

European Commission's Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

Submission by Open Markets Institute

Introduction

We welcome the opportunity to submit feedback on the European Commission's Draft Guidelines on the application of Article 102 TFEU on exclusionary abuses ("**DGL**").

Profound change has taken place since the publication of the Commission's enforcement priorities in 2008. Markets have become increasingly concentrated and profits and markups have soared, especially for dominant firms. According to the Commission's recent report on the evolution of competition, competition in Europe is now weaker than before, and this may have contributed to higher prices, greater wage inequality and reduced responsiveness to economic shocks among other impacts.¹

The enforcement of Article 102 TFEU, combined with the application of the Digital Markets Act and the EU Merger Regulation will be crucial in tackling the growing concentration of power and abusive conduct in critical sectors. If enforced effectively, Article 102 TFEU has a major role to play in curbing exploitation of dominance that harms citizens, workers, small businesses and ultimately the stability and resilience of our economies and democracies.

Since 2008, the Commission has sought to address rising concentration in digital markets, including by pursuing abuse cases in the tech sector.² Overall however, enforcement of Article 102 TFEU has been hampered by lengthy back-and-forth with the EU Courts and a burdensome effects-based approach which has prolonged the duration of investigations. More encouragingly, the Commission has managed to reduce its reliance on pricing tests and to capture new forms of harmful conduct by expanding the types of abuse that are caught by the provision (e.g. self-preferencing).

The new Guidelines should not only take stock of the past, but also be forward-looking in determining how Article 102 TFEU will be applied over the next decade and beyond. We believe the final Guidelines could be strengthened in several important ways.

- The Guidelines should extend the scope of legal presumptions to a wider range of practices. These should capture practices that are systematically resorted to by certain

¹ European Commission, Report "*Protecting competition in a changing world : Evidence on the evolution of competition in the EU during the past 25 years*", p 7.

² Cases that have or are being prosecuted in the tech sector include: Qualcomm chips, Google Android, Google Shopping, Google AdSense, Broadcom, Qualcomm (predation case), Facebook Marketplace, Amazon Buy Box and Marketplace, Google AdTech, Microsoft Teams.

dominant firms - such as self-preferencing - and other practices that are widely understood to undermine fair competition (e.g. discrimination).

- We welcome the Commission's openness towards considering a wider set of objectives for competition law beyond just consumer welfare, grounded in the public interest. However, as consumer harm is still central to several key concepts relied on by the guidelines, we encourage the Commission to shift further beyond a narrow consumer-centric lens in the final Guidelines.
- To tackle dominance at source – instead of merely addressing the harms inflicted by dominant undertakings – the Guidelines should refer to super-dominant firms and acknowledge – in line with case-law – that the mere existence of dominance harms competition. We also invite the Commission to further refine its methodology for establishing a dominant position, including taking into account corporate profits and mark-ups.
- Despite the endorsement of legal presumptions, the DGL are still rooted in an effects-based approach. We encourage the Commission to further move away from this approach, which seriously undermines the effective enforcement of Article 102 TFEU by significantly extending the duration of investigations and allowing powerful corporations to overwhelm the Commission's limited resources.
- The DGL tackle exclusionary conduct only. Exploitative abuses are as harmful as exclusionary practices and should be addressed in separate guidelines.

Moving forward, we also encourage the Commission to engage more proactively with civil society groups, be this in policymaking or in relation to specific proceedings. By hearing a broader array of perspectives, the Commission will be able to adopt policies and decisions that are more closely aligned with the public interest.

This submission shares general remarks (1.) and dives into specific aspects of the DGL (2.).

I. Overall assessment of the DGL

The DGL include a number of positive developments. We welcome the Commission's ambition to vigorously enforce Article 102 and to adapt enforcement to the major changes that have taken place in the EU economy.

For instance, the DGL represent a welcome and necessary move beyond a narrow consumer-focused enforcement lens and a shift away from the highly flawed as-efficient-competitor test. We strongly believe that this test cannot be applied where challengers face huge barriers of entry (such as economies of scale or high investment capacities), as they typically do in concentrated markets.

We fully welcome the DGL's endorsement of legal presumptions. These will streamline enforcement by alleviating the burden of proof on the Commission, which both reduces the number of cases it can take on and the speed with which it is able to tackle them. Moreover, since certain behaviours – in particular self-preferencing – are becoming an almost systematic

modus operandi of certain dominant firms,³ we encourage the Commission to widen the scope of legal presumptions to catch this and other practices (such as discrimination) that are widely understood to undermine fair competition. Self-preferencing is frequently used by vertically- or horizontally-integrated firms, typically Big Tech firms, to strengthen their market position, foreclose rivals and exploit customers and consumers. The DGL must be forward-looking and anticipate that the Commission will, in the coming years, continue to face such conduct.

We also support the DGL's emphasis on digital markets and the impact of network effects. For instance, footnote 42 specifically addresses digital products by referring to the Commission's updated Notice on Market Definition according to which, in zero-price markets, indicators other than market shares (such as numbers of users) may be more relevant in assessing the market power of companies. To ensure that the Guidelines are consistent, we suggest that paragraph 70(d), which indicates that a higher share of total sales may contribute to showing exclusionary effects, refers to "total sales or any other appropriate quantitative value (such as the number of users or number of clicks)".

Finally, the lack of coverage of exploitative abuses in the Guidelines means that Article 102 TFEU will continue to only be partially enforced. The types of abuses are a key way in which dominant corporations abuse their market power, and competition enforcers must be able to respond effectively. For instance, pharmaceutical companies have repeatedly been found guilty of excessive pricing.⁴ Exploitative abuses must therefore be part of the Commission's enforcement priorities, in the same way as exclusionary abuses. While we recognise the DGL's focus on exclusionary abuses we encourage the Commission to draft separate guidelines that cover exploitative abuses.

II. Assessment of specific aspects of the DGL

Means to ensure the effective application of Article 102 TFEU

First, the DGL include concepts that are either unclear or could lead to uncertainty when enforcing them. This lack of conceptual clarity could trigger lengthy back-and-forth with EU courts, create confusion for the Commission, national authorities, businesses and consumers, and help powerful corporations exploit this ambiguity to steer enforcement of Article 102 TFEU to their advantage.

The most striking example of this ambiguity lies in the notion of "competition on the merits" which is not properly defined and at times confusing.⁵ The DGL refer to the concept at paragraph 50 – without explaining what it means in practice – and then seem to rely on a list of practices to define it. Paragraph 58 also argues that when exclusionary effects are balanced by efficiencies, this means that the conduct in question amounts to competition on the merits. This

³ See the various past and antitrust cases: Google Shopping, Google Adtech, Amazon Buy Box.

⁴ On excessive pricing, see for instance the following cases :Aspen (EU), Pfizer and Flynn (UK), CD Pharma (Denmark), Leadiant (several Member States).

⁵ The meaning of "merits of the products" (paragraph 55) is also unclear for the reader.

ties the latter concept to the notion of efficiencies when competing on the merits should be a self-standing concept.

We encourage the Commission to clarify the meaning of “competition on the merits” on the basis of the Court’s case-law and to clarify any other aspects of the Guidelines that could lead to uncertainty.

Second, establishing a two-part test – covering both exclusionary effects and conduct departing from competition on the merits – makes it more burdensome for the Commission to find an abuse. In practice, if one condition is not met, defendants escape the application of Article 102 TFEU. We encourage the Commission to seriously reconsider the establishment of this test especially since this move relies on a reading of the Court’s case-law which could be questioned.⁶

Consumer harm

We welcome the Commission’s acceptance, in accordance with the Court’s case-law, to reduce the reliance on consumer harm in the enforcement of Article 102 TFEU. Beneficiaries of competition policy cannot be limited to consumers when powerful companies hurt, through anti-competitive practices, our democracies, our citizens and our economic resilience.

The DGL state that, to demonstrate exclusionary effects, “*it is [...] not necessary to prove that the conduct resulted in direct consumer harm*” and that the provision captures behaviour of dominant firms that distorts or impairs effective competition “*to the detriment of the public interest, other market players and consumers*”.⁷ This wider approach is consistent with the Court’s case-law.⁸

In practice, when studying exclusionary effects, this means the Commission can (and should) take into account the impact of a dominant firm’s behaviour on (for example) workers, media plurality, and supply chain resilience, given these fall under the category of public interest considerations. By way of an example, the General Court has specifically referred to the need to “*ensure plurality in a democratic society*”.⁹

According to the DGL, Article 102 also covers practices that harm consumers “*by undermining an effective structure of competition*”. We strongly support this approach; markets have been

⁶ See L. Peepkorn and Pablo Ibanez Colomo who do not consider that competition on the merits would necessarily always be a second condition to find an abuse. (L. Peepkorn, The Draft Article 102 Guidelines: A Somewhat Confused Attempt to Roll-Back the Effects-based Approach of the Union Courts, Kluwer Competition Law Blog, 2024; and Pablo Colomo commenting on the Google Shopping C-48/22 P case: “*Accordingly, there may be instances in which it is not necessary to show that the practice departs from competition on the merits and, similarly, instances where it is not necessary to demonstrate the actual or potential effects on competition (that is, ‘by object’ infringements).*” – case comment accessed on this [link](#)).

⁷ DGL, respectively paragraphs 2 and 5 and 72.

⁸ See judgment of 10 September 2024, C-48/22 P, Google, paragraph 87; judgment of 21 December 2023, European Superleague Company, C-333/21, paragraph 124.

⁹ General Court, T-604/18, Google Android, paragraph 1028.

shown to be detrimental to competition and to society at large¹⁰ and should be seen as problematic in themselves.

Despite these positive developments, some aspects of the DGL still rely on a narrow interpretation of consumer welfare to enforce Article 102 TFEU. For instance, this restricted interpretation is still reflected in definitions of competitive harm, “normal competition” and efficiencies, as illustrated by the following quotes:¹¹

- competitive harm “*may take various forms, such as higher prices, a deterioration in the quality of goods and services, a reduction in innovation or a limitation of consumers’ choice*”;
- normal competition refers to a situation “*in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services*”; and
- an efficiency defence “*cannot be accepted if the exclusionary effects produced by the conduct bear no relation to the alleged advantages for consumers*”.

These definitions suggest that the competitive process, and the harmful behaviour of dominant corporations, should be understood solely through their impacts on consumers. For the sake of consistency with the rest of the Guidelines, and to ensure that competition enforcement takes into account the full array of threats posed by concentrated market power, we encourage the Commission to expand the shift beyond consumer welfare in the final Guidelines.

Tackling dominance at source and defining a dominant position

The ability of powerful corporations to behave independently of their customers or rivals inherently weakens competition on the market, whether there is an abuse or not. Although the EU Courts have repeatedly stated that Article 102 TFEU does not seek to penalise dominant positions *per se*, they have also highlighted that the mere existence of dominance harms competition. For instance, the Court’s ruling in the *Unilever* case states that “*the concept of ‘abuse’, within the meaning of that provision, is thus intended to penalise the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened because of the presence of the undertaking concerned, adversely affects an effective competition structure*”.¹² In the same vein, in *Google Shopping*, the General Court (without being overturned by the CJEU on that point) relied on the Google’s super-dominance and other factors in stressing its responsibility not to commit an abuse.¹³

¹⁰ European Commission, Report “*Protecting competition in a changing world : Evidence on the evolution of competition in the EU during the past 25 years*”.

¹¹ DGL, paragraphs 2, 51 and 169.

¹² Judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, paragraph 36.

¹³ Judgment of 10 November 2021, *Google Shopping*, T-612/17, paragraph 183. “*At the time when Google started its activities on the market for specialised comparison shopping search services, there were already numerous providers of such services. Moreover, in view of its ‘superdominant’ position, its role as a gateway to the internet and the very high barriers to entry on the market for general search services, it was under a stronger obligation not to allow its behaviour to impair genuine, undistorted competition on the related market for specialised comparison shopping search services.*”

The DGL do specify that the *degree* of dominance may be relevant for the purposes of analysing exclusionary effects. We welcome this and encourage the Commission to go further by (i) quoting the Unilever case, noting that the weakening of competition is exacerbated in the presence of super-dominance, whether there is an abuse or not, and (ii) emphasising that super-dominant firms have a greater responsibility not to commit an abuse and that a super-dominance increases the both likelihood and extent of exclusionary effects.¹⁴

On a similar matter, namely the establishment of a dominant position, we share the following observations:

- In establishing a dominant position, the DGL (footnote 37 at paragraph 24) should add that profits and mark-ups generated by companies may be taken into account. In the same vein, we encourage the Commission to view increases in profits and mark-ups as a market development signalling the existence of exclusionary effects (paragraph 70(g)).
- To ensure consistency with the Court's case-law, paragraph 26 should specify that market shares constitute a first indicator but are not determinant in themselves.
- There is a risk of paragraph 28 being misinterpreted. As currently drafted, it implies that high market shares on fast-growing markets with short innovation cycles may be transitory and therefore less relevant to the finding of a dominant position. Corporations could exploit this wording to argue that they are not dominant. We urge the Commission (i) to delete this reference as it will unnecessarily limit the scope of enforcement, and (ii) investigate these fast-growing markets even where high market shares are a relevant recent development.

On exclusionary effects and the effects-based approach

First, we welcome several aspects of the DGL's definition of exclusionary effects. For instance, the Commission endorses the Court's case-law according to which the extent of a dominant position is taken into account in finding exclusionary effects. In addition, we agree that the absence of exclusionary effects is not sufficient in exempting a corporation from the application of Article 102 TFEU.

The DGL could nonetheless go further in crystallising the Commission's 2023 policy orientation by clarifying that exclusionary effects include behaviour that “weakens an effective competitive structure even without necessarily producing the full exclusion or marginalization of competitor”.¹⁵

Second, despite the use of legal presumptions and the move away from the AEC test, an effects-based approach still shapes the DGL. For instance, according to the draft, price-cost tests may be relied upon to show that a dominant firm that engages in predation and margin squeeze departed from competition on the merits. In our view however, qualitative criteria

¹⁴ We acknowledge that 70(a) outlines that the greater the dominance, the more likely the conduct is capable of having exclusionary effects. We simply note that a super-dominance naturally increases the likelihood and seriousness of exclusionary effects.

¹⁵ European Commission, Competition Policy Brief 1/2023.

should be sufficient in proving that a conduct has departed from competition on the merits since a pricing test is already conducted to find exclusionary effects. In practice, qualitative criteria could include for instance the intention of abusing market power or applying unfair and discriminatory terms.

Pricing tests are also at the core of analysing certain types of abuses (predation, margin squeezes) and can be used for other abuses (such as conditional rebates). Yet this approach misses a crucial point: where powerful firms hold a dominant position on the market, these abusive behaviours are inherently harmful for consumers and society at large, and pricing tests should not be needed to confirm this conclusion.

More widely, we believe that an effects-based analysis runs counter to robust enforcement of Article 102 TFEU. Over-reliance on economic analysis undermines legal certainty, as economic studies can be used to support many different conclusions. The need to conduct detailed studies also greatly lengthens the duration of abuse investigations, which are already long, delaying timely enforcement and draining the Commission's resources. Furthermore, recent research has shown that large multinationals exploit the effects-based approach to submit numerous and lengthy economic reports – often of poor quality – that nonetheless all need to be reviewed by the Commission.¹⁶ While there is some room for the weighing of effects in Article 102 enforcement, the current approach clearly undermines the effective and timely enforcement of the law.

We therefore urge the Commission to shift further away from an effects-based approach and to rely primarily on legal criteria to find an abuse.

Other recommendations

We believe that the final Guidelines could include the following useful additions.

- A reference to the interplay between Article 102 TFEU and the Digital Markets Act could be added at paragraph 12 since both regulations work hand in hand to tackle dominant positions held by digital companies.
- Paragraph 158 on self-preferencing could specify that markets may be related in a vertical or conglomerate way. This would capture the reality of the EU economy.

We thank you for your attention and remain available should you have any questions.

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¹⁶ Journal of Antitrust Enforcement, Spamming the regulator: exploring a new lobbying strategy in EU competition procedures, 2023.