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The European Commission Moves Away from Economics and Proposes a Presumption-Based Approach in its Draft Guidelines on Exclusionary Abuses

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The European Commission has published for public consultation its long-awaited draft Guidelines on exclusionary abuses (draft Guidelines). The draft Guidelines aim at making it faster and easier for the Commission to pursue abuse of dominance cases, in particular by classifying a number of practices as "presumptively harmful". This represents a marked departure from the 2008 Guidance Paper, which had introduced a more economic approach into Article 102 TFEU.

Background and scope of application

In 2008, the Commission published its Guidance Paper on Enforcement Priorities for Exclusionary Abuses (2008 Guidance Paper), which introduced an effects-based approach (as opposed to a formalistic approach). While the 2008 Guidance Paper was only intended to set out enforcement priorities, it was later endorsed by the EU Courts for the biggest part. The 2008 Guidance Paper was intellectually innovative and influenced profoundly the EU case law, but at the same time was the target of criticism both internally (within the Commission) and by stakeholders who complained that it complicated the Commission's ability to intervene in abuse cases. Another problem for the Commission was that it was criticised on appeal in a number of cases for conducting incorrect assessments, in particular with the application of the so-called "as efficient competitor test".

In March 2023, the Commission announced that it was planning to publish new Article 102 guidelines and issued a call for evidence to inform their preparation. Pending the publication of guidelines, the Commission revised the 2008 Guidance Paper to provide certain clarifications on its approach.

The draft Guidelines focus on exclusionary abuses (conduct foreclosing competitors), where there have been more than 30 judgments from the EU Courts. They do not cover exploitative abuse (conduct imposing unfair prices/conditions on consumers), where there has been much less case law.

The draft Guidelines are based on the Commission's own interpretation of the case law of the EU

Courts and are without prejudice to the interpretation that the EU Courts may give in future cases.

Two cumulative conditions

According to the draft Guidelines, in order to determine whether conduct constitutes an abuse, it is necessary to establish:

- Whether the conduct departs from competition on the merits; and
- Whether the conduct is capable of having exclusionary effects.

Where it is demonstrated that conduct is liable to be abusive, it remains possible for the dominant company to show that the conduct is either objectively justified or "counter-balanced or even outweighed by advantages in terms of efficiency that also benefit consumers".

New categorisation and introduction of a presumption-based approach

The key novelty of the draft Guidelines is the categorisation of conduct in three groups. In one category the Commission must prove that the conduct departs from competition on the merits, as well as the capability of producing exclusionary effects, and in the other two categories the departure from competition on the merits and the exclusionary effects can be presumed. In the second category, the presumption is rebuttable, whereas in the third one it is pretty close to being non-rebuttable.

The categories and proposed allocation of burden are as follows:

CATEGORY 1 – GENERAL PRINCIPLES	
Scope	Conduct not covered by Categories 2 and 3 below.
Conduct departing from competition on the merits?	The Commission needs to prove that the conduct departs from competition on the merits based on the specific circumstances of the case.

Capability to produce exclusionary effects?	The Commission needs to prove that the conduct is capable of having exclusionary effects. The suggested evidentiary threshold is not high. While the effects must be more than hypothetical, there is no requirement of proof, for example, that the conduct: · has actual exclusionary effects; · is the sole cause of exclusionary effects; · resulted in direct consumer harm; · was capable of excluding competitors that are as efficient as the dominant company; and · had an appreciable impact (i.e., there is no *de minimis* threshold). Where a company puts forward evidence to rebut the Commission's presumptions, the Commission will need either to: · show that the arguments and supporting evidence submitted are insufficient to call into question the presumption (for instance due to the insufficient probative value of the evidence, or the fact that the arguments refer to theoretical assumptions rather than the actual competitive reality of the market); or · provide evidentiary elements that give "due weight to the probative value of a presumption, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects".

CATEGORY 2 – THE PRESUMPTION-BASED APPROACH – SPECIFIC LEGAL TESTS

Scope	This category applies to: · exclusive supply or purchasing agreements; · exclusivity rebates; · predatory pricing; · margin squeeze; and · certain forms of tying.
Conduct departing from competition on the merits?	Conduct fulfilling the requirements of a specific legal test is deemed as falling outside the scope of competition on the merits.
Capability to produce exclusionary effects?	Conduct that is **presumed** to lead to exclusionary effects. Once the factual existence of the relevant conduct is established, the Commission proposes that exclusionary effects can be presumed, although a company can submit evidence to rebut that presumption and the Commission is required to examine this evidence. Such evidence can be of an economic nature and in pricing cases it can also include an "as efficient competitor test", as well as other economic analyses.

CATEGORY 3 – NAKED RESTRICTIONS

Scope	Naked restrictions that have no economic rationale other than to restrict competition. Examples provided in the draft Guidelines are: · payments by the dominant company to customers that are conditional on the customers postponing or cancelling the launch of products that are based on products offered by the dominant company's competitors; · the dominant company agreeing with its distributors that they swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors; and · the dominant company actively dismantling infrastructure used by a competitor.
Conduct departing from competition on the merits?	Conduct that holds no economic interest other than restricting competition is deemed as falling outside the scope of competition on the merits.

Capability to produce exclusionary effects?	The draft Guidelines state that "only in very exceptional circumstances" will a company be able to rebut this presumption.

Assessment of dominance

The draft Guidelines include a chapter on the assessment of dominance, which includes modern considerations such as data-driven advantages and network effects, particularly relevant to digital markets. They also include a long chapter on collective dominance with a helpful analysis of the case law.

Legal tests for specific conduct and additional guidance

The draft Guidelines have short chapters explaining the specific legal tests applicable to exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze.

In addition, the Commission provides some guidance on the application of the general legal principles to conditional rebates that are not subject to exclusive purchase or supply requirements, multi-product rebates, self-preferencing, and access restrictions different from refusal to supply.

Assessment of objective justifications and efficiencies

The draft Guidelines contain a short chapter explaining how a dominant company can show that a conduct is either objectively justified (objective necessity defence) or is counterbalanced or outweighed by advantages in terms of efficiency (efficiencies defence). Aligning with Ursula von der Leyen's political guidelines for the next Commission 2024-2029, the draft Guidelines specifically refer to conduct contributing "to the Union's resilience as it is necessary to reduce dependencies and mitigate shortages and disruptions in supply chains" as a potential objective necessity defence.

Key takeaways and tension points

The effects-based approach is undermined. While the Commission accepts, in principle, the effects-based approach, the categorisation of practices based on their formal characteristics instead of their economic function and the introduction of presumptions for certain categories of practices as opposed to others, in reality, represents a certain departure from the so-called "new economic analysis" and the effects-based approach.

Reduced focus on consumer harm. The draft Guidelines shift the focus away from consumer harm, which was one of the central points in the 2008 Guidance Paper, and explicitly state that there is no need to prove direct harm on consumers to find a conduct liable to produce exclusionary effects. Connected to that, the draft Guidelines no longer rely on the concept of "anti-competitive foreclosure", i.e. foreclosure of competitors that produces consumer harm, as opposed to pro-

competitive foreclosure.

The practical impact of the draft Guidelines on the ability of the Commission to intervene in abuse cases could be limited. While the Commission is suggesting a shift of the evidentiary burden in particular with Category 2 cases (where conduct is **presumed** to lead to exclusionary effects), the Commission will still be bound to consider any evidence that the dominant company puts forward that shows that conduct is not capable of having exclusionary effects. This comes as a consequence of the very explicit case law of the EU Courts. Therefore, it remains to be seen whether the introduction of presumptions will have any practical effects.

The Commission's suggested allocation of the evidentiary burden according to three categories and some of its legal tests for specific practices may not be accepted by the EU Courts that will have the last word. The suggested presumption that certain conduct in Category 2 is capable of exclusionary effects, is expected to be contentious. In addition, the Commission's reliance on case law to describe the legal tests for specific practices is, at times, controversial.

Next steps

The Commission invites comments on the Guidelines by 31 October 2024, and aims to adopt final Guidelines during 2025.

This entry was posted on Friday, August 23rd, 2024 at 11:23 am and is filed under Source: OECD“>Abuse of dominance, Competition policy, European Commission, European Union, Exclusionary Abuse, Guidance, Presumptions
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