

Draft Guidelines on exclusionary abuses: comments

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Summary

- **General approach**
- Classification of practices
- Competition on the merits
- Anticompetitive effects
- Other comments

General approach

- There is significant scope for streamlining, and for a more systematic approach to the definition and treatment of legal issues
 - In particular, specific legal tests could be simplified to be more easily administrable through the use of proxies and similar tools
 - Core concepts (e.g. anticompetitive effects and competition on the merits) would benefit from a better-defined structure around the following issues:
 - What is the **meaning** of the concept?
 - What needs to be proved by the authority (**legal burden** of proof)?
 - What sort of evidence can the dominant undertaking produce (**evidential burden**)?
 - **How** is the legal burden of proof discharged by the authority?

General approach

- Streamlining and systematising would assist the (i) uniform application of Article 102 TFEU across the EU and (ii) legal certainty:
 - Neater and more administrable concepts and legal tests would provide the sort of guidance from which **national courts** would benefit
 - In addition, it would avoid the perception that the concept of abuse has no boundaries and that anything could amount to a breach of Article 102 TFEU
 - The Draft Guidelines are drafted in a context where **private enforcement is on the rise** and increasingly sophisticated

General approach

- In the name of administrability and legal certainty, the Guidelines would also benefit from a neat distinction between, respectively:
 - The **codification** of the case law as such (that is, the law as interpreted and declared by the Court of Justice)
 - The **interpretation** (and potential extension) of the case law
 - GC judgments that did not reach the Court (e.g. *Microsoft*)
 - The Commission's decisional practice
 - The Guidelines themselves
 - The Commission's **policy approach** that seeks to operationalise the principles underpinning the case law (e.g. AEC test)
- Soft law in other areas (e.g. vertical restraints) places greater emphasis on the latter (policy) and provides a useful template

General approach

The test in the case law and...

‘38. It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is **preventing the emergence of a new product for which there is a potential consumer demand**, that it is unjustified and such as to exclude any competition on a secondary market’

Case C-418/01, *IMS Health*

...the Draft Guidelines

‘105. In these cases, the refusal to supply an input protected by an intellectual property right may be regarded as liable to be abusive if it fulfils the requirements of the specific legal test for refusal to supply (see paragraph 99) and in addition, **if it limits technical development on the market**’

Draft Guidelines

General approach

- As it does in other soft law instruments (e.g. vertical restraints), the Commission could provide proxies to operationalise the Guidelines:
 - The exercise is conducted thoroughly in some cases (e.g. AEC test)
 - It could be expanded to cover major practical questions, including, but not limited to:
 - The length of the reference period of rebate schemes (e.g. one year)
 - Coverage of the practice (anticompetitive effects, e.g. unlikely below 25% coverage)
- As usual, these bright lines would only bind the Commission, but could offer off-the-shelf guidance to national courts and authorities

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Classification of practices

- There is clearly support in the case law for the three categories of practices identified in the Draft Guidelines:
 - Naked restrictions serving no purpose other than exclusion
 - Presumptively abusive practices (e.g. exclusive dealing)
 - Practices that require a case-by-case assessment
- There is a **missing category**: practices that are **presumed to be legitimate** expressions of competition on the merits:
 - Genuine quantity rebates
 - Pricing above average total costs (mentioned in passing in para 57)

Classification of practices

‘28. So far as the rebate scheme at issue in the main proceedings is concerned, it must be observed that that scheme cannot be regarded as a **simple quantity rebate linked solely to the volume of purchases**, since the rebates at issue are not **granted in respect of each individual order**, thus corresponding to the cost savings made by the supplier, but on the basis of the aggregate orders placed over a given period. Moreover, it was not coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark, a point which served to distinguish it from loyalty rebates within the meaning of the case-law referred to in paragraph 27 above’

Case C-23/14, Post Danmark II

Classification of practices

- There is some scope for classifying and reclassifying important practices, in particular the following:
 - **Predatory pricing** within the meaning of *AKZO* is **unquestionably a naked restriction**, according to the case law
 - One can think of other practices that can be classified as naked restrictions:
 - **Pay-for-delay** arrangements when they are found to have an anticompetitive object (e.g. *Servier*, *Generics*, both of which had an Article 102 TFEU dimension)
 - Providing **misleading information to regulatory authorities** (e.g. *AstraZeneca*)
 - **Disparaging** practices (e.g. *Vifor*)

Classification of practices

Predatory pricing in the case law and...

‘71. [...] A dominant undertaking has **no interest in applying such prices except that of eliminating competitors** so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced’

Case C-62/86, AKZO

...the definition of naked restrictions

‘54. Likewise, **conduct that holds no economic interest for a dominant undertaking, except that of restricting competition** (so-called naked restrictions, see paragraph 60(c) below) is also deemed as falling outside the scope of competition on the merits’

Draft Guidelines

Classification of practices

- Finally, it can be debated whether there is no specific legal test applying to ‘third category rebates’:
 - The case law seems stable since *Post Danmark II*, which seems to provide a legal test as much as *TeliaSonera* does for margin squeeze conduct
 - The structured legal test for conditional rebates revolves around two steps:
 - The **nature of the scheme** and the **conditions for the award** of the rebates
 - The **actual or potential effects**, to be assessed in light of the extent of the dominance, the coverage of the practice and the prevailing conditions of competition

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Competition on the merits

- The issue of competition on the merits could benefit, first, from a clear definition of what it means to compete on the merits (I):
 - The text could be more explicit that competition on the merits considers both the (i) **methods** and (ii) the **assets** that are employed
 - One can think of a **positive and a negative definition** of the concept, both of which would encompass all relevant instances

Competition on the merits

- The issue of competition on the merits could benefit, first, from a clearer definition of what it means to compete on the merits (II):
 - Under a **positive definition**, a firm competes on the merits where:
 - It relies upon assets it has developed on its merits (e.g. no legacy assets); *and*
 - It gets ahead in the marketplace with better, cheaper and/or more innovative products
 - Under a **negative definition**, there is no competition on the merits where:
 - The firm uses assets that have not been developed on the merits; *or*
 - Its conduct is not a plausible means to offer better, cheaper and/or more innovative products; *or*
 - Given the characteristics of the relevant market(s) (as per *Google Shopping*), the practice is liable to prevent equally efficient rivals from competing on the merits

Competition on the merits

- The presentation of the various practices could be more systematic and streamlined by placing them in two groups:
 - Conduct that is **inherently at odds with competition on the merits**:
 - Conduct involving the use of legacy or subsidised assets (*Servizio Elettrico Nazionale*)
 - Conduct that cannot be plausibly rationalised as merits-based competition, including:
 - Providing misleading information to regulatory authorities (*AstraZeneca*)
 - Concluding a settlement with the sole purpose of preventing entry (*Servier*)
 - More generally, practices that make no economic sense other than as a means to exclude rivals (e.g. 'sham litigation')
 - Conduct that may or may not be at odds with competition on the merits **depending on the circumstances of the case** (*Google Shopping*)

Competition on the merits

- The distinction between conduct that is inherently and not inherently at odds with competition on the merits is crucial for various reasons:
 - **Consistency with the case law:** discriminatory conduct, for instance, is not necessarily at odds with competition on the merits (Google Shopping)
 - Similarly, the limitation of choices is sometimes a side-effect of competition on the merits (e.g. innovative design integrating several features)
 - **Other fields of law may be at odds with EU competition law** (e.g. consumer law) which means that a case-by-case approach is warranted
 - Ensure the **uniform application of Article 102 TFEU** across the EU: avoid the conflation of steps, in particular by national courts

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Anticompetitive effects

- The issue of anticompetitive effects could particularly benefit more streamlining and a more systematic analysis
 - **What is an anticompetitive effect?**
 - It is unclear at present what the Commission understand by the concept
 - What is more, the definitional issue is dealt with in different places in the Draft
 - **What needs to be proved** (Section 3.3.2)? This section could be more systematic in the treatment of the various issues, as suggested below
 - It is probably more intuitive if issues pertaining to the **dominant firm's evidential burden** were all addressed together in Section 3.3.4.
 - **How is the burden of proof discharged** (Section 3.3.3.)? The use of proxies as suggested above, and more granular policy guidance would be beneficial

Anticompetitive effects

- The definition of what amounts to an anticompetitive effect is particularly unclear
 - The definition provided in para 6 suggests that any competitive disadvantage and/or limitation of choice amounts to an effect
 - The perception that it would be possible to establish an effect virtually always and everywhere would not be without consequences:
 - Every practice potentially falling within the scope of Article 102 TFEU could be seen, in practice, as presumptively abusive (inevitably impacting on legal certainty)
 - Such an outcome could give rise to complexities considering the rise of private enforcement and the need to ensure a uniform application of Article 102 TFEU

Anticompetitive effects

A suggested definition: *‘anticompetitive effects exist where the practice reduces rivals’ ability or incentive to compete to such an extent that the competitive pressure to which the dominant firm is subject is reduced as a result’*

Anticompetitive effects

- Section 3.3.2. could be more systematic in the way it presents the various **substantive elements**, along the lines of what follows:
 - **Capability**: The threshold of effects ('capability' is not defined) is crucial, and, the case law suggests, should mean that effects are 'more likely than not'
 - **Temporal dimension**: Effects need not be actual; evidence of potential effects is sufficient to establish an abuse
 - **Causal link**: There must be a causal link, and not a mere correlation (*Servier* and *Google Shopping*) between the practice and any alleged effects

Anticompetitive effects

What needs to be proved: *‘the authority must prove that the practice is capable of producing actual or potential anticompetitive effects in the relevant economic and legal context, and that such effects are attributable to it’*

Anticompetitive effects

- A revised Section 3.3.4. could address issues pertaining to the dominant firm's evidential burden when providing counterarguments:
 - Rebuttal as far as **presumptively abusive conduct** is concerned
 - Rebuttal as far as **naked restrictions** are concerned
 - The evidence that dominant firms may put forward in the context of a **full-blown analysis of effects**, including, inter alia:
 - Evidence pertaining to the absence of effects during the implementation of the practice (*Servizio Elettrico Nazionale*)
 - A counterfactual showing the absence of a causal link between the practice and any alleged effects (*Google Shopping*)
 - Evidence that is irrelevant (e.g. *de minimis* claims or rivals' relative efficiency)

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Other comments

- Concerning naked restrictions, the presumption of effects should be rebutted only in '**very exceptional cases**'
 - While this point is unquestionable, the Draft Guidelines are relatively vague about how and when the presumption can be rebutted
 - The best approach would be to rely on the case law on 'by object' infringements under Article 101(1) (*Servier*)
 - This approach would also be consistent with *Superleague*, which pleads for a consistent interpretation of both provisions
 - Accordingly, the presumption could only be rebutted where there would have been **no actual or potential competition** even absent the naked restrictions

Other comments

Example: disparaging a firm that plans to enter the market (a naked restriction) amounts to an abuse unless the dominant undertaking can show that the firm in question is not an actual or potential competitor (for instance, because there are 'insurmountable barriers to entry' precluding entry)

Other comments

- Concerning tying conduct, the case law clearly now suggests that there is not a ‘one size fits all’:
 - As the Draft Guidelines explains, tying is sometimes presumptively abusive; in other instances, it is not
 - The text could provide greater clarity about the instances in which effects are presumed and when they are not
 - The presumption seems to apply to traditional instances of tying (Hilti), where it is achieved by **contractual** means
 - Android suggests that case-by-case evidence of effects (at least) is necessary in cases that involve the **technological integration** of products

Other comments

- Concerning refusals to deal:
 - The definition of indispensability is provided in *IMS Health*, and could be usefully cited, even in a footnote
 - The wording of para 101(iii) could be tweaked to make it clearer that an input is not indispensable if there ways around it, even if less advantageous
 - At present, it comes across as a rehearsal of the overall criterion of indispensability
 - It could be tackled by merging and redrafting paras 101(iii) and 102
 - The criteria to distinguish between a refusal to deal and an 'access abuse' could be tackled in a clearer way
 - On refusals to license intellectual property, the new product condition could be better explained as an instance of asymmetric competitive constraints