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EU Movement on Exclusionary Abuses, but in Which Direction?

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The European Commission (the Commission) has launched a project to codify EU law on the application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) to exclusionary abuses of dominant positions, such as exclusive dealing, tying and bundling, predatory pricing, refusals to supply and margin squeezes. The Commission published a call for evidence on guidelines for exclusionary abuses of dominance (the Call for Evidence) in March 2023, receiving 45 responses in the one-month comment period. The Commission plans to publish draft guidelines for comment in mid-2024 before adopting a final version by the end of 2025 — almost 25 years after the Commission first published guidelines on the assessment of agreements under Article 101 TFEU.

Simultaneously, but without seeking comments, the Commission amended its 2008 guidance on its enforcement priorities in relation to exclusionary abuses (the 2008 Guidance) to reflect the Commission's enforcement experience and judgments of the European Union (EU) courts. The amended guidance introduces changes in four areas: the definition of anti-competitive foreclosure, the "as efficient competitor" (AEC) test and the assessment of allegedly abusive refusals to supply and margin squeezes (the Amended Guidance). The Amended Guidance also includes copious new citations to Article 102 TFEU jurisprudence.

The Call for Evidence included no specific questions that might foreshadow positions the Commission plans to take in the future guidelines, although the Amended Guidance offers clues. In addition, a March 2023 policy brief (the Policy Brief) published by a number of Commission officials (in their personal capacities) discusses the policies behind these changes. In some cases, the Policy Brief reveals that apparently minor wording changes in the Amended Guidance reflect major policy shifts.

Background

The Call for Evidence notes that EU courts have delivered 32 judgments on exclusionary abuses since 2008, including such landmark cases as Unilever Italia, Google Android, Intel and Post Danmark II. According to the Commission, this extensive body of case law provides a solid basis for the Commission to develop guidelines on an effects-based approach to the assessment of exclusionary abuses.

As the Commission noted in its 2008 report on competition policy, the 2008 Guidance "*continue[d] the effects-based approach used by the Commission in several Article [102] cases, and consolidate[d] the analytical framework to identify the existence of consumer harm*". When the 2008 Guidance was adopted, however, the effects-based analysis seemed to run counter to European court precedents such as Hoffman-LaRoche, which tended to apply black-or-white tests to exclusionary conduct by dominant companies. Accordingly, the 2008 Guidance was couched as a description of how the Commission would decide what cases to prioritize for investigation, rather than as a summary of current EU law.

The Court's recent case law cements the effects-based analysis in Article 102 TFEU jurisprudence and arguably vindicates the Commission's 2008 Guidance, even though the Commission lost some of these cases. In the Amended Guidance and the Policy Brief, the Commission explains its interpretation of Article 102 TFEU jurisprudence, often in ways that increase the Commission's discretion when choosing which cases to prioritize.

The Commission vs. the Courts

Judging solely by the amended text, the Amended Guidance leaves the 2008 Guidance largely intact. The Amended Guidance changes only eight paragraphs out of 90, in some cases only by a few words. These changes concern four areas, each of which is discussed below (footnotes omitted throughout).

Anti-competitive Foreclosure

The Commission. The concept of "*anti-competitive foreclosure*" is key to the analysis of exclusionary abuses in the 2008 Guidance, which defined it as "*a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers*". The Amended Guidance, instead, describes anti-competitive foreclosure as "*a situation where the conduct of the dominant undertaking adversely impacts an effective competitive structure 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*".

The Policy Brief highlights two aspects of these changes. First, the Policy Brief comments that the notion of "'*effective access of actual or potential competitors to supplies or markets' (…) should be understood as not only referring to conduct that can result in the full exclusion or marginalisation of actual or potential competition but also to conduct that (…) weakens an effective competitive structure even without necessarily producing the full exclusion or marginalization of competitors*".

Second, the deletion of the reference to the dominant undertaking being able to "*profitably*" increase prices reflects the Commission's interpretation of European court precedents that "*have not considered the profitability of the dominant undertaking as a condition for a finding of potential anticompetitive effects" and have even "dismissed [this criterion] (…) in response to*

arguments by the parties, for instance in the area of predatory pricing" According to the Policy Brief, "*[t]he reference to "profitably" in the [2008 Guidance] (…) needs to be read as a reference to a general framework for assessment to set the Commission's enforcement priorities rather than a requirement to show the profitability of a conduct*".

The Courts. The changes in the Amended Guidance are supported by citations to two recent cases, *Unilever Italia* and *Google Android*. Para. 36 of *Unilever Italia* describes anti-competitive foreclosure as conduct that "*adversely affects an effective competition structure*", while para. 281 of *Google Android* refers to "*various parameters of competition, such as price, production, innovation, variety or quality of goods or service*".

Some may question the selection of citations. *Unilever Italia* is a more recent judgment of a higher court than *Google Android*, which is under appeal. Like *Google Android*, *Unilever Italia* references parameters of competition other than price, including innovation and quality (para 39), but also clarifies that the benchmark for assessing allegedly abusive conduct is whether the conduct would foreclose an equally efficient competitor or does not "*come within the scope of 'normal' competition, that is to say, competition on the merits*" (paras. 37 and 39). The 2008 Guidance mentions the concept of "*competition on the merits*" only briefly, and the Amended Guidance does not discuss its role in recent jurisprudence.

The As-Efficient Competitor Test

The Commission. One of the 2008 Guidance's most important innovations was its reliance on the AEC test as a guiding principle of Article 102 TFEU enforcement. The Amended Guidance changes the 2008 Guidance in two main respects.

The first change in effect reduces the relevance of the AEC test as a guide to the Commission's priorities. The 2008 Guidance stated that the Commission will "*normally only intervene in relation to price-based exclusionary conduct where the conduct concerned has hampered or could hamper competition from competitors which are considered to be as efficient as the dominant undertaking*" (para. 23). The Amended Guidance replaces the words "*normally only*" with "*generally*".

The 2008 Guidance also stated, "*However, a less efficient competitor may also exert a constraint which should be taken into account*" (para. 24). The Amended Guidance replaces "*However*" with "*At the same time*", apparently treating foreclosure of less-efficient competitors as potentially equally relevant to effects on as-efficient competitors, not as an exception to the rule.

The 2008 Guidance concluded that "*If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this analysis in the general assessment of anti-competitive foreclosure (…), taking into account other relevant quantitative and/or qualitative evidence*" (para. 27). The Amended Guidance replaces this firm statement with the more general, "*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 (…), taking into account other relevant quantitative and/or qualitative evidence".

The Policy Brief explains these changes by noting that "i*t 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*." The Policy Brief explains that "*in markets where barriers to entry and expansion are significant, such as in the presence of economies of scale or network effects (…), market challengers may not be expected to be able to achieve the same or even a similar cost structure as the incumbent. However, such competitors could still be successful in satisfying specific consumer needs. For instance, in certain digital markets, competitors may offer features that are particularly attractive to a specific group of customers.This may allow them to gain a foothold in the market, with the prospect of scaling up volumes and potentially increasing their efficiency at a later stage*."

Second, when applying the AEC test, the 2008 Guidance stated that "*the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing (…). Where available, the Commission will use information on the costs of the dominant undertaking itself[, but otherwise] the Commission may decide to use the cost data of competitors or other comparable reliable data*" (para. 25). The Amended Guidance changes this language in two subtle ways: inserting the words "*in terms of costs*" after "*a hypothetical competitor as efficient as the dominant undertaking*" and replacing the words "*the Commission will examine*" with "*the Commission may examine*". The Amended Guidance thus does not commit to using a price-cost analysis to assess efficiency even in terms of costs and offers no guidance as to how the Commission assesses other relevant efficiency criteria.

The Policy Brief argues that the "*Union Courts have (…) clarified that the application of an AEC test is not legally required*" and provides clearer guidance on the Commission's position on when the AEC is applicable. The Policy Brief states that "*the use of an AEC test is warranted in predatory pricing and margin squeeze cases*", since "*in these types of abuse, it is the price that is charged in itself that may be liable to be abusive, rather than the conditions associated to such price*". In the case of rebates, "*the use of an AEC test is possible but not required to prove an abuse (…). [T]he suitability of an AEC test in rebate cases should be assessed on the basis of the type of rebates at stake, by distinguishing between retroactive rebates conditional on a customer purchasing all or most of its requirements from the dominant firm ("exclusivity rebates") and other (non-exclusivity) rebate schemes*". First, as regards non-exclusivity rebates, the use of an AEC test may be appropriate to prove anticompetitive effects, depending on the circumstances of each specific case, keeping in mind the "*difficulties inherent in the drawing up of an AEC test" and that the appropriateness of such test needs to be assessed in light of factors such as the type of conduct at stake, the availability of data and the possibility to establish sufficiently reliable parameters to run the test (which is by nature based on economic inferences, assumptions and approximations)*". In the case of exclusivity rebates, "*the use of an AEC test is generally not warranted [since] (…) [e]xclusivity rebates (…) are by their very nature capable of affecting competition*".

In conclusion, the Policy Brief states, "*[e]ven in situations where the Commission is required to assess the capability of such conduct to restrict competition, the Court of Justice has not referred to an AEC test as one of the elements that the Commission is bound to take into account to carry*

out its assessment. While in certain specific cases it may be appropriate to make use of an AEC test, these cases should be considered as exceptional, in light of the high anticompetitive potential of exclusivity rebates, on the one hand, and the difficulties inherent in the drawing up of an AEC test, on the other. Finally, even when carried out, an AEC test remains only one element in the overall competitive assessment (…). The fact that a dominant undertaking's pricing conduct "passes" an AEC test should not be considered as a conclusive indication that such pricing conduct is not capable of negatively affecting competition".

The Courts. The Amended Guidance's footnotes observe that "*[t]he 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*" (para. 23), citing para. 37 of *Unilever Italia* and para. 134 of *Intel*. In para. 37 of *Unilever Italia*, the European Court of Justice (ECJ) stated that "*it is not the purpose of Article 102 TFEU to (…) ensure that competitors less efficient than an undertaking in (…) [a dominant] position should remain on the market. Indeed, not every exclusionary effect is necessarily detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient*". "*Thus,*" concludes the ECJ in para. 39, "*abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality, or where that conduct was based on the use of means other than those which come within the scope of 'normal' competition, that is to say, competition on the merits*". Para. 134 of *Intel* states that "*[c]ompetition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation*".

Thus, the inclusion of parameters other than cost structure is consistent with recent case law. Again, however, recent jurisprudence on the concept of "*competition on the merits*" is not mentioned in the Amended Guidance.

In relation to the significance of less-efficient competitors, the Amended Guidance cites *Post Danmark II* (paras. 59-60) and *Unilever Italia* (para. 57). Paras. 59-60 of *Post Danmark II* note that "*the presence of a less efficient competitor might contribute to intensifying the competitive pressure" in a market "characterised by the holding by the dominant undertaking of a very large market share and by structural advantages (…) [that] make[] the emergence of an as-efficient competitor practically impossible*". Para. 57 of *Unilever Italia* does not refer to "*less efficient competitors*", but notes that the AEC test "*may be inappropriate in particular in the case of certain non-pricing practices, such as a refusal to supply, or where the relevant market is protected by significant barriers*".

Thus, the authorities cited provide at best weak support for the Commission's elevation of the role of less efficient competitors in assessing anti-competitive foreclosure. *Post Danmark II* confirms the relevance of less efficient competitors, but only in the (presumably rare) circumstance in which the emergence of an as-efficient competitor is "*practically impossible*", while the relevance of *Unilever Italia* is unclear.

For the change in the Commission's approach to using economic data on costs and sales prices to

assess foreclosure effects on a hypothetical as-efficient competitor, the Amended Guidance cites *Post Danmark II* (para. 61), *Intel* (para. 141), *Google Android* (para. 643), and *Unilever Italia* (paras. 57, 58 and 62).

In para. 61 of *Post Danmark II*, the ECJ stated that the "*as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme*". Para. 141 of *Intel* states that "*[i]f, in a decision finding a rebate scheme abusive, the Commission carries out . . . [an as-efficient competitor] analysis, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings*", suggesting that the Commission is not required to conduct such an analysis. In *Unilever Italia*, the ECJ notes that "*such a test is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects; moreover, that method takes into consideration only price competition*" (para. 57), concluding that "*the competition authorities cannot be under a legal obligation to use the 'as efficient competitor test' in order to find that a practice is abusive*" (para. 58). Summing up in para. 61, the ECJ stated that "*[t]he use of an 'as efficient competitor test' is optional. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results*".

Thus, the cited precedents confirm that the AEC test is only one tool for assessing an alleged abuse's foreclosure effect, and the Commission is not required to use it in a given case. However, the Amended Guidance does not reflect the fact that, whether or not it decides to conduct an AEC test, it must assess evidence from such tests submitted to it.

For the change in para. 27 of the Amended Guidance — replacing the firm statement that the Commission will "*be unlikely to intervene*" if its analysis shows that an equally efficient competitor could compete with the dominant company's pricing with a much softer statement that the Commission will integrate the results of its as-efficient competitor analysis with other information – the Amended Guidance cites *Generics (UK)* (para. 154), *Telefónica de España* (para. 175), *Deutsche Telekom* (para. 175), and *TeliaSonera Sverige* (para.. 28).

In para. 54 of *Generics (UK)*, the ECJ stated that "*the finding that a manufacturer of generic medicines has a firm intention and an inherent ability to enter the market of an active ingredient that is in the public domain, if not called into question by the existence of insurmountable barriers to such market entry, can be confirmed by additional factors*". In para. 175 of *Deutsche Telekom* and para. 28 of *Telia Sonera Sverige*, the ECJ stated that "i*t is necessary to consider all the circumstances*". Similarly, in para. 175 of *Telefónica de España*, the General Court stated that "*to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances*".

While the need to consider all the circumstances is well supported and uncontroversial, the new language arguably reduces the Amended Guidance's helpfulness in understanding which circumstances the Commission considers most relevant to its enforcement priorities.

Constructive Refusals to Supply

The Commission. The 2008 Guidance noted that "*[t]he concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers, refusal to*

license intellectual property rights, including when the licence is necessary to provide interface information, or refusal to grant access to an essential facility or a network". However, the Amended Guidance deletes two sentences describing "*constructive refusals to deal*" that the Commission will investigate. The deleted sentences read: "*it is not necessary for there to be actual refusal on the part of a dominant undertaking; 'constructive refusal' is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply*" (para. 79).

The deletion of references to "*constructive*" refusals to supply might suggest that the Commission now attaches less priority to enforcement in this area than it did in 2008. However, the Policy Brief suggests that the opposite may be true. The Policy Brief states that European court precedents have "*clarified that practices other than an outright refusal supply, in particular making the access subject to unfair conditions, cannot be equated to a simple refusal to supply. In these cases, (…) the Union Courts have considered that the scope of application of the Bronner criteria, in particular the criterion of indispensability, is narrower than the scope envisaged in the [2008] Guidance*". The Policy Brief describes the Bronner criteria as requirements that a refusal to supply "*relate to a product or service that is indispensable; [be] likely to lead to the elimination of effective competition; likely to lead to consumer harm, and cannot be objectively justified*".

Accordingly, the Policy Brief indicates, "*the [Amended Guidance] deleted the last two sentences of paragraph 79 of the [2008] Guidance (…), which made reference to constructive refusal to supply being assessed in the same manner as actual refusal to supply. This does not mean that the enforcement in constructive refusal to supply cases should not be prioritised, but rather that prioritisation should not depend on whether the standard set out in the original version of the Guidance on enforcement priorities for outright refusal to supply is met*".

The Courts. The Amended Guidance does not cite any authority for the deletion of the two sentences on constructive refusals to deal, but the Policy Brief cites Slovak Telekom (paras. 50-51) and Lietuvos geležinkeliai (paras. 81-84 and 91). Paras. 50-51 of Slovak Telekom state that, "*where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down . . . in Bronner do not apply. It is true that where access to such an infrastructure – or service or input – is indispensable in order to allow competitors of the dominant undertaking to operate profitably in a downstream market, this increases the likelihood that unfair practices on that market will have at least potentially anticompetitive effects and will constitute abuse (…). Nevertheless, as regards practices other than a refusal of access, the absence of such an indispensability is not in itself decisive (…). While such practices can constitute a form of abuse where they are able to give rise to at least potentially anticompetitive effects, or exclusionary effects, on the markets concerned, they cannot be equated to a simple refusal to allow a competitor access to the infrastructure, since the (…) measures that would be taken in such a context will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business*". *Lietuvos geležinkeliai* dealt with a situation in which a dominant undertaking made infrastructure completely inaccessible by destroying it, an action that the ECJ described as "methods different from those governing normal competition" (para. 71).

Thus, *Slovak Telekom* does not indicate that the Bronner criteria are irrelevant in constructive refusal to deal cases, but rather that where these criteria are not met the potential foreclosure effects of the conduct in question must be assessed on a case-by-case basis. The relevance of *Lietuvos geležinkeliai* is unclear, but again the focus on "*normal competition*" is noteworthy.

Margin Squeezes

The Commission. The Amended Guidance moves the brief discussion of margin squeezes from the section on refusals to deal into a separate section, noting in a footnote that "*[t]his conduct constitutes an independent form of abuse distinct from that of refusal to supply*," citing *TeliaSonera Sverige* (para. 56).

Although the Amended Guidance does not discuss the significance of the reorganization, the Policy Brief states that "*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. Notably, the case law of the Union Courts has clarified that a margin squeeze is not a type of refusal to supply but an independent form of abuse to which the Bronner criteria, in particular the condition of indispensability, do not apply*". Thus, the changes to the Amended Guidance "*reflect the independent nature of this type of abuse and the fact that the criteria for assessment are not the same as for refusal to supply*" and "*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*".

The Courts. Paras. 55 and 56 of *TeliaSonera Sverige* state that "*it cannot be inferred from (…) [Bronner] that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser (…). Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply*". The ECJ went on to state that "*the practice in question, adopted by a dominant undertaking, constitutes an abuse within the meaning of Article 102 TFEU, where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned*" (para. 63).

Thus, *TeliaSonera Sverige* confirms that a margin squeeze is an independent abuse to which the Bronner criteria do not apply, but also confirms that for a margin squeeze to infringe Article 102 TFEU the practice "*must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking*" (para. 64).

Takeaways

The 2008 Guidance's introduction of an effects-based analysis into the previously black-and-white world of Article 102 TFEU has been vindicated by the European courts, even when Commission decisions were overturned. Ironically, in the cases the Commission lost, the European courts have condemned the Commission not for straying from the courts' traditional presumption-based analysis, but instead for not applying an effects-based analysis with sufficient rigor.

Although a number of these cases are still under appeal, the Commission believes it is time for it to develop guidelines summarizing EU law in relation to exclusionary abuses, as the Commission has done in relation to Article 101 TFEU and the EU Merger Regulation. Unfortunately, the Commission won't issue draft guidelines until mid-2024. The Call for Evidence was open-ended, providing no hints as to the Commission's views on key outstanding issues.

For clues on approaches the Commission may take in the draft guidelines, we must look to the Amended Guidance and the Policy Brief. The Commission expands the concept of anti-competitive foreclosure to include metrics other than price, de-emphasizes the significance of the AEC test, and sets the stage for more aggressive enforcement in the areas of constructive refusals to deal and margin squeezes. However, the Amended Guidance and the Policy Brief raise many questions: how will the Commission assess foreclosure of competition on non-price metrics? When does foreclosure of less-efficient competitors constitute abuse? What competitive strategies fail to qualify as "competition on the merits" absent foreclosure of an equally efficient competitor? How will the Commission decide which potential constructive refusal to deal and margin squeeze cases to prioritize where the inputs in question are not "indispensable"?

To provide meaningful guidance to the business community, the forthcoming guidelines will need to provide more information, as well as practical guidance and examples. Given the complex case law, not fully addressed in the Amended Guidance, a more detailed consultation, perhaps accompanied by stakeholder workshops, could help flesh out the issues before the Commission publishes a full draft for comments. This would be consistent with the Commission's approach to the amended guidelines on the application of Article 101(1) TFEU to vertical and horizontal cooperation agreements, even though the law in these areas is generally more developed.

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