



The Article 102 exclusionary Guidelines

Public consultation on draft text

IBA Antitrust Conference

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Background

- Contrary to Article 101 and merger control, **there are currently no Commission guidelines on Article 102**
- On 27 March 2023, the Commission adopted: (i) a Communication amending the Guidance on Enforcement Priorities (short-term initiative) and (ii) a Call for Evidence (CfE) launching the **Guidelines on exclusionary abuses of dominance** (long-term initiative)
- In parallel, DG COMP published a policy brief providing more details on the background of the initiatives and promoting a workable effects-based approach to Article 102
- **48 responses to the CfE** from a range of stakeholders - respondents overall welcomed the initiative; call for clarity and legal certainty in the application of Article 102 to exclusionary conduct
- **Public consultation on draft text** of the Guidelines launched on 1 August 2024

Objectives of 102 Exclusionary Guidelines

1. Systematise the rich and complex case law on Article 102 to ensure **legal certainty** and **predictability at EU and national level**, in a context of increased decentralised enforcement of abuse of dominance rules
2. Provide operational guidance to dominant firms as a means to facilitate **self-assessment** and foster **compliance**, to the benefit of all stakeholders including EU consumers and businesses
3. Draw lessons from the Courts' case law and the Commission's extensive enforcement experience to promote a **workable effects-based approach**, which is firmly grounded in economic thinking and conducive to a robust and effective enforcement of Article 102

Structure of draft Guidelines

- 1) **Introduction** (purpose of competition law enforcement, broad notion of consumer welfare and exclusion)
- 2) **Dominance** (single firm dominance, collective dominance)
- 3) **General principles** (two-pronged assessment: (i) conduct departs from competition on the merits; and (ii) conduct is capable of producing exclusionary effects)
- 4) **Specific categories of conduct:**
 - a) Conducts subject to specific legal test (exclusive dealing; tying and bundling; refusal to supply; predatory pricing; margin squeeze)
 - b) Conducts without specific legal test (conditional rebates; multi-product rebates; self-preferencing; access restrictions)
- 5) **Objective justifications**

Departure from competition on the merits

- Draft Guidelines provide a framework to assess **when a conduct departs from competition on the merits**, notably:
 1. So-called “**naked restrictions**” are always considered as “off the merits”
 2. For **abuses with specific legal test**, finding that the conduct is “off the merits” is already incorporated in the relevant legal test
 3. For other conducts, **list of elements** that can be relevant in analysis
 - e.g. breach of other laws when it affects competition parameters, deceiving behaviour, exclusion of hypothetical as efficient competitors
 - AEC test: used to establish competition “off the merits” for pricing conduct *stricto sensu* (predation and margin squeeze) and could also be appropriate for other pricing abuses (non-exclusivity rebates)

Capability to produce exclusionary effects

- **Broad meaning of exclusion:** reducing actual or potential competitors' ability or incentive to exercise competitive constraint → full-fledged exclusion, marginalisation, increase barriers to entry or expansion, constraints on competitor growth, ...
- **Causality / attributability:** no need to establish that the conduct is the only cause for exclusionary effects; it is sufficient to use as comparator to establish attributability one plausible scenario that would have materialised absent the conduct (e.g. analysis of market before / after implementation of the conduct)
- **Modulation in the burden and standard of proof:** depending on general likelihood that conduct leads to exclusionary effects, draft Guidelines distinguish between: (i) conducts where the Commission needs to show capability to produce effects; (ii) conducts with a high potential of exclusion, which are subject to a “soft” presumption; and (iii) conducts for which there is no interest other than to exclude (“naked restrictions”), which are subject to a “hard” presumption

Objective justifications

- Draft Guidelines distinguish between:
 - **Objective necessity defence**
 - based on evidence that a behaviour of the dominant undertaking was objectively necessary to achieve a certain aim, e.g. public health, safety, or the protection of the dominant undertaking against unfair competition
 - can only be accepted if the actual or potential exclusionary effects resulting from the conduct are proportionate to the alleged necessary aim
 - **Efficiency defence**
 - exclusionary effects resulting from the dominant undertaking's conduct are counterbalanced, or even outweighed, by advantages in efficiency that also benefit consumers
 - *Post Danmark I* criteria need to be fulfilled
- The fact that a conduct has high potential to produce exclusionary effects or is a naked restriction must be given due weight in the balancing exercise
- Burden of proof for objective justifications is on dominant undertaking

Next steps

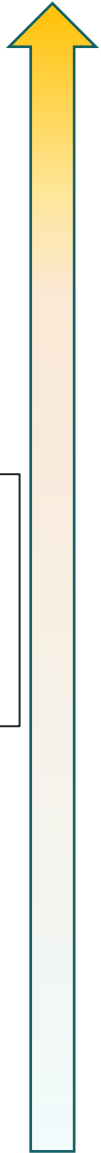
- Public consultation open until 31 October 2024
- Feedback from all categories of stakeholders will be key in shaping the direction for the next steps, also in light of upcoming judgments from EU Courts
- Commission is currently envisaging organising a stakeholder workshop in Q1 2025
- Final adoption of the Guidelines envisaged to take place in the course of 2025

Thank you

Backup slides

Modulation in the burden and standard of proof

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Full burden on Commission

- Need to show at least capability to exclude
- Possible to justify with efficiencies
- E.g. non-exclusivity rebates, self-preferencing, refusal to supply

“Soft” presumptions

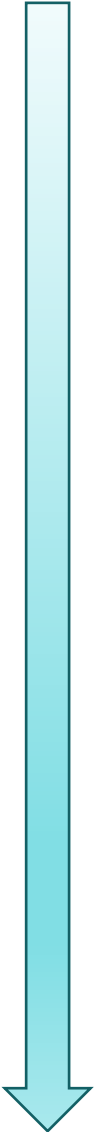
- Conduct generally recognised as having a high potential to produce exclusionary effects
- Possible to rebut the presumption
- Possible to justify with proven efficiencies
- If presumption questioned, possible to either (i) show that the rebuttal is insufficient to call into question the presumption; or (ii) provide evidence to show that the conduct can produce exclusionary effects, while giving due weight to the probative value of the initial presumption
- E.g. exclusive dealing, predation

“Hard” presumptions

- “Naked restrictions”: no economic interest other than restricting competition
- Rebuttal of presumption very exceptional
- Showing efficiencies highly unlikely
- E.g. destroying infrastructure used by a competitor, payments to drop/swap competing products

General likelihood that conduct results in exclusionary effects

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Effects analysis & required evidence

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Categorisation of exclusionary abuses

	Type of conduct	Does it amount to competition on the merits?	Presumption of exclusionary effects	Need to demonstrate exclusionary effects
Specific legal test	Naked restrictions	No	✓ ✓	
	Exclusive dealing (including exclusivity rebates)	No	✓	
	Predatory pricing	No	✓	
	Classic tying (Hilti)	No	✓	
	Other tying (MSFT)	No		✓
	Margin squeeze (negative spread)	No	✓	
	Margin squeeze (positive spread)	No		✓
No specific test	Refusal to deal	No		✓
	Other access restrictions	To be assessed		✓
	Conditional rebates (different from exclusivity)	To be assessed		✓
	Self-preferencing	To be assessed		✓