Comments on the draft Article 102 guidelines in relation to abusive exclusionary conduct by dominant undertakings

ICC

1. Introduction.

1.1 The International Chamber of Commerce ("**ICC**") welcomes the opportunity to respond to the consultation of the European Commission (the "**Commission**") on the draft guidelines on the application of Article 102 of TFEU ("**Article 102**") to abusive exclusionary conduct by dominant undertakings ("**Draft Guidelines**").

1.2 This report has been authored by the ICC Task Force on Competition and the Digital Economy (the "**Task Force**").

1.3 ICC welcomes the Commission's intention to provide guidelines on exclusionary abuses to market participants to reflect both the dramatic technological changes and the evolution of the case law over the last 16 years.[1] In particular, ICC supports the aim of the Draft Guidelines to ensure that markets remain open and dynamic, creating new opportunities for innovative players, including small- and medium-sized enterprises ("**SMEs**") and startups to operate on a level playing field with other players. ICC is also pleased to see the Draft Guidelines' recognition of the need to support innovation and an efficient allocation of resources, thereby contributing to sustainable development and enabling strong and diversified supply chains—a prerequisite for resilience and long-term prosperity.

1.4 Although ICC further welcomes the Draft Guidelines' emphasis on the importance of Article 102 being applied in a predictable and transparent manner, ICC believes that the current Draft Guidelines do not necessarily achieve the intended legal certainty and transparency. The legal tests and presumptions established are, in some respects, vague and need to be clarified by reference to the Article 102 case law. As such, the Draft Guidelines will be unlikely to serve their stated intention of enabling companies to self-assess whether their conduct amounts to exclusionary abuse.

1.5 ICC would, therefore, welcome greater clarity from the Commission as to the intended operation of many of the legal tests and presumptions set out in the Draft Guidelines, especially in light of the recent CJEU judgements, including *Google Shopping*. In particular, ICC would encourage the Commission to reconsider its current articulation of the case law with regards to the assessment of exclusionary effects and competition on the merits, as well as the specific legal tests set out in section 4, in order to achieve greater predictability and legal certainty.

1.6 The remainder of this submission is arranged in four sections dealing with the following topics (in the order of their appearance in the Draft Guidelines): (i) dominance, (ii) the general principles to determine if conduct by a dominant undertaking is liable to be abusive, (iii) principles to determine whether specific categories of conduct are liable to be abusive, and (iv) general principles applicable to the assessment of objective justifications, as well as an additional fifth section, dealing with sustainability considerations.

1.7 Furthermore, the Commission is asked to elaborate in a separate document on exploitative abuses, which were analysed too little in the paper under consultation. Indeed, although

[1] The Commission's existing guidance was issued in 2008, being the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the "**2008 Guidance**").

paragraph 11 of the Draft Guidelines provides that the Draft Guidelines would also be relevant for the assessment of exploitative abuse, ICC considers that the establishment of a number of "*ad hoc*" rules is appropriate for the sake of greater predictability and legal certainty.

2. Dominance

2.1 ICC welcomes the Commission's attempt to consolidate the complex web of case law containing the general principles for the assessment of dominance, there remains a lack of clarity as to their application in practice. This lack of certainty risks having a chilling effect on actions that would enhance competition, as undertakings may err on the side of caution and choose not to engage in conduct which could have brought benefits for both consumers and competition in that relevant market.

Single Dominance

2.2 The suggestion at footnote 41 of the Draft Guidelines that it is possible, "in exceptional circumstances", to find dominance where an undertaking holds a market share of below 10% is illogical, not only because 10% is too far below the level at which any sensible definition of dominance can be said to arise, but more importantly given the existence of the 10% market share threshold in the *De Minimis* Notice. Therefore, the inclusion of his footnote unnecessarily may risk undermining legal certainty and predictability, contrary to the Commission's stated purpose of the introduction of the new guidelines.

2.3 Instead, ICC would encourage the Commission to, at Paragraph 26 of the Draft Guidelines, reinstate the statement in the existing 2008 Guidance that "The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market."[2] This remains a correct statement on the basis of the Commission's decisions to date and is useful (even if only indicative) guidance.

2.4 ICC welcomes the Commission's concession that in fast-growing markets with short innovation cycles, a high market share may be ephemeral. However, in practice such an assertion may be difficult to make, particularly, as the Draft Guidelines state at Paragraph 28 that "market shares that remain stable over time may still be a reliable indicator of dominance in these markets", without providing any indication as to the length of time that a high market share may be held before being considered an indicator of dominance. For example, would a high market share which has been held for more than two years, in a typically fast-moving market, be considered an indication that technological innovation is on the horizon or an indicator of dominance? ICC would welcome further clarity in the guidelines on these points.

2.5 On a related point, outside of "fast-moving markets with short innovation cycles", the Draft Guidelines appears to omit any reference to the need for market power to persist for a

[2] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the "**2008 Guidance**"), paragraph 14.

significant period of time, in contrast to the useful explanation in paragraph 11 of the existing guidance. While we recognise that the statement in footnote 6 of the existing 2008 Guidance (that what is a significant period depends on the circumstances but "normally a period of two years will be sufficient") has no basis in EU court case law, ICC would encourage the Commission to address the temporal aspect of dominance should in some way by the Draft Guidelines.

Collective dominance

2.6 The Draft Guidelines contend that collective dominance may be established for the purposes of Article 102 even in the absence of an agreement or structural links between undertakings. This assertion is based on the test for tacitly collusive oligopoly developed under the EU Merger Regulation and related case law, particularly the judgments in *Bertelsmann/Impala* and *Airtours*. The sole support for this proposition is found in paragraph 45 of the CJEU judgment in *Compagnie Maritime Belge*, which instead stresses that collective dominance can be found based on "other connecting factors", requiring an "economic assessment" and, in particular, an assessment of the relevant market structure. However, because there was in fact an agreement between the members of the liner consortium, this statement was not pertinent to that case and was, therefore, *obiter dicta*.

2.7 Moreover, the reference to "other connecting factors" suggests that the CJEU was not referring to a situation of tacitly collusive oligopoly of the type that arise in Airtours (which can arise without the need for any connecting factors). Instead, it appears the CJEU was referring to "economic links" (consistent with paragraph 42 of the same judgment) other than "links in law", an example of which is a contractual agreement. Therefore, we consider that "connecting factors" was only intended to refer to economic links such as cross-shareholdings or directorships, without the need for an agreement (similar to those found in *Irish Sugar*[3] or *Compagnie Maritime Belge/Dafra-Lines A/S*[4], for example).

2.8 If the Commission chooses to retain this concept in the Draft Guidelines, ICC would encourage the Commission to provide greater clarity as to how an abuse of a tacitly collective dominant position would work. Given the difficulty for businesses of ascertaining with certainty whether they are dominant, many may choose to cautiously assume that they might be, and may avoid conduct which would have otherwise benefitted customers (e.g., below-cost pricing or retroactive rebates).

2.9 In addition, ICC would encourage the Commission to clarify the application of the criteria laid out in the GC's *Airtours* judgment (in the context of a merger control case) to determine whether a concentration may give rise to collective dominance. The judgment established three criteria which must be proven cumulatively but exhaustively: (i) a sufficient degree of market transparency such that all members of the dominant oligopoly are aware, sufficiently precisely and quickly, of the how the market conduct of other members is evolving, (ii) the existence of a credible deterrence mechanism, and (iii) a lack

[3] Case T-228/97 *Irish Sugar v Commission*.
[4] Case T-24/93 *Compagnie Maritime Belge Transports v Commission*.

of both constraints from actual or potential competitors and countervailing market power.[5] However, in *Bertelsmann/Impala*, although the CJEU endorsed the *Airtours* criteria, the CJEU stressed that it was "*necessary to avoid a mechanical approach*" in applying the criteria, and that a separate verification of each of the criteria in isolation should not come at the expense of the consideration of the overall economic mechanism of a hypothetical tacit coordination.[6]

2.10 This has led to conflicting interpretations as to whether the CJEU deviated from the *Airtours*-criteria and their cumulative nature, and as to whether the criteria are only of indicative nature.[7] Since the Draft Guidelines set out not just the *Airtours*-criteria but also repeat the ambiguous language of the CJEU's *Bertelsmann/Impala* judgement, ICC would encourage the Commission to clarify in the final guidelines that at least the Airtours-criteria should be met cumulatively (and possibly in combination with additional, narrower and more precise criteria) to establish collective dominance in cases where there are neither agreements nor structural links between the undertakings concerned.

2.11 Without such clarification, there is a risk that undertakings may err on the side of caution and unnecessarily consider their position to be collectively dominant. This would have the reverse effect to the stated purpose of the Draft Guidelines, and risk undermining the increasing competitive pressure exerted by such upcoming undertakings who could have posed a threat to the truly dominant undertakings.

3. General principles to determine if conduct by a dominant undertaking is abusive

Welcome changes

3.1 We recognise that there are conflicting statements from the CJEU as to whether the absence of competition on the merits and the presence of exclusionary effects should be considered cumulative or alternative requirements. However, ICC support the interpretation adopted by the Commission in the Draft Guidelines that they are cumulative in the case of exclusionary abuses.[8]

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[5] See Case T-342/99 *Airtours,* paragraph 62; Case T-193/02 *Laurent Piau,* paragraph 111; Case T-464/04 *Bertelsmann/Impala*, paragraph 247 et seqq.

[6] Case T-464/04 *Bertelsmann/Impala*, paragraph 125.

[7] *Cf.* e.g. Case C-413/06 *P Käseberg, Thorsten:* Case T-464/04 *Bertelsmann/Impala*, nyr., Common Market Law Review 2009, p.255-267(264); Golding, Jane: The Impala case: a quiet conclusion but a lasting legacy, European Competition Law Review 2010 p.261-267(266); Van Rompuy, Implications for the standard of proof in EC merger proceedings: Bertelsmann and Sony Corporation of America v. Impala (C-413/06 P), ECJ, European Competition Law Review 2008, p.608-612(611); Hirsbrunner, Simon; Von Köckritz, Christian: Da capo senza fine - Das Sony/BMG-Urteil des EuGH, Europäische Zeitschrift für Wirtschaftsrecht 2008 p.591-596(592); Berg, Werner: Die Odyssee geht weiter: EuGH hebt Sony/BMG-Entscheidung auf und verweist die Sache zurück an das EuG, Europäisches Wirtschafts- & Steuerrecht 2008, No 8.

[8] In the case of exploitative abuses, there should be no need to show an exclusionary effect (to do so would blur the distinction between the two categories of abuse).

Conduct departing from competition on the merits

3.2 ICC considers that, as currently drafted, the concept of competition not on the merits (and, in particular, its assessment on the basis of a number of indicative, non-exhaustive factors) is vague and lacking in legal certainty to form a standalone basis for a finding of abuse.

3.3 Although ICC welcomes the Commission's acknowledgement that "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",[9] we do not consider this to be a useful explanation of the concept of competition on the merits. Offering better quality products or services or investing in innovation, which is clearly competition on the merits, will inherently have the purpose and effect of strengthening the company's dominant position, thereby complicating the assessment of competitive behaviour.

3.4 Greater clarity would also be welcomed as to the operation of the legal tests for assessing whether conduct constitutes competition on the merits. Although Paragraph 53 of the Draft Guidelines outlines that conduct which fulfils the requirements of a specific legal test will be deemed as falling outside the scope of competition on the merits, it should also be clarified that the converse is true. Conduct which does not meet the requirements of the relevant legal test should be deemed competition on the merits and, therefore, fall outside the scope of Article 102.

3.5 Similarly, in setting out a non-exhaustive list of factors that are relevant to the assessment of competition on the merits,[10] Paragraph 55 of the Draft Guidelines focuses on factors which suggest the conduct does not amount to competition on the merits. To enable undertakings to effectively self-assess their conduct, ICC would welcome the Commission also setting out a list of factors, with *prima facie* presumptive effect that could be calibrated, which would tend to indicate that their conduct would amount to competition on the merits, for example, conduct which improves the quality of products or services offered by the dominant company. In such cases, the EC should have a higher burden of proof to rebut that presumption.

3.6 Similarly, following the CJEU's judgement in *Google Shopping*,[11] Paragraph 55(d) of the Draft Guidelines should clarify that there is no "general rule" that a dominant undertaking who treats its own products or services more favourably than those of its competitors is necessarily engaging in conduct which departs from competition on the merits without full consideration of the circumstances of the case.

3.7 Moreover, the conceptual coherence of the proposed cumulative test could be enhanced if the Draft Guidelines also provided examples of: (i) conduct which is competition on the merits even if it has exclusionary effects (e.g., above-cost pricing which excludes less

[9] Draft Guidelines, paragraph 49.
[10] Draft Guidelines, paragraph 55.
[11] Case C-48/22 P *Google Shopping*.

efficient competitors); and (ii) conduct which is not competition on the merits but would not be considered to have exclusionary effects.

3.8 ICC would also welcome further clarity as to the Commission's intention with respect to the pricing conduct set out at Paragraph 57 of the Draft Guidelines. Paragraph 57 states (without citing any supporting case law) that conduct which would not typically be considered to depart from competition on the merits (e.g., pricing above ATC) may, in specific circumstances, be found to do so, based on an analysis of all legal and factual elements, in particular: (i) market dynamics; (ii) the extent of the dominant position; and (iii) the specific features of the conduct at stake. This appears to indicate that there are circumstances where pricing above ATC or LRAIC could be treated as exclusionary predatory pricing. Such a position would be inconsistent with the well-established position of the EU Courts, that dominant companies must not only be able to assess the legality of its pricing conduct by reference to its own cost structures,[12] but also that being able to offer better prices than less efficient competitors is a form of competition on the merits. To reverse this position would not only create legal uncertainty, but would also directly conflict with the Commission's stated intention to help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102.[13] However, if in fact this position was intended to be limited to exclusivity rebates, such that they may not be competition on the merits even if they result in an effective price that is above ATC, ICC would encourage the Commission to make this clear.

Capability to produce exclusionary effects

3.9 Throughout Section 3.3, the Draft Guidelines refer only to the "capability" of conduct to have exclusionary effect. Although the CJEU's case law remains inconsistent and unclear as to the degree of likelihood of anticompetitive effects which must be proved, ICC considers that the Draft Guidelines should recognise that it has, on occasion, referred to exclusionary effects that are "actual or likely" and "probable".

Evidentiary burden

3.10 ICC recognises that using properly calibrated presumptions for conduct which is highly likely to have anti-competitive effects may aid legal certainty, by clarifying a long line of judicial debate and disagreement around the role of rebuttable presumptions in exclusionary abuses, while, if properly articulated, minimising any chilling effect on pro-competitive conduct.

3.11 However, as elaborated below, ICC would encourage the Commission to revisit its current articulation of these presumptions, so as to ensure consistency with the existing case law and provide greater clarity as to their operation.

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[12] See, for instance, Case C-333/21 *European Superleague* and Case C-377/20 *Servizio Elettrico Nationale*.
[13] Draft Guidelines, paragraph 8.

3.12 Firstly, the Draft Guidelines fail to make clear that the categories of conduct which may be subject to this rebuttable presumption should be interpreted narrowly. Without this critical safeguard, conduct which is unlikely to have any exclusionary effects and should, therefore, not be captured by Article 102, will too easily become presumptively abusive. For example, the Draft Guidelines appear to extend the rebuttable presumption set out in *Intel* to all scenarios of predation,[14] despite the existing predation-related case law only applying such a presumption to pricing below average variable/avoidable costs (**"AVC"/"AAC"**).

3.13 Given the well-established difficulties in successfully arguing the presence of an objective justification or efficiencies, the categories of conduct must be clearly delineated so as to minimise any chilling effect on pro-competitive conduct.

3.14 Secondly, there is no basis for lowering the evidentiary burden for the Commission to establish the requisite exclusionary effects. ICC would encourage the Commission to recognise that in order for a conduct to be considered an abuse under Article 102, it should not remain at the project stage without having been implemented, since the exclusionary effects should be more than purely hypothetical[15]. Furthermore, ICC would encourage the Commission to specify more clearly the causal relationship between the allegedly harmful conduct attributable to the dominant undertaking and the anti-competitive effects on the market.

3.15 Moreover, in describing the rebuttable presumption from the *Intel* judgement for certain forms of (exclusivity) conduct, the Commission appears to suggest (at Paragraph 60) that where the dominant firm has successfully rebutted the presumption (for example, by showing that the conduct does not prevent as-efficient competitors from being able to profitably compete), the evidentiary burden for the Commission to show the abuse should be reduced. To find that the Commission faces a lower legal standard or evidentiary burden for establishing effects, simply because the dominant firm has successfully rebutted the presumption of exclusionary effects, is not only inconsistent with the judgement in *Intel*, but also with the CJEU's statement in *Unilever*.[16] In *Unilever*, the CJEU stressed (at paragraph 42) that the EC's demonstration of exclusionary effects must be *"based on tangible evidence… going beyond the simple hypothesis*", such that any doubt as to the capacity of the conduct to produce exclusionary effects "*should benefit the undertaking resorting to such a practice*" (emphasis added).

3.16 The Draft Guidelines additionally appear to indicate that there is an asymmetric evidentiary burden for the finding of exclusionary effects, as opposed to the dominant firm's ability to prove the presence of pro-competitive effects. In doing so, the Draft Guidelines appear to suggest there is a reversal in the evidentiary burden by indicating that the Commission need only present 'specific, tangible points of analysis and evidence' to demonstrate exclusionary effects, whereas the dominant firms must provide a 'cogent

[14] Draft Guidelines, paragraph 112.
[15] Case C-377/20 *Servizio Elettrico Nationale,* paragraph 70. See also Case C-23/14 *Post Danmark*, paragraph 66.
[16] Case C-333/21 *Unilever Italia Mkt Operations*.

and consistent body of evidence' to substantiate countervailing efficiencies or the presence of objective necessity.

Substantive legal standard

3.17 In omitting any reference to "likely exclusionary effects", and instead focusing solely on the "capability" of the conduct to have "exclusionary effects", the Draft Guidelines are inconsistent the line of case law following *Post Denmark I*, which (although somewhat inconsistently) have established that the Commission must establish that effects must be *"probable"* or *"likely"* to be actionable. This approach appears to suggest that the evidentiary burden is one of less than the "balance of probabilities"; a position which is not only inconsistent with the established Article 102 case law, but also directly conflicts the position recently taken by the CJEU in *CK Hutchinson*[17] in the context of European Union ("**EU**") merger control.

3.18 The Draft Guidelines also omit any reference to the various statements of the EU Courts that not all exclusionary effects are anticompetitive[18] and, by removing the reliance on the concept of "anti-competitive foreclosure", misses the distinction between "aggressive, yet healthy and permissible, competition" ("foreclosure") and conduct which results in consumer harm ("anti-competitive foreclosure").[19] The Draft Guidelines instead stress that it is not necessary to prove 'direct consumer harm' nor that the competitors on the market 'are as efficient as the dominant undertaking' to find a conduct liable to produce exclusionary effects. By appearing to discard with the notion of anti-competitive effects, the Draft Guidelines risk creating uncertainty, by adopting a position which sits in direct conflict with the key principle of effects-based enforcement, as propounded in the body of case law following the advent of the enforcement priorities under the 2008 Guidance. Moreover, the Commission's approach, which is no longer focused on the prevention of consumer harm, risks moving towards the adoption of formalistic decisions that do not necessarily lead to anti-competitive effects.

3.19 While ICC recognises that the case law has proposed that protecting less efficient rivals may be warranted in some circumstances, for example, new entrants in the initial stages of market entry, this does not justify dispensing with the Commission's need to establish anti-competitive effects, rather than foreclosure of rivals. To do so would risk creating a position which prioritises protecting competitors over consumers, in a manner which would be inconsistent with the basic principles of competitive law in other major jurisdictions worldwide and the line of case law following the publication of the 2008 Guidance.

3.20 Moreover, Paragraph 62 of the Draft Guidelines states that, to demonstrate exclusionary effects, "it is sufficient to show that the conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors that existed at the time of the conduct's implementation". This is not only a notably low bar for establishing exclusionary

[17] Case C-376/20 P *Commission v CK Telecoms UK Investments*.
[18] Case T-286/09 *Intel Corporation v Commission*.
[19] Case C-209/10 *Post Danmark I*, paragraph 44; and Case C-23/14 *Post Danmark II*, paragraph 69.

effects, but also the cited authority for this statement, *Lundbeck v Commission*, Case T-472/13, is an Article 101 case, where the reference to "*removing uncertainty*" (as regards competitors' conduct) borrows from language which is generally used to establish the existence of a concerted practice, for which there is no equivalent concept under Article 102. In the interests of coherence and consistency, ICC would encourage the Commission to either amend Paragraph 62 so as to rely on relevant Article 102 cases or, if no such cases are available, remove the paragraph from the from the Draft Guidelines altogether.

3.21 Overall, moving away from the robust building blocks for assessing anti-competitive effects, as were established in the 2008 Guidance, would risk sacrificing legal certainty in favour of greater administrative expediency on the part of the Commission. While ICC recognises that faster decision-making could be beneficial for enforcement, there is a risk that it could lead to inconsistent or arbitrary rulings, creating an environment where undertakings feel vulnerable to unpredictable enforcement actions.

Elements that may be relevant to the assessment of effects

3.22 Paragraph 70 of the Draft Guidelines sets out a number of elements which may be relevant to the assessment of effects. Although Paragraph 70(c) states that the position of competitors is relevant in the assessment, the Commission goes onto to stress that the actions which have been taken (or could have been taken) by competitors to limit the effects of the conduct of the dominant undertaking, cannot call into question the capability of the conduct to produce exclusionary effects. However, the case cited as authority for this proposition (*Servizio Elettrico Nazionale* (paragraph 102)), only concerned situations where the possible reactions of competitors could (only) limit the harmful consequences of that practice, rather than such reaction could have prevented the harmful consequences from arising in the first place. ICC, therefore, considers that this is not an appropriate or relevant element to be included in this list and would welcome its removal.

3.23 Similarly, Paragraph 70(d) seeks to outline the relevance of the degree of market coverage of a dominant firm's conduct to the assessment of exclusionary effects. The Draft Guidelines indicate that even a small share of the market may have exclusionary effects if it relates to strategically important customers. However, in the interests of legal certainty and predictability, ICC would welcome further guidance as to what factors can be considered “strategically important” and what degree of market coverage – in the absence of conduct aimed at strategically important customers or products – is unlikely to be considered exclusionary.

Elements that are not necessary to show exclusionary effects

3.24 A consistent theme in the Draft Guidelines appears to be to minimise the relevance, or at least the weight, of the “as efficient competitor” ("**AEC**") price/cost test, with Paragraph 73 of the Draft Guidelines stating that the "assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential

competitors that are affected by the conduct are as efficient as the dominant undertaking" (citing the *Google Shopping* GC judgment in support). Although this statement is technically correct, it should remain relevant whether the conduct was incapable of excluding a hypothetical, equally efficient competitor. Contrary to footnote 325 of the Draft Guidelines, neither the ruling of the GC nor the subsequent CJEU judgment mean that the assessment of exclusionary effects is assessed solely in relation to existing actual or potential competitors. In fact, the CJEU has made clear in *European Superleague*[20] (paragraph 129) and *Google Shopping* (paragraph 165) that the capacity to exclude equally efficient competitors can be an important consideration.

3.25 Moreover, an over-arching observation that applies to all sections of the Draft Guidelines which deal with the notion of exclusionary effects, is that the Commission has failed to set out a coherent framework which allows actually or potentially dominant undertakings to ascertain whether their conduct would be considered exclusionary if their conduct would exclude only a less efficient (actual, potential or hypothetical) competitor. ICC would encourage the Commission to amend Section 3.3 of the Draft Guidelines to do so, including by clarifying that the capacity of conduct to exclude an equally efficient (even if hypothetical) competitor should be considered the "benchmark" or "default" principle for assessing whether the conduct of dominant company is exclusionary, in line with the statements of the CJEU in *European Superleague* (paragraph 129) and *Intel* (paragraph 134 and 144)[21].

3.26 Consequently, ICC considers that the onus should be on the Commission to establish why, in the circumstances of the case, it is not appropriate to apply that principle. For example, if the Commission chooses to assess conduct on the basis of its capacity to exclude potential new entrants (in reliance on paragraph 131 of the *European Superleague* judgment), it should explain why that is appropriate (e.g., because without the conduct, new entry was sufficiently likely and would have materially increased competition in the market).

3.27 Further discussion as regards the relevance of the AEC test to the legal tests set out in Section 4 of the Draft Guidelines is included below at paragraphs 4.1 to 4.3, and 4.10.

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

Section 4.2. Conducts subject to specific legal tests

Section 4.2.1. Exclusive dealing

4.1 Despite the case law following *Post Danmark I* consistently referring to the central role of the AEC test in assessing pricing conduct[22], the Draft Guidelines appear to minimise the role of the AEC test in finding an abuse.

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[20] Case C-333/21 *European Superleague Company*.
[21] Case C-413/14 P *Intel Corp v Commission*.
[22] See, for instance, Case C-333/21 *European Superleague* and Case C-377/20 *Servizio Elettrico Nationale*.

4.2 In attempting to articulate the specific legal test for exclusive dealing, the Commission simply outlines the factors set out in the CJEU's *Intel* judgement.[23] In doing so, the Draft Guidelines make no specific reference to the ability of a dominant undertaking to put forward evidence demonstrating that its rebate system does not hinder the entry or expansion of equally efficient competitors (e.g., by successfully proving that its rebates pass the AEC cost price test). ICC would, therefore, welcome greater clarity as to the proposed framework for evaluating the probative value of such evidence.

4.3 Moreover, the absence of any explanation as to the significance of successfully proving that the price/cost AEC test is passed, runs counter to the fact that such evidence was in fact determinative in the subsequent *Intel* judgment of the General Court. The clear and inherent implication of both judgements in *Intel* is that the price/cost AEC test is relevant to the assessment of the conditions and arrangements for granting the rebates in question (including their duration and amount), and if it is passed this should, at a minimum, be considered strong evidence that they do not amount to an abuse. To find an abuse in such cases, the burden should be on the Commission to explain why the foreclosure of only less efficient competitors has the actual or potential effect of restricting competition, for example, by reference to the factors set out in Paragraph 145 of the Draft Guidelines or because it prevents potentially competitors from even entering the market.[24]

Section 4.2.2 Tying and Bundling

4.4 Although ICC generally supports the Commission's reflection of the case law in articulating the specific test for tying and bundling, ICC would encourage the Commission to clarify how the re-introduction of a presumption-based rule for tying and bundling can be reconciled with the effects-based analysis articulated in *Google* (*Android)*[25] and *Microsoft* (*Windows Media Player*, "*WMP*").[26] As currently drafted, the Draft Guidelines appear to suggest a return to the early "classical tying cases" in which it had been suggested that such practices were presumptively unlawful and, therefore, effects were presumed.[27] Greater clarity is, therefore, required so as to avoid creating legal uncertainty or unpredictability.

Section 4.2.3. Refusal to supply

4.5 ICC would encourage the Commission to revisit their current articulation of the specific legal test applicable to refusals to supply. The reference to the input is necessary for the requesting firm to "remain viably on the market" at Paragraph 101(iii) of the Draft Guideline appears to set the bar too high. The existing Art 102 enforcement guidance outline a more appropriate approach, outlining that when examining whether a refusal to supply

[23] Case T-286/09 *Intel Corporation v Commission,* paragraph 160-166.
[24] As per Case C-333/21 *European Superleague,* paragraph 131.
[25] See Case AT.40099, *Google Android*, paragraph 749.
[26] See Case COMP/C-3/37.792, *Microsoft,* paragraph 841.
[27] See, for example, Case T-201/04, *Microsoft Corp*, para. 86.

deserves its priority attention, the Commission will consider whether the supply of the refused input is "objectively necessary for operators to be able to compete effectively on the market".[28] Similarly, the Commission should also reinsert the helpful clarification contained in the existing guidance that an input will be considered indispensable where there is no actual or potential substitute on which competitors in the downstream market could, in the long-term, rely upon to counter the negative consequences of the refusal.[29]

4.6 Moreover, despite *Bulgarian Energy Holding* containing key guidance on the circumstances in which conduct does not amount to a refusal to supply, the Draft Guidelines contain no reference to the judgement. In particular, ICC would encourage the Commission to clarify that there must be proof that the potential competitor has a sufficiently advanced plan to enter the relevant market, within a period of time which would impose competitive pressure on the operators already present in the market.[30] Otherwise, a refusal to supply could be established where the alleged effects are purely hypothetical. Additionally, the Commission should make clear that to establish a request for access (to which the dominant undertaking would be required to respond) it is not sufficient for the third party to make only a purely exploratory approach to the dominant undertaking which controls the access to the infrastructure.[31]

4.7 ICC would additionally encourage the Commission to include a reference in the Draft Guidelines to the CJEU's recent judgement in *Google Shopping*, in particular, its explanation that the essential facilities doctrine is largely confined to cases involving intellectual property rights or infrastructure where the dominant company has invested in design or development for its own purposes and that it is entitled to protect its investment and prevent others from free-riding on it.

Section 4.2.4. Predatory pricing

4.8 In setting out the scope of the specific legal test for predatory pricing, the Commission inaccurately reflects the case law in its assertion that "predatory pricing can take place in the market in which the undertaking is dominant or in related markets".[32] The Akzo judgment which has been cited in support of this proposition actually related to predatory pricing in a segment (or "sub-market" in the words of the Commission's decision) of the same, single market in which Akzo was held to be dominant. This was possible, on the facts, because the organic peroxide product in respect of which predatory prices were charged had different applications. Consequently, despite the reference to "different market" , a proper reading of the judgement does not support the proposition that predatory pricing can still constitute an abuse if the undertaking is not dominant in that market, but the market is "related" to one in which they have been found to be dominant.

[28] See paragraph 83 of the 2008 Guidance.
[29] *Ibid.*
[30] See Case T-136/19, *Bulgarian Energy Holding,* paragraph 281.
[31] See Case T-136/19, *Bulgarian Energy Holding,* paragraph 282.
[32]

4.9 In any event, ICC would encourage the Commission to carefully consider whether there are sound policy justifications for making such a sweeping assertion that dominant companies cannot price below costs in other, related markets in which they are not dominant. Non-dominant companies will often engage in below-cost pricing to build market share, to enable them to achieve the economies of scale which are necessary to effectively compete in the market. Prohibiting such conduct, simply because an undertaking is relevant in another, related market, risks leading to less competition (and consumer harm), particularly where the related market they are hoping to enter is dominated by a different business. Moreover, such a prohibition risks creating a "chilling effect" whereby undertakings who consider that there is a risk they *might* be considered dominant in one market may err on the side of caution and adopt a broad definition of "related market", avoiding engaging in such conduct across a wide range of unrelated markets, depriving customers of not only short term price benefits, but also the long term benefits of increased competition in each potential market.

4.10 At minimum, ICC would welcome the Draft Guidelines outlining that: (i) unlike other forms of predatory pricing, where pricing conduct in a non-dominant market fails the AEC price/cost test, there will be no presumption that the conduct is not on the merits and has anticompetitive effects; and (ii) the Commission will, in general, only consider such conduct to amount to an abuse if it can prove that it has the effect of excluding a potential competitor from the dominated market.

4.11 The Draft Guidelines also state that predatory pricing in a segment of a market may be considered an abuse if the intention of the pricing strategy is to either increase the attractiveness of the dominant undertaking's overall portfolio on the market or to prevent competitors (actual or potential) from getting a solid foothold in the market.[33] While ICC supports the inclusion of the latter example (for which the GC judgment in *Qualcomm*[34] can now also be cited in support), the former theory of harm does not make economic sense as a standalone theory of harm. Where competition exists at the level of the portfolio of products, then irrespective of the pricing of the individual components of the offering, competitors simply need to match the effective price of the portfolio. If competition does not exist at the portfolio level and, instead, customers source different products in the portfolio from different suppliers, then the overall attractiveness of the portfolio is irrelevant. It those circumstances, it is only the capacity of the predatory pricing in a particular segment to prevent actual or potential rivals from getting a foothold in the wider market which should be considered relevant.

Section 4.2.5. Margin squeeze

4.12 The Draft Guidelines appear to be seeking to lower the threshold for a finding of margin squeeze. The Commission cites *Teliasonera*[35] as authority for stating that where the price-

[33] Draft Guidelines, paragraph 197.
[34] Case T-671/19, *Qualcomm (predatory pricing)*.
[35] Case C-52/09 *Teliasonera*.

cost test indicates a negative spread, the margin squeeze has a high potential to produce exclusionary effects and that such effects can be "presumed".[36] However, this is not an accurate restatement of the judgement, which actually states that where the margin is negative an effect which is at least potentially exclusionary is "*probable*".[37] This inconsistency between the case law and Draft Guidelines, risks creating unnecessary legal uncertainty and unpredictability and, as such, the drafting should be updated to accurately reflect the case law (as is the stated intention of the Draft Guidelines).

4.13 Similarly, ICC would welcome increased clarity as to the basis for the Commission assertion at Paragraph 136 of the Draft Guideline, that the Commission may be able to find an abuse even if a margin squeeze is not applied across all products in the relevant market, but instead only in respect of some products, or even an "individual offer". ICC considers that the conduct set out in the example provided at footnote 306 of a circumstance in which it may be appropriate to do so (being a new offer with volumes which could substantially increase in the future and so eventually lead to an overall negative margin) should not be considered abusive. Simply because an offer might result in volume increases and an overall negative margin in the future should not be considered sufficient to find an abuse, but instead an abuse should only be found when the overall margins actually become negative. ICC would, therefore, encourage the Commission to instead refer to the factors discussed in Paragraph 107 of the Draft Guidelines, whereby below cost pricing may be abusive if it takes place in a segment that is strategically important for competitors to establish a solid foothold in the market.

Section 4.3. Conducts with no specific legal test

Non-exclusive conditional rebates

4.14 Despite the position taken with regards to the AEC test's potential role in the assessment of pricing conduct, in Section 4.2.1, the Commission appears to imply that the AEC test, or indeed any price/cost test, has no role to play in assessing the capability to exclude of the non-exclusivity rebates. This stands in stark contrast to position taken by the CJEU in it judgement in *Servizio Elettrico Nationale* (a judgement consistently relied upon by the Commission in the Draft Guidelines) where it states that for pricing conduct *"which includes loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the 'as-efficient competitor' test, which seeks specifically to assess whether such a competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position."*[38]

4.15 In general terms, it seems well-established that it may be useful to apply the replicability test to all exclusionary abuses, and not only to pricing practices where the AEC test applies, as this may encourage greater legal certainty and predictability for competition

[36] Draft Guidelines, paragraph 128.
[37] Case C-52/09 *Teliasonera,* paragraph 73.
[38] Case C-377/20 *Servizio Elettrico Nationale*, paragraph 79 and 80.

authorities and companies alike. Indeed, in the case of refusal to supply, there is no abuse if the inputs denied by the dominant undertaking can be duplicated by equally efficient competitors, by either purchasing them from other suppliers or by developing them themselves. Similarly, in the context of tying and bundling practices, whether it is possible to replicate a product is particularly relevant in establishing whether there is potential or actual anticompetitive foreclosure[39].

4.16 ICC considers that although the Commission is correct to reject the notion of any all-encompassing AEC test, attempting to draw such a distinction between the assessment of exclusivity and non-exclusivity rebates is impractical and contrary to legal certainty. Not only does such an approach stand in conflict with established case law, but also in light of the practical difficulty of drawing a line, given economically and in terms of effects there is no fundamental difference between exclusivity and non-exclusivity rebates. Instead, ICC would encourage the Commission to make clear that the AEC test remains one tool amongst many which the Commission has at its disposal in the assessment of non-exclusivity rebates.

4.17 At Paragraph 144(b) of the Draft Guidelines, the Commission outlines further circumstances in which it may not be appropriate to carry out a price-cost AEC test. The first example states that a price-cost test may not be appropriate if non-monetary inducements cannot "easily" be converted into a quantified monetary amount, even though the relevance of the "ease" of carrying out the test is not referenced in the cited case of *Unilever*. ICC would encourage the Commission to clarify that if a non-monetary inducement is conditional on the purchase of certain volumes, its quantification should be by reference to the objective cost to the dominant company of offering the inducement, rather than the subjective benefit that may be realised by the customer. This approach would bring the guidance in line with the current position taken in the EU courts.[40]

4.18 Although ICC recognises that the second example is drawn from the *Post-Danmark II* case law, we consider that it gives rise to the unusual result in that a dominant company which either has a very large market share or operates in a market with significant barriers to entry or expansion would be entitled to exclude less efficient rivals by setting a (non-predatory) price that is below those rivals' costs, unless it does so by way of retroactive rebate, despite the customer's effective price being the same. In order to support the logical coherence of the guidance, ICC would welcome further clarification as to the reasons for this difference (perhaps by reference to those set out in Paragraph 145(c)).

4.19 Moreover, by stating that a price-cost test is only required to assess standardised incremental rebates, Paragraph 144(b) appears to imply that a price-cost test may not be appropriate for non-standardised incremental rebates. However, this is contrary to the position taken in *Post Danmark I*, where the court made clear that a dominant company is entitled to offer discounts selectively to certain customers provided they do not result in a predatory price. The judgment also confirmed that effective price in that case included

[39] Opinion of Advocate General Rantos, Case C-377/20 *Servizio Elettrico Nationale*, paragraphs 70 and 71.
[40] See paragraphs 436-438 of the General Court's second *Intel* judgment (Case T-286/09 RENV), as approved by AG Medina in the Commission's appeal against that judgment (Case C-240/22).

the use of rebates and discounts (paragraph 11). Given an incremental rebate, standardised or non-standardised, allows the customer to ascertain in advance the per-unit price of every product subject to the incremental rebate, there is no effective difference from the perspective of a rival seeking to win that customer's volumes. Consequently, given drawing such a distinction is both confusing and unnecessary, we would encourage the Commission to consider amending paragraph 144(b) to refer to all incremental rebates, standardised or not.

4.20 As regards the AEC price/cost analysis, at Paragraph 151 of the Draft Guidelines, the Commission states that rebates will be considered not to be competition on the merits if they result in an effective price on the contestable portion of demand that is below AAC. However, in contrast to the existing guidance, the Draft Guidelines, omit any reference to the implications of effective prices that are between AAC and LRAIC. ICC would encourage the Commission to clarify in the new Draft Guidelines that such pricing will be considered to be competition on the merits, as the dominant company is in fact competing on price and is achieving greater profits than if it had not sold the relevant volumes. Alternatively, the Commission could consider adopting a similar test to that set out for predatory pricing, such that pricing between AAC and LRAIC may not be competition on the merits where there is evidence of an intention to exclude a competitor.

Self-preferencing

4.21 ICC would encourage the Commission to update this section of the Draft Guidelines, particularly following the recent judgement of the CJEU in *Google Shopping*. Paragraph 161(iii) of the Draft Guidelines refers to considerations of the General Court in *Google Shopping* (regarding the conduct being contrary to the interests of the dominant company or its customers in the leveraging market), however, the CJEU has since found that these were included "for completeness" and were not determinative in that case.

4.22 Therefore, we encourage the Commission to consider removing Paragraph 161(iii) and instead refer to paragraph 171 of the CJEU's recent judgment in *Google Shopping*,[41] which assesses whether the exclusionary effects on the downstream market and the dominant company's success are attributable to self-preferencing conduct or to the merits of its offering on the market. Nevertheless, in citing this test, it should be clarified that the test would not be relevant where the self-preferencing conduct can itself improve the merits of the dominant company's offering on the market (e.g., where a dominant company uses its superior proprietary information about customer preferences to offer services or products that are better tailored to the demands of their customers).

[41] *"[T]he potential exclusionary effects on the downstream market […] and the success of Google's comparison shopping service on that market […]were due not to the merits of that service but to those practices combined with the specific circumstances identified."*

Access restrictions

4.23 Similarly, in light of the CJEU's judgement in *Google Shopping*, the Commission should also consider revising this section of the Draft Guidelines. Paragraph 166(d) of the Draft Guidelines currently states that an abuse access restriction may be found where a dominant undertaking develops an input with a stated purpose to share it with third parties, but later restricts or fails to provide access. Given the cited authority for this statement is "by analogy" to paragraphs 177-185 of the GC's *Google Shopping* judgment, which were found by the CJEU to be irrelevant to the finding of abuse on the facts, this paragraph should be updated. This update is particularly pertinent given the CJEU also found in paragraph 105 of its *Google Shopping* judgment that the shopping results boxes did not constitute a separate infrastructure from the general search results page, and the general search results page was open to third party access. Moreover, imposing a blanket rule preventing dominant companies from changing their mind about their use of resources that they have created, before they have actually committed to allow third party access, could risk deterring pro-competitive investment.

5. General principles applicable to the assessment of objective justifications

5.1 In outlining the objective necessity defence, ICC welcomes the Commissions recognition of the need to allow for conduct which contributes "to the Union's resilience as it is necessary to reduce dependencies and mitigate shortages and disruptions in supply chains". Parties must retain the ability to fortify their supply chains, provided they do so in a manner which is consistent with effective competition in market. However, additional guidance as to the likely scope and application of this factor would be welcomed, given, as currently drafted, it is no more than a vague and conceptual statement of (seemingly political) policy.

5.2 However, the lack of clarity in the current drafting of Paragraph 48 of the Draft Guidelines undermines the ability for dominant undertakings to effectively exercise this defence. Paragraph 48 conflates the requirements of "objective necessity" (one of the forms of objective justification) with the category of objective justification (which, per Paragraph 5 of the Draft Guidelines, includes both objective necessity and efficiency defence). To meet the requirements of the “necessity defence”, the Draft Guidelines require a conduct being "objectively justified" and proportionate and, therefore, uses a different terminology for the efficiency defence. This may cause confusion, given both defences are considered objective justifications by Section 5. ICC would, therefore, welcome further clarity in the articulation of the Commission's proposed approach to the availability of this defence.

5.3 Additional guidance would also be welcome as regards the evidence needed to justify conduct that is presumed to lead to exclusionary effects and for naked restrictions. For example, Paragraph 70 of the Draft Guidelines makes clear that where conduct has a high potential to lead to exclusionary effects, it must be given "due weight" in the balancing exercise to be carried out in this context. Given "due weight" is an undefined legal concept, the current drafting could lead to significant uncertainty as to the availability of the defences. A similar lack of clarity can be seen at Paragraph 70, where the Commission

states that establishing that while it is "in principle open to the dominant undertaking to seek to show that the naked restriction is justified on the basis of an objective justification, it is highly unlikely that such behaviour can be justified in this way" (emphasis added).

5.4 Indeed, ICC considers that establishing clear standards and a comprehensive, though non-exhaustive, list of generally accepted objective justifications, may bring improved legal predictability, by allowing actually or potentially dominant undertakings to self-assess whether anti-competitive effects that are produced on the market may be justified.

5.5 ICC would also welcome the inclusion of a reference to the State compulsion defence in this section, given it effectively amounts to an objective justification for conduct that may otherwise be abusive.[42] *Bulgarian Energy Holding* should also be cited as an example of circumstances in which conduct can be justified as proportionate so as to protect the dominant company's legitimate commercial interests.[43]

6. Sustainability considerations

6.1 ICC would additionally like to draw attention to the absence of any meaningful reference to sustainability considerations in the Draft Guidelines. This stands in stark contrast to the updated Horizontal Guidelines in 2022, which dedicated an entire chapter of the guidance on horizontal co-operation agreements ("**HGL**") to "sustainability agreements". The HGL set out how businesses can work together to fight climate change; put their industry on a more sustainable basis; and achieve broader social sustainability objectives. While not perfect, the HGL provides a clear framework by which businesses can enter into agreements on things such as green production, phasing out the use of dirty fuels, and sourcing inputs on a more sustainable basis.

6.2 ICC would encourage the Commission to consider taking a similar approach to the Draft Guidelines, and provide a clear framework for taking into account sustainability considerations at all levels of the Article 102 assessment. Taking such an approach would be consistent with the Commission's statement at Paragraph 1 of the Draft Guidelines regarding the importance of ensuring "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."

Sustainability and the conduct assessment

6.3 The courts have long recognised that dominant companies have a "special responsibility" not to allow its conduct to impair genuine undistorted competition and that the categories of abuse are not fixed. Moreover, recent decisional practice has demonstrated that the existing categories of conduct are increasingly flexible. There is, therefore, no reason why unsustainable practices by dominant companies, such as: burning toxic waste, dumping pollutants in rivers, using child labour, paying starvation wages, or cutting down the

[42] See, in particular, Case T-136/19, *Bulgarian Energy Holding*, paragraphs 548, 572 and 616.
[43] See Case T-136/19, *Bulgarian Energy Holding* paragraphs 547, 616 and 625.

Amazon jungle should not be recognised for what they are – abusive practices, and where perpetrated by dominant companies, treated as an abuse of dominance.[44]

6.4 One practical example might be the distortion of competition that arises when a dominant company avoids the costs of disposing responsibility of waste products (e.g. by dumping them on land or in rivers) while it's smaller rivals incur those costs, suffering a competitive disadvantage as a result. This could be considered both an "exclusionary", and arguably an "exploitative," abuse by a company in a dominant position.

6.5 Although there are more limited cases in this area, national competition authorities are showing increasingly willingness to recognise sustainability considerations in the assessment of abuse.

6.6 For example, in the *Google/Enel X* case, harming the environment was an aggravating factor when fines of £100 million were imposed on Google by the ICA, the Italian competition authority. The ICA took into account the "possible negative effects (which) could occur to the diffusion of electric vehicles, to the use of "clean" energy and to the transition towards a more environmentally sustainable mobility".[45]

6.7 Similarly, in the *Corepla* case, the ICA imposed a EUR 27 million fine on a plastics supply chain consortium for abusing its dominant position in the market for the recovery and recycling of plastic packaging for food use. The ICA said its intervention contributed to the achievement of recycling and waste management-related environmental goals (as established by both EU and Italian legislation).[46]

6.8 Another example is the *Engie II* case in France. In this case the French competition authority was concerned that various pricing and contractual provisions of Engie were an abuse of its dominant position. These included an obligation on co-owners not to use energy sources other than gas for heating and hot water. The case was settled by means of commitments which included releasing co-owners associations from the obligation to use only gas for heating and hot water which would enable them to consider other energy sources for heating and hot water.[47]

6.9 Moreover, the Commission is also considering a number of pending cases in this area. For example, in alleging that the dominant Greek electricity provider, PPC, has abused its dominant position by selling its electricity in the Greek wholesale electricity market below cost, the Commission's statement of objections alleges that, not only were independent power providers marginalised, but also investment into more environmentally friendly energy sources was deterred. In outlining the harm, the Commission draws upon how the conduct may have led, not only to higher prices for Greek consumers, but also to "higher emission levels and local pollution".[48]

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[44] For a more detailed consideration of this see, for example, "A sustainable Future: how can control of monopoly power play a part?" (Simon Holmes and Michelle Meagher) at Part II and articles cited therein.
[45] AGCM Press Release of 13 May, 2021.
[46] AGCM Press Release of 10 November, 2020.
[47] Decision of the French Competition Authority of 7 September, 2017.
[48] The *Greek Lignite* case, Commission Press Release of 7 February, 2024 [IP/24/672].

6.10 While ICC considers that there is scope to expand the categories of abusive conduct to include unsustainable practices by dominant companies (where these exclude rivals or exploit consumers), the above cases illustrate that this may not always be necessary where the theories of harm involve well established categories of abuse. In *Google/Enel X*, Google had refused to allow interoperability between its (dominant) android operating systems and an app which allowed electric car drivers access to a range of charging services. Similarly, in the *Greek Lignite* case, PPC is alleged to have engaged in predatory pricing.

Sustainability and the objective justification assessment

6.11 ICC would also encourage the Commission to make explicit the ability for undertakings to raise sustainability considerations in the context of the efficiencies defence and/or objective justification mechanism. This is particularly pertinent given the fact that many dominant companies are amongst the largest and most successful companies in our economy and, therefore, have the potential to make the greatest contribution to the transition to a more sustainable economy and the fight against climate change. Similar to the HGL, the Draft Guidelines should make it clear that the Commission wants to encourage, rather than discourage, large companies from making this contribution and avoid wrongfully classing efforts in that direction as abusive.

6.12 Examples of the potentially justifiable conduct to which the Commission could refer, drawing inspiration from the Hellenic Competition Commission (the "**HCC**"),[49] include the setting of a higher price to cover environmental and broader sustainability costs or to reinvest in environmental protection and/or the attainment of sustainability objectives without this being found excessive, bundling or tying environmentally friendlier product options, charging different customers different prices for products based on the impact on sustainability goals or refusing to provide inputs to an undertaking that does not satisfy certain sustainability standards.[50]

6.13 Taking such an approach would demonstrate the Commission's commitment to encouraging businesses to strive to achieve broad social sustainability objectives. Climate change and putting the European economy on a more sustainable basis is absolutely critical. ICC would, therefore, encourage the Commission to take the opportunity to consolidate and clarify the law and practice in this area.

[49] Hellenic Competition Commission, 'Sustainability Sandbox- Public Consultation: Proposal for the creation of a sandbox for sustainability and competition in the Greek Market' (July 2021).

[50] While initiatives such as these can, where necessary, be analysed under the "objective justification" mechanism, in many cases they will simply not amount to an "abuse" such that no such analysis is required.

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