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ANTITRUST CLIENT BRIEFING

A Less Economic Approach? European Commission Consults on Draft Guidelines for Exclusionary Conduct

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At a Glance

The European Commission (EC) has published draft antitrust guidelines on exclusionary abuses (the Draft Guidelines) and is conducting a public consultation to gather feedback.

"Our draft guidelines seek to present a predictable, coherent and workable framework to assess abusive conduct. They reflect our interpretation of the EU case law and the precious experience gained through the enforcement of abuse rules." —Margrethe Vestager, Executive Vice-President, Competition Policy, 1 August 2024

Key Points:

- The Draft Guidelines establish a presumption that conduct falling into certain specified categories can produce exclusionary effects. The EC would therefore only have to prove that conduct falls into one of these categories.
- The categories that the EC devised are partly based on explicit findings by the Union courts, such as predatory pricing. For other categories, such as exclusive dealing or tying and bundling, the suggested assessments seem to be based on selective reading of the Union courts' jurisprudence.
- In line with such case law, the Draft Guidelines require a price-cost test to determine whether conduct departs from competition on the merits for predatory pricing and margin squeeze. They foresee, however, little application for such tests in all other categories.

Background

Driven by its goal to apply an "effects-based approach" in enforcing Art. 102 TFEU, the EC published Guidance on the Commission's enforcement priorities in 2008 (the 2008 Guidance). The aim was to promote an approach focused on the potential effects of alleged abusive conduct. As for the 2008 Guidance and despite recent increased enforcement in the field, exploitative abuses, such as excessive pricing, are excluded from the Draft Guidelines.

In March 2023 the EC published a Communication (and Annex) amending its 2008 Guidance. The amendments followed a host of judgments by the Union courts on exclusionary abuses (more than 30 at the time and 34 to date) and signaled moving away from the effects-based approach. This included more emphasis on competition exercised by less efficient competitors and a lesser scope for economic data.[1]

The Draft Guidelines are the next step towards formal guidance on the application of Art. 102 TFEU to abusive exclusionary conduct by dominant undertakings. Following the adoption of the final Guidelines, which is expected in 2025, the EC will withdraw the 2008 Guidance, as amended by the March 2023 Communication.

Exclusionary Abuses Under the Draft Guidelines

The Draft Guidelines envisage the following steps in evaluating a possible infringement of Art. 102 TFEU:

1. As a general rule, the relevant product and geographic market (or markets) must be defined.

2. Whether the undertaking concerned holds a dominant position in the relevant market(s) must be assessed.

3. Whether the conduct of the dominant undertaking is likely to be abusive (i.e., whether it departs from competition on the merits and is capable of having exclusionary effects) must be assessed.

4. Whether the conduct is objectively justified, including on the basis of efficiencies (para. 14) must be assessed.

This briefing will focus on the third step, i.e., Sections 3 and 4 of the Draft Guidelines, which encompass recent developments in jurisprudence and contain important enforcement novelties.

Exclusionary Abuses — A Two-Pronged Test

The Draft Guidelines establish a two-pronged test for a finding of exclusionary abuse. All conduct that (i) departs from competition on the merits, and (ii) is capable of producing anti-competitive effects constitutes an abuse if applied by a dominant company.[2]

Step 1: What is competition on the merits?

Given that the Draft Guidelines establish "competition on the merits" (or, rather, its absence) as a central element to any finding of abuse under Art. 102, it is perhaps surprising that they offer no definition of "competition on the merits". The Draft Guidelines merely state with reference to recent case law that the concept "covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services."[3] (para. 51) They restate established case law that neither the intention to compete on the merits nor the fact that non-dominant companies engage (lawfully) in the same behaviour constitute exemptions from abuse (para. 52).

Importantly, under the Draft Guidelines, all conduct that satisfies the applicable legal test for exclusive dealing, tying and bundling, refusal to supply, predatory pricing, and margin squeeze falls outside competition on the merits (para. 53). The same applies to conduct that holds no economic interest for a dominant undertaking, except that of restricting competition (so-called naked restrictions; para. 54). The Draft Guidelines then provide a list of non-exhaustive factors that were held to be relevant for the qualification of conduct as departing from competition on the merits by the Union courts (paras. 55-58). These consist of the reduction of consumer choice, misrepresentations, the violation of rules in other areas of law, discriminatory treatment, or unreasonable behaviour in the relevant circumstances. Importantly, the list also refers to conduct that a hypothetical "as efficient" competitor would be unable to adopt, "notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market" (para. 55f).

Step 2: When is conduct capable of producing exclusionary effects?

Once it is established that conduct falls outside competition on the merits, it must be determined whether it is also capable of producing exclusionary effects. Therefore, conduct can be abusive only if it can produce exclusionary effects. The Draft Guidelines introduce three categories in this respect: one in which the EC must prove the conduct's capability of producing exclusionary effects, and two others in which these effects can be presumed:

(a) Conduct for which a capability to produce exclusionary effects must be demonstrated

The first category represents the general rule. In order to conclude that a conduct is likely to be abusive, it is necessary to demonstrate — on the basis of specific, tangible points of analysis and evidence — that such conduct is capable of having exclusionary effects (para. 60a).

(b) Conduct that is presumed to lead to exclusionary effects

The EC has identified certain types of conduct that it presumes to be capable of producing exclusionary effects. Importantly, the Draft Guidelines state that once the factual existence of the relevant conduct is established, its exclusionary effect can be presumed (para. 60b). Therefore, once conduct is presumed to lead to exclusionary effects, the dominant company must rebut this presumption or show that it is objectively justified (see Objective Justification and Comments sections below).

For two of the categories, exclusive dealing and predatory pricing, such presumption is triggered by the mere fact that conduct is captured by those categories. For conduct qualified as tying and bundling, refusal to deal, or margin squeeze, further conditions are established in the specific legal tests. Margin squeeze, for example, is only presumed exclusionary if the price-cost test indicates a negative spread (para. 128). If these conditions are not met (e.g., margin squeeze without negative spreads), the burden of proof remains with the EC, as with any other conduct not covered by these presumptions (see point (a) above).

(c) Naked restrictions

The Draft Guidelines identify a third category of conduct, which is of no economic interest to the dominant undertaking other than to restrict competition. These types of conduct are by their very nature capable of restricting competition.[4] Only in very exceptional cases will a dominant undertaking be able to prove that in the specific circumstances of the case the conduct was not capable of having exclusionary effects (para. 60c). The Draft Guidelines provide examples from the case practice, such as instances in which a dominant undertaking makes payments to customers on the condition that they postpone or cancel the launch of products that compete with those offered by the dominant undertaking's competitors. The Draft Guidelines suggest that such behaviour appears highly unlikely to be justified on the basis of an objective justification.

No requirement to show that affected competitors are "as efficient"

In Section 3.2, the Draft Guidelines state the applicable legal standard determined by the Union courts. When the burden of proof is on the EC, it needs to demonstrate that a conduct is at least capable of producing exclusionary effects. Subsequently, the Draft Guidelines provide a helpful non-exhaustive list of the relevant elements to assess a conduct's foreclosure capability (Section 3.3). Notably, according to the Draft Guidelines the assessment "does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking" (Section 3.3.4. at para. 73). The Draft Guidelines' marginalisation of the AEC test differs from the more efficiency-focused approach of the prior guidance paper, which indicated that the EC would only take up cases involving the foreclosure of less efficient rivals "in certain circumstances" where specific market features and a "dynamic view" of the constraint proposed by a rival favoured departing from the general rule.

Guidance on conduct without specific legal test

The Draft Guidelines also provide guidance on specific types of conduct for which the Union courts have not developed a specific legal test but have offered guidance on how to apply the general legal principles to determine whether such conduct is abusive (Section 4.3). This includes conditional rebates that are not subject to exclusive purchase or supply requirements, multi-product rebates, self-preferencing, and access restrictions.

Standardised volume-based incremental rebates are considered to depart from competition on the merits only if they result in pricing below cost which has to be determined through a price-cost test (para. 144a). Its application is explained in more detail (paras. 146-151). On the other hand, the Draft Guidelines recognise circumstances, notably where inducements offered by the dominant undertaking are not monetary and cannot be converted into a monetary amount, where "a less efficient competitor may also exert a genuine constraint on the dominant undertaking", and "the use of a price-cost test may not be appropriate" (para. 144). The Draft Guidelines provide a list of other factors that must be assessed when analysing all relevant legal and economic circumstances (para. 145).

Subsection 4.3.4 lists "access restrictions" that are different from a refusal to supply as the input in question has not been developed exclusively or mainly for the own use of the dominant company (cf. para. 96) and therefore does not need to be indispensable for the access seeker (para. 165). It appears, however, that the EC would still be required to prove the exclusionary effects of such conduct.

Exploitative Abuses

Whilst the Draft Guidelines are confined to exclusionary abuses, Sections 2 (assessment of dominance) and 5 (objective justifications) will also be applicable to exploitative abuses (para. 11).

Assessment of Dominance

Section 2 of the Draft Guidelines summarises the principles on assessing dominance. This includes the well-developed and court-tested principles on single dominance (2.2) as well as the concept of collective dominance (2.3). The latter has rarely been used in EU antitrust law and is therefore largely backed up with precedents from merger control cases. It remains to be seen whether principles developed for assessing prospective structural changes can be successfully applied to antitrust cases in which actual past conduct is being investigated. Given the strict requirements established for the finding of collective dominance, this question will likely continue to remain theoretical.

Objective Justifications

Section 5 of the Draft Guidelines contains references to the rare practice on objective justifications for conduct that has been found abusive under Art. 102 TFEU. It is split into the "objective necessity defence" and the "efficiency defence". Objective justifications were very rarely successful in past cases. Hence all conducts that have ever been considered or even accepted as objectively necessary to achieve a legitimate aim fit into one paragraph (168). They will only be accepted as justifications if the actual or potential exclusionary effects resulting from the conduct are proportionate to the alleged necessary aim.[5] The burden of proof for both defences is on the dominant company (or companies) and requires "a cogent and consistent body of evidence". The EC assumes that the dominant undertaking is typically better placed than the EC to disclose the existence or demonstrate the relevance of such evidence (para. 171).

Comments

In line with its preannouncements on several occasions in the past year, the EC suggests establishing a presumption that conduct falling into certain specified categories can produce exclusionary effects. The aim is to counter perceived shortcomings, notably the duration of Art. 102 TFEU procedures and the resulting perceived underenforcement.[6]

However, the impact of such presumption on dominant companies should not be underestimated. If, as the Draft Guidelines suggest, exclusive dealing is presumed to be capable of having exclusionary effects (para. 82), the dominant company must prove that the conduct is *not capable* of producing exclusionary effects. This will in many cases be very difficult and leave the dominant company with the equally difficult task of proving that its conduct is objectively justified. Notably in interim proceedings this would be nearly impossible. Such guidelines will also steer the enforcement of the national competition authorities and courts. The Draft Guidelines therefore seem to increase the risk for dominant firms that engage in exclusive dealing.

There does not seem to be any basis to shift the burden of proof to the dominant firm for exclusive dealing. The Court of Justice of the European Union (CJEU) in *Intel*[7] and *Unilever*[8] has placed the burden on the EC to prove that exclusive dealing can have exclusionary effects where the dominant firm has advanced evidence to show that its conduct was not capable of restricting competition. Similarly, we have difficulties reconciling the Draft Guidelines' reintroduction of a presumption-based rule for tying and bundling with the development of the case law. The EC has not relied on presumptions for assessing such conduct in more than 30 years. It considered that such an approach was not warranted in *Microsoft (Windows Media Player, "WMP")* as there were "good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition".[9] In *Google Android* the EC engaged in a similar effects analysis.[10] In both cases, the European General Court upheld the EC's decisions to assess conduct's capability to produce exclusionary effects, thereby distinguishing the cases from the early "classical tying cases" in which such effects had been presumed.[11] For refusal to deal we note that the Draft Guidelines are silent on the requirement for the EC to show that competitors have requested access "sufficiently precisely for the dominant undertaking to be in a position to assess whether it is required to respond

to it".[12] The court has held that a mere exploratory outreach to the dominant undertaking does not constitute a request for access.

The Draft Guidelines mark a substantial shift from the "as efficient" standard. This is probably expressed most clearly in para. 73 where the EC stipulates that exclusionary effects do not require a showing that affected competitors are as efficient as the dominant undertaking. In the same vein, the Draft Guidelines aim to limit the application of and reliance on the "as-efficient competitor" (AEC) test. The term which has been used in recent judgments (e.g. *Unilever, Intel,* and *Servizio Elettrico Nazionale*) is entirely avoided in the Draft Guidelines which refer to price-cost tests, thereby also largely avoiding references to the "as efficient" standard.

Finally, the Draft Guidelines explicitly recognise circumstances in the context of conditional rebates in which "a less efficient competitor may also exert a genuine constraint on the dominant undertaking" and "the use of a price-cost test may not be appropriate" (para. 144). The EC explains the Draft Guidelines as a necessary update to reflect the evolution of the case law since the original guidance paper. However, it is not clear that the isolated circumstances in which the CJEU has discarded the relevance of the as-efficient competitor test – for example, when analysing the position of a former statutory monopolist protected by high entry barriers[13] – justify abandoning the guidance paper's more cautious approach.

The CJEU has been very clear that whilst the use of an "as efficient competitor" test is optional, competition authorities are required to assess the probative value of the test results submitted by the undertaking concerned during the administrative procedure.[14] Given that the CJEU recognises the as-efficient competitor benchmark as an important factor across the exclusionary abuses, companies concerned could refer to this tool for their defence in assessing exclusionary effects even for non-pricing conduct.[15] The EC should therefore provide guidance on the use of the test beyond the pricing practices (predatory pricing, margin squeeze, and conditional rebates). In particular, it would be helpful to state when the test might be relevant (or not) and how its results would be considered in relation to other factors deemed relevant for the assessment. The complete abandonment of the "as efficient" standard in assessing exclusionary effects is a step in the opposite direction and, as such, not backed by case law of the Union courts.

Next Steps: Timeline

31 October 2024: Deadlines for comments on the Draft Guidelines

2025: Publication of final Guidelines on Exclusionary Abuses based on comments received

Conclusion

The Draft Guidelines represent the EC's effort to facilitate enforcement of Art. 102 TFEU. Such effort was anticipated because procedures have been perceived as very lengthy and resource-intensive, raising concerns about the provision's operability. At the same time, intervention into market mechanisms should follow clear rules and aim to improve competition in the markets rather than protecting competitors. The Union courts have provided helpful guidance on these rules and their underlying procedural requirements. These should be operationalised through guidelines; the attempt to marginalise the "as efficient" standard goes too far and is a missed opportunity towards developing a modern Art. 102 TFEU enforcement.

Sources

Draft Guidelines on Exclusionary Abuses (1 August 2024).

Accompanying press release of the European Commission (1 August 2024).

The 2008 Guidance on the Commission's enforcement priorities.

The Communication and Annex amending the 2008 Guidance on enforcement priorities concerning exclusionary abuses published in March 2023.

The Policy Brief of the Directorate-General for Competition, "A dynamic and workable effects based approach to abuse of dominance" published in March 2023.

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Endnotes

1 Cf. paragraphs 19 and 23-27 of the amended 2008 Guidance.

2 This appears to be based on the findings of the CJEU, Grand Chamber, in its judgment of 21 December 2023, *European Superleague Company SL ("Superleague")*, C-333/21, EU:C:2023:1011, para. 129.

3 Notably CJEU, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others ("ENEL")*, C-377/20, EU:C:2022:379, paras. 75 and 85. But this is not new: Already in *Hoffmann-LaRoche*, the CJEU had stipulated that adverse effects on competition must result from "*recourse to methods different from those which condition normal competition in products or services*", judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, para. 91.

4 Cf. CJEU, judgment of 21 December 2023, *European Superleague Company SL*, C-333/21, EU:C:2023:1011, para. 131, 148 and 185.

5 See for the only successful objective necessity defence recognised by the CJEU judgment of 16 September 2008, *Sot. Lelos kai Sia and Others*, C-468/06 to C-478/06, EU:C:2008:504, paras. 70-71.

6 See, for example, *Schweitzer/De Ridder*, How to fix a failing Art. 102 TFEU, Journal of European Competition Law & Practice, 2024, 15(4), 222 at 223-225 and 229 (risk of systemic underenforcement).

7 CJEU, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, para. 138.

8 CJEU, judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para. 52.

9 See EC decision of 24 March 2004, *Microsoft*, COMP/C-3/37.792, para. 841.

10 See EC decision of 18 July 2018, *Google Android*, AT.40099, para. 749.

11 GCEU, judgment of 17 September 2007, *Microsoft Corp.*, T-201/04, ECLI:EU:T:2007:289, para. 867 and GCEU, judgment of 14 September 2022, *Google Android*, T-604/18, ECLI:EU:T:2022:541, paras. 290-291.

12 GCEU, judgment of 25 October 2023, *Bulgarian Energy Holding EAD*, T-136/19, EU:T:2023:669, para. 282.

13 See CJEU, judgment of 6 October 2015, *Post Danmark (II)*, C-23/14, EU:C:2015:651, paras. 59 and 60.

14 CJEU, judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para. 62.

15 CJEU, judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, para. 59.