POSITION PAPER

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Draft Guidance on Exclusionary Abuses of Dominance
Commission Consultation

Introduction

Well-functioning and coherent competition rules play a fundamental role in the internal market, both in terms of limiting or preventing distortions and ensuring efficiency and innovation by allowing competitors to enter new markets and protecting consumer choice. Consistent and effective application of EU competition rules in accordance with relevant fundamental rights and procedural safeguards is essential for the integrity of the single market; it provides protection and legal certainty.

Undue fear that companies could be infringing competition rules increases the risk that those companies will refrain from certain activities. This can lead to under-investment, for example to develop market-based sustainable solutions and technologies. Society has undergone significant changes which have impacted commercial relations and will continue to have substantial impact in the coming years. Businesses are rapidly adapting to technological innovations and to changing markets and consumer trends.

A self-assessment on the question of whether a particular business conduct is admissible is increasingly complex in such a dynamic and multifaceted environment and the risk of harmful/significant sanctions is real also because decisions of competition authorities have binding effect for the purpose of damages actions. It is therefore important that competition authorities offer the necessary guidance that reflects these developments and shields businesses from harm.

To keep pace with the dynamic reality, relevant guidelines should be continuously amended or supplemented and thoroughly motivated when authorities' practices and case law depart from the established doctrine or usual approach and becomes a source of legal uncertainty. In this context, we support that the Commission now intends to also provide guidance on exclusionary abuses of dominance (Article 102 TFEU) and we commend the Commission for having published draft guidelines which aim at reflecting the EU Courts' case law on exclusionary abuses in light of the enforcement experience of the Commission.

Having said that we are very concerned about presumption rules or a reduced use of a more economic approach because it would lead to more legal uncertainty, unpredictability, imposing costs and significant burdens on companies. We are not convinced that the draft guidelines fully reflect the Courts' case law, which has a more efficient-focused approach. The proposed move away from effect-based analysis makes it quite difficult, if not impossible, for potentially dominant companies to discharge the burden of proof. We set out these points in more detail below.

Conduct that is presumed to lead to exclusionary effects

An "intermediate category" of exclusionary effects behaviour is proposed which is subject to specific tests (exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze). In such cases, the Commission will have to demonstrate

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the existence of the conduct in question, after which it will be for the undertaking to demonstrate that the conduct does not have an exclusionary effect.

The identification of certain types of conduct that are presumed to be capable of producing exclusionary effects is worrisome. We believe that this approach does not always reflect the case law and it will often be very difficult for a company to rebut this presumption or show that the conduct is objectively justified once the conduct is presumed to lead to exclusionary effects. Furthermore, the definition of the exclusionary effects seems to refer to competitors only, where it should also refer to consumers, as the harm on consumer welfare would reflect the "competition on the merits" approach that lies at the heart of EU competition policy at best. Furthermore, it is also important to note that companies do not have access to the same resources and market data as the Commission.

As regards exclusive obligations, there is no case law precedent to support a corresponding presumption. On the contrary, the Court recently recalled that "*although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic*" (Case T-334/19, Google v. Commission (Adsense), 18 September 2024, para. 384).

Moreover, in relation to exclusive supply obligations, the Commission's own view to date, as expressed in the Guidance on enforcement priorities, is that these obligations are only liable to result in anti-competitive foreclosure if a dominant purchaser has tied up most of the efficient input suppliers, and its competitors are unable to find alternative efficient sources of supply, e.g., through vertical integration or by sponsoring entry. This view is also in line with relevant commitments decisions. Consequently, this distinction between exclusive purchasing and exclusive supply should be upheld.

An exclusive supply obligation will not have any impact on a competitor's ability to compete if the competitor is able to source similar inputs elsewhere. This is a decisive difference in relation to exclusive purchasing, where every exclusivity obligation imposed on a customer by a dominant undertaking reduces the size of its competitors' addressable market and thereby always leads to some customer foreclosure. Moreover, in modern supply chains, it is more common than not that there is a significant transfer of know-how from a buyer to its supplier, to enable the production of advanced inputs tailored to the buyer's business. Exclusive supply obligations are a natural corollary to such exchanges. This is particularly true where the upstream manufacturer did not produce any similar products prior to the know-how transfer (cf. the Vertical guidelines para. 16 points e-f and the Subcontracting notice, para. 2). In our view, such enhanced technological cooperation with suppliers coupled with exclusive supply obligations is generally pro-competitive and should be encouraged as long as it does not create genuine sourcing challenges for competitors.

Regarding tying and bundling, the draft guidelines state that tying is liable to be abusive where several conditions are met, including that the undertaking concerned must be dominant in the market for the "tying product". It is also stated that "*in the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied aftermarket*". This statement may be read as providing that a tying abuse may be found where the undertaking is dominant in the "tied aftermarket" but not in the "tying primary product". This position is not supported by existing case law or economic thinking. The existing case law and economic literature refer to leveraging a dominant position in the "tying market" to acquire market power in the "tied market".

Absence of dominance in the "tying market" is thus essential. In no case it is provided that having a dominant position in the "tied aftermarket" would suffice for a finding of abusive conduct.

BusinessEurope is worried that introducing a general presumption of abuse in these cases could unnecessarily hamper innovation and knowledge transfer in companies. For example, large companies will be discouraged from sharing quality-enhancing know-how with their suppliers and will instead have incentives to insource as much of the supply chain as possible. Also, tying and bundling often benefits consumers and drives innovation. Therefore, more alignment with the effects-based approach and more emphasis on use of economics should be a priority.

Recent case law has also advocated for considering the effects of abusive conduct. The Google Shopping case (case C-48/22) requires for example (para. 166) that evidence be provided in relation to the conduct being capable of producing exclusionary effects. Also, in relation to self-preferencing (para. 186) it confirms that no presumption may apply, but it must be assessed on the basis of the specific circumstances of each case. However, the draft guidelines assume that such treatment leads to exclusionary effects. This approach should be amended in light of the mentioned precedent.

AEC Test

The Commission proposes that it should not be required to prove that the actual or potential competitors that are affected by the conduct are "as efficient" as the dominant undertaking. This is also a regrettable departure from a more "efficiency-focused" approach and seems at odds with the latest case law of the Court stating that "*abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors <u>that were as efficient as the perpetrator</u> of that conduct in terms of cost structure, capacity to innovate, quality*" (Case T-334/19, para. 106, emphasis added). The proposed approach has also not been followed in the abovementioned Google Shopping judgment (para. 264), in which it was held that the test is essential for determining the ability to foreclose competitors.

Although it is true that genuine competition may also come from firms that are less efficient than the dominant firm and that there may be cases where the use of the "as-efficient" competitor test may be inappropriate depending on the type of conduct or the functioning of the relevant market, and that, if the test is carried out, its results should be assessed with all other relevant evidence, we encourage the Commission nevertheless to give more guidance on (i) situations where the test would be relevant, (ii) the possibility for an undertaking to rely on such a test to rebut the presumption, as well as (iii) the other relevant factors that it would consider, rather than disregarding and weakening the test.

Suggestions for more guidance, safe harbours, ex ante guidance

As regards <u>single dominance</u>, the draft guidelines contain a brief footnote referring to some principles and case law applicable to the assessment of dominance in the case of aftermarkets. Given that the purpose of the guidelines is to enhance legal certainty and help undertakings self-assess whether their conduct is prohibited under Article 102 TFEU, we suggest that the guidelines are elaborated in more detail than a simple footnote to provide additional clear and effective guidance, at least for the special case of aftermarkets, where the case law is settled. On a general point, we are concerned that the criteria for evaluating when a company is dominant in the draft guidelines could lead

to legal uncertainty in particular regarding cases where companies have market shares of less than 40% but more than 10%. Merely reflecting on market shares to evaluate dominance is insufficient, especially if the relevant threshold is so extremely low. This should also be made clearer.

Regarding refusal to supply, we suggest providing more guidance with respect to the specific legal test described to establish whether a refusal to supply by a dominant undertaking may infringe Article 102 TFEU. The draft section could be clearer by providing a better definition of the markets affected by a refusal to supply, which is not the market for the inputs themselves but an adjacent market for goods manufactured making use of such inputs. Even if some references are made to a “downstream market” (par. 99.a) or a “secondary market” (par. 106) there is no clear general distinction between the inputs market where the undertaking refusing to supply is dominant and the adjacent market for which the input is sought.

Regarding conducts with no specific test, BusinessEurope appreciates the Commission’s effort to provide guidance on its assessment of specific types of conducts which are currently not subject to any specific legal test, such as self-preferencing and access restrictions. However, Section 4.3 lacks specificity and sufficient clarity to usefully help businesses assess their conducts, and risks having significant harmful effects. While the draft guidelines build on previous cases, these dealt with complex situations that were subject to detailed assessments before finding a possible abuse. The guidance provided in this Section abstracts the reasoning of such cases to such a high level that it significantly broadens the notion of abuse. BusinessEurope fears that this would have a disproportionate effect on companies, which would be deterred from engaging in legitimate and pro-competitive activities for fear of falling within the wide net of the guidelines.

To further increase legal certainty, BusinessEurope suggests that the guidelines include clear examples, e.g. of the efficiencies that may be considered. The Commission could follow the approach taken in its Horizontal Guidelines and provide examples of real-life situations, explaining how it expects to assess such situations. In addition, the Commission should provide safe harbours for certain conduct. Ex ante guidance by competition authorities (preferably in close coordination with the Commission and other national competition authorities to ensure consistency throughout the EU) is also a good way to steer companies or markets at an early stage. Such authorities can thus indicate to companies where bottlenecks for fair competition may arise. To this end, it would be good for competition authorities to develop the capacity and willingness to provide guidance on market developments at an early stage and to investigate the possibility for supervisors to issue case-by-case guidance letters (via a much more informal and faster route than via an infringement procedure) comparable to how this sometimes happens in the form of 'informal opinion' or even 'comfort letters'.

Conclusion

BusinessEurope encourages the Commission to take a pragmatic approach to business’ needs, so that the final guidelines will provide the necessary legal certainty for the diverse and hybrid situations in which businesses may find themselves in the future. To stay ahead with the dynamic reality, the guidelines should be continuously amended or supplemented when authorities’ decision-making practices and case law becomes a source of legal uncertainty. Furthermore, the Commission should set a standard for enforcement against certain practices at national level to avoid fragmentation.