

Guidelines on Article 102 TFEU - EuroCommerce views on the Commission proposed draft

Introduction

1. EuroCommerce welcomes the opportunity offered to comment on the draft Guidelines on abuses of dominance contrary to Article 102 of the Treaty on the Functioning of the EU ('TFEU') ('the draft Guidelines') published by the European Commission on 1 August 2024.
2. EuroCommerce represents the retail and wholesale sector in Europe. The sector stands for strong competition as the best way to achieve global competitiveness and ensuring that both business customers and consumers continue to have a wide choice of innovative and affordable products.
3. New guidelines on Article 102 can be a helpful instrument for companies to self-assess their conduct and for national competition authorities to apply art. 102 with consistency across the EU Single Market, provided that they offer legal certainty and predictability.
4. EuroCommerce would like to offer a number of comments on the draft Guidelines.

Key messages

- New guidelines on Article 102 can be key to increase legal certainty and ensure consistency of application of art. 102 in the EU Single Market.
- To ensure their goal is achieved, we ask the Commission to provide guidance on exploitative abuses, including fragmentation of the EU Single Market by large suppliers.
- Establishing dominance depends on a number of circumstances in each individual case; however, we would appreciate if the Guidelines could give a general indication – as the 2009 Enforcement priorities did – that dominance will be unlikely below at least 30%.
- The draft Guidelines should not adopt an excessively formalistic approach on the finding of an abuse and reiterate that a full economic analysis is necessary for all cases.
- The Guidelines should reflect recent judgements by the EU courts which were decided following the publication of the Guidelines (*Google Shopping*, *Intel*).

The focus of the draft Guidelines on exclusionary abuses

5. We regret that the focus of the draft Guidelines is on exclusionary abuses only and would invite the Commission to consider also providing guidance on exploitative abuses which fragment the EU Single Market.
6. Examples of exploitative abusive behaviour seeking to prevent parallel imports in breach of art. 102 can be derived from the Commission's decision in Case AT.40134 - *AB InBev trade restrictions* and Case AT.40632 - *Mondelez trade restrictions*.
7. These are serious exploitative abuses of dominance which damage the EU Single Market and have a serious impact on consumer welfare - as they may lead to higher prices and/or reduce product choice for EU consumers.
8. The inflationary crisis of the last few years negatively affected EU consumers' purchasing power; this has been made worse by the continuing impossibility that retailers and wholesalers (and consumers) to benefit from the EU Single Market due to the fragmentation imposed by large manufacturers of fast-moving consumer goods.
9. In many key product categories for consumers (in food as well as other fast-moving consumer goods), leading brands enjoy a significant position, at times well above 50%. Enforcement of art. 102 must continue against territorial supply restrictions where such undertakings enjoy a dominant position in the EU or at national level.
10. Providing guidance on this issue would send a signal that these practices are violations of EU antitrust rules that should be taken seriously by the market, national competition authorities and the European Commission.

Market shares and dominance

11. The draft Guidelines note in footnote 41 that '*market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances.*'
12. This is departing from the previous indication in the 2009 [Commission Enforcement priorities on art. 102](#) that '*dominance is not likely if the undertaking's market share is below 40 % in the relevant market.*'
13. The finding of dominance depends on the individual circumstances of a case and dominance may be indeed established even when undertakings have relatively low market shares; however, we would appreciate if the Guidelines could give a general indication – as the 2009 Enforcement priorities did – that dominance will be unlikely below at least 30%.
14. An excessively low market share threshold as a safe harbour to exclude the existence of a dominant position (e.g. 10%) may deter certain undertakings from implementing certain practices which could be win-wins for them and others in the market, for instance their customers (e.g. in the case of certain rebates) due to the legal uncertainty around such a low market share.

Other issues related to the assessment of dominance

15. Art. 2 of Regulation 139/2004 (the EU Merger Regulation) declares as lawful under EU law mergers '*which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position*'.
16. Therefore, the dominance sub-test of the broader 'Significant Impediment to Effective Competition' test is a key aspect of EU merger control, and not just of art. 102.

17. For these reasons, we would appreciate clarification on whether the criteria for dominance in the draft Guidelines would also be applicable to assessing dominance in merger control proceedings.

The AEC test, anticompetitive foreclosure and consumer welfare

18. In the draft Guidelines, the AEC ('as efficient competitor') test is only discussed in detail in the context of the assessment of margin squeezes.
19. We appreciate the helpful guidance provided in the draft Guidelines on the application of the AEC test which clarifies existing caselaw, but we would also ask that the Guidelines indicate that the AEC test is relevant to assess all abuses of a dominant position. Indeed, the Court of Justice of the EU confirmed the importance of the AEC test in art. 102 cases as recently as September 2024 in their *Google Shopping* decision.¹
20. Additionally, there is no reference in the draft Guidelines to anti-competitive foreclosure – which was extensively used in the 2008 Guidance. We believe it would be important for the Commission to again refer to anti-competitive foreclosure, which is a key principle of art. 102 to establish the anticompetitive effects of the conduct at stake, as confirmed by the recent *Intel* judgment of October 2024, which we would ask the Commission to consider when finalising its Guidelines.

Conduct capable or presumed to lead to exclusionary effects and naked restrictions

21. The draft Guidelines establish three categories of restrictions.
22. For the second category (abuses presumed to lead to exclusionary effects), the draft Guidelines explain that such presumption is rebuttable but provide little guidance about the necessary evidence to rebut such presumption. For example, an undertaking can present evidence to show that its case is different from 'background assumptions' – but this concept is not defined. We would urge the Commission to provide further guidance on the type of evidence necessary to rebut presumptions and the methodology according to which the Commission would consider such evidence.
23. Overall, EuroCommerce agrees with Mario Draghi, who writes in his Competitiveness Report of September 2024, who writes: *'excessive discretion on the finding of exclusionary abuses is left by the draft Guidelines on the enforcement of article 102. As an example, tying can be presumed to have exclusionary effects, but the Guidelines do not detail under which conditions; similarly, there is no safe harbor for dominant firms setting prices above average total cost.'*
24. As noted above, the Commission should also include references from more recent caselaw, for instance in *Intel*.²
25. The Commission should not create 'by object' restrictions under art. 102 which are impossible to rebut or where it is impossible to prove efficiencies (as could be the case with the third category identified in the draft Guidelines, i.e. 'naked restrictions'). This could lead to an overcautious approach by undertakings which could negatively impact customers and consumers (for example on rebates). Even in cases of naked restrictions, the Court of Justice has reiterated the importance of the effects analysis under the AEC test.

¹ ECLI:EU:C:2024:726

² ECLI:EU:C:2024:915.

Competition on the merits

26. We would be grateful if the draft Guidelines could provide a clearer definition of ‘competition on the merits’; the draft Guidelines simply mentions all the instances where EU courts have referred to this concept, without providing a more principled definition.

Categories of abuses

Exclusivity

27. We would appreciate a clarification on the meaning of ‘*most of a customer or supplier’s requirements*’, as footnote 184 is not very helpful as it does not contain a reference to the duration of the exclusivity rebate. For example, under German caselaw there is no foreclosure effects if contracts can be terminated within a reasonably short time (1-2 years) or if only 50-80 % of the requirements were covered by the exclusivity obligation (for a period of 4 years).

Tying and bundling

28. The draft Guidelines seek to suggest that tying and bundling practices are presumptively unlawful.
29. EuroCommerce agrees with Mario Draghi, who writes in his Competitiveness Report of September 2024: ‘*excessive discretion on the finding of exclusionary abuses is left by the draft Guidelines on the enforcement of article 102. As an example, **tying can be presumed to have exclusionary effects, but the Guidelines do not detail under which conditions.***’

Refusals to supply

30. In relation to indispensability, the draft Guidelines should reflect more recent caselaw, such as Google Shopping, which defines indispensability as ‘*indispensable to carrying on that undertaking’s business, inasmuch as there is no actual or potential substitute in existence for that infrastructure*’.³

Self-preferencing

31. We would like to offer a number of reflections on self-preferencing and the differences between online and brick-and-mortar contexts.
32. As regards in-store location, the retail sector serves a wide range of consumers, offering a broad choice, and helping consumers with their purchasing decisions in line with their lifestyle and ethical considerations. The allocation of shelf space can be part of contractual negotiations, and it is important to acknowledge that choices involve complex interactions between actors in the supply chain.
33. On a search engine results page, self-preferencing is problematic (and indeed also addressed by the Digital Markets Act) as prominently ranking certain products over others may totally remove visibility for other products (because they would only appear on a second page or outside the visible screen of a smartphone).
34. However, in a brick-and-mortar store, consumers are still able to have a complete overview of the offer on shelves (even if some products will be placed on higher or lower shelves). This is a key distinction to be considered when looking into self-preferencing.

³ ECLI:EU:C:2024:726 paragraph 86.

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EuroCommerce is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 27 countries and 5 million companies, including leading global players and many small businesses. Over a billion times a day, retailers and wholesalers distribute goods and provide an essential service to millions of business and individual customers. The sector generates 1 in 7 jobs, offering a varied career to 26 million Europeans, many of them young people. It also supports millions of further jobs throughout the supply chain, from small local suppliers to international businesses. EuroCommerce is the recognised European social partner for the retail and wholesale sector.