

The Enel Group feedback on draft antitrust Guidelines on exclusionary abuses

The Enel Group (“Enel”) welcomes the European Commission (“EC”) proposed draft of the Guidelines on exclusionary abuses (“Guidelines”), as article 102 TFEU is currently the only important area of European competition law lacking guidelines to clarify its application.

Even if the envisaged document does not address the topic of exploitative abuse practices, it nevertheless marks a very important step forward, staying focused on reflecting the Commission’s views on how exclusionary abuses are supposed to be dealt with in the context of its future enforcement endeavors.

It should be emphasized from the very beginning that the declared purpose of this exercise, in addition to boosting the speed and effectiveness of intervention of the competition authority, was to help increase legal certainty (to the benefit of various market players and stakeholders), as well as to improve the predictability of decisions.

In the context of the above-mentioned desiderates, Enel would like to suggest the further enhancement of the Guidelines with respect to bringing more clarity and transparency:

- with respect to which are the “safe harbors” for the presumably dominant companies, as well as
- regarding some substance-related novelties and challenges, as briefly summarized within the topics below.

A. The concept of conduct departing from competition on the merits

It goes without saying that, in principle, a diligent potentially dominant company should have on its agenda a continuous (*ex-ante*) assessment of its market behaviour and strategies, to eliminate (or at least reduce to the maximum extent possible) the competition law risks. To do so successfully, the Guidelines should be accessible, clear and predictable.

More specifically, while it is true that the proposed draft summarizes a list of elements which were considered relevant by the courts for (or when) deciding whether a dominant company failed to compete on the merits, there is no concrete guidance on what entails competition on the merits.

In other words, the proposed draft refers to a non-exhaustive list of what is not considered competition on the merits, which is very useful for mapping the assessment framework of certain market situations, but would be even more beneficial to also emphasize what competition on the merits from the part of a dominant company should look like, mostly in terms of contents (e.g., offering customers better conditions absent of preventing competitors from doing so, or offering value or taking positive actions to enlarge customer bases, and not necessarily only in a defensive response against their competitors).

Therefore, for the Guidance to be a more valuable instrument for self-assessment, apart from fast-forwarding to the effects of competition on the merits (*i.e.*, lower prices, better quality, wider choices for the consumers), it could go a little further and be more clear (if not unequivocal) about what is allowed, so that the companies' certainty (and expectation) of not-infringing article 102 TFEU to be higher than in the absence of such Guidelines.

Otherwise, focusing on addressing the courts' non-exhaustive case law and adding the flavour of the necessity to look at a specific behaviour placed in a specific context could not entirely exclude the interpretation that every type of conduct may depart, in a certain point and/or to a certain extent, from competition on the merits.

B. A new presumption-based approach

The Guidelines introduce a number of presumption rules, which in their turn impact directly on the burden of proof allocation between the EC and the investigated companies, based on a categorization encompassing the three types of behavior considered relevant by the EC in the context of assessing exclusionary abuses (*i.e.*, the so-called "naked restrictions", the conduct which is presumed to lead to exclusionary effects, and the conduct for which is necessary to demonstrate a capability to produce exclusionary effects).

At a first glance, introducing more presumptions to work with relieve the EC of the initial burden of proving exclusionary effects, but it does not seem to create at the same time good grounds for increasing predictability as such. This is especially the case for the category of behaviors presumed to lead to exclusionary effects, once the factual existence of the relevant conduct is established, where reversing the burden of proof may be more impactful in practice, as compared to the "naked restrictions" category.

While it makes sense that the evidentiary burden associated with the demonstration of exclusionary effects needs to be proportionate to the likelihood that conduct will produce harm, lowering the burden on the EC side is clearly not very helpful for companies which are supposed to demonstrate a negative fact contrary to the presumption (the inexistence of the capability to produce exclusionary effects), knowing that negative facts are much more difficult to prove than the positive (presumption-based) ones.

To overcome this kind of drawbacks, the Guidelines should further detail on the specific type and magnitude of rebuttal evidence that should be enough to overturn an initial presumption. Only a referral to circumstances of the case which are substantially different from the background assumptions upon which the presumption is based is not enough, in the context in which is not clear what these assumptions are.

The objective pursued by the EC of handling cases with a greater efficiency (and presumably also in a shorter timeframe) should not come at the cost of adversely affecting the right of defense, also

stemming from potentially overloading efforts to build extensive rebuttal exercises to successfully overturn a (simpler to build) presumption. In addition, any uncertainty surrounding the evidentiary standards of proof would probably contribute to longer proceedings, which would be also contrary to the EU's anticipated goals when opting for issuing the Guidelines.

C. The market shares indicative thresholds

The Guidelines conceptualizing the idea that even a market share below 10% is not safe from the perspective of being assessed as dominant (based on a specific German market structure from almost 40 years ago) does not offer predictability, neither proportional legitimate expectation to the ones making self-assessments.

Exhaustively clarifying all the exceptional circumstances applicable to such (low market share) cases, and better explaining what the EC approach in the future in this respect will be, would be highly recommended.

D. Exclusive dealing

Although exclusive dealing give rise to legitimate concerns of competition (by reason of their nature), its ability and capability to exclude competitors is not automatic, so that to “too easily” presume exclusionary effects; neither the degree of market power and the quality of an unavoidable trading partner counts as proof in this respect (these are factors from which exclusive dealing may be originating, but not relevant for the capability burden) as the Guidelines are trying to suggest.

More clarification in this respect would be useful, including updated considerations on the duration factor considering the most recent case law (e.g., the importance of unilateral termination rights, renewal-related clauses, etc).

E. Conditional rebates

From the compliance with the competition rules' perspective, the assessment of conditional rebates which are not subject to exclusive purchase or supply requirements rests on a combination of various elements, which is a very technical exercise by its nature.

In this context, detailing the situations in which granting conditional rebates are lacking capability of generating exclusionary effects would help (e.g., if there is a “de minimis” part of the “relevant range” or of the “contestable share” which would count in this respect, since maybe competitors not having access to the corresponding insignificant sales volume might not be considered excluded from competing for customers).

In addition, in case of retroactive rebates, it would be useful for the Guidelines to clarify to what extent the length of the reference period within which such rebate schemes apply (eventually in correlation with the rebate size) would be a proof for the actual capability of excluding competitors.

F. Self-preference

The draft Guidelines introduces the rather new and broad concept of self-preferencing, which is considered problematic only in certain specific cases, upon considering of all relevant circumstances.

In this context, it appears that the circumstances exemplified in the current version of the Guidelines seem to be very fact-specific and there is no clear benchmark specifying when self-preference is illegal with a general applicability (*i.e.*, which constitutive elements must be met for the self-preferencing to be incompatible with competition on the merits).

More legal certainty in this respect would be useful for both (i) potential dominant companies - in the context of designing new (or simply assessing their existing) business models, and (ii) competitors of potential dominant companies - when assessing whether they could effectively challenge such practices.

G. The counterfactual working method

The Guidelines recognize that, under normal circumstances, analyzing the capability to produce exclusionary effects would imply a comparison of the situation in which the conduct was implemented with the situation absent the conduct (that is to say, to compare market situations before and after the implementation of the conduct in question). At the same time, it is endorsed that the existence of actual exclusionary effects does not matter, since it cannot (in itself) disprove the conduct's capability to produce such effects.

From the perspective of a company putting together such preliminary working premises at the base of its self-assessment, more guidance should be provided on how such a comparison would be relevant to identify a potentially exclusionary conduct which does not require actual effects. In addition, using alternative hypothetical scenarios (as suggested by the Guidelines) does not help, and for sure does not meet the requirement of providing legal certainty.

H. The sustainability-related section

Without prejudice for what is specified below on the opportunity to include more precise references to allow companies to orient their self-assessment activity, the inclusion of a section dedicated to objective justifications (and in particular to the defense based on objective necessity

and the defense based on efficiency) is certainly positive. However, given the central importance of sustainability, we would have expected more concrete and more specific indications on behaviors oriented precisely towards sustainability objectives (for example with an ad hoc section as in the horizontal guidelines).

I. Predatory prices

Paragraph 131 of the Guidelines provides that “*several factors and metrics may influence the results of the price-cost test, in particular: (a) the price and cost benchmarks, and (b) the level of product aggregation. The choice of the relevant factors and metrics is made on a case-by-case basis depending notably on the market, the competitive conditions and the other circumstances of the case*”.

It should be specified that, for example, in relation to products introduced into emerging markets, with a high innovative and technological content, characterized by high investments, the cost parameters traditionally used for the test may not work correctly and different parameters may be applied. In fact, in a start-up phase of these markets, pricing policies that are not entirely profitable must be considered lawful or, better, physiological, because they are instrumental and necessary to allow that good or service to penetrate the market. It’s clear that in these cases the company can cover initial costs by exploiting the efficiencies that are typically generated in a second/subsequent phase (e.g., economies of scale, scope, network effects).

J. Objective justifications

In the last part of the Guidelines on the so-called “objective justifications”, more specifically with respect to the defense based on efficiency (efficiency defence), the parameters to be followed to evaluate the efficiencies produced could be indicated. In this way the company can carry out a correct preventive evaluation of its conduct with respect to article 102 TFEU.

It is well known that the guidelines issued by the EC do not have a binding nature for the national competition authorities. Even so, they are usually considered an example to be followed at local levels (if not directly implemented as such into the Member States’ national secondary legislation).

Therefore, introducing more “safe harbors” and reducing the grey areas subject to diverse interpretation would help both (i) presumably dominant companies to structure their behavior accordingly and strengthen their compliance, and (ii) competition authorities (and even courts) to have a uniform approach when investigating (or deciding) on exclusionary abuse topics.
