Legal Restraints on Single-Firm Conduct in the Digital Age:
The Global Antitrust Institute's Comment on the
European Commission's "Call for Evidence"
and Concurrent Announcements Regarding Exclusionary Abuses of Dominance
Under Article 102, Treaty on the Functioning of the European Union

May 2, 2023

Introduction

The Global Antitrust Institute ("GAI") submits this comment to the European Commission ("EC" or "Commission") in response to the EC's "Call for Evidence" regarding exclusionary abuses of dominance under Article 102, Treaty on the Functioning of the European Union ("TFEU"). This comment is based on the GAI's extensive experience and expertise in competition law and economics.[1]

The Commission's Actions Depart from Its Prior Practice of Inviting and Carefully Evaluating Public Input Before Implementing Major Enforcement Policy Changes

On March 27, the Commission adopted a Communication amending the Guidance on enforcement priorities for Article 102 TFEU.[2] Concurrently, the Commission published a Call for Evidence, announcing an initiative to craft guidelines on exclusionary abuses of dominance.[3] In the first substantive change to the EC's official documents regarding abuse of dominance enforcement since 2008, the Commission cites a desire to reflect the EU courts' caselaw over the past fifteen

[1] The GAI is a division of George Mason University's Antonin Scalia Law School and reports to the Dean of the Law School. In support of its mission, the GAI draws upon the independent expertise of the Law School faculty including Joshua D. Wright, University Professor and former Commissioner of the U.S. Federal Trade Commission ("FTC"); Douglas H. Ginsburg, Professor of Law and Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Chairman of GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice; Bruce H. Kobayashi, Paige V. and Henry N. Butler Chair in Law & Economics and former Director of the Bureau of Economics, FTC; Abbott B. Lipsky, Jr., Adjunct Professor, Director of Competition Advocacy for the GAI, former Acting Director of the Bureau of Competition, FTC, and former Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice; Dr. Alexander Raskovich, the GAI's Director of Research; and John M. Yun, Professor and former Acting Deputy Assistant Director, Bureau of Economics, FTC. We thank the participants in the Global Antitrust Institute Legal Practicum – Samuel P. Bellet, Sophia L. Cabana, Cory Jack, Segev D. Kanik, Seoyi Kim, Daniel Lynch, Andrew Schilling, Mark P. Smith and Konnor P. Ternus -- for substantial contributions to this Comment. The GAI is grateful for the generous contributions from the individuals, foundations, and corporations who enable the GAI to carry out its mission. Its finances are managed through the George Mason University Foundation, Inc., which is a 501(c)(3) corporation established to support the activities of George Mason University. More information may be found at https://gai.gmu.edu.

[2] European Commission Press Release IP/23/1911, The Commission, Antitrust: Commission announces Guidelines on exclusionary abuses and amends Guidance on enforcement priorities (Mar. 27, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1911.

[3] European Commission Call for evidence, EU competition law – guidelines on exclusionary abuses by dominant undertakings (Mar. 27, 2023), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en. ("Call for Evidence").

years, to withdraw the existing 2008 Guidance on enforcement priorities, and ultimately to adopt new guidelines.[4]

The GAI applauds the Commission's request for public comment and its effort to reflect EU caselaw in updated guidance. However, the GAI is concerned that the Commission is departing from the robust public review process it has employed in the past, which is a vital component of informed policy change. The Commission has allowed only four weeks[5] between the time it provided public notice and the due date for comments -- a marked shift from the extensive public engagement in the years leading up to the publication of the 2008 Guidance. Allowing the public sufficient time to formulate submissions carefully and then considering those submissions seriously is not only good administrative practice, but also a crucial step in sound policymaking.[6] The GAI respectfully suggests that the Commission mirror the efforts taken to engage the public in connection with the 2008 Guidance. Before making any of the substantive changes in enforcement priorities outlined in the Communication published with the Call for Evidence on March 27, the Commission should provide adequate time to invite, collect, and consider public comments.

On 3 December 2008, the Directorate General for Competition ("DG Comp") issued guidance on its enforcement priorities in applying Article 102 (then Article 82)[7] to abusive exclusionary conduct by dominant undertakings.[8] In the years leading up to the publication of the Guidance, the Commission routinely emphasized the need for and, in fact, engaged in "wide discussion before taking a firm view" on Article 102.[9]

In July 2005, a report by the Economic Advisory Group on Competition Policy (EAGCP) called for an economics-based approach to Article 102 to align the Commission's approach with its

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[4] Linsey McCallum, Inge Bernaerts, Massimiliano Kadar, Johannes Holzwarth, David Kovo, Marie Lagrue, Edouard Leduc, Luca Manigrassi, Jorge Marcos Ramos, Isabel Pereira Alves, Vera Pozzato, Pinelopi Stamou, European Commission Competition Policy Brief No 1/2023, A Dynamic and Workable Effects-based Approach to Abuse of Dominance (Mar. 2023), https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf.

[5] At most the interval provided for preparation of comments could include only twenty business days, but with the various holidays observed in the Member States and elsewhere during this time (*e.g.*, those associated with the celebration of Easter – Maundy Thursday, Good Friday and Easter Monday in many jurisdictions), the number of available working days is further reduced.

[6] Delia Rodrigo & Pedro Andres Amo, *Background Document on Public Consultation*, THE MENA-OECD GOVERNANCE PROGRAMME, https://www.oecd.org/mena/governance/36785341.pdf ("Public consultation is one of the key regulatory tools employed to improve transparency, efficiency and effectiveness of regulation.").

[7] For consistency and readability, this paper refers to former Articles 81 and 82 of TFEU as Articles 101 and 102, respectively.

[8] European Commission, Art 82 Review, https://web.archive.org/web/20090809163244/http:/ec.europa.eu/competition/antitrust/art82/index.html (last visited Apr. 15, 2023) (August 9, 2009 snapshot of http:/ec.europa.eu/competition/antitrust/art82/index.html, using the "Wayback Machine" on web.archive.org) [hereinafter August 9 Art 82 Review].

[9] European Commission, Art 82 Review, https://web.archive.org/web/20060616015517/http:/ec.europa.eu/comm/competition/antitrust/others/article_82_review.html (last visited Apr. 15, 2023) (June 16, 2006 snapshot of http://ec.europa.eu/comm/competition/antitrust/others/article_82_review.html, using the "Wayback Machine" on web.archive.org) [hereinafter June 16 Art 82 Review].

earlier reform of Article 101 and its approach to merger control.[10] Months later in an address to the Fordham Corporate Law Institute, then European Commissioner for Competition, Neelie Kroes, echoed these concerns: "I am convinced that the exercise of market power must be assessed essentially on the basis of its effects in the market . . . . [T]his is consistent with the way we apply Europe's rules on collusive behaviour, laid down in Article [10]1 of the EC Treaty, as well as other instruments of European competition law."[11]

While Commissioner Kroes was transparent in describing her preferences for an enforcement approach, she emphasized that it was "not [her] intention to propose a radical shift in enforcement policy."[12] Commissioner Kroes made good on her expressed intentions. In the years to follow, Commissioner Kroes embarked on a well-structured process to engage the public for input on draft Guidelines for enforcement of Article 102. The Commission engaged the public "to ensure that the EU's powers to intervene against monopoly abuses are applied consistently and effectively[.]"[13] In Commissioner Kroes's view, this process was "worthwhile for the clarity it will give to companies and their advisers."[14]

On 19 December 2005, the Commission published a Discussion Paper "designed to promote debate[.]"[15] The Commission invited comment on the Discussion Paper on December 19, 2005, giving the public more than three months (until March 31, 2006) to respond.[16] After receiving and reviewing over 100 comments, the Commission held a public hearing on June 14, 2006.[17] The Hearing featured extensive remarks from experts on competition policy from around the world—including law professors, law firms, economists, and institutes devoted to the study of competition law.[18] All of these measures invited further public debate.[19] After engaging the public extensively and incorporating international recommendations, the Commission issued the Guidance on Article 102 on December 3, 2008. In short, the 2008 Guidance reflected meticulous inquiry into expert opinion and a wide variety of other views on sound policy.

Today, the European Commission takes a markedly different approach to the amendment of Article 102 Guidance. In the "first major policy initiative in the area of abuse of dominance rules . . . since 2008[,]" the Commission has given the public just four weeks to comment on its

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[10] Antitrust Subgroup, Economic Advisory Group on Competition Policy, European Commission Report, *An Economic Approach to Article 82* (July 2005), https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.
[11] Neelie Kroes, Commissioner, European Commission SPEECH/05/537, Speech at the Fordham Corporate Law Institute, Preliminary Thoughts on Policy Review of Article 82, (Sept. 23, 2005), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_537.
[12] *Id.*
[13] June 16 Art 82 Review, *supra* note 9.
[14] *Id.*
[15] European Commission Press Release IP/05/1626, Competition: Commission publishes discussion paper on abuse of dominance (Dec. 19, 2005), https://ec.europa.eu/commission/presscorner/detail/en/ip_05_1626 [hereinafter IP/05/1626]; June 16 Art 82 Review, *supra* note 9.
[16] IP/05/1626, *supra* note 15.
[17] European Commission, Public hearing on Article 82 (June 14, 2006), https://web.archive.org/web/20070524111427/http:/ec.europa.eu/comm/competition/antitrust/art82/hearing.html (last visited Apr. 15, 2023) (May 23, 2007 snapshot of http://ec.europa.eu/comm/competition/antitrust/art82/hearing.html, using the "Wayback Machine" on web.archive.org).
[18] *Id.*
[19] August 9 Art 82 Review, *supra* note 8.

initiative.[20] The Commission then plans to publish draft Guidelines in "mid-2024" with an opportunity for public consultation before the adoption of final Guidelines in 2025.[21]

The GAI respectfully suggests that the Commission reconfigure its approach to amending the 2008 Guidance. The Commission should supplement its preliminary four-week Call for Evidence to allow meaningful and thoughtful discussion regarding its initiative to modify enforcement priorities and develop guidelines for exclusionary abuses under Article 102. The GAI is concerned that the unanticipated announcement and extremely brief interval provided for public input may result in the Commission drafting Guidelines without consideration of the full range of well-considered views on potential changes to the Guidance. This may discourage procompetitive and innovative conduct as businesses lack the requisite clarity on what constitutes compliance and, therefore, fear exposure to costly and disruptive investigations, the unfavorable public attention attracted during the lengthy legal process, and above all to the severe fines, mandated restrictions on competitive freedom, and other remedies imposed on those found to have infringed Article 102. Independent of GAI's view on the substance of such revised Guidelines, a robust call for public comment is vital to sound administrative practice.

The Amendments to the 2008 Guidance Require Additional Explanation

The approach to exclusionary abuse of dominance outlined in the just-disclosed amendments to the 2008 Guidance creates substantial tension, if not outright conflict, with aspects of recent competition precedents of the courts of the European Union. Although we appreciate the operative distinctions between a statement of law (which would be represented in Guidelines on Article 102, when issued) and a statement of enforcement agency priorities (the stated character of the 2008 Guidance and the Amended Guidance), agency pursuit of cases that are legally questionable is, at best, a waste of public resources, and, at worst, a violation of substantive rights pending correction by a court of competent jurisdiction. Specifically in the context of enforcing government restraints on unilateral business conduct, pursuing cases of doubtful legal merit has the potential to inflict profound adverse economic effects (limited innovation, reduced growth, unnecessarily high prices, reduced product quality and variety, etc.). Sound administrative practice should therefore involve careful consideration of the numerous and complex issues associated with the definition of appropriate proper legal constraints on unilateral conduct by dominant firms. At the least, the Commission should be forthright if it chooses to engage in efforts to persuade the EU Courts to change their approach to the interpretation and application of key treaty provisions.

In addition to publishing specific revisions to the 2008 Guidance, the Commission has also released a "Policy Brief", apparently not representing the official view of the Commission itself but authored by twelve named individuals on the professional staff of DG Competition.[22] It seems inevitable that the views of such individuals – especially considering that the amendments have already been adopted by the Commission – would point toward the Commission's intentions in developing the anticipated draft Guidelines. The specific amendments are not extensive, but they are far from self-explanatory and potentially very significant. Moreover, the additional discussion and explanations provided in the "Policy Brief" leave many such issues unresolved. A few

[20] IP/23/1911, *supra* note 2.
[21] *Id.*
[22] *See* Linsey McCallum et al., *supra* note 4.

examples will suffice to illustrate the dilemma that undertakings subject to Article 102 enforcement will endure given the state of play established by the Commission's various announcements of 27 March.

One amendment to the 2008 Guidance expands the definition of "anticompetitive foreclosure." Rather than requiring the potential or current competitor to be cut off from "supplies or market," the Commission will first look at adverse impacts to "effective competitive structure."[23] To support this change in enforcement practice, the Commission cites two recent decisions, *Unilever*[24] and *Google and Alphabet (Android)*.[25] The extent to which these decisions (the latter of which remains pending on appeal to the Court of Justice) support the Commission's apparent relaxation of its standard of proof of "anticompetitive foreclosure" is debatable. In particular, while the Court of Justice has been clear that "competition on the merits" should not be regarded as abusive,[26] this basic principle is not discussed in connection with the changes in the definition of "anticompetitive foreclosure." Moreover, the apparent increased emphasis on "effective competitive structure" does not reflect full consideration of the fact that "competitive structure" is sometimes affected by procompetitive and economically desirable marketplace conduct, such as innovation resulting in cost reduction, superior product quality or new products, or enhanced distribution efficiency.

Unilever does not support a structural approach to identifying competitive harm. Indeed, the court declared that "the submission, in the course of the procedure, of evidence capable of demonstrating the inability to produce restrictive effects *gives rise to an obligation* for the competition authority to examine that evidence."[27] The evidence that the Commission has a legal obligation to consider includes economic evidence:

> It follows that, where the undertaking in a dominant position has produced an economic study in order to demonstrate that the practice of which it is accused was not capable of excluding competitors, the competent competition authority cannot exclude the relevance of that study without setting out the reasons why it considers that the study does not contribute to demonstrating that the practices in question were incapable of undermining effective competition on the relevant market and, consequently, without giving that undertaking the opportunity to determine the evidence which could be substituted for that study.[28]

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[23] European Commission, ANNEX to the COMMUNICATION FROM THE COMMISSION: Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, at 1 (Mar. 27, 2023) [hereinafter Annex to the Communication], https://competition-policy.ec.europa.eu/system/files/2023-03/20230327_amending_communication_art_102_annex.pdf.

[24] Case C-680/20 – Unilever Italia Mkt Operations Srl v Autorità Garante della Concorrenza e del Mercato, judgment of 19 January 2023 ("*Unilever"*).

[25] Case T-604/18 – Google and Alphabet v Commission (Google Android), judgment of 14 September 2022 ("*Android*").

[26] Case C-413/14 – Intel Corp. v. European Commission, judgment of 6 September 2017 ("*Intel*"), ¶8.

[27] *Unilever*, ¶ 54.

[28] *Id.*, ¶ 55.

If the recipient of a statement of objections or adverse Commission decision supplies economic evidence, it is clear that the Commission must consider that evidence, or the Commission's case will be undermined and rejected, as it was in *Intel*.[29]

The announced modifications involving the "as-efficient-competitor" test similarly raise significant unresolved questions. Although *Unilever* and *Intel* do not require the Commission to apply the as-efficient-competitor test for prices and costs in all cases of exclusionary abuse, this does not mean that these cases stand for the proposition that evidence, economic or otherwise, is not required to establish a claim of abuse of dominance.[30] The agency must address economic evidence raised by the defendant, but the requirement to consider relevant evidence, including economic evidence, is not limited merely to this procedural instance. The Commission always bears the burden of establishing the infringement and "adduc[ing] evidence capable of demonstrating . . . the existence of circumstances constituting an infringement."[31] The Commission's determination that it need not consider costs and prices is starkly at odds with its duty to consider all relevant evidence. This is especially so given the Commission states that, when reviewing price-based exclusionary conduct, it "may examine economic data relating to cost and sales prices."[32] It is difficult to see how costs and prices will not be relevant evidence in the case of *price-based* exclusionary conduct.

The Commission's apparent willingness to disregard the "as-efficient-competitor" test is at odds with repeated statements by the Court of Justice that the benchmark for exclusionary abuse, whether price or non-price, is the as-efficient-competitor.[33] The Commission's focus on less efficient competitors is in direct contrast to the Commission's previous Guidance as well. The purpose of the Guidance is to provide clarity and predictability to the Commission's enforcement.[34] Yet, the proposed revisions reduce clarity and predictability regarding when conduct that is procompetitive in relation to as efficient competitors becomes anticompetitive based that conduct's effects on less efficient competitors.

Conclusion

For the reasons stated herein, we respectfully urge the Commission to conduct a targeted, searching, and thorough process for soliciting and considering public views on any proposed changes to its enforcement policy (Guidance) or views on the law (Guidelines) regarding exclusionary abuses of dominance under Article 102 TFEU.

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[29] *See* Case C-413/14 – Intel Corp. v. European Commission, judgment of 6 September 2017 ("*Intel*").

[30] *See Unilever*, ¶ 44 (stating that "Other factors specific to the circumstances of the case . . . *must be taken* into account when determining whether . . . the conduct at issue must be regarded as having had . . . the ability to produce exclusionary effects on the market concerned.") (emphasis added).

[31] Case T-235/18 – Qualcomm v Commission, ¶ 359, judgment of 15 June 2022.

[32] Annex to the Communication, *supra* note 23, at 2.

[33] *See Intel*, ¶ 140 ("That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are *at least as efficient* as the dominant undertaking.") (emphasis added); *Qualcomm*, ¶¶ 356, 396.

[34] European Commission, Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 Feb., 2009), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01).