



Recent update on Competition Law: the Draft Guidelines on exclusionary abuses of dominance

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Commission published its draft Guidelines on exclusionary abuses of dominance

On August 1st, 2024, the European Commission launched a public consultation inviting all interested parties to provide their input and comment on the draft Guidelines on exclusionary abuses of dominance. Article 102 TFEU prohibits companies with a dominant position from engaging in abusive behaviour, including behaviour that excludes competitors from the market. The enforcement of Article 102 TFEU plays a vital role in ensuring that competition works effectively both for businesses and consumers.

The draft Guidelines reflect the Commission's understanding of Article 102 TFEU and its interpretation of the EU Courts' case law on exclusionary abuses as well as the Commission's practice based on it. The key takeaways from the draft Guidelines include the following:

- ❖ The two-step test for determining an exclusionary abuse. For the conduct to be abusive, it is necessary to be established whether the conduct departs from competition on the merits and whether the conduct can have exclusionary effects. It is noteworthy that specific legal tests have been developed to determine a violation of Article 102 TFEU for the conducts of exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze. It is possible for the dominant firm to argue that the conduct is objectively justified. To be objectively justified, the conduct must be "objectively necessary or produce efficiencies that counterbalance or even outweigh, the negative effect of the conduct on competition".
- ❖ For the first step, the draft Guidelines provide a list of factors to assess whether conduct by a dominant firm departs from competition on the merits, even though further detailed guidance is needed. Moreover, conduct which satisfies one of the specific legal tests or conduct which falls into the naked restrictions category are considered to depart from competition of the merits.
- ❖ For the second step and the assessment of whether a conduct is capable of having exclusionary effects, three categories of conduct are identified:
 - i) Conduct at least capable of producing exclusionary effects: The evidentiary burden lies with the European Commission. Specific, tangible points of analysis and evidence are required to demonstrate that such conduct is capable of having exclusionary effects. A more structured test is provided for conditional rebates not subject to exclusive purchase or supply requirements, multi-product rebates, self-preferencing and access restrictions whereas the As Efficient Competitor (AEC) test seems to be appropriate for establishing an abuse with relation to pricing practices.
 - ii) Conduct with a high potential to produce exclusionary effects: This presumption applies to exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeeze in the presence of negative spreads and certain forms of tying. The burden of proof shifts to the dominant undertaking.
 - iii) Naked restrictions: a conduct with no economic interest for the dominant firm other than restricting competition. This conduct, by its very nature, is capable of restricting competition. While the undertaking may seek to demonstrate objective justification, this is possible in exceptional circumstances.

The draft Guidelines lean towards a more formalistic approach, and it seems that the intended legal certainty has not been achieved. Interested parties can comment on the draft Guidelines by 31 October 2024. We are looking forward to reading the final version of the Guidelines which, according to the European Commission, will be published during 2025.

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