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BRIEFING

The new EU abuse of dominance guidelines
More clarity, less predictability?

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The European Commission has issued new guidelines on exclusionary abuses of dominance that infringe Article 102 of the Treaty on the Functioning of the EU. While the new guidelines are expressed as a statement of the legal framework for assessing dominance, abuse and potential defences to a finding of abuse, they inevitably reflect the Commission's favoured interpretations of the EU courts' complex case law in this area. Consequently, while they bring substantial clarifications of the Commission's approach to assessing exclusionary abuses, they do not necessarily bring greater legal certainty for businesses. In many areas, they create new compliance risks, such as a risk of being found collectively dominant even when not the largest player in the market, or a risk of being presumed to have caused exclusionary effects when offering exclusivity rebates. In others, they may reduce predictability of enforcement, for example when assessing whether conduct is "capable" of having anticompetitive effects.

Businesses should therefore re-assess whether they may be considered dominant in any of the EU markets in which they operate and, if so, update their compliance policies to reflect the new guidelines.

Key issues

1. Why are these guidelines not a statement of enforcement priorities, like the 2009 guidance?
2. When might businesses be treated as collectively dominant, even if they are not dominant on their own?
3. What is "competition on the merits"?
4. Are exclusionary effects defined more broadly than they were in the previous guidelines?

5 Can conduct be abusive if it excludes only less efficient competitors?

6 What are the main changes to the assessment of specific types of abuse?

7 When can dominant companies defend their conduct as objectively justified?

8 How should businesses adapt their compliance policies in light of the new guidelines?

Background

The new guidelines replace guidance that was issued in 2009 and follow a consultation draft that was issued in 2024. The 2009 guidance was expressed as a statement of the Commission's enforcement priorities: giving comfort to businesses that – notwithstanding case law of the EU courts that seemingly gave the Commission leeway to find infringements even in cases where the dominant company's conduct could not be shown to have anticompetitive effects – the Commission would not enforce the law in such cases. Since then, the Courts have largely followed the Commission's lead, clarifying that, as a rule, a dominant company's conduct will not be considered abusive unless it meets the cumulative conditions of having actual or potential "exclusionary effects" and departing from "competition on the merits".

Consequently, the new guidelines are expressed not as a statement of enforcement priorities, but as a summary of the Courts' current case law on exclusionary abuses. In places, the guidelines adopt interpretations of ambiguous case law that favour the Commission's freedom to find infringements and limit dominant companies' prospects of successfully appealing those decisions. In others, the Commission clarifies the approach that it takes in areas where the Courts have not yet issued rulings. However, for the most part, the new guidelines seek to set out a coherent framework for enforcing the prohibition on abuse of dominance and to make sense of the (sometimes inconsistent) case law in this area.

The guidelines do not deal with so-called exploitative abuses, *i.e.,* conduct by dominant companies that harms consumers directly through the imposition of unfair trading conditions or excessive prices, although the guidance on the assessment of dominance and of objective justifications for conduct are also relevant to these types of abuse.

While binding on the Commission (to a degree), the guidelines do not bind national competition authorities of EU member states or courts, although the judgments of the EU courts that are covered by the guidelines are largely binding. Consequently, while the guidelines are likely to be highly influential, they do not reduce the possibilities for potentially divergent and fragmented enforcement by the various competent authorities – an issue which may be revisited in the upcoming review of the enforcement framework under Regulation 1/2003.

WHAT'S NEW?

The guidelines cover: (i) how the Commission assesses the existence of dominance; (ii) general principles for assessing whether conduct is abusive; (iii) tests for determining whether specific types of conduct are abusive (predatory pricing, margin squeeze, conditional rebates, exclusive dealing, tying and bundling, refusals to supply and self-preferencing); (iii) types of conduct that are considered to be harmful to competition by their very nature; and (iv) the circumstances in which a dominant company can defend against an allegation of abusive conduct by showing that its conduct was objectively justified or would benefit consumers.

The most important features of the new guidelines are summarised below.

Dominance

The guidance on circumstances in which the Commission may find a single firm to be dominant remains broadly the same but supplemented with additional information on dominance in aftermarkets and digital eco-systems, the relevance of data advantages and an expanded list of factors that may amount to barriers to entry. Helpfully, the new guidelines have retained the statement that single firm dominance is unlikely to arise for businesses with market shares of less than 40%.

An important change in the guidance is the new section on collective dominance, *i.e.,* scenarios where multiple firms that are not individually dominant are treated as acting together on the market. This includes cases in which the firms have no express agreement to coordinate their conduct, but do so tacitly, because of market features such as a small number of players and a high degree of transparency. While the Commission has only identified dominance on the basis of tacit coordination in one past decision, and then only on a preliminary basis, the guidelines signal that this could become a more frequent basis of enforcement in the future, due to the increasing use of algorithms and AI, which can facilitate tacit coordination in a wider range of circumstances. This could significantly complicate the design of compliance policies for businesses active in markets that are becoming more transparent as a result of these new technologies.

What is competition on the merits?

The guidelines define "competition on the merits" as conduct within the scope of normal competition based on the performance of economic operators, benefiting consumers through lower prices, better quality and wider choice in the short and long term. Dominant companies do not abuse their dominance if they exclude less efficient rivals by competing on the merits.

Whether conduct departs from the merits is assessed on all the facts, with a strong indication of departure where the conduct involves misleading regulatory or judicial authorities, misusing legal process, or breaching other areas of law in a way that affects price, choice, quality or innovation. Other factors relevant to the assessment are where the conduct relies on resources inherent to the dominant position, prevents merits-based consumer choice, or enables biased self-favouring treatment. A subjective intention to compete fairly is not itself a defence, though the dominant undertaking can rebut a merits-departure finding or seek to demonstrate the existence of legitimate objectives and benefits for consumers.

This is a marked shift from the 2009 guidance, which referenced a requirement to "compete on the merits" only in passing and without developing it into a defined legal test. The 2024 consultation draft – relying on the findings established in subsequent seminal case law of the EU courts such as *Google Shopping* and *Servizio Elettrico Nazionale* – had already moved decisively toward the position reflected in the new guidelines.

Exclusionary effects

The notion of "exclusionary effects" is drawn more widely in the new guidelines. The 2009 guidance stated that the Commission would normally intervene only where conduct is *likely* to lead to "anticompetitive foreclosure", defined as "a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated […] to the detriment of consumers". In contrast, the new guidelines require only that it is "more than hypothetical" that conduct is *capable of* having "exclusionary effects" – a concept which covers "a broad range of possible hindrances to the normal competitive process" – and emphasise that "there is no legal requirement to demonstrate direct harm to consumers".

Moreover, it appears that (counter-intuitively) exclusionary effects may even arise in scenarios in which a dominant undertaking is not an actual or potential competitor to the businesses that are excluded by its conduct.

Another change is the introduction of presumptions for certain types of conduct (albeit fewer than were proposed in the Commission's earlier consultation draft): a rebuttable presumption for exclusive dealing and an irrebuttable presumption for types of conduct that are considered by their very nature harmful to competition, *e.g.*, paying customers not to deal with a specific competitor, dismantling infrastructure on which rivals rely, or abusing regulatory powers to deny competitors access to a market.

The lower standard for the likelihood of anticompetitive effects and the use of presumptions for certain types of conduct arguably marks a shift away from the economics-based approach of the 2009 guidance.

<u>Exclusion of as efficient competitors</u>

One of the key innovations in the 2009 guidance was an emphasis on the idea that dominant companies should not be penalised for pricing practices, such as predatory pricing and conditional rebates, that would not exclude a hypothetical competitor that is as efficient as the dominant company. The old guidance also developed a price-cost test for assessing whether this was the case for conditional rebates: if a dominant company is pricing above its costs for sales that are contestable by rivals, then an as efficient competitor could profitably match those prices and so would not be excluded.

Subsequent case law of the EU courts elevated this idea to a general principle with potential application to non-pricing cases too, but subject to wide exceptions that undermine its practical significance. Reflecting this case law, the new guidelines state that the Commission does not need to demonstrate exclusion of an as efficient competitor where:

- conduct impedes entry by potentially competing undertakings at an earlier stage, thereby preventing the growth of competition in the market. The new guidelines indicate that this may be of particular relevance for digital markets and ecosystems; and
- situations where the emergence of an equally efficient competitor would be practically impossible, for instance due to the dominant undertaking's very large market share, the presence of significant barriers to entry or expansion, or the existence of regulatory constraints.

In practice, the Commission is likely to rely on these exceptions in a wide range of cases. The guidelines note that in non-pricing cases, the courts have not required evidence that the conduct was capable of excluding a hypothetical as efficient competitor. Even in pricing cases, the new guidelines downplay the relevance of price-cost tests that are typically used to establish whether pricing practices may exclude an as-efficient competitor. In particular, they assert that, even if the above exceptions do not apply, it may not be feasible to carry out the necessary price-cost analysis and assert that, in certain scenarios, as-efficient competitors may be excluded even if a dominant company does not price below its costs.

<u>Specific legal tests</u>

The guidelines set out the specific analytical frameworks and principles that have been developed by the EU courts to assess certain types of conduct, namely predatory pricing, margin squeeze, exclusive dealing, tying and bundling, refusals to supply, conditional rebates and self-preferencing. These sections largely update the previous guidance with reference to developments in the courts' case law since the 2009 guidance. The areas in which the new guidelines differ the most from the previous version include:

- *self-preferencing*, for which there was no developed case law in 2009. The guidelines make it clear that there is no general rule that dominant companies must not treat their own products more favourably than those of competitors. Exclusionary effects can, however, arise if a dominant company leverages its dominance in one market to give preferential treatment to its own products in another, related, market. This is more likely to raise concerns where a dominant company is able to control conditions of access to the other market or to an ecosystem of products in several markets, for example through the positioning or display of rivals' products in search engines or online platforms, or the manipulation of selection processes such as auctions;
- *refusal to supply* products, services or access to rivals, where the Courts have made it clear that the Commission is only required to prove that the strict conditions of the *Bronner* test are met – *i.e.,* that supply by the dominant company is indispensable for rivals to be able to compete and the refusal to supply would eliminate all effective competition – in cases where a dominant company owns an input that it has established or developed solely for its own use. In all other cases, exclusionary effects may be found even where

the dominant company's products or services are not indispensable. These include, for example, unreasonably refusing access to a platform developed for third party use, imposing unfair or unreasonable conditions for access, or failing to comply with legislative or contractual access obligations; and

- *exclusivity rebates*, where the new presumption and the reduced scope for defending on the basis of the as efficient competitor test (see above) create additional risks for dominant companies that offer such rebates. One helpful clarification in the new guidelines relates to rebates that are conditional on a customer purchasing specified volumes from a dominant supplier that happen to equate to all or most of the customer's requirements. The guidelines state that "to ensure predictability", the Commission will not treat such rebates as exclusive dealing (and so will not apply a presumption of exclusionary effects) unless there is evidence that the dominant company set the volume thresholds with the intention of requiring or incentivising the customer to purchase all or most of its requirements from it.

Defences

Under the new guidelines, conduct that distorts effective competition can still escape being characterised as an abuse where it is objectively justified. The dominant company must show either that the conduct was objectively necessary (protecting legitimate commercial interests, or pursuing public health, safety or another public interest objective) or that it is necessary for the achievement of efficiencies that will benefit consumers and outweigh its exclusionary effects. These efficiencies are assessed on a "sliding scale" under which conduct that is inherently more harmful to competition is correspondingly less likely to satisfy those conditions.

The guidelines go substantially further than the 2009 guidance by expressly recognising dynamic, qualitative efficiencies – investment in R&D, technical advances, addressing free-rider or hold-up problems – and, notably, sustainability benefits such as reduced emissions, resilient infrastructure and reduced supply chain disruption risk. This aligns the framework for assessing efficiency defences to exclusionary abuses with the Commission's parallel horizontal cooperation guidelines and draft merger assessment guidelines, both of which have similarly broadened their efficiency and sustainability analysis, and gives dominant undertakings a materially richer (if still evidentially demanding) toolkit for justifying conduct than existed under the 2009 guidance.

CLEARER, BUT LESS PREDICTABLE?

While the new guidelines bring substantial clarifications of the Commission's approach to assessing exclusionary abuses, they do not necessarily bring greater legal certainty for businesses.

In many areas, they create new compliance risks, such as a risk of being found collectively dominant even when not the largest player in the market, or a risk of being presumed to have caused exclusionary effects when offering exclusivity rebates. In others, they may reduce predictability of enforcement, for example when assessing whether conduct is "capable" of having anticompetitive effects.

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