ECLF
European Competition Lawyers Forum

European Competition Lawyers Forum Position Paper on the European Commission's Draft Guidelines on Exclusionary Abuses

31 October 2024

1. Introduction

1.1 On 1 August 2024, the European Commission (the "**Commission**") launched a public consultation seeking views on the Draft Guidelines on Exclusionary Abuses ("**Draft Guidelines**").

1.2 The European Competition Lawyers Forum ("**ECLF**")[1] welcomes the opportunity to participate in the consultation and provide feedback on the Draft Guidelines. This Position Paper summarises the ECLF working group's considerations relating to the Draft Guidelines. In section 2, we present an executive summary of our general comments and recommendations. The following sections contain our specific comments. In particular, in section 3, we discuss the parts on dominance. In section 4, we refer to the general framework proposed and in section 5 we examine the specific legal tests proposed for individual forms of exclusionary practices. Throughout these sections, we also highlight areas where we believe the Draft Guidelines could be better aligned with the EU Courts' case law.

2. General observations and position of the ECLF

2.1 The ECLF believes that the Draft Guidelines represent a departure from the economic and effects-based approach of the 2008 Guidance Paper. This may be deliberate as such an approach is more resource intensive. It does however mean moving towards a more formalistic approach based on a set of form-based presumptions that does not fully align with the case law of the EU Courts in the post-*Intel I*[2] era.

2.2 The Draft Guidelines shift the focus away from "consumer harm" and state that proving direct harm to consumers is not necessary to establish that a conduct is liable to produce exclusionary effects. The Draft Guidelines no longer rely on the concept of "anti-competitive foreclosure", which refers to foreclosure of competitors that results in consumer harm, as opposed to pro-competitive foreclosure. Instead, the Draft Guidelines focus on "competitive harm", which may imply a shift towards protecting competitors as such. The ECLF recommends that the final Guidelines clarify this concept to ensure it does not inadvertently protect competitors at the expense of consumer welfare.

2.3 At the same time, the Draft Guidelines remove some of the safe harbours provided by the 2008 Guidance Paper and increase the discretion of the Commission, potentially decreasing legal certainty and predictability. This concern is echoed in the recent

[1] The European Competition Lawyers Forum ("**ECLF**") is a group of the leading practitioners in competition law from firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or their law firms. The views set out in this working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 1.

[2] Case T-286/09, *Intel v Commission* [2014] ECLI:EU:T:2014:547.

Draghi report, which criticized some aspects of the Draft Guidelines.[3] The ECLF recommends that the Commission considers reintroducing certain safe harbours to enhance legal certainty.

2.4 This development could impact all sectors of the economy and many business models. The easier finding of dominance in a given market due to the abolition of safe harbours based on market shares and the adoption of a new Market Definition Notice that leaves much discretion to competition authorities, could even affect companies that do not consider themselves as "dominant". Dominance could now be found with market shares as low as 10%. The ECLF suggests that final Guidelines provide clearer guidance on market share thresholds to prevent undue uncertainty for businesses as well as Type I errors.

3. <u>Dominance</u>

(a) Single dominance

3.1 The ECLF notes that the Draft Guidelines have not included the (soft) safe harbour that the 2008 Guidance Paper included,[4] which stated that low market shares are generally a good proxy for the absence of substantial market power and that dominance is not likely if an undertaking's market share is below 40 % in the relevant market.[5] For long, the Commission's enforcement actions have not included cases against undertakings with market shares below 40% and even cases involving undertakings with market shares between 40% and 50% are relatively rare. Reinstating this safe harbour would provide clarity and consistency, ensuring that undertakings with lower market shares are not subject to unnecessary compliance risks. Therefore, the ECLF suggests reinstating this safe harbour, potentially with some disclaimers for specific market structures and situations.

3.2 The Draft Guidelines make an assertion in footnote 34 that, under certain circumstances, more than one undertaking can be individually dominant in the same market. This statement is not further developed and appears to contradict the concept of single dominance as established in the EU case law. If such "specific characteristics of a market" exist, the issue may be related to the accuracy of the market definition, which might require more precise definitions, such as geographically, temporally, or per level of activity (upstream or downstream, supply or distribution), rather than introducing a potentially confusing new approach. Moreover, this proposition seems to blur the lines between single and collective dominance. The decisions referenced in the footnote do not support the conclusions drawn. The *German electricity wholesale market* and *German electricity balancing market cases* (Cases AT.39388 and AT.39389, respectively) do not provide an analysis of multiple undertakings holding separate and single dominant positions in the same market; they merely reference

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[3] European Commission, *The future of European competitiveness: Report by Mario Draghi*, 9 September 2024 (the **Draghi Report**), p. 304: "*excessive discretion on the finding of exclusionary abuses is left by the draft Guidelines on the enforcement of article 102 released in August 2024*".

[4] Paragraph 14 of the Guidance on enforcement priorities.

[5] There is a theoretical dispute whether this represents a safe harbour, but history shows that dominance below 40% has only been found in one case – T-219/99, *British Airways v Commission* [2003]EU:T:2003:343, paragraphs 211-215 (confirmed on appeal in case C-95/04 P, British Airways v Commission,EU:C:2007:166).

preliminary assessments and ultimately address the matter as one of collective dominance. For these reasons, the ECLF suggests omitting footnote 34 from the final Guidelines.

3.3 The Draft Guidelines, in paragraph 25 for example, place more emphasis on market shares than is warranted by existing practice, effectively creating a strong market share-based presumption of dominance, which is inconsistent with case law. Both administrative practice and case law has typically included additional factors beyond market shares when assessing dominance. For instance, in *Irish Sugar*, the Commission assessed the size of the shares of other competitors, regulatory restrictions, the distribution system, purchasing power and other factors.[6] Similarly, in the *Intel* Decision, the Commission conducted a thorough analysis of other circumstances such as barriers to entry, product differentiation and financial strength before concluding on dominance despite Intel's high market share (in the range of 70-80%).[7] In *Prokent-Tomra* the Commission examined, among other things, Tomra's past reactions to the entry of new competitors, purchasing power and Tomra's self-assessment of its position.[8] In *Telefonica España*, the Commission examined purchasing power, barriers to entry and other factors.[9] These few examples illustrate that a more nuanced approach, considering a range of factors beyond mere market shares, better reflects established administrative practice and case law.

3.4 It is well understood and discussed in both economic and legal theory that market shares alone have several limitations: (i) they provide little insight into the competitive dynamics that have shaped the market structure; (ii) they do not indicate whether such shares can be maintained in the future; (iii) they fail to account for potential competition; and (iv) they do not consider buyer power or other competitive constraints. While these elements are discussed in later sections of the Draft Guidelines, the structure and wording still create the impression that a strong presumption of dominance arises once a certain market share threshold—apparently 50%—is reached. The creation of a *de facto* presumption of dominance based solely on market share levels risks oversimplifying the analysis and undermining the need for a robust, evidence-based approach. Furthermore, such a presumption seems less relevant in dynamic markets as illustrated in *Google Search* (Shopping).[10] While the Commission mentioned the *AKZO*[11] presumption, its analysis relied on barriers to entry, the specifics of the markets for the products provided for free, multi-homing and customer behaviour.

3.5 Instead of emphasising that dominance can exist for market shares below 50% (as in paragraph 26 of the Draft Guidelines), it would be more appropriate to clarify that dominance is generally unlikely below a certain threshold (e.g., below 40%), except in some circumstances and in the presence of significant additional factors as set out in

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[6] Commission Decision of 14. 5. 1997 in Case IV / 34.621 - *Irish Sugar*, OJ [1997], L258/1, paragraphs 99-110.

[7] See Commission Decision of 13.05.2009 in Case COMP/C-3 /37.990 – *Intel,* see paragraph 852.

[8] Commission Decision of 29.3.2006 in Case COMP / E1 / 38.113 - *Prokent-Tomra*, paragraphs 57-96.

[9] Commission Decision of 4.7.2007 in Case COMP / 38.784 - *Wanadoo España*, paragraphs 220-277.

[10] Commission Decision of 27.6.2017 in Case AT.39740 - *Google Search (Shopping)*, paragraphs 264-330 (especially paragraphs 266-267).

[11] Case C-62/86, *AKZO v Commission* [1991] EU:C:1991:286.

case law. The current reference to a 10% threshold in footnote 41 is an outlier and has no basis in modern case law.

3.6 The elements listed in paragraphs 29-33 of the Draft Guidelines do not seem to offer systematic guidance for assessing the existence or non-existence of a dominant position. Instead, the approach resembles a list of possible factors for the finding of a dominant position, without providing a balanced and nuanced analysis of when these factors are relevant or, conversely, when they might indicate the absence of dominance. This does not seem to establish a robust framework for analysis.

(b) Collective dominance

3.7 As a general observation, the inclusion of an extended section on collective dominance may undermine legal certainty without adding substantial practical value. Collective dominance cases have been very rare, and most cited cases are older and primarily related to merger control. Given the limited practical application of collective dominance in competition law enforcement, this approach might unintentionally suggest that collective dominance is more prevalent and easier to establish than it actually is. The ECLF therefore recommends that the Commission considers shortening this section or including more specific guidance.

3.8 As to the references to and the relationship with Article 101 TFEU, the Draft Guidelines could more clearly distinguish between situations best analysed under Article 101 TFEU (concerted practices) and those falling under Article 102 TFEU (collective dominance). Without this distinction, there is a risk that collective dominance may be seen as a fallback option when concerted action between undertakings cannot be demonstrated.

3.9 Concerning the references to the Horizontal Merger Guidelines, the ECLF believes that the Commission should be very cautious. Not only are these guidelines 20 years old and need updating, but also merger control and Article 102 TFEU involve different types of oversight: *ex ante* (merger control) versus *ex post* (abuse of dominance)—and, therefore, the considerations and legal standards for intervention are inherently different. Merger control entails a forward-looking analysis of structural changes that may arise in the future as a result of a transaction. In contrast, Article 102 TFEU entails an assessment of past or present facts that must be based on a body of evidence, which, viewed as a whole, is sufficiently precise and consistent to support the firm conviction that a collective dominant position exists. Applying the same framework for both contexts raises many difficulties. Overreliance in the Draft Guidelines on the Horizontal Merger Guidelines, especially their non-coordinated effects framework (as seen in paragraphs 39 and following) should therefore be avoided.

4. <u>General Framework</u>

(a) Departure from the "anti-competitive foreclosure" guiding principle and other fundamental concepts

4.1 When it comes to the guiding principles behind the concept of abuse, the Draft Guidelines appear to deviate from the core principle of "anti-competitive foreclosure" as outlined in the 2008 Guidance Paper. This principle marked a shift from formalism

to an economic approach, focusing on the foreclosure of competitors that leads to consumer harm rather than merely protecting the commercial freedom of competitors. In other words, it is consumer harm that makes foreclosure "anti-competitive". Recent case law, such as *Google Android*,[12] *Qualcomm (exclusivity)*,[13] *Lithuanian Railways* (GC),[14] *Google Shopping* (GC),[15] and *Intel renvoi*,[16] prominently uses the term "anti-competitive foreclosure". The final Guidelines would benefit from an explicit acknowledgement and incorporation of this guiding principle, which is currently not observed.

4.2 In addition, the Draft Guidelines shift focus from "consumer harm" and "consumer welfare" to "*competitive harm*", which is defined as harm that undermines "*an effective structure of competition*" (paragraphs 3 and 5). This contradicts more recent EU case law, such as *Post Danmark I*,[17] *Intel*,[18] *Google Android*,[19] *Qualcomm (exclusivity)*,[20] *Servizio Elettrico Nazionale*,[21] *Unilever Italia*,[22] and *European Superleague*,[23] which emphasise and clarify that "consumer welfare" is the ultimate objective of Article 102 TFEU. The final Guidelines should realign with these established legal principles.

4.3 Paragraph 6 of the Draft Guidelines set out the definition of "*exclusionary effects*" as "*any hindrance to actual or potential competitors' ability or incentive to exercise a competitive constraint on the dominant undertaking*". This diverges from the modern approach of "anti-competitive foreclosure" resulting in "consumer harm". This approach lacks support in case law (cf. *AstraZeneca*[24]). It also conflates dominance and abuse.

4.4 In contrast with the Draft Guidelines, more recent case law characterises "*exclusionary effects*" in the same way as paragraph 19 of the 2008 Guidance Paper, which characterises "*anti-competitive foreclosure*", namely "*situations in which effective access of actual or potential competitors to markets or to their components is hampered or eliminated as a result of the conduct of the dominant undertaking, thus allowing that undertaking negatively to influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services*".[25]

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[12] Case T-604/18, *Google and Alphabet v Commission (Google Android)*, [2022] EU:T:2022:541, paragraphs 299 and 643.

[13] Case T-235/18, *Qualcomm, Inc. v Commission*, [2022] EU:T:2022:358, paragraph 414.

[14] Case C-42/21 P, *Lietuvos geležinkeliai AB v Commission* [2023] ECLI:EU:C:2023:12, paragraph 98.

[15] Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763, paragraph 615.

[16] Case T-286/09 RENV, *Intel Corporation, Inc. v. Commission* [2022] EU:T:2022:19, paragraphs 287, 335, 457, 481and 525.

[17] Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] EU:C:2012:172, paragraphs 21-22.

[18] Case C-413/14 P, *Intel v Commission* [2017] EU:C:2017:632, paragraphs 133-134.

[19] Case T-604/18, *Google and Alphabet v Commission (Google Android)*, [2022] EU:T:2022:541, paragraphs 277-278.

[20] Case T-235/18, *Qualcomm, Inc. v Commission*, [2022] EU:T:2022:358, paragraphs 349 and 351.

[21] Case C-377/20, *Servizio Elettrico Nazionale and Others v. Autorità Garante della Concorrenza e del Mercato and Others* [2022] EU:C:2022:379, paragraph 73.

[22] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33, paragraph 37.

[23] Case C-333/21, *European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* [2023] EU:C:2023:1011, paragraphs 126-127.

[24] Case C-457/10 P, *AstraZeneca v Commission* [2012] EU:C:2012:770, paragraph 117, cited in footnote 12.

[25] Case T-604/18, *Google and Alphabet v Commission (Google Android)*, [2022] EU:T:2022:541, paragraph 281.

4.5 The notion in the Draft Guidelines goes to the protection of competitors rather than competition and could misguide the analytical framework by neglecting that it "*is not the purpose of Article 102 TFEU to* […] *to ensure that competitors less efficient than an undertaking in* [a dominant position] *should remain on the market*".[26] The final Guidelines should reflect more recent case law stating that "*not every exclusionary effect is necessarily detrimental to competition*".[27] And "*competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors which are less efficient*."[28]

(b) Less economic and more formalistic approach

4.6 The 2008 Guidance Paper's achievement was its focus on an economic approach over legalistic formalism, emphasising the function, and likely anti-competitive effects of the practices rather than their form (i.e. what is the "theory of harm" behind the intervention). The Draft Guidelines, however, revert to a formalistic categorisation of practices into three groups: (i) those few practices that amount to "[c]*onduct for which it is necessary to demonstrate a capability to produce exclusionary effects*", (ii) the vast majority of practices that are "*presumed to lead to exclusionary effects*", and (iii) "*naked restrictions*", which in effect are seen as "by object" abusive.

4.7 This categorisation is purely formalistic and not economically grounded, relying on external characteristics rather than economic similarity or likely exclusionary effects. For example, paragraph 60(b), third sentence of the Draft Guidelines presumes exclusionary effects based on the external characteristics of a practice ("*factual existence of conduct*"): "*Once the factual existence of the relevant conduct is established, if need be under the conditions established in the specific legal test, its exclusionary effects can be presumed*".

4.8 The Draft Guidelines' approach results in arbitrary and form-based distinctions, leading to different evidentiary burdens for similar practices. For example, self-preferencing (subject to the effects-based analysis) and tying (some forms of which are subject to a presumption) are treated differently despite their economic similarities; tying is a form of self-preferencing. Likewise, rebates that are conditional on exclusivity are treated differently from retroactive rebates that can be very similar, especially when they are based on a fixed threshold that is equal or close to the total requirements of a customer. The Draft Guidelines should instead focus on the theory of harm to categorise the conduct.

4.9 The introduction of presumptions for various practices is the most striking element of formalism. While "light" presumptions easing the evidentiary burden for competition authorities can align with an effects-based approach, a shifting or allocation of the evidentiary burden, as stated in footnote 131 of the Draft Guidelines, that means that the Commission does not bear any burden other than establishing the external

[26] Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763, paragraph 164.

[27] Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] EU:C:2012:172, paragraph 22 and Case C-413/14 P, *Intel v Commission* [2017] EU:C:2017:632, paragraph 134.

[28] Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763, paragraph 164; *European Superleague*, Case C-333/21, *European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* [2023] EU:C:2023:1011, paragraphs 126 and 127 .

characteristics of a certain practice, is pure formalism. In addition, such formalism is not compliant with the case law.

4.10 The Draft Guidelines should avoid arbitrary form-based distinctions and ensure alignment with case law, which does not support "hard" presumptions for the first stage of the analysis under Article 102 TFEU, i.e. for whether certain conduct is likely to foreclose. Indeed, "*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*"[29] and the benefit of any doubt "*must be given to the undertaking accused*".[30]

4.11 The competition authority must "*demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question* […] *which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position*".[31] The Draft Guidelines' suggestion that the investigated undertaking bears an evidentiary burden to rebut any form of presumption lacks support in case law.[32] Similarly, the Draft Guidelines' claim in paragraph 60 (b) that certain types of conduct can be presumed to be capable of producing exclusionary effects lacks support in case law including the sole reference to *Google Android*, paragraph 428, cited in footnote 138 (the judgment discusses no presumption). These elements may reflect the Commission's own wishes, but not the EU Courts' case law.

4.12 The Court of Justice specifies that "hard" presumptions, in the sense of allocating, or shifting, the burden of proof, apply only to the second stage of the analysis, where the dominant undertaking must prove objective justifications or efficiencies.[33] The final Guidelines should reflect this and not introduce unsupported presumptions. Indeed, while it is for the investigated firm to raise any plea of objective justification before the end of the administrative procedure, the burden of proof of the existence of the circumstances that constitute an infringement of Article 102 TFEU is always borne by the Commission.[34] When the Commission proposes to make a finding of an abuse of dominance it will have to show that the arguments and evidence relied on by the firm in advancing its plea of objective justification cannot prevail.[35]

4.13 Most case law references in the Draft Guidelines do not support the proposed presumptions but rather explain that the standards for proving infringements may vary according to the facts and findings in each case.

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[29] Case C-240/22 P, *Intel Corporation v Commission* [2024] EU:C:2024:915, paragraph 328.

[30] Case C-89/11 P, *E.ON Energie v Commission* [2012] EU:C:2012:738, paragraphs 71 and 72.

[31] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33, paragraph 40.

[32] Case C-413/14 P, *Intel v Commission* [2017] EU:C:2017:632, paragraph 138; Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33, paragraphs 47-48.

[33] see e.g. Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] EU:C:2012:172, paragraph 42; Case C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority* [2020] EU:C:2020:52, paragraph 166; Case T-604/18, *Google and Alphabet v Commission (Google Android)*, [2022] EU:T:2022:541, paragraph 602.

[34] see, e.g., Case T-604/18, *Google and Alphabet v Commission (Google Android)* [2022] EU:T:2022:541, paragraph 601; Case T-201/04, *Microsoft Corp. v Commission* [2007] EU:T:2007:289, paragraph 688.

[35] Case T-201/04, *Microsoft Corp. v Commission* [2007] EU:T:2007:289, paragraphs 688 and 1144.

(c) Missed opportunity to elucidate the concept of "competition on the merits"

4.14 The latest case law establishes two cumulative conditions for an Article 102 TFEU violation: (i) conduct against competition on the merits and (ii) likelihood of anti-competitive effects. The Draft Guidelines should have clarified the concept of "competition on the merits" and should have followed a principled approach on how to distinguish conduct on this basis.

4.15 Unfortunately, Section 3.2.2 of the Draft Guidelines only lists instances where the EU Courts have referred to conduct against "competition on the merits", but these references are taken out of context and could lead to significant Type I errors. This is also a negative definition rather than a positive definition.

4.16 Some of the references in paragraph 55 are particularly concerning, such as those related to: (i) consumer choice ("*the dominant undertaking prevents consumers from exercising their choice based on the merits of the products, including product quality*"), (ii) violations of other legal rules ("*the dominant undertaking violates rules in other areas of law (for instance, data protection law) and thereby affects a relevant parameter of competition, such as price, choice, quality or innovation*"), (iii) self-preferencing ("*the dominant undertaking* […] *enables, biased or discriminatory treatment that favours itself over its competitors*"), (iv) changes in prior behaviour ("*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, such as an unjustified termination of an existing business relationship*". Just like the reference "*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*", these references are very open-ended and could lead to over-inclusion.

4.17 In fact, very recently, in *Google Shopping*,[36] the Court of Justice rejected the notion that bias or discrimination favouring a dominant company's own products departs from competition on the merits. In the Court's words, "*it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits irrespective of the circumstances of the case*". This is indicative of the broader problem of the casuistic approach of paragraph 55 of the Draft Guidelines.

4.18 Instead of a casuistic list of cases, the final Guidelines should develop a more principled approach grounded in economics and the incentives and disincentives of dominant companies. This would provide clearer guidance and avoid undue over-inclusion.

5. <u>Individual Practices</u>

5.1 The Draft Guidelines, in the second part (paragraph 76 *et seq.*), contain the Commission's interpretation of the legal tests that apply to specific practices. The Commission's analysis departs from the approach followed in the 2008 Guidance

[36] Case C-48/22 P, *Google LLC and Alphabet Inc. v Commission* [2024] EU:C:2024:726, paragraph 189.

Paper, which included several (soft) safe harbours, some of them based on self-administrable tests of legality that do not require information on rivals. We cannot but view this departure from the previous approach with some regret, since it is important to recognise the value that these tests provide to dominant companies attempting to comply with competition law *ex ante*. The so-called AEC test is one of these tools.

5.2 Although some of the legal tests are well-grounded in case law, there are several instances (as illustrated below) where the Draft Guidelines do not align with established case law. This is an overarching concern. The ECLF recommends that the final Guidelines should better reflect the case law or at least acknowledge that the Guidelines is a departure from recent case law and provide a justification for this departure.

(a) Exclusivity rebates and exclusive dealing

5.3 With respect to the analysis of exclusive dealing, the following amendments are warranted.

5.4 First, the principal concerns with respect to the Draft Guidelines' approach to "presumptions" have been explained above at paragraphs 4.8 to 4.10. The recent case law on exclusive dealing illustrates these concerns well: "*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*".[37]

5.5 In this ruling, the Court of Justice referred to the 2008 Guidance Paper (paragraph 36) to illustrate factors to be included, as part of an effects-based analysis, as to the capacity of exclusive purchasing arrangements to anti-competitively foreclose rivals. In the same vein, the General Court's ruling in *Qualcomm (exclusivity)*[38] confirms that alleged exclusivity clauses can only be anticompetitive if, in fact, they are capable of foreclosing rivals and that the Commission must take proper account of "*all the relevant factual circumstances surrounding the conduct concerned*" rather than resort to presumptions. As cases like *Unilever Italia*[39] and *Intel*[40] have shown, this is a matter of both substance and due process.

5.6 Second, with respect to the effects of exclusive dealing, the Draft Guidelines should be amended, as per paragraph 4.3 above, by replacing reference to the generic "*exclusionary effects*" (e.g., paragraph 82), with references to "*excluding an 'as-efficient' competitor*" which is the term used in the case law discussed above.

5.7 Third, the Draft Guidelines no longer view exclusivity rebates as a pricing abuse that is subject to evaluation using numerical tools, like the AEC test. Instead, they group exclusivity rebates with exclusive dealing, considering both as presumptively abusive. However, in addition to the discussion of presumptions above, this approach runs counter to the most recent case law of the Court of Justice under which the capacity of loyalty rebates "*to foreclose a competitor as efficient as the dominant undertaking* […]

[37] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33, paragraph 51.

[38] Case T-235/18, *Qualcomm, Inc. v Commission*, [2022] EU:T:2022:358, paragraph 411.

[39] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33.

[40] Case C-413/14 P, *Intel v Commission* [2017] EU:C:2017:632.

must be assessed, as a general rule, using the AEC test" because that test "*seeks specifically to assess whether such an as-efficient competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position and, consequently, whether that conduct must be considered to come within the scope of normal competition, that is to say, competition on the merits*".[41]

(b) Tying and Bundling

5.8 With respect to the analysis of tying and bundling, for instance the following amendments are warranted.

5.9 First, with respect to the effects of tying and bundling, the Draft Guidelines should be amended, as per paragraph 4.3 above, by replacing reference to the generic "*exclusionary effects*" (*e.g.*, paragraph 93), with references to "*excluding an 'as-efficient' competitor*" which is the term used in the case law discussed above.

5.10 Second, in paragraph 95 the Draft Guidelines states, in reference (footnote 233) to passages in old case law that simply summarises the Commission's own (rather than the Courts') findings, that certain forms of tying are presumed to produce exclusionary effects even though the Commission has always brought tying cases under an effects-based approach.[42] That does not lend support to any form of presumption.

5.11 Third, the Draft Guidelines lack of a clear distinction between tying practices that supposedly fall under the presumption and those requiring a full-fledged effects-based analysis beyond a mere reference to "*depending on the specific circumstances of the case*". This creates unpredictability rather than the desired legal certainty that guidelines should provide. This unpredictability was also noted in the Draghi Report[43]: "*As an example, tying can be presumed to have exclusionary effects, but the Guidelines do not detail under which conditions*"). Admittedly, the Draft Guidelines were published prior to the Draghi Report. However, it is recommended that the Commission, which commissioned the Draghi Report, pay close attention and reflect his observations in the final Guidance.

(c) Refusal to supply and access restrictions

5.12 With respect to the analysis of refusal to supply and access conditions, the following amendments are warranted.

5.13 First, paragraph 97 of the Draft Guidelines deviates from the 2008 Guidance Paper in distinguishing between refusal to supply practices and so-called "*access restrictions*" (or "constructive refusals to supply"). The latter practices are examined under an effects-based approach without requiring the *Bronner*[44] test to be satisfied, including

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[41] Case C-240/22 P, *Intel Corporation v Commission* [2024] EU:C:2024:915, paragraphs 180 and 181.

[42] e.g, Case T-201/04, *Microsoft Corp. v Commission* [2007] EU:T:2007:289; Case T-604/18, *Google and Alphabet v Commission (Google Android)* [2022] EU:T:2022:541.

[43] European Commission, *The future of European competitiveness: Report by Mario Draghi*, 9 September 2024, p. 304.

[44] Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] EU:C:1998:569.

the condition of "indispensability". While this aligns with recent case law,[45] additional clarity is expected from the forthcoming judgment of the Court of Justice in the *Google Android Auto* case[46] and it is recommended to reserve the position pending the outcome of that case.

5.14 Second, as regards the indispensability condition that applies to "pure" refusal to supply cases (paragraphs 99(a) and 101 (d)), the Draft Guidelines state that "*access to the input is necessary for the requesting firm to remain viably on the market and exert an effective competitive constraint*" (emphasis added). This unsupported definition is at odds with the case law of the Court of Justice, which specifies the indispensability condition in the following terms: "*indispensable to carrying on that undertaking's business, inasmuch as there is no actual or potential substitute in existence for that infrastructure*".[47]

5.15 Third, as regards the elimination of competition condition, the Draft Guidelines are inconsistent. Paragraph 99(b) references, as per the case law, "*capability to eliminate all competition on the part of the requesting undertaking*", whereas paragraph 103 refers to "*capability to eliminate all effective competition on the part of the requesting undertaking*" but the word "effective" is not to be found in the Court of Justice cases and paragraphs cited in the respective footnote (footnote 246).

5.16 Fourth, when it comes to "access restrictions", the Draft Guidelines align with the recent case law that has reduced the scope of application of *Bronner*.[48] However, the open-ended nature of the tests describing the abusive elements of "access restrictions" creates uncertainty. The reference to a dominant company developing "*an input for the declared purpose of sharing it widely with third parties*" (paragraph 166(d)) could impose far reaching equal treatment and access duties on dominant companies vis-à-vis services and products developed for commercialisation.

5.17 Fifth, it is also surprising that the Draft Guidelines treat discontinuation of supply not as a special case of refusal to supply but instead propose to treat it in the same way as "access restrictions" (paragraph 166(a) in conjunction with paragraph 164). This is unwarranted and at variance with the case law,[49] which considers discontinuation of supply as a special form of refusal to supply, for which the condition of indispensability may not be required, but the other conditions, in particular the condition about the elimination of all competition must be fulfilled. In addition, the Draft Guidelines (paragraph 166(a)) use too open-ended a language when stating that "*dominant undertakings cannot cease supplying existing customers who are competing with them*

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[45] Case T-851/14, *Slovak Telekom, a.s. v Commission* [2018] EU:T:2018:929; *Case C-42/21 P, Lietuvos geležinkeliai AB v Commission* [2023] ECLI:EU:C:2023:12; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763.

[46] Case C-233/23 *Alphabet Inc. and others v Autorità Garante della Concorrenza e del Mercato and others.*

[47] Case C-48/22 P, *Google LLC and Alphabet Inc. v Commission* [2024] EU:C:2024:726, paragraph 89 with references also to Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] EU:C:1998:569 and Case C-42/21 P, *Lietuvos geležinkeliai AB v Commission* [2023] ECLI:EU:C:2023:12.

[48] Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] EU:C:1998:569; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763.

[49] e.g., Joined cases C-6/73 and C-7/73, *Istituto Chemioterapico Italiano and Commercial Solvents Corporation v Commission* [1974] EU:C:1974:18.

in a downstream market, if the customers abide by regular commercial practices and the orders placed by them are in no way out of the ordinary". However, dominant companies must be able to change their business models and even - sometimes - the products/services they offer.

(d) Predatory pricing

5.18 With respect to the assessment of predatory pricing, the following amendments are warranted.

5.19 First, regarding predation involving prices between AVC and ATC, the Draft Guidelines (paragraph 111 (b)) should explain why such prices may be abusive. The General Court has held that these prices are "*capable of excluding an 'as-efficient' competitor, which corresponds to what the Commission must demonstrate when applying the 'as-efficient' competitor test in order to prove that an anticompetitive practice has foreclosure potential*".[50] The AEC-test is an inherent part of the test.

5.20 Second, the final Guidelines should reflect case law specifying that prices between AVC and ATC are deemed abusive if part of a plan "*for eliminating a competitor*" (see cases cited in footnotes 261, 263), rather than a plan to "*eliminate or reduce competition in the general market*" as stated in the Draft Guidelines (paragraph 111(b)). The distinction is important, as the case law requires proof of a plan with a specific aim - to "*eliminate*" a specific competitor – not just "*marginalise*" a competitor or generically "*reduce*" competition in the market.

5.21 Third, with respect to the effects of predatory pricing, the Draft Guidelines should replace references to generic "*exclusionary effects*" (*e.g.*, paragraph 112), with "*excluding an 'as-efficient' competitor*" as used in the case law discussed above. The use of the generic terms creates ambiguity and may lead to Type I errors. Perhaps the Commission has decided that it prefers Type I errors to Type II errors, which is a policy choice and the Commission's prerogative (to the extent this does not contradict the case law), but an explanation for such policy choice would be helpful to be able to follow the Commission's thinking.

5.22 Fourth, in the context of price and cost data, paragraph 118 of the Draft Guidelines includes a cryptic, unsupported statement, suggesting that "*it may be appropriate to account for opportunity costs of the dominant undertaking*" in the price-cost test. This statement without limiting principles should be clarified or removed.

5.23 Fifth, paragraph 57 of the Draft Guidelines includes an unsupported statement (in the part not dealing with predation) that pricing above ATC "*may, in specific circumstances, be found to depart from competition on the merits*". Although this does not purport that the conduct would amount to predatory pricing, a clarification would be welcome, or the statement should be removed to avoid confusion.

(e) Margin squeeze

5.24 With respect to the assessment of margin squeeze, the following amendments are warranted.

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[50] Commission Decision of 18.7.2019 in Case AT.39711 – *Qualcomm (Predation)*, paragraph 526.

5.25 First, regarding the effects of margin squeeze, as per the discussion at paragraph 4.3 above, the Draft Guidelines should replace references to generic "exclusionary effects" (e.g., paragraphs 122(c), 127, 128), with references to "*anti-competitive effects*".[51] Moreover, "*exclusionary effects*" capable of making market entry more difficult or impossible should affect "*competitors who are at least as efficient as the dominant*" firm.[52] The case law references at footnote 292 do not support the positioning in paragraph 127 of the Draft Guidelines. Additionally, paragraph 127 should reflect that, while the upstream input may not need to be "*indispensable*", if it is not, "*a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially*".[53]

5.26 Second, paragraph 128 of the Draft Guidelines states that "*exclusionary effects*" can be "*presumed*" where the price-cost test has a negative spread. This should be changed to reflect the case law cited (footnote 296), which indicates that negative margins suggest "*an effect which is at least potentially exclusionary is probable*" in view of the fact that "*in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss*".[54] This does not establish any presumption. It is simply a rule on the evaluation of evidence.

5.27 Third, paragraph 129 of the Draft Guidelines refers to "*capability of the conduct to produce exclusionary effects*" in the context of positive spreads. The cited case law (footnote 298), however, requires demonstrating that the pricing was "*likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned*".[55] The final Guidelines should be rephrased accordingly.

(f) Rebates other than exclusivity rebates

5.28 For conditional rebates not based on *de iure* or *de facto* exclusivity, the Draft Guidelines adopt an effects-based analysis, however, certain amendments are warranted.

5.29 First, with respect to the effects, the Draft Guidelines should, as per paragraph 4.3 above, replace the reference to the generic "*exclusionary effects*" (e.g., paragraphs 142, 145), with references to "*excluding an 'as-efficient' competitor*" which is the term used in the case law.[56]

5.30 Second, paragraph 143 the Draft Guidelines implies that a price-cost test (the AEC test) is entirely discretionary ("*may be appropriate to make use of a price-cost test*" – paragraph 143) in the analysis of conditional rebate schemes. Recent case law, while not establishing a legal obligation to always have recourse to the AEC test, makes clear that a test of that nature "*may be inappropriate in particular in the case of certain non-pricing practices […] or where the relevant market is protected by significant barriers*" and "*even in the case of non-pricing practices, the relevance of such a test cannot be*

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[51] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] EU:C:2011:83, paragraph 61.

[52] Case C-280/08 P, *Deutsche Telekom v Commission* [2010] EU:C:2010:603, paragraph 253.

[53] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] EU:C:2011:83, paragraph 72.

[54] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] EU:C:2011:83, paragraph 73.

[55] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] EU:C:2011:83, paragraph 74.

[56] e.g., Case C-377/20, *Servizio Elettrico Nazionale and Others v. Autorità Garante della Concorrenza e del Mercato and Others* [2022] EU:C:2022:379, paragraph 71.

ruled out".[57] It is submitted that this limits any discretion significantly, given that the analysis concerns pricing practices with the overall aim of verifying the potential to exclude an as-efficient competitor. In fact, the capability of rebates to foreclose rivals should, as a rule, be assessed using the AEC test, as discussed above at paragraph 5.7 and when presented with an AEC analysis by the undertaking concerned a competition authority is required to consider its probative value.[58]

5.31 Third, paragraph 143(b) the Draft Guidelines suggests that an AEC test may not be appropriate where "*the emergence of an as-efficient competitor would be practically impossible, for instance, because of the dominant undertaking's very large market share or the presence of significant barriers to entry or expansion in the market, or the existence of regulatory constraints*" (paragraph 144(b)). In the same paragraph, the Draft Guidelines posit that, in the circumstances given, even a less effective competitor may genuinely constrain the dominant firm. This statement relies (footnote 315) on *Post Danmark II*,[59] where the Court clarified that the structure of the market in issue made the emergence of an as-efficient competitor "*practically impossible*" given the dominant firm's statutory monopoly. So, when it was practically impossible for an as efficient competitor to emerge, the emergence of a less efficient rival "*might contribute to intensifying the competitive pressure*" (paragraph 60). However, that ruling does not establish a general rule, but deals with a rather specific situation. In addition, this ruling predates *Intel*, in which this case was not mentioned at all.

5.32 Fourth, paragraph 145(d) of the Draft Guidelines labels certain individualised rebates as "loyalty inducing" and potentially suspect. Such rebates are "*in general more capable of producing exclusionary effects because they allow the dominant undertaking to target the rebate thresholds to each customer's size/ demand, thereby enhancing the loyalty effects*" (paragraph 145(d)), with a reference (footnote 323) to *Tomra*.[60] That cited part of the judgment makes clear that this concerned rebates that were retroactive and individualised to give customers strong incentives to source all or almost all requirements from the dominant firm and artificially generated switching costs for the customers. The Court found that, for a substantial part of demand, there were no proper substitutes for the dominant firm. Consequently, this older case law on retroactive, individualised, exclusivity rebates, does not establish a general rule for individualized rebates as such.

5.33 Fifth, and most importantly, the Draft Guidelines do not refer to "coverage" as a factor that must be considered as part of the effects-based analysis. This omission should be corrected in line with case law holding that "*the extent of that conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the undertaking in a dominant position is, at least, for part of the demand, an inevitable partner, must be taken into account*" (").[61] The omission is also difficult to reconcile to the Draft

[57] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33, paragraphs 57-58.

[58] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33, paragraph 60.

[59] Case C-23/14, *Post Danmark A/S v Konkurrencerådet* [2015] EU:C:2015:651, paragraph 59.

[60] Case T-155/06, *Tomra Systems and Others v Commission* [2010] EU:T:2010:370.

[61] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023] EU:C:2023:33, paragraph 44; see also Case C-413/14 P, *Intel v Commission* [2017] EU:C:2017:632, paragraph 139, referring to "*the share of the market covered by the challenged practice*".

Guidelines accepting the relevance of coverage for rebutting exclusivity rebates presumptions but deny its relevance for loyalty rebates (which are seen as less anti-competitive by the Draft Guidelines). This inconsistency should be addressed.

(g) Self-preferencing

5.34 The Draft Guidelines include a new section on self-preferencing, an effects-based practice. The section appears to be generally aligned with the recent *Google Shopping* judgment. However, certain amendments are warranted.

5.35 First, the Draft Guidelines should elucidate the critical contextual circumstances that can render self-preferencing abusive. The General Court held that not every leveraging practice is anti-competitive,[62] as mentioned in paragraph 4.18. That means that a dominant company's growth in adjacent markets as such is not problematic, absent other anti-competitive elements. Dominant companies are not under a general duty to treat all customers, partners and service providers and suppliers equally.

5.36 The Court of Justice also noted in that case that the Commission's analysis (as upheld by the General Court), considered the characteristics of the upstream market and specific circumstances. The conduct at issue (consisting of highlighted presentation of own results and demotion of rivals'), was discriminatory and did not fall within the scope of competition on the merits.[63]

5.37 Second, considering this, a contextual explanation would be particularly important for paragraph 159 of the Draft Guidelines, which states that "[p]*referential treatment can concern, for example, the positioning or display of the leveraged product in the leveraging market, manipulating consumer behaviour and choice or manipulating auctions. Preferential treatment can also consist of a combination or succession of different practices over time*". As currently drafted, these explanations are open-ended and create unnecessary uncertainty.

[62] Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763, paragraph 186.

[63] Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763, paragraph 187.

ANNEX 1

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