Van Bael & Bellis

European Commission publishes draft Guidelines on exclusionary abuses: lowering the bar for intervention

On 1 August 2024, the European Commission (**Commission**) launched a public consultation on its draft Guidelines on exclusionary abuses of dominance (**Draft Guidelines**). The Draft Guidelines summarize the Commission's interpretation of the law governing the application of Article 102 TFEU to exclusionary abuses of dominance.

As could be expected from the Commission's 2023 revision of its Article 102 Guidance Paper and the accompanying Policy Brief previewing the key elements of future Article 102 guidelines, the Draft Guidelines are rich in sometimes highly selective quotes from Article 102 judgments of the European Courts, but offer very little in terms of general principles that could be derived from those judgments to govern the assessment of conduct under Article 102. They therefore represent more an enforcement manual for competition authorities rather than significant guidance assisting potentially dominant firms to assess ex ante potential strategies that can reduce competition law risks.

A few key takeaways are noted below.

Analytical framework

Under the Draft Guidelines the Commission can find an exclusionary abuse if conduct by a dominant firm:

i. departs from competition on the merits;
ii. is capable of having exclusionary effects; and
iii. is not demonstrated to be objectively justified.

Departure from competition on the merits

The Commission bears the burden of demonstrating the lack of competition on the merits. For certain types of conduct, such as exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze, the Draft Guidelines provide specific tests to detect a lack of competition on the merits as well as the likelihood of exclusionary effects. In other cases, the Commission will take account of a non-exhaustive list of factors used to assess competition on the merits in the European Courts' case law, including abnormal/unreasonable changes in the dominant firm's behavior, discriminatory self-preferencing behavior, and violations of other areas of law.

Notably, the Draft Guidelines downplay the relevance of the "as efficient competitor" (**AEC**) test in determining whether competition is on the merits or capable of producing exclusionary effects. The AEC test is only discussed in detail in the context of the assessment of margin squeezes, where this has been explicitly required by case law.

Otherwise, consistent with its approach in the 2023 revision of its Guidance Paper, the Commission characterizes the AEC test as one of a number of possible metrics it might use to show lack of competition on the merits or exclusionary effects. In fact, in the case of conditional rebates, the Commission considers that the conduct's capability to have exclusionary effects should be assessed in relation to existing actual or potential competitors, rather than in relation to hypothetical as efficient competitors.

The effects of the Commission's approach are clear – dominant firms would not be able to rely on the AEC test as a defense or use the AEC test to develop an Article 102-compliant rebate strategy (as the Commission could always switch to other factors in order to determine that a pricing strategy departs from "competition on the merits"). The Commission would, however, have the discretion to resort to use of the AEC test, whenever convenient, to show that the defendant's pricing strategy was not consistent with the competition on the merits principle.

Capability of having exclusionary effects

The Draft Guidelines indicate that an effects-based assessment is an essential aspect of finding an exclusionary abuse and lay out a complex framework governing how this assessment should operate in practice. The Draft Guidelines identify three categories of conduct for which the related burden of proof is allocated differently:

- *Conduct that the Commission must demonstrate is capable of producing exclusionary effects* – the Commission bears the burden of demonstrating the conduct is at least capable of producing exclusionary effects (a standard above hypothetical possibility but below showing that it is intended to, actually does or will in the future produce such effects) with reference to specific tangible analysis and evidence.That the conduct enhances the likelihood of such effects arising on the market is deemed sufficient to meet this standard.

Notably, while the Commission indicates that examining the counterfactual may be helpful in some cases, it does appear to downplay the importance of always doing so, noting that it may be unnecessary or impractical. With this approach the Commission also signals that it is not committed to seriously engaging in an examination of causality between allegedly harmful conduct and effects on the market.

- *Conduct that is presumed capable of producing exclusionary effects* – this category of conduct (including exclusive supply or purchasing, rebates conditioned on exclusivity, predatory pricing, margin squeeze in the presence of negative spreads and certain types of tying) is seen as highly likely to produce exclusionary effects. As such exclusionary effects are presumed, the Commission is not required to extend its effects analysis beyond the consideration of any evidence introduced by the dominant firm to rebut the presumption. It remains to be seen whether the European Courts (whose case law to date has not explicitly recognized such presumptions) will agree with this shift of evidentiary burden in future appeals.

  Unfortunately, the Commission does not provide meaningful guidance on what rebuttal evidence might be deemed sufficient. For instance, the Draft Guidelines indicate that the firm can submit evidence showing that the circumstances of the case are substantially different from the "background assumptions" upon which the presumption is based, without explaining what these assumptions are.

- *Conduct that constitutes a "naked restriction"* – this conduct has no other economic object but to restrict competition, and a dominant firm can only exceptionally prove that it is not capable of having anticompetitive effects. The Draft Guidelines indicate that this category would include the dominant firm making payments to customers to postpone the launch of new products based on competitors' products, agreeing with distributors to swap a competing product for its own under threat of withdrawing discounts, or actively dismantling infrastructure used by a competitor.

Possible justifications

Finally, the dominant firm bears the burden of demonstrating that conduct that departs from competition on the merits and is capable of producing exclusionary effects is nonetheless objectively justified. To succeed, the firm must demonstrate that the conduct is either necessary to achieve a certain legitimate aim (objective necessity defense) or that it creates efficiencies that counterbalance or outweigh the harmful effects on competition (efficiency defense). In both cases, the exclusionary effects must be proportionate to the legitimate aim/efficiencies generated. Conduct that falls into the categories of presumptively producing exclusionary effects or of naked restrictions will consequently be much harder to justify. As the language surrounding justifications is somewhat broad and vague, it is not clear whether this will provide a meaningful opportunity to excuse conduct that would otherwise violate Article 102. Experience suggests that it will continue to be very difficult, if not impossible, to defend conduct as objectively justified.

A significant opportunity to comment

The aim of the Draft Guidelines is to provide market actors with greater legal certainty as to how the Commission will assess potential violations. While the Draft Guidelines do not wholly address outstanding legal questions regarding exclusionary abuses, they lay out the Commission's proposed interpretive roadmap on these issues. The direction of the roadmap is clear – lower the burden on the Commission (reflecting the narrative among enforcers that European Court cases have made Article 102 enforcement "too difficult") and maximize opportunities to find an Article 102 infringement.

With this approach, the Draft Guidelines signal a departure from the 2008 Guidance Paper, where the Commission demonstrated a greater commitment to using economic principles and related evidentiary requirements to distinguish conduct that would likely infringe Article 102 from competitive conduct that would generally be considered competition law compliant. In recent years, the European Courts have been receptive to the principles laid out in the 2008 Guidance Paper and it remains to be seen whether they will be prepared to adopt the approach set out in the Draft Guidelines.

Comments on the Draft Guidelines can be submitted until 31 October 2024, and the Commission aims to publish the final version of the Article 102 Guidelines in 2025. In light of the low evidentiary burden and seemingly wide discretion the Draft Guidelines give the Commission, it is in the interest of market actors to review the Draft Guidelines closely and make their views known during the consultation process.

If you have any questions or want to discuss any aspect of the Draft Guidelines, please reach out to our team.

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