



## EUROPEAN COMMISSION DRAFT GUIDELINES ON EXCLUSIONARY ABUSES OF DOMINANCE

### GOOGLE RESPONSE TO COMMISSION CONSULTATION

#### Introduction

1. The Draft Guidelines have the stated goal of “*enhanc[ing] legal certainty*” and promoting the application of Article 102 “*in a predictable and transparent manner*” so that businesses can “*self-assess whether their conduct constitutes an exclusionary abuse*”, also to the benefit of “*national courts and national competition authorities [...] in their application of Article 102.*”<sup>1</sup> The Call for Evidence clarified that “[t]he guidelines will codify the case law of the EU courts” and that “[t]his initiative does not involve policy choices as the guidelines will be based on the case law of the EU courts and of the Commission’s enforcement practice developed in line with it.”<sup>2</sup> Google welcomes the Commission’s initiative. A clear framework for the application of Article 102 benefits all stakeholders: incumbents, the companies with which they compete, and the competition authorities and courts called upon to evaluate their conduct.<sup>3</sup>
2. However, the Draft Guidelines fall short of providing predictability and legal certainty for businesses.<sup>4</sup> The Commission recognizes that the Union Courts have developed a “*heightened substantive legal standard*” and raised “*the bar for intervention*” in Article 102 cases.<sup>5</sup> Yet the Draft Guidelines offer fewer limiting principles for the exercise of the Commission’s enforcement powers than either their predecessor, or the case law. Rather than “codify” precedents, the Draft Guidelines appear to set out a new enforcement framework that prioritizes administrative discretion over predictability and legal certainty. This risks chilling innovation and legitimate commercial activity by businesses and would invite vexatious third-party complaints.

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<sup>1</sup> Draft Guidelines, paras. 4 and 8.

<sup>2</sup> Call for Evidence, p. 2.

<sup>3</sup> See also CJEU, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, para. 44; and CJEU, judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, para. 202 in which the Court ruled that aligning the price/cost test on the dominant undertaking itself, rather than of the price and cost data of actual or potential competitors is “*in line with the principle of legal certainty to enable dominant undertakings to assess the lawfulness of its own conduct*”.

<sup>4</sup> Former judge Nils Wahl stated at a recent conference that the Courts’ “*new concepts designed to characterize illegal conduct [are] vague*”. See N. Hirst, *Wahl warns of EU court’s ‘slippery slope’ on antitrust abuses and effects*, 12 September 2024, MLex.

<sup>5</sup> Competition Policy Brief, Issue 1, March 2023, pp. 2 and 4.

3. Google has commented on prior Commission communications that informed the Draft Guidelines. Google offers the following supplemental reflections on specific areas of the text, while referring the Commission also to its prior remarks.<sup>6</sup>

## **Observations**

### **I. The Draft Guidelines should restate the primacy of consumer welfare**

4. The EU Court of Justice (the “CJEU”) has stated clearly that consumer welfare is “*the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position*”.<sup>7</sup> The Commission should ensure that the Draft Guidelines align with that objective and confirm the primacy of the consumer welfare standard.
5. The Draft Guidelines define “*genuine, undistorted competition in the internal market (“effective competition”)*” as the goal pursued by EU competition law, and state that, according to the Union Courts’ case-law, Article 102 applies to practices that harm consumer welfare. However, the Draft Guidelines list other goals alongside consumer welfare, such as “*open and dynamic*” markets, “*new opportunities for innovative players [...] and start-ups to operate on a level playing field*”, “*sustainable development*” or even “*strong and diversified supply chains*”.<sup>8</sup>
6. Enforcement by reference to the consumer welfare standard can promote other objectives. For example, by targeting conduct that would exclude as-efficient rivals, the consumer welfare standard can encourage innovators to find new ways of unlocking production or distribution efficiencies including through diversifying their supply chains. But these indirect objectives are too imprecise or subjective to be the primary goal of Article 102 enforcement which may lead to burdensome remedies, very significant financial penalties, and exposure to follow-on damages claims. Consumer welfare serves a critical, disciplining function, ensuring that administrative action can be tied back to measurable consumer benefits and that the antitrust laws do not conflict or overlap with other instruments or legal disciplines.<sup>9</sup>
7. Google agrees that it is helpful for the Draft Guidelines to explain the overriding goals of Article 102. The Draft Guidelines could provide further guidance by illustrating the Commission’s understanding, for example, of what form(s) harm to consumer welfare

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<sup>6</sup> Google Response to the European Commission’s Call for Evidence (24 April 2023).

<sup>7</sup> CJEU, judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, para. 46.

<sup>8</sup> Draft Guidelines, para. 1. These new notions echo the Policy Brief, which presented consumer welfare as one among “*multiple goals*” of competition enforcement, such as “*fairness and level-playing field*”, “*preserving competitive process*” and “*plurality and democracy*”. See also, Policy Brief, p. 1.

<sup>9</sup> Fairness, contestability and a level-playing field are the goals pursued by other EU rules, particularly by the Digital Markets Act. The EU legislature has taken the view that those objectives are different from the objectives pursued by the competition rules. See, e.g., Digital Markets Act, Recital 11.

may take in an online context; notably, whether the notion is confined to traditional competitive metrics such as price, quality, output and innovation or also encompasses other user benefits such as protection against online abuses (e.g., fraud, identity theft). If the final version of the Draft Guidelines nonetheless retains an expanded inventory of enforcement goals, the Commission must at a minimum set out a hierarchy between these objectives, with consumer welfare prevailing in case of conflict.

## **II. The Draft Guidelines should provide a positive definition of “competition on the merits”**

8. The Draft Guidelines should promote a positive definition of “competition on the merits” based on the Union Courts’ case law so that businesses can better evaluate their proposed conduct.
9. The Draft Guidelines set out a two-stage test for exclusionary abuse. First, evaluating “whether the conduct departs from competition on the merits” and, second, “whether the conduct is capable of having exclusionary effects”.<sup>10</sup> Google agrees with the Draft Guidelines’ recognition that Union case law on Article 102 requires a departure from competition on the merits and that this test forms a distinct analytical stage, separate from the assessment of exclusionary effects. The Draft Guidelines enshrine the principle as an important corrective to avoid Type 1 enforcement errors.
10. However, experience has shown that the concept of “competition on the merits” is challenging to define in isolation.<sup>11</sup> It is trite that, under Article 102, otherwise economically rational conduct – such as refusing to supply a rival with infrastructure constructed and developed at considerable expense and risk – may, in specific circumstances, fall afoul of antitrust rules when undertaken by a dominant company.<sup>12</sup> Outside extreme scenarios of economic irrationality such as the intentional, profit-sacrificing destruction of infrastructure used by a rival, there is less consensus around when competition departs from “the merits”.<sup>13</sup>
11. The Draft Guidelines volunteer examples from the Union Courts’ case law of what is *not* “competition on the merits”.<sup>14</sup> But a list of negatives is of little practical use to

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<sup>10</sup> Draft Guidelines, para. 45.

<sup>11</sup> Former judge Nils Wahl recently stated that he was “*baffled by the term competition on the merits... [and] couldn’t really explain it [...], it is some kind of fairness idea.*” See Nicholas Hirst, *Wahl warns of EU court’s ‘slippery slope’ on antitrust abuses and effects*, 12 September 2024, MLex.

<sup>12</sup> See Draft Guidelines, para. 52 (“*a dominant undertaking may have to refrain from engaging in certain practices that are unobjectionable for undertakings that do not hold a dominant position. The mere circumstance that the conduct is also implemented by non-dominant undertakings in the market is not sufficient to exclude that it departs from competition on the merits*”).

<sup>13</sup> See, e.g., Pablo Ibáñez Colomo, *Competition on the Merits*, 20 December 2023, Common Market Law Review.

<sup>14</sup> Draft Guidelines, para. 55.

businesses assessing product and service improvements that do not correspond closely to these prior fact patterns. The Draft Guidelines would serve as a more helpful roadmap for businesses (and national courts) if they promoted a positive definition of “*competition on the merits*”.

12. The CJEU in *ENEL* sought to define “*competition on the merits*” as a concept that covers “*a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. Thus, [...], conduct which has the effect of broadening consumer choice by putting new goods on the market or by increasing the quantity or quality of the goods already on offer must, inter alia, be considered to come within the scope of competition on the merits*”.<sup>15</sup>
13. The Draft Guidelines could therefore, while remaining consistent with the case law, frame the evaluation of “*competition on the merits*” in more positive terms than they do currently. Following the Court’s observations in *ENEL*, the statement should, at a minimum, operate to protect any conduct by which a dominant company betters rivals through superior efficiency or by providing products or services that consumers find more attractive.

### **III. The Draft Guidelines should reassert the relevance of the as-efficient competitor (“AEC”) principle**

14. Businesses will struggle to evaluate the risk associated with a proposed course of conduct if they must in all cases avoid adverse effects on as- and less-efficient rivals alike. The Draft Guidelines should define more clearly in which circumstances dominant companies must accommodate the vulnerability of less efficient rivals.
15. The Draft Guidelines undermine the AEC principle, by expanding the circumstances in which the Commission may challenge harm to less-efficient rivals under Article 102. The Draft Guidelines state that the AEC principle is unnecessary because “*a less efficient competitor may also exert a genuine constraint on the dominant undertaking*”, regardless of the category of abuse at issue.<sup>16</sup>

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<sup>15</sup> CJEU, judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, para. 85. The Union Courts have held, furthermore, that the notion of “*competition on the merits*” should not vary according to the company’s market position, which implies that the notion may serve as an objective standard regardless of market share. See GC, judgment of 10 November 2021, *Google Shopping*, T-612/17, EU:T:2021:763, paras. 159-162.

<sup>16</sup> Draft Guidelines, para. 144. With respect to rebates specifically, the same paragraph adds, further, that the AEC price-cost test may be inappropriate in rebate cases involving non-monetary inducements or where market shares, barriers to entry, regulatory constraints or other features suggests it may be “*practically impossible*” for a competitor to achieve comparable efficiency while a dominant undertaking is in situ. The Draft Guidelines exclude the application of the AEC [test] for “*exclusivity rebates*” (disregarding that the factual distinction between “*loyalty-inducing*” and “*exclusivity*” rebates may be fine to the point of arbitrary as illustrated in CJEU, judgment of 16 December 1975, *Suiker Unie v*

16. Google recalls that, as a general matter, it is not the role of Article 102 to “*ensure that competitors less efficient than the undertaking with the dominant position should remain on the market*”.<sup>17</sup> Moreover, the Union Courts have stated affirmatively that if the dominant undertaking presents evidence relating to the AEC principle during the administrative procedure, the reviewing authority “*is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.*”<sup>18</sup>
17. There is, in short, no basis to justify abandoning the presumptive relevance of evaluating exclusionary effects by reference to as-efficient rivals. The Draft Guidelines should reassert the relevance of the AEC principle. If the Commission wishes to depart from this baseline, contrary to the case law of the Union Courts, it must provide more prescriptive guidance for when it considers the AEC principle is inappropriate.

#### **IV. The Draft Guidelines should reaffirm the importance of counterfactual analysis**

18. Similarly, the Draft Guidelines provide only lukewarm support for the use of counterfactuals in Article 102. The Commission should not discourage businesses from using this established analytical tool to evaluate antitrust risk.
19. The Article 102 Guidance Paper established an expectation that a counterfactual analysis “*will usually be made*” under Article 102. The approach reflected the established position that Article 101 and Article 102 – which must be “*interpreted and applied consistently*”<sup>19</sup> – require a causal link between the impugned conduct and the

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Commission, C-40/73, EU:C:1975:174, para. 499 and CJEU, judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, para. 89).

<sup>17</sup> CJEU, judgment of 27 March 2012, *Post Danmark I*, C-209/10, EU:C:2011:342, para. 21.

<sup>18</sup> CJEU, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para. 139; and CJEU, judgment of 27 March 2012, *Post Danmark I*, C-209/10, EU:C:2012:172, para. 29. See also the remarks of former CJEU judge, Nils Wahl: “*It seems to me, for something to be of an exclusionary character, it does not suffice, in that sense, that you exclude not as efficient competitors,*” and “[y]ou need to exclude as efficient competitors. Otherwise, where’s the exclusionary effect? Or at least that’s what the court said in *Intel*.” N. Hirst, *Wahl warns of EU court’s ‘slippery slope’ on antitrust abuses and effects*, 12 September 2024, Mlex. See also CJEU, judgment of 6 September 2017, *Intel*, EU:C:2017:632, para. 140.

<sup>19</sup> CJEU, judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, para. 119.

adverse effects on competition.<sup>20</sup> Indeed, the same conduct may be assessed under both provisions.<sup>21</sup>

20. However, the Draft Guidelines instead indicate that counterfactuals may only be appropriate “[i]n *certain cases*” under Article 102, *i.e.*, that they might become the exception rather than the rule. The Draft Guidelines propose that “*such comparison may not be required in particular where the conduct of the undertaking has made it very difficult or impossible to ascertain the objective causes of observed market developments*”.<sup>22</sup> Case law since the publication of the Article 102 Guidance Paper does not support this change.<sup>23</sup> Nor is there an obvious, conceptual reason why a counterfactual analysis would be more difficult in the case of Article 102 than Article 101, where its importance is firmly established. It should be possible in each case to identify a focal period for the anti-competitive practice under examination and a pre-practice *status quo* to serve as the baseline scenario. The requirement to develop a realistic baseline scenario does not appear to be unduly burdensome. As the Article 102 Guidance Paper noted, this could be as “*simple*” as “*the absence of the conduct in question or [...] another realistic alternative scenario, having regard to established business practices*”.<sup>24</sup>

21. There is no obvious justification for discarding tools that are capable of lending rigor to a complex factual and legal analysis. Google encourages the Commission to restore the counterfactual to the status it was afforded in the Article 102 Guidance Paper, elevating the counterfactual to an expected feature of Article 102 enforcement.

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<sup>20</sup> With respect to Article 101 TFEU, see CJEU, judgment of 30 January 2020, *Generics v Commission*, C-307/18, EU:C:2020:52, para. 118; and CJEU, judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, para. 161. With respect to Article 102, see CJEU, judgment of 10 September 2024, *Google Shopping*, C-48/22 P, EU:C:2024:726, para. 224; and CJEU, judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, para. 199.

<sup>21</sup> See, e.g., CJEU, judgment of 21 December 2023, *Superleague*, C-333/21, EU:C:2022:993; CJEU, judgment of 30 January 2020, *Generics*, C-307/18, EU:C:2020:52; and GC, judgment of 23 October 2003, *Van den Bergh Foods*, T-65/98, EU:T:2003:281.

<sup>22</sup> Draft Guidelines, para. 67. The CJEU did not endorse the GC’s doubts regarding the benefits of counterfactual analysis in Article 102 cases. See CJEU, judgment of 10 September 2024, *Google Shopping*, C-48/22 P, EU:C:2024:726, paras. 231-232.

<sup>23</sup> See, e.g., GC, judgment of 15 June 2022, *Qualcomm v Commission*, T-235/18, T:2022:358; GC, judgment of 18 November 2020, *Lietuvos geležinkiai v Commission*, T-814/17, EU:T:2020:545; and GC, judgment of 2 February 2022, *Engagements de Gazprom*, T-616/18, EU:T:2022:43 in which the GC assessed a counterfactual. See also CJEU, judgment of 10 September 2024, *Google Shopping*, C-48/22 P, EU:C:2024:726, para. 228 in which the CJEU clarified that the GC’s intention had not been to “*ru[l]e out the usefulness of a counterfactual analysis*” but “*merely*” to explain that “*it is permissible for the Commission to rely on a range of evidence, without being required systematically to use any single tool to prove the existence of such a causal link*”. The Commission “*cannot be required systematically to establish such a counterfactual scenario*” but this is not the same as suggesting that such an analysis should be the exception, not the rule.

<sup>24</sup> Article 102 Guidance Paper, para. 21.

**V. The Draft Guidelines should not introduce presumptions that are unsupported by case law**

22. The Draft Guidelines list certain types of conduct “*that [are] presumed to lead to exclusionary effects*”.<sup>25</sup> If adopted, the Commission would only have to establish “*the factual existence of the relevant conduct*”, thereby relieving itself from performing an effects analysis and instead pushing the dominant undertaking to prove a negative, *i.e.*, that the conduct was not capable of exclusionary effects.<sup>26</sup>
23. However, the Union Courts’ case law does not support a reversal of the evidentiary burden. The Commission cannot claim to “*codify*” the existing case law through the Draft Guidelines if these presumptions are maintained in current form.
24. With respect to exclusive dealing, the Draft Guidelines invoke the *Intel*<sup>27</sup> and the *Unilever*<sup>28</sup> rulings. But in both cases, the Court placed the burden on the Commission to prove exclusionary effects – not merely to “*assess such evidence*” where the dominant firm had advanced evidence to show that its conduct was incapable of restricting competition.<sup>29</sup> In such circumstances – as the General Court recently held – the Commission must demonstrate exclusionary effects of the impugned exclusivity provisions according to “*all the relevant circumstances*”.<sup>30</sup>
25. Similarly, the Draft Guidelines’ contortions to reintroduce a presumption for certain types of tying<sup>31</sup> seem difficult to reconcile with more than three decades of effects-based analysis of tying infringements. Indeed, while the Draft Guidelines argue for the reintroduction of a presumption for certain tying cases, they acknowledge later authorities promoting an effects-based approach to such cases.<sup>32</sup> The Draft Guidelines would more accurately “*codify*” the existing case law if they recognized that the presumption of exclusionary effect in tying cases is likely to be the exception, not the rule.
26. The case law does not support the Commission’s reliance on presumptions for these forms of abuse.

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<sup>25</sup> Draft Guidelines, para. 60b.

<sup>26</sup> Draft Guidelines, para. 60b.

<sup>27</sup> CJEU, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para. 137.

<sup>28</sup> CJEU, judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para. 46.

<sup>29</sup> CJEU, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para. 138; and CJEU, judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para. 52.

<sup>30</sup> GC, judgment of 18 September 2024, *Google AdSense*, T-334/19, EU:T:2024:634, paras. 993–994.

<sup>31</sup> Draft Guidelines, para. 95 (“*tying has a high potential to produce exclusionary effects and those effects can be presumed*”).

<sup>32</sup> Draft Guidelines, para. 95 (“*In other circumstances, a closer examination of actual market conditions may be warranted [...]*”).

## VI. The Draft Guidelines should clarify when conduct is “*capable of producing exclusionary effects*”

27. The Draft Guidelines do not explain when the Commission is likely to consider a dominant undertaking’s conduct “*capable of producing exclusionary effects*”.<sup>33</sup> The absence of guidance creates uncertainty and affords the Commission undue administrative discretion.<sup>34</sup> The Commission should state that, at a minimum, conduct *must be more likely than not* to produce exclusionary effects.
28. The Draft Guidelines set out an expansive list of the types of evidence that the Commission does *not* need to show in its analysis of exclusionary effect, depending on the circumstances. They include “*actual*” exclusionary effect,<sup>35</sup> a less competitive outcome relative to a counterfactual,<sup>36</sup> the inability of rivals to respond with countermeasures,<sup>37</sup> that the impugned behavior was the preponderant cause of exclusion,<sup>38</sup> that excluded rivals were as-efficient,<sup>39</sup> and that exclusionary effects were appreciable.<sup>40</sup> Conversely, the Draft Guidelines do not offer a countervailing list of evidence consistent with the absence of exclusionary effects, such as the very low market coverage of any impugned conduct.
29. Furthermore, several of the factors highlighted in the Draft Guidelines as potentially relevant to the “*capability to produce exclusionary effects*” are elements that would more appropriately be evaluated as part of the dominance assessment,<sup>41</sup> including: the conditions of the relevant market, the extent of the conduct or the position of customers or input suppliers. The conflation of the dominance and effects limbs of Article 102 runs contrary to the well-established principle that a dominant position is not abusive in itself.<sup>42</sup>
30. The low evidentiary bar is compounded by the absence of a probabilistic threshold for exclusionary effects. EU and Member State courts have considered and sought to

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<sup>33</sup> Draft Guidelines, para. 21.

<sup>34</sup> In its report on competitiveness, Draghi calls out the “*excessive discretion on the finding of exclusionary abuse [...] left by the draft Guidelines on the enforcement of Article 102*” and gives as examples the absence of any conditions for finding that tying can be presumed to have exclusionary effects and the lack of a safe harbor for dominant firms setting prices above average costs. See, The future of European Competitiveness – In-depth analysis and recommendations, p. 304.

<sup>35</sup> Draft Guidelines, para. 61.

<sup>36</sup> Draft Guidelines, para. 67.

<sup>37</sup> Draft Guidelines, paras. 62 and 70.

<sup>38</sup> Draft Guidelines, para. 65.

<sup>39</sup> Draft Guidelines, para. 73.

<sup>40</sup> Draft Guidelines, para. 75.

<sup>41</sup> Draft Guidelines, Section 3.3.3.

<sup>42</sup> CJEU, judgment of 9 November 1983, *Michelin v Commission*, C-322/81, EU:C:1978:22.



quantify the probability of anticompetitive effects.<sup>43</sup> A probabilistic threshold promotes legal certainty and helps to maintain businesses' incentives to innovate and invest in new projects. To illustrate: if a 1% probability of exclusionary effects were sufficient to merit enforcement action, this would have a significant chilling effect on a company's incentives to explore new pricing initiatives or commercial ventures that could operate even incidentally to the detriment of rivals. The risk, however slight, of challenge under Article 102 would have a strong dissuasive effect.

31. The Article 102 Guidance Paper's threshold of "*likely*" exclusionary effects left room for interpretation but at least had the benefit of simplicity and uniformity.<sup>44</sup> The Union Courts have at times used inconsistent or imprecise formulations for the probability of exclusionary effects (as the Policy Brief acknowledges), referring variously to conduct "*capable of producing exclusionary effects*",<sup>45</sup> conduct that may be "*likely to eliminate [competition]*",<sup>46</sup> conduct with the "*at least potential - ... effects of restricting or eliminating competition*",<sup>47</sup> conduct with "*actual or potential exclusionary effects*"<sup>48</sup> or conduct with the "*intrinsic capacity*" to foreclose competitors.<sup>49</sup>
32. The Draft Guidelines have missed an opportunity to draw a connecting line between these different formulations, to recognize the presumption of innocence in relation to Article 102, and to state clearly how likely exclusionary effects must be. They offer no greater predictability than the Union Courts' statement that exclusionary effects must not be purely "*speculative*" or "*hypothetical*" (mentioned only incidentally and partially

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<sup>43</sup> For example, the Court declared that practices with an "*insignificant effect*" on competition fall outside the scope of Article 101 TFEU; see CJEU, judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, para. 50 or CJEU, judgment of 9 July 1969, *Völk v Vervaecke*, C-5/69, EU:C:1969:35, para. 7. For merger control, the Court held that only transactions leading to a "*significant impediment to effective competition*" can be declared incompatible and that the Commission should "*demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition*"; see CJEU, judgment of 13 July 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, para. 87. See also UK CAT, judgment of 21 January 2010, *British Sky Broadcasting Group Plc and Virgin Media Inc v Competition Commission*, C1 2008/3053 and 3066, paras. 65-70.

<sup>44</sup> Article 102 Guidance Paper, para. 20.

<sup>45</sup> CJEU, judgment of 10 September 2024, *Google Shopping*, C-48/22 P, EU:C:2024:726, para. 166; CJEU, judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, para. 102; and CJEU, judgment of 25 March 2021, *Slovak Telecom*, C-165/19 P, EU:C:2021:239, para. 109.

<sup>46</sup> CJEU, judgment of 6 October 2015, *Post Danmark II*, C-23/14, EU:C:2015:651, paras. 67 and 69; and CJEU, judgment of 14 October 2010, *Deutsche Telekom AG v Commission*, C-280/08 P, EU:C:2010:603, para. 198.

<sup>47</sup> GC, judgment of 10 November 2021, *Google Shopping*, T-612/17, EU:T:2021:763, para. 518.

<sup>48</sup> CJEU, judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, para. 98.

<sup>49</sup> CJEU, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para. 140.

in the Draft Guidelines at para. 60b) – a description which the Union Courts did not intend to be exhaustive and which leaves open a broad probabilistic range.<sup>50</sup>

33. The Commission should adopt a firmer benchmark. The benchmark should be no lower than a balance of probabilities standard, *i.e.*, in excess of 50% or that exclusionary effects are “*more likely than not*”. This is lower than the minimum threshold proposed by AG Wahl in *Intel*<sup>51</sup> and equal to the equivalent proposal by AG Kokott in *Post Danmark II*.<sup>52</sup> It would ensure consistency with the Commission’s approach in merger control. And it would provide a clearer probability threshold for businesses to embed in their *ex ante* legal risk analysis.

34. Overall, the Draft Guidelines appear to set a low bar for Commission intervention, affording the Commission generous discretion to determine when conduct is capable of providing exclusionary effect. The landing zone for dominant companies is too narrow and too obscure: it is hard to conceive of any conduct by a dominant company that would be immune from challenge, given the absence of firm requirements as to how the Commission must demonstrate exclusion and to which standard.

## **VII. The Draft Guidelines should explain how the Commission will apply Article 102 alongside the DMA**

35. Neither the Draft Guidelines nor the Policy Brief address the interplay between Article 102 and the DMA. The Draft Guidelines must explain how the Commission plans to

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<sup>50</sup> GC, judgment of 10 November 2021, *Google Shopping*, T-612/17, EU:T:2021:763, para. 457 which states that “[t]hese considerations alone are too imprecise to show that there are anticompetitive effects, even potential effects, in the national markets for general search services. No analysis has been presented of the importance of the revenues concerned or of their possible impact on the position of Google and Google’s competitors on those markets. Consequently, so far as those markets are concerned, Google is fully entitled to argue that the Commission’s analysis of the effects of the practices at issue was purely speculative and that, therefore, those effects have not been proved”. See also, CJEU, judgment of 6 October 2015, *Post Danmark II*, C-23/14, EU:C:2015:651, paras. 64-65.

<sup>51</sup> Opinion in *Intel vs Commission*, C-413/14 P, EU:C:2016:788, paras. 117-119 which state the “[t]he 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 [...] To assume the existence of an abuse on the basis that, on balance, anticompetitive foreclosure seems more likely than not risks capturing not only isolated instances of practices, but a non-negligible number of practices that may, in reality, be pro-competitive. The cost of error of such an approach would be unacceptably high due to over-inclusion.”

<sup>52</sup> Opinion in *Intel vs Commission*, C-23/14, EU:C:2015:343, para. 82 which states that “[a]ccording 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.”

deploy the two instruments without creating a disproportionate regulatory thicket for affected companies.

36. The DMA has created a new set of detailed, *ex ante* prohibitions (and obligations) governing the activities of designated “gatekeepers”. The Regulation is the most significant change for many years in the EU legislative framework governing technology companies. Yet the Draft Guidelines do not even mention the DMA, let alone explain how the Commission intends to operate this parallel regime alongside Article 102.
37. In principle, the DMA and Article 102, established on different legal bases, pursue adjacent objectives. Article 102 seeks to protect undistorted competition on the market in order to preserve consumer welfare, the DMA aims to ensure that digital markets in which gatekeepers are present remain “contestable” and “fair”. A gatekeeper may occupy a dominant position in relation to a CPS but the Commission itself has presented the tests as non-contiguous.<sup>53</sup>
38. However, in practice, there is considerable overlap between the DMA and Article 102. The DMA prohibitions appear form-based but are drawn from effects-based decisions and rulings under Article 102. The Commission must apply both sets of rules in a manner consistent with general principles of European law, including the principles of proportionality and *ne bis in idem*.
39. In Google’s view, the Draft Guidelines should explain how the Commission will interpret the DMA obligations and Article 102 where a gatekeeper’s conduct may implicate both regimes, or how it will sequence or prioritize the two enforcement tools. The omission undermines predictability and legal certainty both dominant companies and other stakeholders. Gatekeepers are entitled to understand in advance whether product development relating to a CPS will be assessed only by reference to its form or, consistent with the principle of proportionality, by reference to its likely effects and the objectives of the relevant statutory instrument. The Commission should consider clarifying that when a gatekeeper has agreed a DMA compliance solution following a formal investigation, this could serve as a safe harbor for that specific conduct for the dominant company under Article 102.
40. The additional guidance must extend to the interplay between the DMA and national rules on abuse of dominance. The Draghi Report recommends “*prompt clarifications*” to explain how Member States should apply national competition rules in areas of

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<sup>53</sup> Case DMA.100011 – Alphabet – IS Verticals, decision of 5<sup>th</sup> September, 2023, para. 19 which states that “the application of EU competition rules, including competition law precedents, is without prejudice to the application of Regulation (EU) 2022/1925, and vice versa. Accordingly, the delineation of CPSs under Regulation (EU) 2022/1925 has no bearing on the definition of the relevant market for the purpose of applying EU competition rules (and vice versa) and those two types of analyses may thus lead to different results.”

potential overlap with DMA enforcement, failing which there is a “*risk of the potential of fragmenting the regulatory landscape of EU digital markets.*” The overlap is not hypothetical, as parallel investigations of Apple’s anti-steering provisions at the Commission (Article 102 and DMA) and Member State (Netherlands) level demonstrate.

41. Google encourages the Commission to enhance this area of the draft guidance in order to provide greater legal certainty and predictability for companies.

## **Conclusion**

42. Article 102 cases are necessarily complex, involving the reappraisal of commercial behavior and competitive responses that would be lawful if undertaken by any other (non-dominant) company. The economics-led approach has resulted in longer, more evidence-intensive Commission investigations and commensurately extensive court review. But the economics-led approach was introduced for a reason: to add rigor to an enforcement model that relied too heavily on blunt, form-based inferences. In evidence-intensive investigations entailing finely balanced judgements regarding commercial behavior and intentions, even small changes to overriding objectives, intervention thresholds and analytical tools matter.
43. Google commends the Commission for its initiative in developing guidance that will provide a roadmap for businesses and Member States. While a welcome project, the Draft Guidelines would benefit from amendments to address the shortcomings identified above. The Draft Guidelines in current form optimize for administrative discretion rather than legal certainty. They offer an extensive list of factors and benchmarks that the Commission can discard or deprioritize when considering possible exclusionary conduct but fail to offer companies a clear list of positive, workable principles to guide product development and *ex ante* legal analysis.
44. Google encourages the Commission to revisit these elements of the Draft Guidelines with a view to maintaining analytical rigor in the Commission’s enforcement practice, protecting the presumption of innocence and rights of defense, and preserving legal certainty and predictability for businesses.