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ANNEX

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to the

COMMUNICATION FROM THE COMMISSION

**Amendments to the Communication from the Commission
Guidance on the Commission's enforcement priorities in applying Article 82 of the EC
Treaty to abusive exclusionary conduct by dominant undertakings**

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Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC
Treaty to abusive exclusionary conduct by dominant undertakings

1. Taking into account the experience gained through the Commission’s enforcement practice and the clarifications provided by the case law of the Union Courts, it is appropriate to clarify that the concept of ‘anti-competitive foreclosure’ (Guidance on enforcement priorities, paragraph 19) refers not only to cases where the dominant undertaking’s conduct can lead to the full exclusion or marginalisation of competition but also to cases where it is capable of resulting in the weakening of competition, thereby hampering the competitive structure of the market to the advantage of the dominant undertaking and to the detriment of consumers. Moreover, in view of the Commission’s enforcement practice and the case law of the Union Courts, it is important to clarify that it is not appropriate to use the element of profitability of the dominant undertaking’s conduct in order to determine the Commission’s enforcement priorities, i.e. to pursue cases as a matter of priority only where the dominant undertaking can *profitably* maintain supra-competitive prices or *profitably* influence other parameters of competition, such as production, innovation, variety or quality of goods or services. Therefore, in paragraph 19 of the Guidance on enforcement priorities, the second sentence is replaced by the following text:

‘In this document the term ‘anti-competitive foreclosure’ is used to describe a situation where the conduct of the dominant undertaking adversely impacts an effective competitive structure^(1a) thus allowing the dominant undertaking to negatively influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services^(1b).

^(1a) Judgment of 19 January 2023, *Unilever Italia Mkt.Operations Srl v Autorita Garante della Concorrenza e del Mercato*, Case C-680/20, EU:C:2023:33, paragraph 36.

^(1b) Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 281.

2. Taking into account the experience gained through the Commission’s enforcement practice and the clarifications provided by the case law of the Union Courts, it is not appropriate, as regards price-based exclusionary conduct of a dominant undertaking, to pursue as a matter of priority only conduct that may lead to the market exit or the marginalisation of competitors that are as efficient as the dominant undertaking in terms of their cost structure. Indeed, in certain circumstances genuine competition may also come from undertakings that are less efficient than the dominant firm, in terms of their cost structure. Therefore, as set out below, two amendments to the Guidance on enforcement priorities are made:

- (a) In paragraph 23 of the Guidance on enforcement priorities, the last sentence is replaced with the following text:

‘With a view to preventing anti-competitive foreclosure, the Commission will generally intervene where the conduct concerned has already been or is capable of

hampering competition from competitors that are considered to be as efficient as the dominant undertaking⁽¹⁾.

⁽¹⁾ Judgment of 3 July 1991, *AKZO Chemie v Commission*, Case 62/86, EU:C:1991:286, paragraph 72, where, in relation to pricing below average total cost (ATC), the Court of Justice of the EU stated: ‘Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them’; see also judgment of 10 April 2008, *Deutsche Telekom v Commission*, T-271/03, EU:T:2008:101, paragraph 194, upheld on appeal by the Court of Justice (see judgment of 14 October 2010, *Deutsche Telekom AG v Commission*, C-280/08 P, EU:C:2010:603). The Court of Justice has recognised that the notion of an “as efficient” competitor refers to efficiency and attractiveness to consumers from the point of view of, among other things, price, choice, quality or innovation, see judgment of 6 September 2017, *Intel Corp. v Commission*, C-413/14 P, EU:C:2017:632, paragraph 134, and judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraph 37.’

- (b) In paragraph 24 of the Guidance on enforcement priorities, the first sentence is replaced with the following text:

‘At the same time, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure^(1a).

^(1a) Judgment of 6 October 2015, *Post Danmark A/S v Konkurrencerådet*, C-23/14, EU:C:2015:651, paragraphs 59-60; judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraph 57.’

3. As has emerged from the Commission’s enforcement practice and the clarifications provided by the case law of the Union Courts, the price-cost “as-efficient competitor test” is only one of a number of methods for assessing, together with all other relevant circumstances, whether a conduct is capable of producing exclusionary effects. The Court of Justice has also clarified that the use of an ‘as efficient competitor test’ is optional and that a test of that nature may be inappropriate depending on the type of practice or the relevant market dynamics.¹ As a result, a generalised use of such test to determine which cases of price-based exclusionary conduct to pursue as a matter of priority is not warranted and, if such test is carried out, its results should in any event be assessed together with all other relevant circumstances. Therefore, as set out below, two amendments to the Guidance on enforcement priorities are made:

- (a) In paragraph 25 of the Guidance on enforcement priorities, the first sentence is replaced with the following text:

‘In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking in terms of costs would likely be foreclosed by the conduct in question, the Commission may examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing^(1b).’

^(1b) Judgment of 6 October 2015, *Post Danmark A/S v Konkurrencerådet*, C-23/14, EU:C:2015:651, paragraph 61; judgment of 6 September 2017, *Intel Corp. v European Commission*, C-413/14 P,

¹ See e.g. judgment of 19 January 2023, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*, Case C-680/20, EU:C:2023:33, paragraphs 57-58.

EU:C:2017:632, paragraph 141; judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 643; judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraphs 57, 58 and 62.’

- (b) Paragraph 27 of the Guidance on enforcement priorities is replaced by the following text:

‘When analysing data to assess whether an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will integrate this analysis in the general assessment of anti-competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence⁽⁴⁾.’

⁽⁴⁾ Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 154; judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 175; judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 175; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 28.

4. Taking into account the experience gained through the Commission’s enforcement practice regarding access to the dominant undertaking’s input or assets and the clarifications provided by the case law of the Union Courts on such access, it is important to distinguish situations of outright refusal to supply from situations where the dominant company makes access subject to unfair conditions (“constructive refusal to supply”). In situations of constructive refusal to supply, it is not appropriate to pursue as a matter of priority only cases concerning the provision of an indispensable input or the access to an essential facility. This is in line with the case law of the Union Courts, which has clarified that such cases cannot be equated to an outright refusal to supply and therefore the criterion of indispensability of the product or service in question does not apply².

Therefore, in paragraph 79 of the Guidance on enforcement priorities, the last two sentences are deleted.

5. Taking into account the experience gained through the Commission’s enforcement practice and the clarifications provided by the case law of the Union Courts, it is not appropriate to pursue as a matter of priority margin squeeze cases only where those cases involve a product or service that is objectively necessary to be able to compete effectively on the downstream market. This is in line with the case law of the Union Courts, which has clarified that a margin squeeze is not a type of refusal to supply but an independent form of abuse that is subject to different criteria of assessment. Therefore, as set out below, four amendments to the Guidance on enforcement priorities are made.

- (a) The title preceding paragraph 75 of the Guidance on enforcement priorities is replaced by the following title:

‘D. Refusal to supply’;

² Judgment of 25 March 2021, *Slovak Telekom v Commission (Slovak Telekom)*, Case C-165/19 P, EU:C:2021:239, paragraphs 50-51 and judgment of 12 February 2023, *Lietuvos geležinkeliai AB v European Commission*, Case C-42/21 P, EU:C:2023:12, paragraphs 81-84 and 91.

- (b) Paragraph 80, including footnotes 8 and 9, is deleted;
- (c) Paragraphs 81 to 90 are renumbered as follows:

Paragraph 81 is renumbered paragraph 80; Paragraph 82 is renumbered paragraph 81; Paragraph 83 is renumbered paragraph 82; Paragraph 84 is renumbered paragraph 83; Paragraph 85 is renumbered paragraph 84; Paragraph 86 is renumbered paragraph 85; Paragraph 87 is renumbered paragraph 86; Paragraph 88 is renumbered paragraph 87; Paragraph 89 is renumbered paragraph 88; Paragraph 90 is renumbered paragraph 89.

- (d) After new paragraph 89 of the Guidance on enforcement priorities, the following title and paragraph 90 are inserted:

‘E. Margin squeeze’

‘90. A dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market⁽³⁾, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called ‘margin squeeze’)⁽⁴⁾. In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking⁽⁵⁾.

⁽³⁾ This includes a situation in which an integrated undertaking that sells a ‘system’ of complementary products sells one of the complementary products on an unbundled basis to a competitor that produces the other complementary product.

⁽⁴⁾ This conduct constitutes an independent form of abuse distinct from that of refusal to supply, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 56.

⁽⁵⁾ In some cases, however, the LRAIC of a non-integrated competitor downstream might be used as the benchmark, for example when it is not possible to clearly allocate the dominant undertaking's costs to downstream and upstream operations.’