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Exclusionary abuse by dominant undertakings: the Commission's proposal to review its guidance

1. Introduction

On 27 March 2023, the European Commission published a Communication (and Annex) amending its Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings (the "*2008 Guidance*") and launched an initiative to adopt Guidelines on exclusionary abuses by dominant undertakings. All interested third parties had until 24 April 2023 to comment on the Call for Evidence. 45 replies have been submitted. The goal is to adopt the formal Guidelines in 2025. This package is the first major policy initiative in the area of abuse of dominance rules in 15 years.

This Newsflash highlights the most important changes to the 2008 Guidance.

2. Background information

Article 102 TFEU prohibits abusive conduct by undertakings that have a dominant position on a particular market. Holding a dominant position on any given market is not illegal. However, it confers a special responsibility on the undertaking concerned "*not to allow its behaviour to impair genuine, undistorted competition on the internal market*".[1]

The Commission's approach to the enforcement of Article 102 TFEU has evolved over time and continues to do so. The Commission's prior approach was "form-based", supported by among others the famous *Hoffmann-La Roche v Commission*[2] case, meaning that the Commission only looked at the form and nature of the conduct in question to establish the capability to foreclosure competitors from the market.

Following criticism of its formalistic approach, the Commission adopted the 2008 Guidance. The document outlines the enforcement priorities of the Commission when applying Article 102 TFEU to exclusionary conduct by a dominant undertaking. It was the first step in its effort to provide more systematic guidance concerning the application of Article 102 TFEU and to move away from the formalistic approach of enforcing Article 102 TFEU (as was embodied by the *Hoffmann-La Roche* case).

Although the 2008 Guidance was not binding on the National Competition Authorities (hereafter, "NCAs") or the Union Courts, it influenced the case law. The Union Courts have delivered 32 judgements on exclusionary practices under Article 102 TFEU since 2008. The meaning and scope of various concepts introduced in the 2008 Guidance have been clarified further.

The most famous case is probably *Intel v Commission*. The General Court held that, given the rights of defence, the presumption of illegality of fidelity rebates granted by a dominant undertaking does not allow the Commission to disregard the evidence submitted by that undertaking during the administrative procedure.

In our previous Competition Newsflash[3], we discussed the *Unilever*[4] judgement. The CJEU ruled that, given the right to be heard, NCAs can no longer disregard the "as efficient competitor test" (hereafter, "AEC test") when the undertaking under suspicion (or any other third such as a complaining company) puts forward evidence based on this test to dispute the actual ability of an exclusionary practice to restrict competition.

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[1] Judgment of the Court of Justice of 6 September 2017, *Intel v Commission*, C-413/14 P, §135.
[2] Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, § 89.
[3] Competition Newsflash – February 2023, https://www.strelia.com/nl/insight/competition-regulatory-newsflash-february-2023.
[4] Preliminary ruling of 19 January 2023, *Unilever Italia v AGMC*, C-680/20.

3. Key changes to the 2008 Guidance

Until the adoption of the Guidelines, the Commission provides certain clarifications on its current approach to determine whether to pursue cases of exclusionary conduct as a matter of priority. Therefore, the Commission adopted a Communication and Annex amending specific parts of its 2008 Guidance. The Policy Brief titled "*A dynamic and workable effects-based approach to Article 102 TFEU*" explains the background to the launch of the Guidelines and changes to the 2008 Guidance.

A. Anti-competitive foreclosure

The 2008 Guidance stated that "*The Commission will normally intervene under Article [102] where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure*."[5]

Anticompetitive foreclosure was defined 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*."[6]

The Commission intends to alter the notion of "anti-competitive foreclosure" through the Amending Communication.

The Commission will consider conduct of the dominant undertaking that can lead to the full exclusion or marginalization of actual or potential competition **and** conduct that is capable of weakening an effective competitive structure, even if such conduct does not lead to full exclusion or marginalization of competitors. Given that full exclusion or marginalization is not required, the notion has been broadened.

Moreover, the dominant undertaking's ability to "*profitably increase prices*" is no longer a condition to determine the Commission's enforcement priorities but the ability of its conduct to adversely impact an effective market structure allowing it to negatively influence "*price, production, innovation, variety or quality of goods or services"*[7] to its own advantage and to the detriment of consumers. This broadens the scope of conducts for which a dominant undertaking may be prosecuted because of their anti-competitive foreclosure.

B. As efficient competitor test

The revised 2008 Guidance states that the Commission "may" (rather than "will") examine economic data relating to cost and sales prices in order to determine whether a hypothetical as efficient competitor would be foreclosed by the dominant undertaking's conduct. A generalized use of the AEC test to all forms of exclusionary conduct is not warranted. This is in line with the case law of the Court of Justice stating that the AEC test is only one of a number of methods to assess whether a price-based practice is capable of producing exclusionary effects.

Although it does not appear explicitly in the Amending Communication, it is important to note that the Commission recognizes in its Competition Policy Brief of March 2023 that the use of the AEC test is warranted in predatory pricing and margin squeeze cases. The Commission explains that this reflects the fact that in these types of abuse, it is the price that is charged *itself* that may be liable to be abusive, rather than the conditions associated to it.[8]

In addition, in markets with significant barriers [9], such as those in the presence of network effects or economies of scale, or where emergence of as efficient competitors may not be possible due to the current market structure[10], the Commission may consider competition from less efficient competitors when assessing price-based exclusionary conduct. This is in line with the case law of the Court that recognized that genuine competition may also come from less efficient undertakings and therefore competitive

[5] Communication from the Commission - *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45, 24.2.2009, p. 7, §20.
[6] Communication of the Commission - *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45, 24.2.2009, p. 7, §19.
[7] Amendments to the Communication from the Commission – *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, §19.
[8] Competition Policy Brief of 1 March 2023, https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf, p. 6.
[9] Preliminary ruling of 19 January 2023, *Unilever Italia v AGMC*, C-680/20, § 57
[10] Judgement of the Court of Justice of 6 October 2015, *Post Danmark II*, C-23/14, § 59-60.

constraints from those competitors may also warrant protection under Article 102 TFEU. This does not change the fact that Article 102 TFEU does not intend to guarantee less efficient competitors (vis-à-vis the undertaking holding the dominant position) a place on the market since competition on the merits may lead to the market exit or the marginalization of less efficient competitors.[11]

C. Constructive refusals and unfair access conditions

The 2008 Guidance was also altered with regard to the abuse of "refusal to supply". The part of paragraph 79 of the 2008 Guidance relating to constructive refusals to supply (i.e., *the unduly delaying or otherwise degrading supply of the product or the imposition of unreasonable conditions in return for the supply*), has been deleted. According to the Commission, an outright refusal to supply must be distinguished from the constructive refusal to supply as the latter cannot result in an obligation by the Court to grant access since it has already been granted.[12] Consequently, the indispensability criterion of the input in *Bronner*[13] (i.e., *the conduct must be related to a product or service which is indispensable to the recipient*) does not apply in abusive conducts concerning access conditions when access was already granted. It must be limited to outright refusals to supply.

D. Margin squeeze

The 2008 Guidance considered a margin squeeze as a type of refusal to supply in order to set prosecution priorities. Consequently, this practice was considered an enforcement priority if the *Bronner* criteria were fulfilled. The revised 2008 Guidance recognizes a margin squeeze as an independent form of abuse of dominance.[14] Therefore, the practice should no longer be treated in the same way and is subject to different criteria of assessment.

The indispensability criterion of the input, established in the *Bronner* case, no longer applies.

4. Next steps and conclusions

The amended 2008 Guidance is a temporary solution as the Commission intends to publish a draft of the Guidelines for public consultation in 2024 and adopt them in 2025. Once the guidelines on exclusionary abuses of dominance have been adopted, the 2008 Guidance will be withdrawn.

The Guidelines will align the Commission's enforcement practice with the significant developments in the case law of the EU courts on Article 102 TFEU since the adoption of the 2008 Guidance. This will increase legal certainty and transparency in enforcing Article 102 TFEU at Commission level and across the EU. Moreover, it will help undertakings better assess if their practices comply with Article 102 TFEU.

Although this action of the Commission is very welcome, we consider that it could be further improved regarding the following aspects:

- First, the part of the definition of anti-competitive foreclosure which referred to the "*effective access of actual or potential competitors to supplies or markets*" should not have been removed. The amended definition referring only to "*an effective competitive structure*" is too vague and is not really mandated by the case law to which the Commission refers (see *Unilever*, §37). Moreover, such a definition blurs the lines established by the guidance with respect to *conducts which are directly exploitative of consumers* (i.e., exploitative abuses) which are not subject to the guidance on abusive anticompetitive foreclosure (i.e., exclusionary abuses).

[11] Judgement of the Court of Justice of 27 March 2012, *Post Danmark I*, C-209/10, § 21.

[12] See Competition Policy Brief of 1 March 2023, https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf, p. 6, footnote 69: Judgment of the Court of Justice of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, §50-51 and Judgment of the Court of 12 February 2023, *Lietuvos geležinkeliai AB v European Commission*, C-42/21 P, §81-84 and 91.

[13] Judgment of the Court of Justice of 26 November 1998, *Oscar Bronner v Mediaprint Zeitungs-und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft*, C-7/97.

[14] See Competition Policy Brief of 1 March 2023, https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf, p. 8, footnote 74-75: Judgment of the Court of 17 February 2011, *TeliaSonera*, C-52/09, § 56, Judgment of the Court of 10 July 2014, *Telefonica*, C-295/12 P, §96 and Judgment of the Court of Justice of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, §52.

- Secondly, it is a missed opportunity that the necessity for the Commission to assess the probative value of the AEC test put forward by the suspected company (under the rights of defense) and by third parties (under the right to be heard) has not been highlighted by the Commission. It is true that this obligation can be found in its requirement to take into account "*other relevant quantitative and/or qualitative evidence*"[15]. However, such a reference is again too vague.
- Thirdly, the Commission should have also dedicated a specific section to "*constructive refusals to supply*". Indeed, if it considers based on the case law that they constitute an independent form of abuse distinct from that of outright refusal to supply, it should have inserted a specific section in its Guidance as it did, for similar reasons, for the margin squeeze.

For any additional information, please do not hesitate to contact us or your usual Strelia contact person.

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[15] Amendments to the Communication from the Commission – *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, §27.