the case-law of the EU Courts.
- 5.22 First, the Draft Guidelines consider that situations involving disruptions of previous supplies to competitors are not subject to the legal test for refusal to supply, but this is not confirmed by the case-law, as discussed above.¹⁵¹
- 5.23 Second, the Draft Guidelines list as an example of access restrictions a situation where “*the dominant undertaking develops an input for the declared purpose of sharing it widely with third parties but later does not provide access or restricts access to that input*”. This is supposedly so because in such cases “*the dominant undertaking has already made the*

¹⁴⁷ Judgment of the General Court (Fourth Chamber, Extended Composition) of 25 October 2023, *Bulgarian Energy Holding and Others v Commission*, T-136/19 (**the judgment in Bulgarian Energy Holding**).

¹⁴⁸ Judgment in *Bulgarian Energy Holding*, para. 281 (citing among others the judgment in *Generics*, paras. 43 and 46).

¹⁴⁹ Judgment in *Bulgarian Energy Holding*, para. 448.

¹⁵⁰ Judgment in *Bulgarian Energy Holding*, para. 282; see also para. 450.

¹⁵¹ See para. 5.17 above.

business and investment decision to share the input from the outset and to contract with third parties to give access thereto".¹⁵² However:

- This is not confirmed by the case-law. The cases where the EU Courts have refused to apply the *Bronner* criteria concern situations where the undertaking has already provided access to infrastructure (instead of merely intending to do so).¹⁵³
- It would be unreasonable to treat cases where a dominant undertaking develops an infrastructure with the purpose of providing access to it similarly to situations where such undertaking actually provides such access. Commercial considerations may change over time; what may have made business sense at an earlier point in time may not make sense at a later stage.
- Such an approach would also be undesirable from a policy perspective, as it could incentivise dominant firms to develop closed infrastructures to avoid any potential obligation to grant access to their competitors.

5.24 **Suggestion:** The Draft Guidelines should be amended to remove point d) from para. 166.

6. Objective justification

6.1 The Draft Guidelines rightly note that conduct that is liable to be abusive may nevertheless be objectively justified because it is objectively necessary or because of efficiency considerations.¹⁵⁴ The Draft Guidelines could be further improved in the following respects:

- The Draft Guidelines are correct in stating that maintaining or improving the performance of the dominant undertaking's product may constitute an objective necessity defence based on technical justifications (distinct from an efficiency defence).¹⁵⁵ It would be helpful to provide worked examples of such situations, including in the context of digital markets, with a view to providing greater guidance to undertakings.
- The Draft Guidelines consider that, when examining an efficiency defence, "*whether the conduct has a high potential to produce exclusionary effects [...] must be given due weight in the balancing exercise to be carried out in this context*".¹⁵⁶ However, this position

¹⁵² Draft Guidelines, para. 166, point d). citing by analogy the General Court judgment in *Google Shopping*, paras. 177-185.

¹⁵³ Judgment of the Court (Third Chamber) of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, paras. 50-51; General Court judgment in *Google Shopping*, paras. 238

¹⁵⁴ Draft Guidelines, para. 167.

¹⁵⁵ Draft Guidelines, para. 168.

¹⁵⁶ Draft Guidelines, para. 170.

is not justified; there is nothing special about conduct that is (allegedly) presumed to have exclusionary effects that justifies a different treatment of an efficiency defence.¹⁵⁷ Indeed, the value or weight of exclusionary effects does not differ based on how they have been established or evidenced. This statement should therefore be removed from the Draft Guidelines.

7. Conclusion

7.1 The Draft Guidelines are a welcome effort to provide guidance on the Commission's approach to applying Article 102 TFEU. As discussed in this submission, the Draft Guidelines could be further refined to (a) more accurately reflect the case-law of the EU Courts and (b) provide additional guidance (e.g., by elaborating on certain concepts with concrete examples). In any case, the final guidelines should be rooted on the fundamental principles confirmed by the EU Courts, in particular:

- The **effects-based approach** to assessing exclusionary conduct, which is in tension with the introduction of broad presumptions of anti-competitive effects;
- The **anti-competitive foreclosure standard**, which reflects the role of **consumer welfare** as the ultimate objective of competition law; and
- The **AEC principle**, which ensures that Article 102 TFEU serves consumers by protecting competition, not competitors.

¹⁵⁷ See e.g., judgment in *Unilever Italia*, para. 50 (noting that "...both rebate practices and exclusivity clauses are capable of being objectively justified or of having the disadvantages which they generate counterbalanced, or even outweighed, by advantages in terms of efficiency which also benefit the consumer...") and 51; judgment in *Intel*, para. 140.