ERT

Strengthening Europe's Competitive Edge

Competition Policy Priorities for the New European Commission

April 2025

Key Conclusions

- ERT is convinced that effective competition law enforcement is critical to ensure open markets, deliver consumer benefits and maintain a fair level-playing field between companies. As the most sophisticated and impactful antitrust enforcer globally, that is seen as the role model for agencies around the world, the European Commission's Directorate General for Competition (DG COMP), is a critical enabler and guardian of European prosperity.

- Competition enforcement should be predictable, stable and free from influence exercised from outside the Commission. At the same time, competition enforcement must take into account the impact of (geo-) political developments on markets. ERT therefore welcomes President von der Leyen's Mission Letter[1] to Executive Vice-President Teresa Ribera tasking her with developing a 'new approach' to EU competition policy. This stance was reiterated in the Commission's Competitiveness Compass, published in January 2025.[2]

- It is crucial to further evolve competition policy to address the challenges of European businesses in relation to digitalisation, security, resilience and climate change in the face of threats to supply chains and unfair competition through subsidies. The modernisation of the EU's competition policy should also aim at supporting companies in becoming more competitive. This includes enabling them to scale up and ensuring they have stronger incentives and capacity to invest, adapt, innovate and grow. DG COMP decisions must be evidence-based and should consider EU sectoral policies and the EU's wider objectives.

- ERT supports Mario Draghi's report on the Future of European Competitiveness, which stresses the need for a new industrial strategy for Europe and represents an important contribution to the Commission's work on a plan for Europe's sustainable prosperity and competitiveness.

- Faster and more streamlined procedures across all areas, from antitrust and merger control to State aid and the Foreign Subsidies Regulation (FSR), should be another priority for the new European Commission.

- At the same time, the protection of the rights of the parties in competition proceedings – including confidentiality and the right to anonymity of third parties who fear commercial retaliation – should be further developed. Defendants in abuse of dominance investigations must be able to to rely on a thorough analysis of the economic effects of their behaviour, ensuring consistency with long-established case law, legal certainty and the right of defence.

- It is also about time to adopt a more contemporary understanding of the in-house legal function. A well-calibrated protection of in-house legal advice as privileged is indispensable for effective compliance with the competition law rules of the Treaty on the Functioning of the European Union (TFEU), without mitigating the effectiveness of DG COMP's investigations.

1 Mission Letter: https://commission.europa.eu/document/download/5b1aaee5-681f-470b-9fd5-aee14e106196_en?filename=Mission%20letter%20-%20RIBERA.pdf

2 Competitiveness Compass: https://commission.europa.eu/document/download/10017eb1-4722-4333-add2-e0ed18105a34_en

ERT's Main Recommendations

1. Merger control and the Foreign Subsidies Regulation (FSR)

a) While the Commission's merger control reviews must remain independent of outside political influence, DG COMP should take into consideration wider EU objectives such as competitiveness, sustainability, social fairness, security, efficiency, innovation or resilience when assessing the effects of mergers. As articulated in the Mission Letter of the Commission President, the Horizontal Merger Guidelines should be revised to "give adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors, and the changed defence and security environment".

b) To consider those wider EU objectives, ERT believes that the Commission should continue its journey towards a more holistic approach to consumer welfare in its substantive merger assessments. DG COMP should adopt an even more forward-looking view which considers not only short-term effects on price, quality and choice but also sufficiently takes into account how innovation and investments resulting from cooperation and mergers can benefit consumers and sustainability goals in the longer run.

c) More consistency is needed in the application of the standard of proof, in particular with respect to the requirements for a successful efficiencies defence, which should become an effective and widely used tool of competition policy in the renewed EU merger control policy.

d) ERT also suggests that a more comprehensive and nuanced approach be applied in relation to the imposition of remedies. Structural remedies have proven not to be always suited to certain markets which are subject to permanent evolution. In certain cases, behavioural remedies are more effective and should be preferred. They also have the advantage of providing more flexibility to adapt to changing circumstances.

e) ERT considers that the following procedural modifications should be included in the EU merger control instruments:

- A local nexus test should be introduced to avoid that joint ventures with no effect in the EU require merger control notification and review. ERT believes that this could be done by amending the Jurisdictional Notice and could inspire other authorities around the world to also abandon an unnecessary burden on cooperation, especially in relation to the effective promotion of sustainability objectives.

- ERT urges the Commission to safeguard legal certainty and predictability for M&A deals in line with the Court of Justice of the European Union's (CJEU) Illumina/Grail Judgment. Unpredictable call-in rights or non-turnover-based thresholds under national law should not form the basis of a referral procedure from national competition authorities (NCAs) to DG COMP under the EU Merger Regulation (EUMR). If the Commission wants to expand its jurisdiction in order to review potential so-called 'killer acquisitions' which otherwise fall below its thresholds, the EUMR thresholds must be amended, for instance, by introducing a new threshold based on transaction value over €2 billion with a local nexus test.

- The mechanisms for referral from NCAs to DG COMP should be adapted in a way that merging parties can refer the transaction to DG COMP and the NCAs do not have a veto right. This would create more one-stop-shop procedures and substantially reduce red tape for companies.

- Relatedly, in light of inflation during the long periods of time that many merger control instruments have not been updated, as well as the proliferation of regimes (notably FSR and national Foreign Direct Investment (FDI) legislation) that impose heavy administrative burdens on companies, the Commission and the NCAs should re-evaluate and consider increasing the level of their thresholds. This should be done in coordination between DG COMP and NCAs so as not to distort the current balance between the EU and national dimensions of mergers in the EU.

Many of the above-mentioned improvements to the EU merger control regime, which are necessary to adopt the new approach mandated in President von der Leyen's Mission Letter, could be achieved by revising the Horizontal Guidelines as well as other EC notices, such as the Jurisdictional Notice (for instance, for the local nexus test). If amendments

to those soft law instruments are not sufficient to deliver the urgent priorities as set out above, the Commission should initiate a review of the EUMR to ensure maximum legal certainty, predictability and alignment with EU objectives.

f) The Commission should continue to ease notification requirements under the FSR in cases where a disruptive impact on the Internal Market appears unlikely from the outset.

2. Antitrust procedure

a) Shortening antitrust procedures should be the number one priority of the envisioned revision of Regulation 1/2003. More efficient evidence-gathering, especially when using information requests, would be part of an effective solution.

b) Third parties are seriously threatened with commercial retaliation from key suppliers and customers, if fully transparent and candid in responses to third-party RFIs or when considering complaints. The protection of confidentiality – and where necessary guaranteed anonymity – is indispensable for effective enforcement.

c) The decentralisation of EU antitrust enforcement has delivered many benefits but instances of inconsistent application of Articles 101 and 102 TFEU across Member States have become more frequent. The appropriate response would be to cooperate more with NCAs via the ECN.

3. Legal privilege

a) In-house lawyers have become the guardians and drivers of antitrust compliance in their companies – and thus crucial contributors to the effective administration and enforcement of EU competition law. However, written legal advice and competition compliance investigations could expose their companies to self-incrimination. Lack of legal privilege therefore stands in the way of in-house legal functions' ensuring and monitoring effective competition law compliance. The lack of in-house legal privilege forces companies to retain (often very costly) outside advisers who cannot provide the same quality and effectiveness of tailor-made legal guidance for business.

b) The Commission should recognise – in a revised Regulation 1/2003 – a professional privilege for clearly defined categories of in-house counsel correspondence, without putting the effectiveness of DG COMP's investigations at risk.

4. Antitrust – substantial rules

a) The Commission's new Horizontal Guidelines (HGL) provide clarifications as to which sustainability-based collaborative projects between competitors are non-problematic and fall outside Art. 101 TFEU. Nevertheless, DG COMP should give more leeway for considering environmental out-of-market efficiencies in Art. 101(3) TFEU, which are crucial to drive the green transition. The Commission should also recognise that critical sustainability goals might only be achieved if the majority of the industry moves, including through the adoption of improved minimum standards.

b) ERT encourages the Commission to issue more positive guidance on where information exchanges could lead to companies ideating green and other innovative collaborations acceptable under the HGL, thus permitting brainstorming around the feasibility of pro-competitive projects.

c) Further clarifications regarding the distinction between buyer cartels and legitimate purchasing alliances would also be highly welcome.

d) The Commission should specify that also when the *buyer* of a product selects the fulfilment services provider, the parties should be allowed to agree on resale prices if they meet the other requirements defined by the Commission's Vertical Guidelines (VGL).

e) The upcoming guidelines on Art. 102 TFEU should maintain an economic effects-based analysis as defined by the CJEU in abuse of dominance proceedings. Any lowering of the legal standard to show anticompetitive foreclosure and unjustified shift of the burden of proof will create legal uncertainty, potentially significant unjustified constraints on dominant undertakings and increase opportunistic claims by third parties to the detriment of effective and robust competition in the market.

f) DG COMP should also use the new Art. 102 TFEU guidelines as an opportunity to reinforce contractual freedom and ultimately effective competition and incentives to invest and negotiate optimally by specifying the (limited) situations where refusal to supply or discriminatory behaviour could be abusive, based on existing case law.

Introduction

Effective and vigorous competition law enforcement is a critical element of a healthy market economy that benefits consumers and ensures a competitive structure. This is not only a key policy conviction for ERT as a matter of principle: Functional antitrust and merger enforcement is also a fundamental practical business need – probably all ERT Member companies have experienced harmful anti-competitive behaviour of suppliers, customers or competitors.

In the European Commission's 2019-2024 mandate, DG COMP has introduced new legislation in crucial areas, such as the Foreign Subsidies Regulation and the Digital Markets Act (DMA). The new horizontal and vertical block exemptions regulations and guidelines, as well as the further simplified procedure for mergers, have brought valuable clarifications and addressed business concerns that ERT and others had articulated.

ERT however also believes that competition enforcement cannot operate in a vacuum and should consider wider dimensions. In her Guidelines for the new Commission, President Ursula von der Leyen calls for "a new approach to competition policy, better geared to our common goals" which "keeps pace with evolving global markets".[3] This ambition was reiterated in the Commission's Competitiveness Compass, published in January 2025.

Notably in merger control, a more long-term substantive perspective is needed, based on a broader consumer welfare concept which takes into account a broader set of competitive parameters (price, choice, quality, innovation, investments,...), as well as other EU objectives, such as security, resilience, sustainability and competitiveness, as indicated in the President's Mission Letter to Executive Vice-President Ribera. This new approach should be more supportive of companies scaling up, allowing European businesses and consumers to reap all the benefits of investments, innovation, resilience, competitiveness and vigorous competition. These considerations should also be reflected when assessing cooperations or mergers between competitors.

As laid out below, ERT also advocates for more streamlined procedures across all areas of competition law enforcement while at the same time protecting third-party rights, especially by strengthening them in the envisaged revision of Reg. 1/2003. The upcoming new guidelines on Art. 102 TFEU should reconfirm and emphasise the requirements for an economic effects analysis as established by the case law of the CJEU.

We will also explain why ERT strongly believes that the Commission should respect the confidentiality of in-house legal advice by granting legal privilege without putting the effectiveness of its investigations at risk.

This paper is not covering State aid policy, which ERT is addressing in other publications.

The European Commission – and operationally and strategically DG COMP – is rightfully recognised as the leading, and most sophisticated, competition law authority in the world. Legislation initiated and developed by the Commission, its guidelines, policies, and enforcement practices strongly influence the work of other agencies on all continents.

ERT encourages DG COMP to embrace this position as a role model in many areas, especially of antitrust enforcer, trailblazer and pacemaker, in order to drive the quality and effectiveness of global competition law enforcement. DG COMP should use the International Competition Network (ICN), the European Competition Network (ECN) and other fora to convince other enforcers to resist political influence in their policy- and decision-making.

3 Political Guidelines for the European Commission 2024-2029 - https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf, p. 7.

1. Merger control

1.1 Revising the EU merger control policy to strengthen EU competitiveness, resilience and innovation

It is clear from President von der Leyen's mandate for Executive Vice-President Ribera that a thorough evaluation of the current EU merger control framework is essential so that it better reflects Europe's economic needs more broadly. This is an opportunity for the Commission to ensure that, going forward, EU merger decisions safeguard effective competition in all its forms for the benefit of European consumers and citizens while taking into account the EU's wider policy objectives, such as the competitiveness of the EU, the digitalisation of the economy, sustainability goals and economic security under a more holistic view of consumer welfare.

To this end, one of the main priorities in Teresa Ribera's Mission Letter will be the review of the Horizontal Merger Control Guidelines (the Guidelines), as one of the key elements to ensure that DG COMP's merger decisions give adequate weight to the European economy's acute needs in respect of resilience, efficiency and innovation, as well as appropriate time horizons and investment intensity in certain strategic sectors. ERT welcomes this shift of approach of the Commission and its willingness to review the Guidelines taking into account the current and future needs of the EU. The review of the Guidelines must therefore be broad and deep, with a wider scope than just compiling and codifying previous case-law, simply crystallising the *status quo*.

The review of the Guidelines should be accompanied by the review of other EC notices to ensure this change of approach (for instance the jurisdictional notice). If amendments to those soft law instruments are not sufficient to deliver the urgent priorities as set out above, the Commission should initiate a review of the EUMR to ensure maximum legal certainty, predictability and alignment with EU objectives.

1.2 Expansion of the substantive analysis and specification of the efficiencies defence

a) **Broader consumer welfare concept coherent with other EU objectives**

Consumer welfare has historically been interpreted narrowly by DG COMP. At the same time, consumers do not care just about prices or the short term. There are other features of products and services which consumers value and need, such as quality, design, innovation, choice, reputation, environmental and social impact, etc. These need to be considered more holistically. To adequately protect these aspects of consumer welfare, a longer-term perspective is needed, taking into account companies' requirements on returns of investment, as these will impact the capacity to invest and innovate in the mid- to long-term.

Innovation is a factor which has recently gained more attention from DG COMP, but just as a theory of harm in some specific sectors. It should also be considered as a potential pro-competitive effect and/or as an efficiency when assessing the effects of a specific transaction.

b) **Long-term perspective on the substantive merger control analysis**

The reviewed EU merger control framework should take a dynamic and long-term view that enables sustainable market structures, boosts EU investment and competitiveness and provides for economic security, as emphasised by President von der Leyen in her new mandate and Mario Draghi in his report.

In the substantive merger control analysis, the timeline considered in the assessment of a transaction's impact should be consistent with the usual investment cycles in the relevant sector or industry. This will in some cases require an extended time horizon compared to the current practice.

c) **Efficiencies**

The current approach taken by the Commission when assessing efficiencies is not balanced with regard to differing standards of proof for harm and for efficiencies. In practice, the Commission hardly recognises the pass-on of efficiencies to consumers (e.g. including distribution reach, innovation, investment, quality), the feasibility of efficiencies and when they kick in, putting at odds the recognition of efficiencies, especially those based on mid/long-term investment strategies.

A revised EU merger control regime should specify the standard of proof for efficiencies and which substantive requirements – and by when they have to materialise – would have to be met for a successful efficiencies defence. Such provisions do not exist today, leaving a disproportionate margin of discretion to the Commission that often appears to presume a lack of efficiencies and imposes an insurmountable burden of proof on the parties to rebut that presumption.

The reviewed framework should allow for more openness to pro-competitive evidence that outbalances potential short-term price increases, expressly acknowledging the need to attribute sufficient importance to efficiencies in terms of innovation, performance, quality, sustainability and investments, as pointed out in the Draghi report.

The standard of proof for parties to a transaction to satisfy in relation to efficiencies should be the same as the standard to be satisfied by the Commission to substantiate its theory of harm. It is entirely disproportionate that the standard for the Commission to demonstrate a theory of harm could be as low as showing that the significant impediment of effective competition is 'more likely than not', while asking the notifying parties to show that efficiencies are verifiable, passed on to consumers and merger-specific with a degree of strong probability (which in practice DG COMP has so far never recognised).

Moreover, the Guidelines should provide that out-of-market efficiencies are considered in the substantive assessment in order to allow merger control decisions to support wider EU objectives (competitiveness, sustainability, security and resilience), as mandated by President von der Leyen.

d) **Remedies**

Authorities are often sceptical about the effectiveness of behavioural remedies and give disproportionate preference to structural remedies. Especially in certain markets with heavy investments or long innovation cycles, structural remedies do not capture all relevant market dynamics, are often backward-looking and undermine the pro-competitive rationale for consolidation. Behavioural remedies would allow for more flexibility and adaptability for the markets in permanent movement. In some cases, behavioural remedies would be more effective than structural ones as they can better capture market dynamics (e.g. certain forms of access to infrastructure).

A modernised merger control regime should include a specific mention of behavioural remedies. In the remedy design, the relevant considerations should be consistent with the ones taken into account in the theory of harm (i.e. including also considerations related to the impact on security, resilience, sustainability, innovation, investments or competitiveness).

1.3 Reduction and clarification of notification requirements

a) **Local nexus requirement for joint ventures (JVs)**

Only transactions with a local effect on EU markets should trigger an EU merger control notification obligation. ERT therefore proposes the introduction of an additional jurisdictional requirement of an appreciable local effect for JVs in the foreseeable future.

Reviewing transactions with no local effect within the Single Market does not create any added value and is a waste of resources and cost for the Commission and the parties to the transaction. It moreover is not in line with ICN Recommended Practices and ICC Recommendations for Merger Control. The burden of current JV notification rules in the EU and around the world may lead companies to avoid full-function JVs for less efficient structures.

NCAs around the world have replicated the EU approach of assessing JV jurisdiction solely based on the global turnover of the parents, leading to the absurd result that e.g. a recycling JV in Namibia may be notifiable to the Commission and dozens of other authorities around the world without a nexus to said jurisdictions. There is no benefit of such notifications for anyone, even if they run under the simplified procedure.

The EU must set the right example for authorities around the world, not least because JVs may be the ideal vehicle for

sustainability cooperations in markets where they are most needed.

In addition to the introduction of a jurisdictional requirement on an appreciable local effect for JVs to justify an EU merger control notification obligation, the text of the Commission Jurisdictional Notice and in particular the Commission's interpretation of *"undertakings concerned"* in the context of JVs should be amended (see paragraphs 139 and 140 of the Commission Jurisdictional Notice).

b) **One-stop-shop and updated thresholds**

In order to safeguard the efficiencies of a centralised EU merger control ('one-stop-shop'), the referral mechanisms should be adjusted in a way that merging parties can request a referral of the transaction to DG COMP and that the NCAs do not have the possibility to block the referral.

In addition, the level of thresholds and interplay among them should be improved. Considering inflation as well as the heavy administrative burdens for business created by the proliferation of regimes (notably on FDI, FSR), competition authorities should regularly re-evaluate the level of their thresholds with the objective of increasing them. In the EU, this should be done in coordination between EC and NCAs so as not to distort the current equilibrium of EU/national dimensions of mergers in the EU.

c) **Thresholds ensuring legal certainty and foreseeability**

In Illumina/Grail, the CJEU has underscored the importance of legal certainty and foreseeability in EU merger control.[4] It has clearly spelt out that turnover-based thresholds for national merger control regimes are an important guarantee for undertakings' rights.

Current developments at the national level to establish call-in rights for transactions below the thresholds and extending jurisdiction for NCAs even beyond the closing of the transaction will negatively affect investments and economic growth. EU merger control policy should not follow this trend. DG COMP should acknowledge the CJEU's position that unpredictable call-in rights or non-turnover-based thresholds under national law cannot form the basis of a referral procedure under the EUMR.

To give the Commission the powers to address the perceived enforcement gap regarding transactions where the undertakings' turnover does not adequately represent their competitive importance, a reform of the EUMR's turnover thresholds would be required. Such reform would have to balance the principle of subsidiarity in the context of national merger control regimes with the efficiencies brought about by having a one-stop-shop merger control. If a transaction value threshold were to be considered, ERT would propose not setting such a threshold below €2 billion and combining it with a robust local effects test.

Moreover, recent legislation (article 14 of the Digital Markets Act) that obliges some specific companies, the so-called 'gatekeepers', to inform the Commission about intended concentrations even if not reaching the legal thresholds, could be expanded into a notification obligation and incorporated into a revised EUMR but limited to the undertakings subject to DMA.

1.4 Further simplification of procedures and focus on the most complex cases

ERT welcomes the Commission's efforts to streamline the proceedings for simple and super simple cases, especially the improvements that have come with the 2023 Notice on Simplified Procedure. For other cases, however, EU merger control procedures are still among the most burdensome and time-consuming in the world. This creates significant costs for both the Commission and the undertakings (as well as third parties receiving multiple questionnaires). The Mission Letter of Executive Vice-President Ribera states that rules should be "simpler, more accessible to citizens and more targeted", and based on the "principles of proportionality, subsidiarity and Better Regulation". In order to deliver on this mandate, ERT suggests the following improvements:

4 Cf. para 208: Undertakings that are potentially subject to notification and standstill obligations must be able easily to determine whether their proposed transaction must be the subject of a preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be expected.

a) **Recognise and set boundaries to the prenotification phase**

Prenotification is currently not formally recognised in the EUMR but given its factual relevance for procedures and deals, timelines should be regulated. The EUMR should limit the pre-notification period to 2-3 weeks in normal cases, to three months in complex cases and to six months in exceptionally complex cases.

b) **Decide on necessity of in-depth analysis depending on market feedback**

The Commission should follow the approach of other competition authorities (e.g. the Finnish authority) to reach out to market participants with a general request but only go further if there is a specific reason – e.g. in case the market reaction points toward the need for a more detailed assessment.

c) **Fast-track procedure in complex cases**

In order to speed up the process, merging parties should be able to request that the Commission engage in remedy discussions at any time in the process.

The Commission should also provide merging parties with much earlier feedback and access to file (on a rolling basis). This will allow the parties to address material concerns (including market feedback) as well as any factual misunderstandings earlier in the process.

d) **Limit detailed decisions to select categories of cases**

Merger control procedures at the Commission are particularly burdensome due to the need for the Commission to write elaborate decisions even in cases which do not give rise to any issues. This requires the Commission to gather detailed information from both the parties as well as other market participants. To alleviate this burden, the Commission should only be required to write detailed decisions in cases in which it does not unconditionally clear a transaction in phase 1 or where third parties have shown sufficient interest to be formally admitted to the merger control procedure.

Similarly, third parties should only be allowed to challenge a clearance decision at the European Courts if they were previously admitted to the procedure.

e) **Publish important takeaways of substantial and jurisdictional analyses**

Should the Commission's investigation touch upon factual aspects or points of law in cases which do not require a detailed decision but may be of general interest and relevance for businesses, the Commission should publish such information in a case report to allow the general public to benefit from such information.

Relatedly, ERT encourages the Commission to publish, e.g. in Policy Briefs, the takeaways from decisions on jurisdictional questions it dealt with. ERT Member companies have been struggling to self-assess jurisdictional questions and increasingly had to consult the Commission's Legal Services on whether a transaction is notifiable or not.

f) **Strengthen checks and balances within DG COMP**

In order to ensure a better exercise of rights of defence for the parties and to guarantee more objective decisions, a modernised merger control regime should strengthen checks and balances within the procedures, for instance, by strengthening the role of the hearing officer or by transparently separating investigation and decision teams in complex cases.

2. Application of the Foreign Subsidies Regulation

It is critical to ensure a level playing field in the Internal Market and the Foreign Subsidies Regulation (FSR) can be an important tool in achieving this objective. The first cases in which the Commission has launched in-depth investigations confirm this positive view.

At the same time, the FSR places a substantial administrative burden on European companies. Collecting granular data on foreign financial contributions is a challenging task, as most of the categories of information required do not correspond to actual business and/or accounting practices and thus are not available in a central database. This makes it a very burdensome, manual exercise involving lots of different internal stakeholders across the globe to gather the relevant information in due course. ERT remains concerned that in most cases this burden continues to be disproportionate to the potential underlying harm.

For the FSR to be an effective and proportionate tool, ERT suggests the following:

a) **FSR's scope and timing**

The necessity of requiring notification from undertakings with parent entities based in the EU (or countries with free trade agreements covering subsidies with the EU) should be re-evaluated. It is unlikely that they receive foreign subsidies that may distort the Internal Market, making the broad notification obligation disproportionate. This was acknowledged in the Commission's White Paper on foreign subsidies and in the impact assessment (but not in the final legal text). Another point which should be re-evaluated is the information duties concerning JVs where the notifying parties often do not have the access powers.

In addition, investigations should be sufficiently fast and flexible so that FSR notifications do not unduly delay transaction timelines and the normal pace of business.

b) **Commission's staff and priorities**

A centralised unit (dealing with both concentration and public procurement filings) within the Commission in charge of all FSR tools should be set up, with sufficient staff and a clear mission to allocate its resources wisely. The unit should prioritise cases that could uncover meaningful distortions of the Internal Market.

It should use a light touch and pragmatic approach for other cases, with a simplified procedure that entails reducing the scope for reportable foreign financial contributions and providing waivers, which could also cover entire categories of financial contributions if not relevant for the purpose of assessing the specific transaction.

Further, as envisaged in Article 47 1 (a) FSR, the EC should adopt a simplified procedure for cases that appear less likely to lead to anti-competitive outcomes.

The Commission's outreach activities should be increased to ensure that all tendering authorities affected by the FSR are well-informed and aligned with its objectives and procedures.

The Commission should continue to regularly update its Q&A document and make use of the Policy Newsletter, especially identifying measures which do not qualify as foreign financial contributions and clarifying the concept of "generally available".

3. Revision of Reg. 1/2003 and related procedural antitrust issues

3.1 Investigation timelines and interim measures

There is an overarching issue with the general duration of antitrust proceedings. With the revision of Reg. 1/2003, procedures should be substantially shortened. This is in line with Teresa Ribera's Mission Letter and should be a priority for the new mandate. Statutory deadlines or at least indicative timelines should be introduced.

In fast-moving (digital) markets, where there is a risk of tipping, the Commission should consider making more use of interim measures. At the same time, as long as there are no timelines for main proceedings, interim measures should have an end date to avoid the business being blocked for an unlimited amount of time.

Commitments can also be a very useful tool and it is important to have the flexibility to discuss commitments at different points in the proceedings. At the same time, commitment offers should not be abused to delay antitrust proceedings. A possible solution would be to introduce timelines for the conclusion of commitment negotiations.

3.2 Investigative and enforcement powers of the Commission

The extent of evidence gathering, which has massively increased in recent decades, needs to be adjusted by refocusing the requests on key issues in the case at hand and related key documents.

Request for information (RFI) procedures need to be shortened and simplified, especially via (a) initial scoping calls with the targeted party and key non-targeted parties early in the process and (b) consulting the parties to a procedure when drafting RFIs. Currently, businesses face questions that are unclear, unnecessary, repetitive (in the case of multiple RFIs) or overly complex.

Relatedly, DG COMP should establish manageable timelines to respond to RFIs and have bespoke questions for the case at hand and not off-the-shelf RFIs. With regard to third-party RFIs, there should be the option to skip questions and to answer only those questions that are relevant to the specific company. We suggest that the case team head pre-check all RFIs sent out to ensure (a) no repetition of previous or similar questions asked, (b) no contradictory questions and (c) no fishing expedition questions. Interviews should be the favoured option whenever possible and the subject matters discussed should not be repeated in follow-up questionnaires, in particular when parties are asked to review and confirm telephone interview notes.

With regard to investigative powers, the principle of proportionality is crucial and the Commission should always use the least invasive tool. Investigations on premises other than business premises should be the very last resort. As far as remote inspections may be envisioned by DG COMP, companies must have full transparency and maintain their rights of defence.

DG COMP should strengthen checks and balances and allocate separate investigation and decision teams, especially in complex cases, for instance involving novel theories of harm or multiple infringements.

The existence of a robust compliance programme (while maintaining implementation flexibility) should be factored into the determination of fines in Art. 101 and 102 proceedings.

3.3 Third-party rights

The right to a formal decision following a complaint by a third party must remain. At a minimum, a third party needs to have the right to appeal if the Commission rejects rendering a formal decision.

A third party providing information to the Commission should ultimately decide whether the information is confidential or not. The third party currently has little influence on the decision-making regarding the disclosure of information which might have a significant impact on the day-to-day business and commercial relationship with the investigated company. Full guaranteed anonymity must be a real option when non-targeted parties genuinely fear commercial retaliation by key customers or suppliers.

In general, to facilitate a more efficient confidentiality and access to files process, the Commission should (i) have clearer rules on which categories of confidentiality claims would be accepted and (ii) grant earlier access to the files also for third parties. From the outset

of confidentiality requests, there should be a categorisation along the following lines: (a) general business secrets, (b) information which may be reviewed directly by investigated parties, (c) information which may only be reviewed by the investigated parties' external advisors, and (d) information which may only be shared if anonymised.

The confidentiality ring procedure can reduce the administrative burden and is generally welcome as an option. However, the relevant provisions need to specify how to provide adequate protection for highly sensitive information. Participation in confidentiality rings should not be mandatory for third parties. Beyond that, they need to be combined with a clear and effective system for sanctions where confidentiality rules are disrespected. Where justified, the rules for the confidentiality ring procedure should grant anonymity as an option for third parties, given that Reg. 1/2003 provides for this.

3.4 Cooperation within the ECN

ERT recommends the introduction of a genuine one-stop-shop for leniency applications as ECN+ is an ineffective halfway house.

The Commission should be vested with more meaningful intervention powers than currently provided for in the ECN framework in national proceedings to ensure greater consistency in the application of Art. 101 and/or 102.

The current opening of Reg. 1/2003 for stricter national rules on unilateral conduct should be limited to certain categories to avoid a proliferation of different national rules, especially in the context of digital regulation(s).

More transparency on the priorities and topics that are being discussed in the ECN and clarity on the principles in the allocation of cases would be helpful for stakeholders. Thus, investigated parties should have access to the formal reports the competition authorities exchange with each other pursuant to Art. 11.4 of Reg. 1/2003.

4. In-house legal privilege

The *Akzo* decision of the CJEU of the EU which goes back 15 years confirmed the Commission's (then-)refusal to accept in-house Legal Professional Privilege (LPP). However, the reality of in-house legal work has since evolved fundamentally. DG COMP should follow the example of more and more EU Member State jurisdictions and the majority of OECD members and recognise a clearly defined in-house LPP, sustained by stringent ethical rules, be it by a revision of DG COMP's policy and/or by amending Reg. 1/2003 accordingly.

4.1 In-house lawyers are independent guardians of corporate compliance

In response to the introduction of the self-assessment mechanism with Reg. 1/2003, companies have massively strengthened internal compliance efforts. Since the 2000s and the success of newly introduced leniency programmes, the Commission's and NCA's big cartel and also abuse of dominance investigations with often hefty fines, massive damage claims and public shaming of companies engaging in anti-competitive behaviour, have made very clear that competition law non-compliance is not an option for corporates.

In-house lawyers have become guardians of compliance who are entrusted with preventing anti-competitive conduct and thus protecting the company from fines and reputational damage. This approach is also enshrined in widespread internal compliance policies which oblige company lawyers and all other employees to ensure adherence to (competition) law.

In-house legal counsels do not advise less independently than outside counsel: We are not aware of any Commission or NCA case in recent years in which in-house lawyers contributed to or facilitated anti-competitive behaviour. In fact, anti-competitive conduct occurs not with the support of in-house counsel but against their legal advice and/or without their knowledge. There is no evidence either that in-house lawyers would be pressured by business to provide inaccurate favourable guidance or facilitate cartels or anti-competitive behaviour. This scenario appears almost inconceivable in an environment where (antitrust) compliance has become a crucial pillar of good corporate governance.

4.2 The lack of in-house LPP leads to substantial compliance shortcomings and inefficiencies

Performing effective and thorough self-assessments and providing legal advice remains substantially restrained if the legal experts that companies employ cannot unambiguously express their views without risking self-incrimination. This violates the fundamental rights of defence as well as to legal advice and a fair trial.

The absence of in-house LLP stands in the way of effective and customised compliance work led by internal experts familiar with industry- and business-specific risk profiles as well as the precise commercial, operational and organisational touchpoints and stakeholders to address potential non-compliance.

Retaining law firms whenever privilege is needed under the current rules leads to excessive, avoidable costs, and inefficiencies: Outside lawyers normally merely act as advisors in isolated matters and are therefore unable to conceptualise, implement, monitor and enforce a company's compliance programme.

The drastic increase in internal investigations – originating from the Anglo-Saxon legal sphere where in-house-counsel privilege is recognised – makes confidentiality of communications with in-house counsel indispensable. The absence of in-house LPP is a significant competitive disadvantage for European companies as internal lawyers are severely restrained in running internal investigations, recording the results and reporting them to management without incurring very substantial and unnecessary outside-counsel costs.

4.3 In-house LPP would not make the Commission's investigations less effective

Recognising in-house LPP would not add complexity when the Commission conducts investigations. The process for handling privileged information would be the same as for outside LPP.

In-house LPP should not go further than outside legal privilege. By way of example, simply copying in-house lawyers on internal emails should not be sufficient to benefit from privilege – as is the case for correspondence with outside counsel. In-house LPP must be clearly restricted to instances where

internal clients are seeking legal advice and the legal function provides such advice, and when in-house counsel is conducting internal audits.

Concerns that communications unrelated to obtaining and receiving legal advice are labelled as privileged would equally apply to exchanges where outside counsel is copied even though such communications do not qualify as privileged.

Objections that in-house LPP would complexify investigations have not been voiced in jurisdictions where it already exists. Any possible concern – which, again, would equally apply to outside LPP – should be addressed procedurally, e.g. by mandating ways to easily identify privileged communications, by efficient means to resolve conflicts and by sanctions if companies disrespect (in-house) LPP rules.

Where not already the case – e.g. when in-house counsels are/can be bar members – similar ethical rules that prevent outside counsel from facilitating infringements should apply to in-house lawyers. This would also further institutionalise and reinforce the compliance function, including in SMEs.

5. Application of Art. 101 and 102 TFEU – substantive rules

5.1 Evolving the application of Article 101 TFEU

a) Upstream Sustainability Collaborations

ERT welcomes the Commission's openness to providing informal and formal comfort with respect to innovative sustainability cooperation agreements. This will be critical where guidance is unclear and/or where Article 10 of Reg. 1/2003 decisions will be necessary to avoid divergence between DG COMP and NCAs and to thus ensure legal certainty for businesses. We encourage the Commission to continue publicising its willingness to issue Article 10 decisions. They should be taken within a reasonable timetable (3, 6 months or 1 year maximum, depending on the complexity of the case at hand).

It is also positive that the new chapter on sustainability agreements in the Horizontal Guidelines clarifies which types of cooperation are not problematic as they already fall outside Art. 101 TFEU. With a view to the benefits that offset restrictions of competitions according to Art. 101(3) TFEU, however, DG COMP should consider out-of-market benefits to a larger extent than explicitly stated in the HGLs. For instance, when it comes to carbon emission reductions, the fact that most beneficiaries – potentially the entire world population – of more environmentally sustainable products or services are not consumers of the product itself should not principally stand in the way of recognising such benefits.

b) Buying Arrangements and Alliances

ERT has doubts about the demarcation between legitimate procurement cooperations versus (by object) procurement cartels. The Commission's theory of harm is not convincing. Both a joint purchasing cooperation and a buyer cartel fix a maximum price at which the participating companies agree to purchase. Reducing input costs may lead to lower prices downstream but could also have negative (viability/innovation) effects on upstream suppliers in both scenarios. This is particularly important as buyer cartels are considered a 'by object' restriction when there is no substantive difference to joint purchasing arrangements.

In respect of retail alliances, the Commission applies a very broad interpretation of what constitutes joint purchasing. Gatekeeper alliances which demand lump sum payments from suppliers for the right to stay in business with their members do not engage in any purchasing. Instead, these alliances bundle and exert the significant market power of their members to extract money from suppliers without providing any counterparts, thus discouraging investment of consumer goods companies in European markets. ERT would highly welcome more guidance on takeaways from DG COMP's investigative work in this space.

c) Guidance on pro-competitive cooperation and information exchanges

ERT encourages the Commission to (continue to) use informal formats to communicate relevant takeaways from its investigative work, such as the compliance guidance for R&D cooperation in the automotive sector issued together with the AdBlue decision or policy newsletters. Case reports would also be a very helpful tool.

The Commission should issue more positive guidance on where information exchanges could lead companies to explore innovative collaborations, for example to contribute to the green transition or innovative digital initiatives. Delineating a safe space where firms can brainstorm collective solutions for legitimate objectives that cannot be attained unilaterally would render the feasibility assessment of such projects far more practical.

d) Fulfilment Arrangements

We appreciate the Commission's increased pragmatism in the revised Vertical Guidelines, recognising that there may be real efficiencies in manufacturers and end customers negotiating prices and terms & conditions directly, even if the products or services are subsequently supplied by an intermediary (a 'fulfiller') who takes title to the products from the manufacturer before

on-selling to the end customer.[5]

However, the new provisions in the Vertical Guidelines on 'fulfilment contracts' are limited to situations where the supplier chooses the 'fulfiller' versus when the customer chooses the 'fulfiller'. This position appears to be arbitrary and does not reflect economic realities in many supply chains where downstream customers take the leading role for various upstream tiers. The theory of harm stated in paragraph 193 of the Vertical Guidelines, namely the restriction of competition for fulfilment services, appears hypothetical in these instances while finding adequate practical solutions is difficult, especially against the serious risk of being charged with resale price maintenance.

The Commission should in a first step clarify the Vertical Guidelines to include the scenario where the customer chooses the 'fulfiller'. To add legal certainty, the Commission should in a second step consider including fulfilment contracts as an exception in the text of Article 4, point (a) of Regulation (EU) 2022/720.

5.2 Reviewing the application of Article 102 TFEU

Businesses need more legal certainty and clarity on Article 102 and the appropriate application of methodologies to enable them to self-assess their commercial practices effectively. In this context, we welcome the publication of the draft Article 102 Guidelines on 1 August 2024[6] which seeks to codify the long list of EU court judgments in relation to exclusionary behaviour and the assessment of anti-competitive effects.

While we commend the ambitious objectives of the draft Article 102 Guidelines, in their current form they 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.[7]

ERT has identified several areas in the draft Article 102 Guidelines that require in-depth revision or at least further clarity and guidance:

- The new approach to the concept of dominance and the outsized role of the definition of the relevant market in Article 102 cases is inconsistent with the case law and would lead to significantly less (and not more) legal certainty.
- 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.
- The draft Article 102 Guidelines should clearly articulate how the as-efficient competitor (AEC) principle will be applied in practice, notably via the AEC test, providing businesses, national competition authorities, national courts and potential complainants with the clarity needed to assess conduct effectively.
- The draft Article 102 Guidelines raise significant concerns regarding the approach to refusal to supply and discrimination. ERT is particularly worried about the potential for Article 102 to be misused by downstream customers of dominant undertakings to remove competition between themselves and other competing customers.
- Finally, the draft Article 102 Guidelines do not offer dominant undertakings any clarity on how sustainability considerations will be addressed under the Article 102 framework.

ERT welcomes DG COMP's proactive approach in initiating procedures against gatekeeper non-compliance with the DMA and encourages the Commission to vigorously enforce the DMA rules for core platform services.

1) Approach to dominance and market definition in the context of Article 102

ERT is concerned about the approach taken in the draft Article 102 Guidelines with regard to the concepts of dominance and market definition.

5 See paragraph 193 of the Commission Guidelines on Vertical Restraints (2022/C 248/01) ("Vertical Guidelines").

6 Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (the "draft Article 102 Guidelines"), available at: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

7 For more details, please see ERT's Response to the consultation on the draft guidelines on exclusionary abuses of dominance.

- The draft Article 102 Guidelines state that "to assess dominance, it is in general necessary to define the relevant market".[8] [9] DG COMP should emphasise in paragraph 20 of the draft Article 102 Guidelines that merger control and antitrust market definitions "can differ" depending on the undertakings, the time period and the behaviours under review. This requires a case-by-case assessment of market definition and is particularly critical to discourage unjustified demands from customers to deal or to receive the same terms and conditions as their competitors, based solely on market definitions set out in merger control precedents.

  The draft Article 102 Guidelines should clarify that market definition (i) requires a new assessment based on the facts at hand, and (ii) is only a prerequisite step to potentially establish an abuse of dominant position under Article 102, i.e. it does not suffice to make an abuse of dominance claim.

- While ERT generally agrees with the factors relevant to a finding of dominance in the draft Article 102 Guidelines, we urge DG COMP 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 (and even more so under 10%). The draft Article 102 Guidelines should recognise that market shares below 40% should be viewed by undertakings as a 'soft safe harbour' and should remove any reference to dominance where market shares are below 10%.

2) **The presumptive approach envisaged in the draft Article 102 Guidelines is disproportionate and contradicts the relevant case law**

   Paragraph 60 of the draft Article 102 Guidelines suggests categorising conduct into three distinct groups with legal presumptions to ease the Commission's administrative burden in bringing Article 102 cases: (i) conduct for which the Commission must demonstrate a capability to produce exclusionary effects, (ii) conduct that is presumed to lead to exclusionary effects, and (iii) naked restrictions.

   The three-pronged approach proposed by the draft Article 102 Guidelines is arbitrary, exclusively form-based and not supported by the CJEU case law:

   - Whilst the CJEU has established presumptions in some very narrow cases (e.g. below AVC pricing), the CJEU has emphasised the need for a thorough, effects-based analysis to determine whether conduct constitutes an abuse of dominance under Article 102. It has held consistently 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 shall be based on specific and tangible points of analysis and evidence.[10]

   - The Commission is wrong to propose applying presumptions for the five types of conducts identified in category (ii) above: the CJEU case law has not established presumptions for these conducts and in any event, the draft Article 102 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. By way of example, the CJEU has recently confirmed in the Intel (2024) and Google AdSense cases that exclusivity arrangements are not per se abusive.[11]

   - Finally, the draft Article 102 Guidelines do not provide guidance on how undertakings can meet the relevant burden of proof to discharge the presumption, and the applicable

8 Draft Article 102 Guidelines, paragraph 20.

9 Commission Notice on the definition of the relevant market for the purposes of Union competition law (revised Notice on the definition of the relevant market), paragraph 14.

10 See in particular CJEU judgment of 24 October 2024, *Intel*, Case C-240/22 P, EU:C:2024:915, paragraph 179.

11 CJEU judgment of 24 October 2024, *Intel*, Case C-240/22 P, EU:C:2024:915, paragraph 340; Judgment of 18 September 2024, Google and Alphabet v Commission, ("Google AdSense"), T-334/19, paragraphs 379-389.

evidentiary burden of proof for the Commission once the presumption is rebutted. We therefore urge the Commission to amend the draft Article 102 Guidelines to clarify, in accordance with CJEU case law, what is the applicable standard of proof after the rebuttal of a dominant undertaking as 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.

3) **The draft Article 102 Guidelines downplay the relevance of the AEC principle and consumer welfare, and unduly disregard the concept of anti-competitive foreclosure**

The draft Article 102 Guidelines set out the conditions to establish whether a dominant company's conduct is abusive, i.e. whether such conduct deviates from competition on the merits, is capable of 'exclusionary effects', and cannot be justified on objective grounds or because of overriding efficiencies.[12] In setting out the conditions to find an exclusionary abuse, the draft Article 102 Guidelines appear to negate the AEC principle and to drop the concept of anti-competitive foreclosure.

ERT considers that the current proposal is at odds with the most recent case law of EU courts – including the Google Shopping and Intel (2024) judgments[13] – and could increase both legal uncertainty for its Member companies and the number of frivolous claims made by disgruntled third parties. For instance:

- The relevant CJEU case law has consistently stressed over time the paramount importance of the AEC principle in exclusionary abuse cases, in particular as EU courts have reiterated that "not every exclusionary effect is necessarily detrimental to competition"[14] and that Article 102 is not there to ensure that less efficient competitors than the dominant undertaking remain on the market.[15]

- The envisaged dropping of the notion of 'anti-competitive foreclosure' in favour of broader 'exclusionary effects' sets out a new standard that widens the scope of Article 102. In this respect, the Article 102 Guidelines should (i) distinguish between exclusionary effects and exclusionary effects that harm consumers and (ii) clarify that 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.

- Even if the Commission is not legally required to carry out an AEC test in every case, it 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 in paragraph 8 of the draft Article 102 Guidelines. Hence, ERT urges the Commission to provide further clarity on how such a test will be applied, clearly distinguishing cases where the test is relevant and, in particular, giving clear directions as to what factors might overturn a successful AEC test submitted by a dominant undertaking in its defence.

4) **Rules governing alleged refusal to supply and discrimination**

Unfortunately, frivolous claims of alleged rights to be supplied by supposedly dominant companies have become an increasing concern. All companies should be able to be confident that their contractual freedom to supply (or not) is preserved. In other words, companies should be free to contract with any

12 Draft Article 102 Guidelines, paragraphs 14 and 15.

13 Court of Justice judgments of 24 October 2024, *Intel*, Case C-240/22 P, EU:C:2024:915; and of 10 September 2024, *Google Shopping*, Case C-48/22 P, EU:C:2024:726.

14 Court of Justice judgment of 24 October 2024, *Intel*, Case C-240/22 P, EU:C:2024:915; paragraph 175.

15 See in particular Court of Justice judgments of 24 October 2024, *Intel*, Case C-240/22 P, EU:C:2024:915; paragraph 175; of 10 September 2024, *Google Shopping*, Case C-48/22 P, EU:C:2024:726, paragraph 164; of 19 January 2023, *Unilever Italia Mkt. Operations Srl vs Autoritá Garante della Concorrenza e del Mercato*, Case C-680/20, EU:C:2023:33, paragraph 37; and of 12 May 2022, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, Case C-377/20, EU:C:2022:379, paragraph 73. See also General Court judgment of 15 June 2022, *Qualcomm Inc.*, Case T-235/18, EU:T:2022:358, paragraphs 349 and 351.

customer or supplier which they choose to, unless the strict criteria set out in EU court judgments on refusal to supply are satisfied.

For example, some ERT Member companies have faced abuse of dominance allegations from intermediaries where suppliers have set up direct-to consumer-models or where a supplier does not need further distributors in a given country and a potential distributor claims that the supplier must supply it because of a dominant position.

Section 4.2.3 of the draft Article 102 Guidelines deals with refusals to supply,[16] while Section 4.3.4 deals with 'access restrictions'.[17] They refer to the freedom of contract and the right to property of the dominant undertaking while stating 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). More specifically:

- On refusals to supply, the draft Article 102 Guidelines note that EU Courts have set up "relatively strict conditions for finding that a refusal to supply is liable to be abusive and, therefore, that an obligation to give access can be imposed".[18] This understates the position of EU courts which have consistently held that it is only in 'exceptional circumstances' that access to an input may be requested.

- On access restrictions, the draft Article 102 Guidelines make it clear that numerous instances of access restrictions may be abusive and identify several examples.[19] This list encompasses a wide range of standard commercial conducts and because of its wide scope, and in the absence of any further detail related to the criteria to establish abuse, it is likely to endanger freedom of contract, incentives to invest and right to property of dominant firms.

The Commission should therefore clarify that an obligation to provide access to products or services on non-discriminatory terms is limited to situations where the Bronner conditions are met. 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.

Finally, ERT is concerned that, with respect to 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 sectors would be inappropriate and jeopardise investments and innovation. The Commission should therefore amend the draft Article 102 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.

5) **The draft Article 102 Guidelines overlook sustainability and fail to clarify the standard of proof in the context of the 'efficiency defence'**

The draft Article 102 Guidelines fail to offer legal certainty regarding the circumstances in which conducts detrimental to competition can be objectively justified on efficiency grounds. They do not clarify what evidence should be provided to successfully rely on the 'efficiency defence', and they ignore the role that improvements in sustainability can play in enhancing consumer welfare:

- Dominant undertakings should be able to pursue 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

16 Such *"refusals to supply"* are defined as *"situations where a dominant undertaking has developed an input exclusively or mainly for its own use and, when requested by a party (typically, an actual or potential competitor, refuses to give access"* (paragraph 96 of the draft Article 102 Guidelines).

17 Such *"access restrictions"* are defined as *"the imposition by a dominant undertaking of restrictions on access to an input that are different from a refusal to supply"* (paragraph 163 of the draft Article 102 Guidelines).

18 Draft Article 102 Guidelines, paragraph 97.

19 See in particular draft Article 102 Guidelines, paragraph 166.

on what is and is not permissible in this context. However, the absence of clear guidelines and legal certainty about environmental objective justifications that may be adduced within Article 102 investigations may hinder the draft Article 102 Guidelines' ability to influence the behaviour of undertakings.

- 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.

The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open, and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €3 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €100 billion annually in R&D, largely in Europe.

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