

Public consultation on draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings¹

Prof. em. Dr. Jacques Steenbergen²

28 October 2024

Please find hereby a few suggestions, with my thanks and congratulations for the draft.

1. Paragraph 20

I welcome the reminder, with reference to more recent case law, that it is in general necessary to define the relevant market. It may not convince economists arguing that too much emphasis is given to market definitions. And I recall comments by the Court of Justice Advocate General VerLoren van Themaat in the 1980s that it is often easier to ‘reverse engineer’ the establishment of dominance on a market by assessing the abuse. But I consider it quasi excluded that a review court will uphold a decision that does not start from a relevant market definition.

2. Paragraph 55 (c)

I welcome the reference to violations of rules such as data protection law as an indication that an undertaking didn’t compete on the merits. I wonder, however, whether it might not be useful to add ‘*or avoids costs that would be unavoidable for undertakings acting in compliance with the relevant rules*’.

3. Paragraph 55 (f)

This example requires in my opinion a more detailed description in the text itself of the Guidelines as given by the Court in paragraphs 91 and 92 of the *Servizio Elettrico Nazionale* case³ (in the draft only referred to in footnote). The fact that a dominant undertaking can dispose of more resources than a non-dominant competitor will often be the result of competition on the merits. It is necessary to demonstrate that the specific use of such resources does not qualify as competition on the merits, as is articulated in the paragraphs 56 and following. Confusion can also be avoided by deleting paragraph 55 (f).

4. Paragraph 60

I welcome very much the approach distinguishing three categories with presumed and naked restrictions.

It would, however, be helpful if the Guidelines articulated better the relations between the conducts subject to specific legal tests or referred to in section 4.3 and the three categories.

¹ Opened 01.08.20.

² Former president of the Belgian Competition Authority.

³ CJEU, 12 May 2022, C-377/20, paragraphs 78, 91 and 22.

The easiest way to do that is probably to create a *‘fourth category: conducts subject to specific legal tests or referred to in section 4.3’*.

But I would prefer if the Guidelines specified for each of these conducts (e.g. as listed in paragraph 80) explicitly the relevant category. This is e.g. already the case in paragraph 112.

5. Paragraph 70 (f)

The case law on predatory pricing has always raised questions about the objective nature of the concept of abuse in Article 102 TFEU (see also paragraph 111(b) of the draft). Would it be helpful to reformulate the last part of the first sentence of this paragraph as follows: “(...), *objective evidence of such intent is relevant for the purposes of establishing an abuse*”.

6. Paragraph 98

I suggest deleting this paragraph. It creates confusion as it seems to be in contradiction with the paragraphs 97 and 99, both referring to more recent case law and referred to as the relevant standard in e.g. paragraph 105 of the draft.

7. section 4.2.4 and Paragraph 107

Below cost pricing is also practiced by non-dominant undertakings in jurisdictions that do not prohibit selling below cost. Competition authorities generally advocate against such prohibitions (with some success in France and none in yet Belgium). To avoid confusion between such pricing practices of non-dominant undertakings and predatory pricing as an abuse of a dominant position, it would be helpful to repeat in paragraph 107 that section 4.2.4 only deals with predatory pricing practices of dominant undertakings.

8. Paragraph 144 (a)

In view of my comment to section 4.2.4 and paragraph 107 I suggest adding to this paragraph: ‘(... in pricing below cost) *by a dominant undertaking*’.

9. Paragraph 145 (d)

I agree with the warning given in respect of individualized thresholds. But standardized thresholds can also have anti-competitive effects because they force dominant undertakings to adopt rigid tariffs.

I suggest considering language to the effect that the Commission “*may however conclude that in view of the specific facts of a case a preference for standardized thresholds may not be justified in order to enable also a dominant undertaking to contribute to a more dynamic market development*”.

10. Paragraph 169 (a)

In view of the debates on Article 101(3) TFEU and the Mission letter to the Commissioner-designate, and in the absence of case law on the interpretation of the ‘fair share to consumers’ condition in this provision, I consider it not helpful to create the impression in Guidelines that there may also be a total compensation requirement under Article 102 TFEU. I therefore

suggest reformulating the latter part of this sub-paragraph as follows: ‘(... on competition) and allow consumers a fair share of the resulting benefits.’

11. The Towercast case law⁴ after the Illumina case⁵

I share the view that powers for national competition authorities to ‘call-in’ concentrations that do not meet their present thresholds for merger control are, at least from the Commission’s perspective, the most effective alternative for the Commission’s interpretation of Article 22 of the Merger Regulation 139/2004 that was rejected by the Court in the *Illumina* case. A lowering of thresholds would create a disproportionate burden for both industry and competition authorities. But not all Member States may be willing to introduce ‘call-in’ powers. This is likely to increase the pressure to refer to the *Towercast* case law. The assessment of concentrations by application of Article 102 TFEU creates, however, even more uncertainty than the Court considered acceptable in the *Illumina* case. Given the fact that the risk of exclusionary practices is one of the theories of harm taken into consideration in merger control, the Guidelines may offer an opportunity to signal to the market and to national judges and competition authorities that the Commission considers that such concentrations will only in exceptional cases be liable to constitute an abuse prohibited by Article 102 TFEU.

I suggest that the Commission does so by introducing a new subparagraph 4.3.5 referring to paragraph 52 of the *Towercast* judgement :

‘4.3.5. Assessment of concentrations by application of Article 102 TFEU

The CJEU ruled that Article 21(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings does not preclude the competition authority of a Member State from regarding a concentration of undertakings which has no Community dimension within the meaning of Article 1 of that regulation, is below the thresholds for mandatory ex ante control laid down in national law, and has not been referred to the European Commission under Article 22 of that regulation, as constituting an abuse of a dominant position prohibited under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope (always provided the practice affects trade between Member States). The Court also ruled that the mere finding that a dominant undertaking’s position has been strengthened is not sufficient for a finding of abuse. In line with the Court’s case law, the Commission considers as non-binding guidance that such concentrations are only liable to constitute an abuse prohibited by Article 102 TFEU when it is established that the degree of dominance reached by the concentration would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market⁶.

⁴ CJEU, 16 March 2023, case C-449/21, *Towercast*.

⁵ CJEU, 3 September 2024, joint cases C-611/22 P and C-625/22 P, *Illumina*.

⁶ CJEU, 16 March 2023, case C-449/21, *Towercast*, paragraph 52; referring to judgments of 21 February 1973, *Europemballage and Continental Can v Commission*, 6/72, EU:C:1973:22, paragraph 26, and of 16 March 2000, *Compagnie maritime belge transports and Others v Commission*, C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 113.