Response to the consultation on the draft guidelines on exclusionary abuses of dominance

15 November 2024

1. Executive Summary

1.1 The European Round Table for Industry ("**ERT**") welcomes the opportunity to provide feedback on the draft Article 102 TFEU Guidelines (the "**draft Guidelines**") and supports the goal of the European Commission (the "**Commission**") for the guidelines to provide clear guidance for undertakings, national courts and national competition authorities ("**NCAs**") on the application of Article 102 TFEU ("**Article 102**").[1]

1.2 The draft Guidelines are a decisive opportunity for the Commission to ensure a level playing field in the EU, to provide undertakings with the necessary guidance and certainty on how they can effectively self-assess, and to frame expectations on the appropriate application of Article 102 in order to continue fostering a competitive, dynamic and innovative EU single market.

1.3 However, ERT considers that the draft Guidelines in their current form will increase and create unnecessary uncertainty for businesses, stifle innovation in the EU single market, dampen competition, and lead to unjustified and frivolous claims from third parties against legitimate business practices.

1.4 ERT has identified areas in the draft Guidelines that require in-depth revision - Sections 2, 3 and 4 below - by the Commission to align with the existing case law of the Court of Justice of the European Union (the "**CJEU**"). More specifically:

(i) **First**, the draft Guidelines take an approach to the concept of dominance and the role of the definition of the relevant market in Article 102 cases which is inconsistent with the case law and would lead to significantly less (and not more) legal certainty. ERT urges the Commission to clarify that the definition of the relevant market is a crucial first step in Article 102 cases, which requires a fresh analysis of the conditions of competition in each specific case. In this respect, it should also be clarified that the definition of the relevant market in Article 102 cases cannot rely on any previous findings in other enforcement contexts, in particular merger control. With regard to the assessment of whether an undertaking is dominant, ERT agrees that market shares represent a useful first indication of market power where shares are above 50%. The draft Guidelines should reinforce that a finding of dominance also requires an analysis of other market factors and conditions (shares of competitors, countervailing buyer power, barriers to entry, etc.). Furthermore, the Commission should recognise that where an undertaking has market

[1] Draft Guidelines, paragraph 8.

shares below 40%, it is extremely unlikely to be found dominant - and that, in fact, market shares below 40% should be viewed by undertakings as a "soft safe harbour" (see Section 2).

(ii) **Second**, the use of presumptions in satisfying the evidential burden in finding an Article 102 abuse, as currently envisaged in the draft Guidelines, contradicts the jurisprudence of the CJEU, and is contrary to legal and economic theory. ERT therefore urges the Commission to change its proposed approach. In particular, there is no basis for the draft Guidelines to introduce a presumptive approach to most of the conducts cited. The CJEU has consistently rejected a presumption-based approach in Article 102 enforcement and has only exceptionally accepted that certain conduct, in very specific circumstances, could fall under a presumption category (i.e. predatory pricing). As a general rule, the CJEU case law has repeatedly emphasised the need to demonstrate that the conduct of a dominant firm has the capability to harm competition and consumer welfare in light of all the factual circumstances.[2] Rather than seeking to go beyond existing case law by establishing broad and sweeping presumptions, the draft Guidelines should instead focus on explaining how the Commission will apply an effects-based analysis to evaluate if conduct is an abuse of dominance pursuant to Article 102. The currently proposed combination of broad presumptions and limited guidance as to how businesses can rebut such presumptions creates a high risk of false positives in finding Article 102 abuses (see Section 3).

By adopting an expansive concept of anti-competitive foreclosure, the draft Guidelines risk equating legitimate competitive behaviour of successful companies with abusive practices, thereby undermining fundamental principles of competition law as well as incentives to innovate to the detriment of other market players and consumers. The principle of anti-competitive foreclosure, as outlined in the 2008 Guidance Paper on the Commission's Enforcement Priorities, focuses on the foreclosure of competitors that leads to consumer harm, which ERT considers to be a fundamental principle to be included in the draft Guidelines as well.[3]

(iii) **Third,** the draft Guidelines in their current form downplay the importance of the as-efficient competitor ("**AEC**") principle and consumer welfare, which have been critical features of competition law aimed at ensuring that market competition is based on efficiency rather than on anti-competitive practices. While recognising that the AEC *test* is not the only tool available to assess conduct under Article 102, ERT is concerned that the proposed marginalisation of the AEC *principle* will result in punishing undertakings that are dominant due to offering the best product and service efficiently, rather

[2] Judgement of 24 October 2024, Intel v Commission ("**Intel (2024)"**), C-240/22 paragraph 179; Judgement of 10 September 2024, Google LLC and Alphabet Inc. v European Commission ("**Google Shopping**"), C-48/22 P, paragraph 166; Judgement of 19 January 2023, Unilever Italia Mkt Operations ("**Unilever**"), C-680/20, paragraphs 40-42; Judgement of 12 May 2022, Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato ("**Servizio Elettrico Nazionale**"), C-377/20, paragraph 72; Judgement of 21 December 2023, European Superleague Company ("**European Superleague**"), C-333/21, paragraph 130.

[3] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings issued in December 2008 ("**Guidance Paper"**), paragraph 19.

than due to any purported exclusionary conduct. The AEC principle is crucial because it strikes the balance between efficient market competition and consumer welfare: it is, and should remain, key to ensure that only those practices that harm consumers, by excluding equally efficient competitors, are deemed abusive.

The draft Guidelines should clearly articulate how the AEC principle will be applied in practice, notably via the AEC test, providing businesses, NCAs, national courts and potential complainants with the clarity needed to assess conduct effectively. By giving the AEC principle its deserved paramount importance in its guidance, the Commission will ensure that competition law continues to promote quality, efficiency and innovation, benefiting consumers and the EU single market as a whole. In particular, reasons to depart from the AEC test should be clarified and limited to pre-defined circumstances. The importance of the AEC principle has been confirmed by recent case law (i.e. *Intel (2024)* and *Unilever)* (see Section 4).

1.5 In addition, ERT has identified other key areas of the draft Guidelines which would benefit from further clarity and guidance. More specifically:

(i) **First**, the draft Guidelines do not offer dominant undertakings any clear steer on how sustainability considerations will be considered under the Article 102 framework, in particular, the draft Guidelines do not explain how these arguments will hold in the context of the so-called “efficiency defence” (or the “objective necessity defence”). This is compounded by the significant omission in the draft Guidelines of failing to clearly articulate the standard of proof needed to raise one of these defences. ERT argues the standard should align with that met by the Commission in demonstrating an Article 102 abuse (see Section 5).

(ii) **Second**, the draft Guidelines raise significant concerns regarding the approach to refusal to supply and discrimination under the Article 102 framework. ERT is particularly worried about the potential for the draft Guidelines to be misused by downstream customers of dominant undertakings to remove competition between themselves and other competing customers. The draft Guidelines suggest that dominant firms may be obliged to supply products or services on non-discriminatory terms, even in situations where the product or service is not considered an essential facility, thereby preventing downstream customers from the possibility of negotiating better terms than their competitors. This broad interpretation would undermine the contractual freedom of businesses, have a negative impact on incentives to invest and innovate and lead to an increase in frivolous claims and harm consumers insofar as customers are not able to pass on savings from astute negotiation strategies (see Section 6).

ERT emphasises that the obligation to provide access to products or services should remain exceptional and be limited to scenarios involving essential facilities. The draft Guidelines should clearly limit the definition of essential

facility in accordance with the *Bronner* case law and limit the criteria for determining when a refusal to supply or discriminatory practice is anti-competitive to those referenced in *Bronner*. Without such limitations, there is a risk that the draft Guidelines could be used to unfairly target dominant firms, stifling competition, investment and innovation.

1.6 Stemming from the above, ERT has identified some specific drafting changes that would bring further clarity to the Guidelines and ensure they provide a neutral and objective summary of the relevant case law (see Section 7).

1.7 The net effect of the current approach proposed in the draft Guidelines on each of these issues is to establish a much broader (and even creative) interpretation of anti-competitive foreclosure than is legitimate and recognised in the case law, which raises significant concerns. This wider concept is likely to lower the threshold and grant wider discretion for the Commission to establish an abuse of dominance, potentially leading to over-enforcement (and potentially "Type I" errors / "false positive" decisions), increased uncertainty for businesses and a multiplication of frivolous complaints and litigation - a risk that has been specifically called out in the Draghi report.[4]

1.8 The immediate consequence of the draft Guidelines would be a chilling effect on competition and innovation in the EU single market, to the detriment of competition (and, more generally, of the EU economy) and in contradiction with the objectives set out by paragraph 1 of the draft Guidelines (effective competition '*spurs innovation and ensures an efficient allocation of resources, thereby contributing to sustainable development and enabling strong and diversified supply chains, all of which contributes to the Union's resilience and long-term prosperity*'). Such negative effects can be aggravated by the absence of any guidance on how the presumptive approach would interplay with the current procedural framework and, in particular, with the potential application for interim measures by the Commission. ERT urges the Commission to ensure that the draft Guidelines do not deviate from one of the key principles of EU competition law - commercial success and the mere holding of a dominant position are not unlawful. Yet in many ways the draft Guidelines have the effect of creating a significant burden and chilling effect on companies as soon as they are (or may be) dominant.

1.9 Finally, ERT emphasises that the Commission must not overlook the far-reaching impact of its guidelines on competition authorities, national courts and other stakeholders (consumers, undertakings, customers, suppliers), both inside and outside the EU. These parties often rely on a literal interpretation of the Commission's guidelines, which at times amplifies unintended consequences. Therefore, ERT urges the Commission to be particularly cautious when considering policy shifts as those reflected in the draft Guidelines; instead, the Commission should only reflect in its guidelines what is the settled case-law of the CJEU and what

[4] The future of European competitiveness – In-depth analysis and recommendations, page 304, footnote 09.

will indeed promote legal certainty, to the benefit of benefit consumers, undertakings and the EU single market as a whole.

2. The draft Guidelines fail to adequately address the concepts of dominance and market definition in the context of Article 102

2.1 ERT is concerned about the approach taken in the draft Guidelines with regard to the concepts of dominance and market definition.

2.2 As stated in paragraph 19 of the draft Guidelines, dominance exists where an undertaking has a position of economic strength which enables it to prevent effective competition by affording it the power to behave to an appreciable extent independently of its competitors, customers and consumers - i.e. therefore (i) an undertaking is dominant where it enjoys market power and (ii) dominance is a legal requirement to then establish an abuse of a dominant position.

2.3 Therefore, the first step in an investigation under Article 102 is the assessment of the position of the undertaking in a certain market, which, in turn, requires the relevant market to be defined. Market definition is a tool used by the Commission under both antitrust (i.e. under both Article 101 and Article 102) and merger control enforcement, in order to identify and define the boundaries of competition between undertakings. And it is the general rule that must be followed in Article 102 cases.[5]

2.4 In this respect, paragraph 20 of the draft Guidelines should expressly recognise that there are significant differences in defining a relevant market for the purposes of:

(i) Antitrust enforcement vs. merger control. The Guidelines should clarify that a certain finding or definition of a relevant market in the context of the EUMR must not be binding and may not even be relevant to proceedings under Article 102, given the substantive differences between the two regimes and the fact that EUMR procedures are generally much less evidence intensive, in particular at Phase 1.

(ii) Within antitrust enforcement, Article 101 vs. Article 102. In Article 101 cases, the Commission may not be required to conduct a precise and exhaustive definition of the relevant market if it is assessing a potentially "by object" infringement - in those circumstances it is required to conduct a thorough assessment of the economic and legal context but does not have to reach a precise conclusion on a "relevant market". However, in Article 102 cases, defining the relevant market is an indispensable first step, as recognised by the the CJEU in the cases mentioned at footnote 31 of the draft Guidelines.

2.5 The second step in an investigation under Article 102 requires the assessment of whether an undertaking is in fact dominant in the previously defined relevant market. ERT generally agrees with the factors relevant to a finding of dominance in the draft Guidelines (market position, barriers to entry and expansion, countervailing buyer

[5] Judgement of 30 January 2020, Generics UK & Others ("**Generics**"), C-307/18.

power) and that market shares are not in themselves determinative of dominance, they are a useful first indicator.

2.6 ERT however urges the Commission to clarify that a finding of dominance where an undertaking has market shares below 40%, although theoretically possible, is extremely unlikely in the absence of special circumstances - as demonstrated by the Commission's experience.[6]

2.7 As such, the draft Guidelines should recognise that market shares below 40% should be viewed by undertakings as a "soft safe harbour". To the contrary, however, footnote 41 states that '*Market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances*'. Not only are there no precedents of a finding of dominance where shares were below 10%, but also, as mentioned above, there is only one precedent in the Commission's decisional practice of a finding of dominance below 40%. Therefore, any reference to dominance where market shares are below 10% is not appropriate and would increase uncertainty and confusion in Article 102 enforcement.[7] This reference would only apply in a purely hypothetical world - under extreme and exceptional circumstances ("academic hypothesis") - and the draft Guidelines do not provide any insights with respect to what those circumstances could be. As such, any reference to dominance where market shares are below 10% should be removed from the draft Guidelines.

2.8 In this context, the Commission should also amend paragraph 26 of the draft Guidelines, in particular where it states that '*the existence of very large market shares, which are in themselves save in exceptional circumstances evidence of the existence of a dominant position'*. As the Commission is well aware, it is in fact not exceptional for undertakings to be able to establish that high market shares are transient (for example, in nascent markets), in which case there is no market power and, consequently, no dominance:

(i) In *Ali Group / Welbilt*, the Commission found that a combined market share of 60% to 70% did not raise any concerns as this was reflective of a first-mover advantage and that this market position was '*likely to decrease as the market continues to mature and to attract new competitors in the coming years*'.[8]

(ii) In *Microsoft / Skype*, as part of its reasoning that a post-transaction market share of 80% to 90% in the video calls market did not raise competition concerns, the Commission noted that *'[m]arket shares only provide a limited indication of competitive strength" because "consumer communications*

[6] The only case in which an undertaking with a market share of less than 40% has been found dominant is the *British Airways* case, where market shares were 39.7% (Judgement of 15 March 2007, British Airways v Commission, C-95/04 P).

[7] In fact, any references to dominance where shares are below 30% would even contradict the approach taken by the Commission in its Article 101 Block Exemptions, in which the Commission presumes that market power is unlikely where shares are below 30%.

[8] Case M.10431 Ali Group/Welbilt [2022] ("**Ali Group / Welbilt**"), paragraph 152.

services are a nascent and dynamic sector and market shares can change quickly within a short period of time'.[9]

2.9 The draft Guidelines should recognise that, at most, (high) market shares only provide a preliminary indication of the competitive situation, and, in any event, the Commission should make the meaning of '*very large market shares*' clear (i.e. by reference to a specific figure or range). However, even where shares are high, the Commission should make clear that, in accordance with settled case law, other factors (such as market position of competitors, countervailing buyer power, barriers to entry and expansion) must also be considered when conducting an assessment of dominance.[10]

2.10 Finally, the draft Guidelines should clarify that dominance can only be established if an undertaking can exercise market power which, consistently with the Horizontal Guidelines, is the power to raise prices or reduce output compared to a competitive equilibrium over a significant period of time.[11] This applies in particular to start-ups, whose shares decrease over time as new entrants join the market, especially those opening up new green markets in accordance with the European Green Deal, and undertakings operating in markets that require significant upfront investments.

3. The presumptive approach envisaged in the draft Guidelines is disproportionate and contradicts the case law

3.1 For the purposes of determining whether a conduct is capable of having exclusionary effects, paragraph 60 of the draft Guidelines distinguishes three types of conduct: (i) conduct for which it is necessary for the Commission to demonstrate a capability to produce exclusionary effects; (ii) conduct that is presumed to lead to exclusionary effects; and (iii) naked restrictions.

3.2 The categorisation proposed by the draft Guidelines is arbitrary, exclusively form-based and it is unclear what differentiates those conducts from similar practices which the draft Guidelines then propose to subject to a different test. For example, while self-preferencing is essentially a form of tying, the two conducts are subject to different legal standards: for self-preferencing the Commission has to demonstrate the capability of the conduct to produce exclusionary effects, while tying is presumed to lead to exclusionary effects.

3.3 In relation to the second category of conduct, the Commission proposes to apply presumptions regarding five types of conduct: (i) exclusive supply or purchasing agreements; (ii) rebates conditional upon exclusivity; (iii) predatory pricing; (iv) margin squeeze; and (v) certain forms of tying. According to the draft Guidelines, in relation to these five categories of conduct, the CJEU case law has developed specific legal

[9] Case M.6281 Microsoft/Skype [2011] ("**Microsoft / Skype**"), paragraph 78.

[10] Judgement of 6 December 2012, AstraZeneca v European Commission, C-457/10 P; Judgement of 13 February 1979, Hoffmann-La Roche & Co. AG v Commission ("**Hoffman-La Roche**"), C-85/76, paragraphs 39-41.

[11] Guidelines on the Applicability of Article 101 of The Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements (COM (2023) 4752) ("**Horizontal Guidelines**") footnote 40.

tests that, once met, lead to the presumption that the relevant conduct falls outside the scope of competition on the merits and is capable of having exclusionary effects. Effectively, this shifts the burden of proof from the Commission to the dominant undertaking, which must prove that its conduct does not lead to exclusionary effects. In addition to the fact that such broadly applied presumptions are not mandated by the CJEU case law, the draft Guidelines also fail to explain in detail what level of evidence the dominant undertaking will be required to adduce to effectively rebut the presumption, which directly contradicts the stated aim of the draft Guidelines to provide legal certainty and enable self-assessment.[12]

3.4 At the outset, it must be observed that a presumption has a precise and well-established legal meaning and dire procedural consequences. As such, the CJEU has been careful to outline the circumstances in which a presumption can be established and has explicitly used the term 'presumption' only in circumstances where it was appropriate to do so.[13] For that reason the approach of the draft Guidelines, which claim in footnote 131 that *'While the Union Courts have not always made explicit use of the term "presumption" [...] the Commission considers that the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as "presumptions*"', patently contradicts established CJEU case law - and effectively seeks to introduce legal presumptions "through the back door". In addition, the draft Guidelines ignore that conduct falling within the five 'presumption categories' can often enhance efficiency, meet market demands, provide significant benefits to consumers and enhance competition: for example, rebates and bundling practices may allow companies to offer products at a lower combined price than if sold separately; and exclusive arrangements may be required to meet customer needs or to encourage a customer's investments to grow a product or service and innovate or to enter a new geographic territory or channel. There are plenty of examples where such practices have no ability to foreclose, particularly when limited in scope and/or duration. These practices often reflect standard and procompetitive business activity in many different markets and should not be considered as potentially abusive unless their effect is foreclosure. The recent *Intel (2024)* and *Google Adsense* judgments confirm once again that not all exclusivity practices are anti-competitive.[14]

3.5 The three-pronged approach to presumptions is not supported by the case law of the CJEU. Whilst the CJEU has established presumptions in some very narrow cases, generally speaking the CJEU has emphasised the need for a thorough, effects-based analysis to determine whether a conduct constitutes an abuse of dominance under Article 102.

3.6 Furthermore, to establish an abuse of dominance, the CJEU held that the Commission shall demonstrate that the conduct has the actual or potential effect of restricting competition, which may entail the use of different analytical templates but

[12] Draft Guidelines, paragraphs 47,53,56 and 60 (b).

[13] Judgement of 10 September 2009, Akzo Nobel NV and Others v Commission, C-97/08 P, paragraph 60.

[14] Intel (2024), paragraph 340; Judgement of 18 September 2024, Google and Alphabet v Commission, ("**Google AdSense**"), T-334/19, paragraphs 379-389.

shall be based on specific and tangible points of analysis and evidence.[15] Instead of trying to establish presumptions which are not supported by the case law of the CJEU, the draft Guidelines should recognise that many of the conducts in question should be allocated to the first category of conduct, i.e. conduct for which it is necessary for the Commission to demonstrate a capability to produce exclusionary effects, and focus on explaining how the Commission will seek to establish and evidence those effects.

3.7 In the narrow and exceptional circumstances where a presumption could apply (i.e. when the Commission demonstrates that the econometric tests on predatory pricing are met), the draft Guidelines should also clearly define what, in accordance with *Intel (2017),* the Commission considers to be sufficient 'supporting evidence' to be provided by the dominant undertaking during the administrative procedure to demonstrate that its conduct is not restrictive of competition. Such standard should be clearly distinguished vis-a-vis the more demanding standard required to prove an objective justification.[16]

3.8 We explain our concerns in more detail below, by reference to the specific conducts referred to in the draft Guidelines.

Conducts addressed in the draft Guidelines

(i) Tying and Bundling

3.9 The draft Guidelines, after having correctly recalled at paragraph 89 the four-step test endorsed by the CJEU case law analysing tying and bundling practices, claim that, in certain circumstances, it is unnecessary to prove the capability of the conduct to produce exclusionary effects as those can be presumed in light of the specific characteristics of the products and markets under consideration.[17] However, the CJEU case law has not explicitly endorsed such an approach. In fact, in the most recent case law both the Commission and the CJEU have engaged in a close examination of the purported exclusionary effects of a specific type of conduct.[18] In fact, the draft Guidelines themselves recognise this requirement at paragraph 89(d).

3.10 In addition, it must be emphasised that the criteria used by Commission to draw the line as to when to apply the proposed presumption are ambiguous allowing for undue discretion in favour of the Commission, as specifically underlined in the Draghi report.[19] By way of example, at paragraph 95 of the draft Guidelines, the Commission considers that exclusionary effects can be presumed when it is easy to obtain alternatives to the tied product. In principle, alternatives to the tied products are available in all circumstances in which it is not technically impossible to use them with the dominant firm's tying product. To establish if such alternatives are easily

[15] Ibid. paragraph 179; European Superleauge paragraphs 129 and 130.

[16] Judgement of 6 September 2017, Intel v Commission ("**Intel (2017)**"), C-413/14, paragraphs 138-140.

[17] Draft Guidelines, paragraphs 95.

[18] Judgement of 17 September 2007, Microsoft v Commission ("**Microsoft"**), T-201/04, paragraphs 868 and 1035-1036; Judgement of 14 September 2022, Google and Alphabet v Commission ("**Google Android"**), T-604/18, paragraphs 290-291 and 295.

[19] The future of European competitiveness – In-depth analysis and recommendations, page 304 footnote 09.

available, it is therefore necessary to analyse the ability and incentives of the customers to switch to such alternatives, and any analysis of this kind is already an analysis of the capability of the conduct to have exclusionary effects incompatible with a presumptive approach.

3.11 In light of the above, the approach taken in the draft Guidelines is not only unwarranted according to established case law of the CJEU, but it effectively creates a circular construct in which the Commission simultaneously claims that exclusionary effects can be presumed in certain tying and bundling cases, while at the same time requiring that anti-competitive effects must be established in order to rely on the presumption. This is clearly unsustainable and highlights the significant challenges with the Commission's attempt to create presumptions for certain kinds of conduct where this is not supported by the case law and cannot be justified by reference to principal competition and economic principles.

(ii) Margin Squeeze

3.12 The draft Guidelines claim that, for margin squeeze cases when the price-cost test indicates a negative spread, it can be presumed that such conduct is capable of giving rise to exclusionary effects. However, the criteria that must be met to rely on the presumption include a requirement to establish that such conduct is capable of producing exclusionary effects.[20] This approach raises concerns for two reasons. First, as explained below, it is in contrast with established CJEU case law to seek to establish a presumption in respect of margin squeeze cases. Furthermore, it is again entirely circular as it requires the Commission to carry out an in-depth econometric analysis with explicit reference to 'equally efficient competitors'[21] - whilst also claiming that exclusionary effects can be presumed when the price-cost test indicates a negative spread. Again, this approach is clearly unsustainable.

3.13 In addition, the CJEU case law has constantly held that the mere existence of a margin squeeze does not allow the Commission to avoid having to prove anti-competitive effects and has explicitly stated that there cannot be a finding of abuse of dominant position absence of anti-competitive effects.[22] Paragraph 73 of *TeliaSonera*, quoted by the Commission at paragraph 128 of the draft Guidelines, states that in case of negative spreads anti-competitive effects are probable, but that it is to be understood as part of a wider analysis that the Commission must carry out taking into account '*all the specific circumstances of the case*'.[23] Therefore, the draft Guidelines unduly equate probability of effects with presumption of effects, effectively going beyond established case law.

[20] Draft Guidelines, paragraph 122(c).

[21] Draft Guidelines, paragraph 122(b).

[22] Judgement of 14 October 2010, Deutsche Telekom v Commission ("**Deutsche Telekom**"), C-280/08, paragraphs 254; Judgement of 17 February 2011, Konkurrensverket v TeliaSonera Sverige AB ("**TeliaSonera"**), C-52/09, paragraph 66.

[23] TeliaSonera, paragraph 68.

(iii) Exclusive Dealing

3.14 All forms of exclusivity arrangements, including exclusivity rebates, are addressed in this section in light of their similar nature, as recognised by the draft Guidelines at paragraph 80, and because the relevant case law of the CJEU applies to all of them. Exclusivity arrangements can foster economic efficiency by stabilising sales for manufacturers, thereby reducing inventory costs and incentivising the introduction or the geographic expansion of products or services, which is clearly to the benefit of consumers. These practices can also generate economies of scale for both sellers and buyers and encourage retailers to engage in promotional activities, again to the benefit of consumers. Exclusivity is also key to stimulate investments and innovation. Efficiency gains which benefit suppliers, can lead to lower prices, better quality and choice of products and services, and innovation, ultimately benefiting other market players, and ultimately end consumers. Furthermore, exclusivity arrangements affecting only part of the demand do not necessarily exclude competition from the rest. In other words, it would be necessary to assess whether the product/service and customer, channel or geographic scope of the exclusivity could lead to foreclosure. For example, exclusivity arrangements with low market coverage and/or limited duration typically do not have exclusionary effects on the market and may be justified for good reasons. Many exclusivities do not have the potential to foreclose. Instead, they may compel competitors to enhance their offerings to remain competitive.[24] There will often be objective justifications for exclusivity, including sustainability objectives (see further paragraph 5.8 below).

3.15 The CJEU case law does not endorse the use of presumptions in relation to exclusivity practices. The draft Guidelines at paragraph 82 quote *Hoffman-La Roche* to support a presumptive approach. However, such judgement, despite at first setting out a formalistic approach regarding exclusive purchasing agreements or rebate schemes, went on to conduct an in-depth examination of the effects of such practices.[25] It is clear that the CJEU did not intend to create a presumptive prohibition. The statement at paragraph 82 of the draft Guidelines that '*exclusive dealing is presumed to be capable of having exclusionary effects*' is supported by a reference to *Intel (2017)* and *Unilever,* suggesting that these cases reaffirm the *Hoffman-La Roche* principle. However, these references are highly selective and taken out of context. In fact, after paragraph 137 of *Intel (2017),* the CJEU essentially went on to overrule *Hoffman-La Roche* making the presumptive approach moot by holding that the EC has to conduct a full effect analysis if the dominant undertaking provides sufficient evidence which substantiates that its conduct does not restrict competition.[26] In *Unilever*, after noting that *Hoffman-La Roche* considered that exclusivity clauses constituted, by their nature, an exploitation of a dominant position (without using the term 'presumption), the CJEU went on to cite *Intel (2017)* to rule that, *'[h]owever, (…) in a situation where an undertaking in a dominant position submits, during the administrative procedure, with evidence in support of its claims,*

[24] OECD, 'Fidelity and Bundled Rebates and Discounts: Key Findings, Summary and Notes' (2008) OECD Roundtables on Competition Policy Papers No 89, OECD Publishing, Paris, page 23.

[25] Hoffman-La Roche, paragraphs 89-90 and paragraphs 92 et seq.

[26] Intel (2017), paragraphs 138-140.

that its conduct was not capable of restricting competition and, in particular, of producing the alleged exclusionary effects' in this case *'the competition 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.'* The CJEU went on to conclude that *'it must be held that, although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is* ***not automatic****'* (emphasis added). In other words, setting aside the (arguably) rare instance where a targeted company would not submit any evidence in defence, the Commission is bound by the CJEU to conduct a full-fledged, effects-based analysis in relation to exclusivity arrangements.[27] Such reading of the case law was recently confirmed in *Google AdSense.*[28]

3.16 In addition, the rebuttal of a presumptive approach was clearly confirmed in the recent *Intel (2024)* judgement where the CJEU explicitly held that it is '*an error of law*' to consider exclusivity rebates abusive irrespective of whether they are capable of foreclosing a competitor as efficient as the dominant undertaking.[29] Again it follows that the current approach proposed in the draft Guidelines is unsustainable.

Evidentiary burden of proof

3.17 For the reasons set out above, ERT reiterates that the presumptive approach runs counter to the CJEU established case law, except in very narrow circumstances. More specifically, the CJEU has clearly held that '*it is for the Commission to prove the infringements of the competition rules it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement'.*[30]

3.18 In any event, there is a lack of guidance in relation to how undertakings can meet the relevant burden of proof to discharge the presumption, and the applicable evidentiary burden of proof for the Commission once the presumption is rebutted.

3.19 In the first place, the draft Guidelines at paragraph 60(b) state that a dominant undertaking can submit evidence to rebut the probative value of the presumption without detailing what kind of evidence would be most appropriate for each type of conduct that falls within paragraph 60(b), nor what is the standard of proof to be met for the presumption to be rebutted. ERT urges the Commission to amend the draft Guidelines clearly indicating what kind of evidence it expects to receive and when the burden of proof to rebut the presumption is met.

[27] Unilever, paragraph 46.

[28] Google AdSense, paragraphs 379-389.

[29] Intel (2024), paragraph 340.

[30] Judgement of 24 October 2024, Intel v Commission ("Intel (2024)"), C-240/22 P, paragraph 328.

3.20 In addition, the draft Guidelines are unclear as to what is the evidentiary burden of proof for the Commission when a dominant undertaking rebuts the presumption. The draft Guidelines seem to suggest that even when the presumption is rebutted, the evidentiary burden for the Commission is nonetheless reduced by claiming that, even at such a stage, '*the evidentiary assessment must give due weight to the probative value of a presumption*'.[31] Such approach is inconsistent with the established CJEU case law, which requires an analysis taking into account all the particular circumstances of the case when the dominant undertaking submits evidence supporting that the conduct is incapable of restricting competition.[32] In other words, beyond the (already crucial) question of the legitimacy of establishing such broad presumptions, there is no justification, in any event, to adopt an *a priori* negative stance in the rebuttal phase, which would *de facto* establish a double layer of presumptions. ERT therefore urges the Commission to amend the draft Guidelines to clarify, in accordance with CJEU case law, what is the applicable standard of proof after the rebuttal of a dominant undertaking: there is no reason to adopt a lower standard for establishing exclusionary effects beyond the usual balancing test between anti-competitive and pro-competitive effects.

4. The draft Guidelines risk downplaying the relevance of the AEC principle and consumer welfare, and unduly disregard the concept of anti-competitive foreclosure

4.1 ERT is concerned that the draft Guidelines attempt to distance themselves from the AEC principle. In fact, the draft Guidelines mention as efficient competitors very rarely (except for margin squeeze and predatory pricing), and mainly to rule out their importance in the anti-competitive assessment claiming, for example, that for the purposes of establishing the conduct's capability of producing exclusionary effects it is unnecessary to show that the competitors affected by such conduct are as efficient as the dominant undertaking.[33]

4.2 It must be observed that the relevant CJEU case law has consistently stressed over time the paramount importance of the AEC principle in EU competition law. In particular, the CJEU held multiple times that Article 102's aim is not to ensure that less efficient competitors than the dominant undertaking remain on the market. According to (very recent) case law from the CJEU '*not every exclusionary effect is necessarily detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient*', furthermore, '*the objective of that article is not to ensure that competitors less efficient than the dominant undertaking remain on the market*'.[34]

4.3 Similarly to what was noted at paragraph 4.1 above, the draft Guidelines refer to exclusionary effects without distinguishing between exclusionary effects and

[31] Draft Guidelines, paragraph 60(b)(ii).

[32] Intel (2017), paragraphs 138 and 140; Servizio Elettrico Nazionale, paragraph 51, Unilever, paragraphs 40 and 42.

[33] Draft Guidelines paragraph 73.

[34] Unilever, paragraph 37; Google Shopping, paragraph 263.

exclusionary effects that harm consumers.[35] Combined with the removal of any mention of anti-competitive foreclosure compared to the Guidance Paper, this represents a departure from the economic approach previously endorsed, entailing a switch from the protection of competition to the protection of competitors (which can harm competition, see above).

4.4 Such departure is not endorsed by the case law of the CJEU. On the contrary, the CJEU, referring to the departure from the market of less efficient competitors, has constantly held that not every exclusionary effect is necessarily detrimental to competition.[36] Such claim was often considered a preliminary matter by the CJEU or a statement of principle testifying how anti-competitive foreclosure represents a necessary part of the framework of analysis of Article 102.[37]

4.5 ERT therefore urges the Commission to give due weight to the AEC principle in the draft Guidelines.

4.6 In addition, it should be noted that the definition of exclusionary effects given by paragraph 6 of the draft Guidelines is circular. In fact, such effects are defined as the consequences of exclusionary abuses, however, as acknowledged by the draft Guidelines in footnote 25, the capability to produce exclusionary effects is required to determine if a conduct is an exclusionary abuse. Therefore, ERT urges the Commission to amend this "definition" to clarify that, in accordance with the case law of the CJEU, not every conduct with exclusionary effects is incompatible with competition on the merits. On the contrary, it is common for competition on the merits to lead to the legitimate foreclosure or exit of competitors, especially a less efficient one. [38]

4.7 Furthermore, ERT acknowledges that the AEC test differs from the AEC principle and that the CJEU's case law has questioned the relevance of the latter as a test to be applied in all investigations.

4.8 ERT recognises that the Commission is not legally required to carry out an AEC test in every case.[39] However, it is to be noted that, as confirmed by the recent case law of the CJEU, the AEC test remains a useful tool in relation to price abuses and (limited) non-price abuses alike.[40] In particular, the AEC test must be used when assessing the capability of pricing practices such as exclusionary rebates to foreclose competition - as stated by the CJEU in Intel (2024), the AEC test is the "general rule" for the competition law analysis of loyalty rebates (and it can also be inferred from this judgement that the AEC test should be generally used in all pricing practices).[41] Finally, it still forms part of the draft Guidelines' framework which, in accordance with

[35] Draft Guidelines paragraph 6.

[36] Unilever, paragraph 37; Servizio Elettrico Nazionale, paragraph 73.

[37] Ibid.

[38] Servizio Elettrico Nazionale, paragraph 73.

[39] Judgement of 6 October 2015, Post Danmark A/S v Konkurrencerådet ("**Post Danmark II**"), C-23/14, paragraph 57; Google Shopping, paragraph 264.

[40] Unilever, paragraph 59.

[41] Intel (2024), paragraphs 181 and 202.

the case law, refer to price-cost tests which are a form of AEC test since they must be based on the dominant undertaking's costs.[42]

4.9 In light of that and considering that the AEC test is a useful tool that enhances legal certainty by allowing undertakings to self-assess their (mostly pricing) conducts in accordance with the principles set out at paragraph 8 of the draft Guidelines, ERT urges the Commission to provide further clarity on how such test will be applied, clearly distinguishing cases where the test is relevant and giving indications about what factors might overturn a successful AEC test submitted by a dominant undertaking.

4.10 ERT therefore encourages the Commission to amend the draft Guidelines to properly reflect the consolidated case law of the CJEU distinguishing between the AEC principle (which is of paramount importance) and the AEC test (which remains important in certain circumstances). Moving away from the AEC principle would represent a shift towards a form-based approach which risks penalising dominant undertakings not because of anti-competitive behaviour but because of their superior efficiency.

4.11 Similarly, while the draft Guidelines briefly acknowledge the relevance of the concept of consumer welfare at paragraphs 5, 6 and 51, they fail to implement it in the legal tests and principles that follow. Such approach departs from the established case law of the CJEU which has recognised consumer welfare as the ultimate goal of Article 102.[43] In addition, it represents another element of a shift towards a form-based approach which risks protecting certain competitors instead of competition. In light of that, ERT encourages the Commission to amend the legal tests clarifying how a particular conduct can lead to direct or indirect consumer harm.

5. The draft Guidelines overlook sustainability and fail to clarify the standard of proof in the context of the "efficiency defence"

5.1 The draft Guidelines fail to offer legal certainty regarding the circumstances in which conducts detrimental to competition can be objectively justified on efficiency grounds. Not only the draft Guidelines do not clarify what evidence should be provided to successfully rely on the "efficiency defence", but they also ignore the role that improvements in sustainability can play in enhancing consumer welfare. We explain our concerns in more detail below.

Sustainability's improvements should be considered as efficiency gains

5.2 The draft Guidelines at paragraph 167 explain that conduct liable to be abusive may be objectively justified. Justifications have been grouped into two headings, following the previous approach: on the one hand, the "objective necessity" justifications/defence and, on the other, the "efficiency gains" justification/defence. Whilst the former is focused on the protection of legitimate public interest objectives,

[42] Deutsche Telekom, paragraphs 198-202.

[43] Servizio Elettrico Nazionale paragraph 44.

the latter justifications are focused on demonstrating consequential net gains in consumer welfare brought about by the dominant undertaking's conduct.

5.3 Dominant undertakings should be able to engage in behaviour in pursuit of a legitimate objective, such as sustainability, especially in light of the European Green Deal that requires them to create 'green product' offerings and should be able to rely on clear guidelines on what is and is not permissible in this context. However, the absence of clear guidelines and legal certainty with regard to environmental objective justifications that may be adduced within Article 102 investigations may hinder the guidelines' ability to influence the behaviour of undertakings.[44] To that end, incentivising these undertakings to align their behaviour with key environmental objectives could be achieved by producing clear guidance on how sustainability arguments may be introduced, which would in turn result in significant positive externalities.

5.4 The lack of discussion on sustainability in the draft Guidelines is an unfortunate omission, especially in comparison to the revised Horizontal Guidelines released last year regarding the cooperation of competitors to achieve sustainability goals. In the Horizontal Guidelines, the Commission included an entire chapter emphasising that EU competition law should not hinder collaboration to pursue sustainability objectives, broadly defining such objectives to encompass social goals, as well as environmental goals.[45] The Commission provides helpful examples of efficiencies that may be generated by sustainability agreements in these revised guidelines such as the use of less polluting production or distribution technologies, improved conditions of production or distribution, or more resilient infrastructure.[46] There is no reason why these types of efficiencies (and similar helpful examples) should not also be referenced in the draft Guidelines. In a recent article published in Concurrences, Wolf Sauter supports the view above, in particular that the draft Guidelines should view environmental benefits, such as the reduction of emissions, as "efficiencies". In fact, the omission reflected in the draft Guidelines implies that a dominant company cannot take leadership to create a positive and measurable shift in market practices, which is incredibly unfortunate, given that the leading company in a market is likely to be best placed to create impactful and long-lasting industry changes.

5.5 In the EU, examples of efficiencies raised during Article 102 TFEU investigations have been most significantly related to the waste management industry and recycling practices. See for example *Tomra* [47] as well as *Nurendale Ltd T/A Panda Waste* (Irish Case).[48] In some cases the dominant undertaking may also rely on environmental reasons to establish that a certain conduct was objectively necessary.[49]

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[44] *Environmental defences as a shield from Article 102 TFEU,* Valentin Mauboussin, Concurrences No.3-2022, available here.

[45] Horizontal Guidelines, Chapter 9.

[46] Ibid. at paragraph 558.

[47] Judgement of 19 April 2012, Tomra Systems ASA and Others v European Commission, ("**Tomra**"), C-549/10 P.

[48] Nurendale Ltd (t/a Panda Waste Services) v Dublin City Council & Ors [2009] IEHC 588.

[49] Judgement of 23 May 2000, Sydhavnens Sten & Grus ApS v. Københavns Kommune, C-209/98.

5.6 At the Member State level, ERT has observed more cases dealing with environmental justifications. For example, the French NCA found in one case that a practice of a dominant undertaking in granting its subsidiary the exclusive rights to transport tourists to a neighbouring island was objectively necessary in preserving the peculiar environment of the island, such as the tranquillity of the monastery area and integrity of the listed site.[50] In another French case examining the behaviour of the SNCF in implementing low price strategies, the SNCF adduced several objectives of public interest, alongside the fact that the conduct helped to safeguard freight transport as an alternative to road transport, ultimately serving the cause of environmental protection.[51] Various other environmental arguments have been adduced in cases at the national level. The Commission should take the opportunity to clearly outline, with examples, what sort of arguments it will accept in this context, as well as the level of evidence required to successfully establish a defence centred on sustainability arguments.

5.7 In an article for Concurrences, Valentin Mauboussin notes a few key examples where dominant undertakings could rely on environmental justifications to underpin their conducts. For instance:

(i) Charging higher prices to cover environmental costs, or investment in environmental protection, as a defence against excessive pricing;

(ii) Charging different customers different prices according to the use to which the product is put (i.e. how environmentally friendly the customers' use is) as well as offering discounts to consumers who buy a significant number of eco-friendly products from one producer, in order to increase the proportion of green goods purchased by consumers, as a defence against discriminatory pricing/practices, fidelity rebates, quantity rebates or even bundling;

(iii) Making the purchase of one product conditional on the purchase of another environmentally friendly product, as a defence against allegations of tying;

(iv) Offering exceptionally low prices to encourage customers to switch to a new environmentally friendly product offering, as a defence against predatory pricing allegations;

(v) Refusing to grant access to an essential facility to a user who intends to use the facility for environmentally unfriendly/unsustainable purposes, as a defence against allegations of refusal to supply; and

[50] Fr. NCA, dec. No. 05-D-60 of 8 November 2005 on practices implemented by the Immaculée Conception Cistercian Order, the Planaria company and the municipality of Cannes.

[51] CA Paris, ch. 5-7, 6 November 2014, La Société Nationale des Chemins de Fer Français (SNCF), No. 2013/01128, p. 53; against Fr. the NCA, dec. No. 12-D-25 of 18 December 2012 on practices implemented in the railway freight sector.

(vi) Against allegations of leveraging market power, making use of environmental prowess, production and resources in one market into another segment that is lagging behind with regard to sustainability/green objectives.[52]

5.8 To further illustrate how this may eventuate in practice by way of example, consider Company A, a dominant producer of products for packaging, has also developed a new, sustainable product that is significantly more expensive to produce. Therefore, Company A has to charge a higher price for the new product making it non-substitutable on the demand side. In order to encourage customers to purchase the more sustainable product, Company A has to engage in practices that may be viewed as having exclusionary effects. For instance, Company A may enter long-term supply agreements with customers/users of packaging products with exclusivity obligations (in order to secure stable production volumes and costs); or Company A may tie the new sustainable product to its less sustainable alternatives, or sell the sustainable product below actual total costs (to encourage demand substitutability) whilst simultaneously increasing the price of the less sustainable products to recoup insufficient revenues generated on the sustainable product.

5.9 Similarly, a dominant undertaking introducing a more sustainable product with higher costs of production than less sustainable alternatives, should be able to justify a pricing policy below AVC when such policy is required for a certain period of time to encourage consumer adoption.

Standard of proof to rely on the "efficiency defence"

5.10 In relation to the standard of proof required to establish efficiencies, ERT would strongly suggest that this is set as the standard needed to demonstrate an Article 102 abuse. The Commission should further take the opportunity to demonstrate the type of evidence and examples the Commission will expect from a dominant undertaking seeking to rely on an efficiency (or objective justification) defence.

5.11 ERT accepts, as the draft Guidelines at paragraph 171 also state, that the evidentiary burden of raising an objective justification is incumbent upon dominant undertakings - given this view is supported by recent cases such as *Post Danmark II, Google Shopping* and *Google Android.*

5.12 However, after allocating that burden, the draft Guidelines do not clearly outline the standard of evidence the Commission expects from a company to establish a defence. The draft Guidelines state that '*vague, general and theoretical claims'* will not suffice and neither will arguments that rely '*exclusively on the dominant undertaking's own commercial interests'*. The Commission will require a '*cogent and consistent body of evidence' but* does not outline clearly the standard of proof necessary for the dominant undertaking to meet to satisfy the evidentiary burden. This is a clear lack of legal certainty. In addition, the lack of clarity surrounding the efficiency defence from an environmental point of view means dominant undertakings might be less enticed to align conducts with key environmental goals in the hope of

[52] *Environmental defences as a shield from Article 102 TFEU,* Valentin Mauboussin, Concurrences No.3-2022, available here, paragraphs 18 to 21.

raising sustainability-related justifications during any Article 102 investigations they may become subject to.

5.13 Furthermore, ERT urges the Commission to supplement section 5 of the draft Guidelines by providing examples of successful "efficiency defences" and "objective necessity defences". Those examples would allow undertakings to more adequately self-assess, which would be consistent with the aim of the draft Guidelines to provide legal certainty and enable self-assessment.

6. The draft Guidelines' approach to refusal to supply risks undermining contractual freedom of dominant companies and their customers in negotiations.

6.1 The draft Guidelines distinguish between (i) a refusal to supply (as a self-standing abuse) where a dominant undertaking has developed an input exclusively or mainly for its own use and, when requested access by a party, refuses to give access, and (ii) other forms of access restriction, including to products and services.

6.2 In ERT's view, the draft Guidelines do not give enough relevance to the necessity to preserve freedom of contract and the right to property of all undertakings, including dominant ones and their negotiating counterparts. ERT urges the Commission to amend the draft Guidelines to reflect such values as to prevent frivolous claims by third parties which seek to obtain the same conditions of their competitors on the sole basis that the supplier is a dominant undertaking. Such behaviour significantly harms competition, including consumers, by removing a customer's ability to engage in savvy negotiations with a dominant undertaking and instead creating input (price/ quantities / etc.) transparency for the customer and its rivals, thereby removing uncertainty in the market and any incentives to overtake rivals through competition on the merits (i.e. innovation, negotiation ability).

6.3 Regarding refusal to supply, the draft Guidelines claim that the CJEU case law allowed an access obligation to be imposed under 'relatively strict conditions'.[53] In reality, the CJEU case law has been very strict, allowing for an access obligation only in 'exceptional circumstances' (the so-called "Bronner conditions").[54] Therefore, except where the "Bronner conditions" are met, a dominant company should never be required or forced to give access to an input, product or service. The draft Guidelines should be clear on this point, given (i) the importance to dominant undertakings who have developed an input exclusively or mainly for their own use or (ii) the need to preserve a (dominant) undertaking's right to choose its trading partners, including by reference to its distribution needs, and the quality, reputation and financial viability of the customer. This is particularly important where unscrupulous customers could harm the brand reputation of the supplier. Therefore, ERT urges the Commission to amend paragraph 55(e) of the draft Guidelines to clarify that interruption of supply

[53] Draft Guidelines, paragraph 97.

[54] Judgement of 26 November 1998, Oscar Bronner ("**Bronner**"), C-7/97, paragraphs 39 and 40.

should not necessarily be seen as not competing on the merits and, in fact, there are sound reasons why an undertaking may do so.

6.4 Outside the scope of refusal to supply, the draft Guidelines suggest that access restrictions can be abusive even if the input is not indispensable, as the need to protect the undertaking's freedom of contract and incentives to invest does not apply to the same extent as in a refusal to supply setting. That is, the draft Guidelines appear to introduce the idea that the need to preserve these fundamental rights will vary depending on whether a refusal to supply scenario is at stake (strong protection), or an access restriction scenario (more limited protection).

6.5 The draft Guidelines enumerate the following conduct as examples of access restrictions: (i) ceasing to supply competitors of the dominant undertaking in a downstream market where the customers have abided by regular commercial practices and have not placed extraordinary orders; (ii) failing to comply with a regulatory obligation to give access, (iii) degrading or delaying the existing supply by imposing unfair access conditions; and (iv) refusing or restricting access to an input that has been developed for the declared purpose of making it widely available to third parties.[55] This list encompasses a wide range of standard commercial conducts and because of its wide scope, and the absence of any further detail related to the criteria to establish an abuse, it is likely to endanger freedom of contract, incentives to invest and right to property of dominant firms.

6.6 ERT's position is that unless the Bronner conditions are met, a dominant undertaking shall not be under any obligation to provide access to an input, product, service or an infrastructure or to provide such access in similar terms to all customers. Any uncertainty in this regard would risk interfering with the dominant undertakings and its customers' contractual freedom and may lead to the suppression of competition in downstream or upstream markets to the detriment of other market players and ultimately consumers. In addition, such an approach would gravely reduce the incentive for (i) dominant or potentially dominant undertakings to invest and innovate, and/or (ii) those that seek access to innovate themselves, if the working assumption is that they will be able to secure access from a dominant undertaking on the same terms and conditions as others. In essence, from a legal perspective such an approach would be detrimental to fundamental rights such as the freedom of contract and the right to property - all undertakings, dominant or not and their customers (or suppliers), should remain free to choose whom to contract or negotiate with. In addition, from an economic perspective, any blanket access to an input (or material uncertainty in this regard) would, on the one hand, significantly impact the incentives for undertakings to develop such an input and, on the other hand, have the same effect on the incentives for the dominant undertaking to invest in the first place (knowing that it could not fully benefit from its efforts).

6.7 ERT is concerned that, in respect of case law relating to dominant undertakings in digital markets and their obligations to provide access, seeking to express those principles as being of general application to all dominant undertakings across all

[55] Draft Guidelines, paragraph 166.

sectors would be inappropriate and jeopardise investments and innovation in particular. ERT therefore urges the Commission to amend the draft Guidelines to recognise that the recent case law focused on digital platforms does not necessarily apply outside the digital world whose market dynamics substantially differ from other markets. It should be noted that any concerns that the Commission may have related to access restrictions in the so-called 'digital world' can either be addressed by the competition law tools that have been developed by the case of the CJEU or have been addressed by the Digital Markets Act, meaning that further 'guidance' in this area (of general application) may not be necessary.

6.8 ERT therefore urges the Commission to narrow down the list of conducts at paragraph 166 making sure that only the conducts for which the CJEU has established a clear legal test requiring a dominant undertaking to provide access in certain narrowly defined circumstances remain. Any uncertainty in this regard risks multiple standard and pro-competitive commercial practices being wrongly caught by Article 102 (or, at the very least, subject to a 'chilling effect' which reduces innovation). This would also have the detrimental effect of allowing access seekers to bring frivolous and unfounded claims against dominant undertakings, using the draft Guidelines as the basis for those claims.

7. Specific drafting changes

7.1 ERT would recommend the following improvements (in addition to the global and far-reaching changes discussed above) which would improve the draft Guidelines and the overall consistency of the application of Article 102 in the European Union:

(i) Footnote 41: this footnote should be amended as follows: '*Judgement of 14 February 1978, United Brands and United Brands Continental v Commission, 27/76, EU:C:1978:22, paragraphs 108 and 109, where dominance was found with a market share of between 40% and 45%. In such a scenario, factors other than the market share of the undertaking concerned, such as the strength and number of competitors, need to be considered. Dominance may also be exceptionally found where market shares are below 40% - in those cases, shares cannot be regarded as indicative of dominance and other factors and exceptional circumstances must be considered. See ~~also~~ judgement of 17 December 2003, British Airways v Commission, T-219/99, EU:T:2003:343, paragraphs 211 and 224 and judgement of 15 December 1994, Gøttrup-Klim u.a. Grovvareforeninger / Dansk Landbrugs Grovvareselska, C-250/92, EU:C:1994:413, paragraph 48. ~~Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances; see judgement of 22 October 1986, Metro SB-Großmärkte GmbH & Co. KG v Commission, Case 75/84, paragraphs 85 and 86~~.*'

(ii) Paragraph 26: this paragraph should be amended as follows: '*One important factor is the existence of very large market shares (i.e. above 80%), which are in themselves, save in ~~exceptional~~ certain circumstances such as where shares are transient (i.e. as it often occurs in nascent markets), evidence of*

the existence of a dominant position' (...) *Dominance may also be found in cases where an undertaking has a market share below 50% if exceptional conditions are met; however, the Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market.(...).'*

(iii) Paragraph 33: this paragraph characterises countervailing buyer power incorrectly as it overlooks, for example, certain industry specificities. Furthermore, the approach proposed by the draft Guidelines is inconsistent with the Commission's previous position set out in the 2009 Guidance on Article 2009, as well as with the 2004 Horizontal Merger Guidelines. In particular, the draft Guidelines should make clear that customer's ability to switch to competing suppliers is only one factor that should be considered when assessing countervailing buyer power. The following sentence should therefore be amended as follows: '*Countervailing buyer power refers to the ability of customers to switch ~~quickly~~ to competing suppliers, or~~,~~ to promote new entry or to vertically integrate, or at least the ability to credibly threaten to do so*.'

(iv) Footnote 99: the following sentence should be added for the sake of precision: *'The Court found in this particular case that standard contracts drawn up entirely by a producer in a dominant position which distributors are required to have signed by sales outlets without being able to amend them, trigger such indirect liability (Unilever Italia, para.31).'*

(v) Paragraph 49: this paragraph should be amended as follows: '*Such an undertaking may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to ~~strengthen its dominant position or to~~ abuse it.*'

(vi) Paragraph 57: this paragraph should be removed from the draft Guidelines as it is likely to create legal uncertainty. According to settled case-law, in particular with regard to all conducts that would not amount to a naked restriction, the Commission must always consider the circumstances of each case and carry out an effects-based assessment of the conduct.

(vii) Footnote 131: ERT considers that the draft Guidelines patently contradict established CJEU case law. As such, footnote 131 may not be used as a 'legal justification' for a presumptive approach and should be removed from the Guidelines.

(viii) Paragraph 60, b): the second to last sub-paragraph creates a double layer of presumption that is not consistent with case law and should be deleted (see Section 3 above).

(ix) Paragraph 60, c): the following wording should be considered too general in scope to cover only naked restrictions: '*(ii) the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under*

the threat of withdrawing discounts benefiting the distributors'. For example, agreeing on a non-abusive, volume-based discount scheme could entail a swap from competing products. If the swap doesn't occur the discount may be lower (that's a threat). The Guidelines should be reformulated to limit its applicability to instances where such conduct aims at securing exclusivity based on loyalty rebates.

(x) Paragraph 60, c): similarly, the following wording should be considered too general in scope to cover only naked restrictions: '*(iii) the dominant undertaking actively dismantling an infrastructure used by a competitor*'. In fact, there may be plausible circumstances where it may be justified to 'dismantle an infrastructure', for example if maintaining the infrastructure is not economically viable, or if a competitor is using the infrastructure but is not willing to pay adequate price or is damaging the infrastructure.

(xi) Paragraph 64: current drafting of the last two sentences is not supported by case law and should be amended as follows - '*The absence of actual exclusionary effects is not sufficient to exclude the application of Article 102 TFEU, but should be seen as ~~and may only constitute~~ indicia that the conduct at issue was not plausibly capable ~~incapable~~ of producing the alleged exclusionary effects. To this end, the undertaking concerned may ~~must~~ supplement such indicia by evidence showing that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects*'.

(xii) Paragraph 70: consistent with the case law, ERT considers that the Guidelines should explicitly include a specific requirement to demonstrate 'causality'.

(xiii) Paragraph 73: ERT considers that this paragraph should be deleted as it contradicts established (and recent) case-law from the CJEU, for example *Google Shopping Intel (2017) and Intel (2024)*.

(xiv) Paragraph 74(c): the Guidelines should abstain from 'over-generalising' certain statements by the CJEU, in particular, the Guidelines should clarify that competitor counter strategies may be an important element when assessing capability to produce exclusionary effects.

(xv) Paragraph 83, b): last sentence of this paragraph about the *Google Android* case should be deleted or made clear that these are exceptional circumstances which cannot be transposed as is outside the tech industry. In any event, should be added the following sentence before this last sentence: *'In principle, conduct affecting a small share of the market is not capable of having exclusionary effects unless under exceptional circumstances'*.

(xvi) Footnote 200: this reference to the *Broadcom* case should be deleted or made clear that these are exceptional circumstances which cannot be transposed as is outside the tech industry. In any event, should be added the following sentence before citing the *Broadcom* case: *'In principle, exclusivity conditions*

of a short duration or which can be easily terminated due for example to regular exit clauses and/or short termination notices, are not capable of having exclusionary effects unless under exceptional circumstances'.

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This contribution has been prepared by ERT's Competition Policy Working Group.

For more information: https://ert.eu/focus-areas/competition-policy/

+32 2 534 31 00 ; contact@ert.eu ; www.ert.eu

Boulevard Brand Whitlocklaan 165
1200 Brussels, Belgium