European Commission Clarifies Effect-Based Enforcement of Exclusionary Conduct by Dominant Companies

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In the European Commission's (EC's) most significant policy shift on abuse of market dominance in 15 years, the authority published revised guidelines, heralding a shift away from the more economics-led approach that the agency had previously advocated.[1] The updates include the following:

- **The foreclosure standard is expanded**. Anticompetitive foreclosure refers not only to conduct that can lead to the full exclusion or marginalization of competition but also to conduct that is capable of weakening an effective competitive market structure.
- **Efficient competitors no longer represent the primary benchmark to determine abuse of dominance**. Whether certain conduct is abusive depends on whether it would be profit-making for a company with a similar cost base. This is the "as efficient competitor" test (AEC). It is important both conceptually (because antitrust rules should not protect inefficient competitors) and procedurally (because dominant companies can be expected to know their own cost base, but not the cost base of competitors).
  - **The AEC test is not warranted in exclusivity rebates cases**. The EC states that the AEC test is no longer solely applicable to rebates cases (where it has suffered notable judicial reversals, including in the long-running *Intel* case). The EC also states that the suitability of an AEC test in rebate cases should be assessed on the basis of the types of rebates at issue. The AEC test is generally not warranted in exclusivity rebates cases. However, the use of the test may be appropriate in nonexclusivity rebate cases and other price-based exclusionary conduct, such as predatory pricing and margin squeeze cases.
  - **Foreclosure of inefficient competitors is a valid criterion for investigation**. In markets where barriers to entry and expansion are high, such as those characterized by economies of scale or network effects (*e.g.*, certain digital markets), the EC may investigate price-based exclusionary conduct capable of foreclosing competitors that are not (yet) as efficient as the dominant firm.
- **The indispensability criterion no longer applies to claims of constructive refusal to deal and unfair access**. The EC may investigate cases where a dominant firm imposes unfair access conditions to a particular input or "constructive refusal to supply" (including, for example, undue delays, degradation of access or supply or unreasonable access or supply conditions), even if there is no evidence that such input is indispensable.

Background

Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits market abuses by dominant firms that may affect trade within the EU and prevent or restrict competition. The prohibition is most frequently applied to exclusionary abuses — which refer to conduct where a dominant company prevents rival firms from entering or expanding in a given market, such as predatory pricing, loyalty rebates, refusal to deal, tying and bundling.

[1] European Commission, "Amendments to the Communication From the Commission — Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty [now TFEU Article 102] to Abusive Exclusionary Conduct by Dominant Undertakings" (the Amending Communication), March 27, 2023; "Annex to the Amending Communication"; and "A Dynamic and Workable Effects-Based Approach To Abuse of Dominance," Issue 1, March 2023 (the policy brief providing the background to the Amending Communication).

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In December 2008, the EC released guidance (2008 Guidance) explaining the framework of analysis it uses to determine whether or not to pursue as a matter of priority cases that involve exclusionary practices by dominant firms. The 2008 Guidance moved the EC's framework of analysis away from a form-based, *per se* approach to favor a more economic, effect-based approach, examining in detail the potential anticompetitive effect of a conduct and taking into account all relevant facts and circumstances. Though not legally binding, the guidance rapidly prompted questions about the practicalities and challenges of its application.

Since 2008, European courts have delivered 32 judgments on exclusionary abuses, confirming the validity of the effect-based approach to exclusionary conduct and also clarifying key legal concepts, resulting in many wins for the EC but also, most recently, some notable losses that have shifted the EC's standard of analysis:

- In *Intel*, the EU General Court affirmed that rebates or discounts conditional upon purchasing all or most of requirements are *prima facie* unlawful, but clarified there was no anticompetitive presumption and that the EC must consider any defense evidence presented that the conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. The General Court noted that "the analysis … was incomplete" and "did not ... establish to the requisite legal standard that the rebates at issue were capable of having, or were likely to have, anticompetitive effects." An appeal is pending before the European Court of Justice (ECJ).
- In *Qualcomm*, the General Court annulled in its entirety the EC's decision to fine Qualcomm after concluding that the EC made manifest errors in its assessment of Qualcomm's exclusivity rebates. The court ruled that the effects of the practices must be considered against all the relevant factual circumstances of the case.
- In *Google Android*, the General Court largely upheld the EC's infringement decision, but rejected the EC's allegation that Google's revenue share agreements were anticompetitive. The court cited errors in the way the EC applied the AEC test to demonstrate the anticompetitive nature of the agreements. The court confirmed the requirement for the EC to assess all the relevant circumstances of the conduct in order to analyze its inherent capacity to foreclose competitors that are at least as efficient. An appeal is pending before the ECJ.
- In *Unilever*, the ECJ ruled that the Italian competition authority should have examined Unilever's economic evidence that allegedly showed that exclusivity arrangements had no effect on competition.

Clarification of EC Enforcement Priorities

Against this background, and until comprehensive new guidelines are adopted, the EC has clarified some parts of the 2008 guidance in a new Amending Communication to reflect the interpretations provided by the EU courts' case law, the EC's decision practice in this area and developments in the EU economies, taking account of the specific features of dynamic, innovation-driven markets often characterized by economies of scale or network effects.

Confirmation of the Effect-Based Approach

The Amending Communication confirmed the importance of economic analysis in determining abuse of market dominance, clarifying that the EC is committed to an effect-based enforcement of TFEU Article 102. For conduit to be considered abusive, regulators must establish that it produces, at least potentially, an anticompetitive effect. The effect does not need to be concrete, but must be more than merely hypothetical. The case law has confirmed that it is sufficient to demonstrate, taking into account all relevant facts and circumstances, that there is an anticompetitive effect that may potentially exclude competitors.

Clarification of the Concept of Anticompetitive Foreclosure

The Amending Communication clarifies how to interpret the notion of anticompetitive foreclosure, which includes taking into account the different types of exclusionary conduct that a dominant company can implement. As mentioned in the summary above, the concept refers not only to conduct that can lead to the full exclusion or marginalization of competition, but also to conduct that is capable of weakening an effective competitive market structure.

The 2008 Guidance cited the dominant company's profitability as a result of the conduct as a key factor in determining the EC's enforcement priorities and whether to pursue a case. The Amending Communication clarifies that the dominant firm's profitability, *i.e.*, the dominant firm's ability to profitably maintain supracompetitive prices or influence other parameters of competition — such as production, innovation, variety or quality of goods or services, is no longer a condition.

Relevance of the AEC Test

The 2008 Guidance stated that the EC would intervene to modify certain price-based exclusionary conduct (such as exclusionary rebates) if the conduct was capable of harming as-efficient competitors, however, EU courts have clarified that the AEC test is only one of a number of methods applicable to assess market abuse. The ECJ has also clarified that the use of an AEC test is optional and that a test of that nature may be inappropriate in certain cases.

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The EC policy brief providing the background to the Amending Communication notes that the suitability of an AEC test in rebate cases should be assessed on the basis of the types of rebates at issue, distinguishing between exclusivity rebates (*i.e.*, those conditional on a customer purchasing all or most of its requirements from the dominant company) and nonexclusivity rebates. The Amending Communication therefore makes clear that, with regard to exclusivity rebates, when determining whether to pursue a case, the AEC test is generally not warranted. However, if such test is carried out, its results must be assessed together with all other relevant circumstances. The Amending Communication notes that the use of the AEC test may be appropriate in nonexclusivity rebate cases and other cases involving price-based exclusionary conduct, such as predatory pricing and margin squeezing. The Amending Communication also indicates that the AEC concept should be interpreted broadly.

The Amending Communication also clarifies that, as referenced in the summary above, in markets where barriers to entry and expansion are high, such as those characterized by economies of scale or network effects (which is the case in certain digital markets), the EC may investigate price-based exclusionary conduct capable of foreclosing competitors that are not (yet) as efficient as the dominant firm.

Constructive Refusal To Supply and Unfair Access

Lastly, the Amending Communication clarifies that the EC may investigate cases where a dominant firm imposes unfair access conditions to a particular input — known as constructive refusal to supply (*e.g.*, undue delays, degradation of access or supply or unreasonable access or supply conditions), even if there is no evidence that such input is indispensable. This addresses the recent ruling by the ECJ in *Slovak Telekom*. Formerly, refusal to deal required that the input be indispensable for it to be an abuse. Famously, in *Oscar Bronner*, a home delivery service was ruled not indispensable to distribution magazines, because these could also be distributed through retail outlets. So Mediaprint could lawfully refuse to distribute Bronner's magazine. The Amending Communication (and case law) makes clear that the same standard is not applicable in conditional refusals to deal (*i.e.*, where the seller will deal only on unfair conditions). In those circumstances the threshold is not one of indispensability; any input will suffice.

Next Steps

Over the years, the case law of the EU courts on exclusionary abuse of dominance has developed beyond the scope of the Amending Communication. This is why the EC intends to adopt new guidelines on the application of TFEU Article 102 to exclusionary conduct that will comprehensively codify the full body of case law of the EU courts and reflect the EC's enforcement practice developed to align with it. The new guidelines will aim to give businesses greater legal certainty and transparency and help foster more consistent competition enforcement at the EC level and across EU member states.

Interested parties have until April 24, 2023, to share with the EC their comments on this policy initiative. The EC intends to publish a draft of the new guidelines for consultation, which is tentatively scheduled for mid-2024, and to adopt a final version by 2025. Once adopted, the EC will withdraw the 2008 Guidance as amended by this year's Amending Communication.

Senior professional support lawyer **Caroline Janssens** contributed to this alert.