

Feedback on the draft Guidelines on exclusionary abuses under Article 102 TFEU

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Introduction

We welcome the opportunity to provide feedback on the draft guidelines on exclusionary abuses under Article 102 TFEU. This feedback is limited to the topic of competition on the merits/normal competition.

Section 3 of the draft guidelines outlines the general principles for determining if conduct by a dominant undertaking is liable to be abusive. According to para 45 it is necessary to establish “whether the conduct *departs from competition on the merits (...)* and *whether the conduct is capable of having exclusionary effects (...)*”. In other words, departure from competition on the merits and exclusionary effects are presented as two separate and necessary conditions for establishing that conduct by a dominant undertaking amount to an abuse.

In our opinion, requiring departure from competition on the merits/normal competition as a separate and necessary condition for establishing an abuse is not necessary based on the case law of the CJEU. Additionally, such a requirement could burden competition authorities with increased resource demands, since it is a concept that may be used strategically as a shield by undertakings. In a worst-case scenario, this could lead to Type II errors, where harmful practices escape classification as abuse due to being deemed "normal" or "competition on the merits." On this basis, we recommend that the final version of the guidelines depart from characterizing departure from competition on the merits/normal competition as a separate and necessary condition for establishing an abuse of a dominant position.

In the following we will first substantiate our argument that the case law of the Courts does not support departure from competition on the merits/normal competition as a separate and necessary condition for establishing an abuse. Thereafter we will demonstrate that the attempt to operationalize competition on the merits/normal competition as a separate condition illustrates how it is impossible to consider this criteria and exclusionary effects as separate conditions.

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The case law and competition on the merits

The draft guidelines refer to the judgments in *Servizio*¹ and *ESL*² in support for considering departing from competition on the merits as a separate and necessary condition. In *Servizio* the ECJ refer to “means other than those which come within the scope of competition on the merits” as one of “two conditions”.³ This is the only judgment by the Courts that clearly present competition on the merits and exclusionary effect as two conditions. The other references in the guidelines refer to statements we have observed in the case law several times, namely that the concept of abuse

*“covers any practice capable of adversely affecting, by way of resources other than those which govern normal competition, an effective competition structure. It is therefore intended to penalise the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to means different from those governing normal competition in goods or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”*⁴

This description of an abuse has been reiterated in case law several times and can be traced back to the judgment in *Hoffmann-La Roche*.⁵ Even though the Courts generally refer to means different from those governing normal competition (or competition on the merits), it has generally not been considered to depict departing from competition on the merits as a separate condition for establishing an abuse. As Colomo has expressed it: «The steady stream of judgments delivered by the Court in the course of the past decade shows that it is not necessary for an authority or claimant to show that conduct is abnormal (or amounts to a “wrongful act”). As a matter of principle, it is sufficient to prove that it is a source of actual or potential effects in the economic and legal context of which it is a part.”⁶ Colomo provides a convincing line of arguments for not considering departing from competition on the merits/normal competition as a separate condition⁷, including that *Servizio* cannot be considered as a decisive argument in support of this conclusion if one among other arguments “reconcile the ruling with the rest of the case law”.⁸

¹ Case C-377/20, *Servizio and others*, EU:C:2022:379.

² Case C-333/21. *European Super League Company v FIFA and UEFA*, EU:C:2023:1011.

³ Case C-377/20, *Servizio and others*, EU:C:2022:379, paragraph 103.

⁴ Ibid. paragraph 68; Case C-333/21. *European Super League Company v FIFA and UEFA*, EU:C:2023:1011, paragraph 129.

⁵ Case 85/76, *Hoffman-La Roche v Commission*, EU:C:1979:36, paragraph 91.

⁶ Pablo Ibáñez Colomo, “Competition on the Merits”, *Common Market Law Review* [61] 2024, pp. 387-416 on p. 389.

⁷ Ibid. in particular section 3.4

⁸ Ibid. p. 401.

In our view the arguments and conclusion put forward by Colomo convincingly demonstrates that departing from competition on the merits/normal competition is not a separate and necessary condition for establishing an abuse, and instead of repeating all of the arguments here, we refer to the article. After the publication of this article, the ECJ did not repeat the statement from *Servizio* in its Google Shopping judgment. In *Google Shopping* the Court presents a statement similar to that quoted from *ESL* above, and in the following paragraphs describes the abuse assessment as an assessment where both effect and competition on the merits are relevant factors.⁹ In its recent *Intel* judgment the ECJ takes the same approach.¹⁰ The Court refers to the AEC test as one way of “assessing whether an undertaking in a dominant position has used means other than those that come within the scope of ‘normal’ competition”, as part on the assessment of the “capability of such rebates to foreclose a competitor as efficient as the dominant undertaking”. This illustrates how normal competition or competition on the merits is an element in the effects-assessment.¹¹

Difficulties in distinguishing between competition on the merits and likely effects

In this section we will provide some examples from the draft guidelines that, in our view, illustrate the difficulty of distinguishing between competition on the merits (or normal competition) and exclusionary effects.

The content of a possible condition related to competition on the merits/normal competition is not easy to distinguish from the condition of a likely exclusionary effect. In our opinion, this difficulty is also demonstrated by the draft guidelines’ attempt to operationalize the concept of competition on the merits. Firstly, when the guidelines refer to the “as efficient competitor”-principle in paragraph 51 as an explanation of competition on the merits, it is clear that the attempt to operationalize competition on the merits is given a meaning relating to the effects of the conduct. If a conduct only excludes less efficient competitors, the reason for not considering the conduct an abuse is the lack of an anti-competitive effect, and not the characteristics of the conduct itself. Yes, such conduct may be labelled competition on the merits, but it does not demonstrate that competition on the merits is something different than a factor in the effects assessment.

Furthermore, when the draft guidelines in paragraph 53 refer to conduct which later in the guidelines are characterized as conduct which are presumed to lead to exclusionary effects (see paragraph 60) as conduct departing from competition on the merits, it refers to conduct which based on the test often will produce an anti-competitive effect.

⁹ Case C-48/22 P, *Google Shopping*, EU:C:2024:726, paragraphs 165 to 173.

¹⁰ Case C-240/22 P, *Commission v Intel*, EU:C:2024:22, paragraphs 175 to 181.

¹¹ *Ibid.* paragraph 181.

Again, it is the (potential or likely) effects of the conduct that are used to determine if the conduct departs from competition on the merits.

The examples provided in paragraph 55 are also conduct which often would be considered likely to produce an anti-competitive effect. The difficulty in distinguishing between the effects and competition on the merits/normal competition also becomes clear in paragraph 56 of the draft guidelines, where the tests for margin squeeze and predatory pricing is described as relevant for the assessment of both conditions.

In our view, this demonstrates the difficulties of distinguishing between the question of whether a conduct has a likely exclusionary effect and whether it is competition on the merits/normal competition, which again is a strong indicator of it being wrong to present these two as separate and necessary conditions for establishing an abuse.