THE GLOBAL TRADE LAW JOURNAL

Volume 2, Number 2 March–April 2025

fastcase FULL COURT PRESS

THE GLOBAL TRADE LAW JOURNAL

Volume 2, No. 2 March–April 2025

THE GLOBAL TRADE LAW JOURNAL (ISSN 2995-1089) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

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Cite this publication as:

The Global Trade Law Journal (Fastcase)

A Full Court Press, Fastcase, Inc., Publication

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729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE GLOBAL TRADE LAW JOURNAL, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

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ISSN 2995-1089

The European Commission's Draft Guidelines on Exclusionary Abuses: Toward Stricter Enforcement?

Karel Bourgeois, Karl Stas, and Benjamin Geisel*

In this article, the authors review the draft guidelines on abusive exclusionary conduct by dominant undertakings published recently by the European Commission.

The European Commission has published its draft Guidelines on abusive exclusionary conduct by dominant undertakings.[1] Its adoption would mark the first major update in over 15 years of the Commission's guidance on the application of the prohibition of abuse of dominance laid down in Article 102 of the Treaty on the Functioning of the European Union (TFEU). The Commission's 2008 Guidance on enforcement priorities in applying Article 82 of the Treaty establishing the European Community to abusive exclusionary conduct by dominant undertakings,[2] which received only a limited update[3] in 2023, were once hailed as a welcome move away from a legalistic, form-based approach to an effects-based approached informed by economics. Is the pendulum now swinging back to a more formalistic approach based on presumptions, shifting the burden of proof onto dominant undertakings and heralding an era of stricter enforcement?

Like the 2008 Guidance, the draft Guidelines only cover exclusionary abuses and leave aside exploitative abuses. The change of the title of the document from "guidance on enforcement priorities" to "guidelines" is not trivial, however: by formally issuing Guidelines, the Commission aims to enhance legal certainty for undertakings when they self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU.

Overview of the Commission's Approach

The first step is, of course, to assess whether an undertaking is dominant on a relevant market. This involves defining the relevant product and geographic market(s) and assessing whether the

The Global Trade Law Journal / March–April 2025, Vol. 2, No. 2, pp. 109–119.

ISSN 2995-1089.

undertaking concerned is able to behave to an appreciable extent independently of its competitors, its customers, and ultimately of consumers on the relevant market(s). As regards assessing whether an undertaking is able to act independently, the main factors to consider in this analysis are the respective market positions of the undertaking and its competitors (as reflected in particular in their market shares), the existence of barriers to entry or expansion, and whether customers have countervailing buyer power.

Once it has been established that an undertaking is dominant on one or more markets, the draft Guidelines propose a two-step approach to assessing whether a particular conduct is abusive:

1. Does the conduct depart from competition on the merits?
2. Is the conduct capable of having exclusionary effects?

Finally, the draft Guidelines discuss how conduct that is liable to be abusive may nevertheless escape the prohibition of Article 102 TFEU by demonstrating that it is objectively justified.

No Competition on the Merits

A dominant undertaking has a special responsibility not to allow its conduct to impair effective competition and may therefore have to refrain from practices that are unobjectionable for non-dominant undertakings. However, it is not unlawful for a dominant undertaking to protect its own commercial interests by means that fall with the scope of competition on the merits. Therefore, the first step in the analysis is to determine whether the conduct in question deviates from competition on the merits. Although this concept is derived from case law, the draft Guidelines clarify that a finding of abuse always requires that the behavior does not constitute competition on the merits.

The concept of competition on the merits covers conduct within the scope of "normal," that is, performance-based competition, and refers to a competitive situation in which consumers benefit from lower prices, higher quality, and a broader choice of new or improved goods or services. Competition law is there to protect competition, not competitors. Therefore, Article 102 TFEU does not preclude the departure from the market or marginalization of competitors that are less efficient than the dominant undertaking and so less attractive to consumers. The Guidelines list a number

of criteria to establish that conduct departs from competition on the merits.

The Three Types of Exclusionary Conduct and the Relevant Burden of Proof

Once it has been determined that conduct departs from competition on the merits, it must be established whether the conduct is capable of producing exclusionary effects. The draft Guidelines distinguish three types of exclusionary abuses, associating each of them with a different level of burden of proof—shifting the burden in most of the cases to the dominant company.

Naked Restrictions

This category encompasses types of conduct that have no economic interest for the dominant undertaking other than to restrict competition. The draft Guidelines mention the following examples: actively dismantling infrastructure used by a competitor (referring to the *Lithuanian Railway* case[4]); payments by the dominant undertaking to customers that are conditional on those customers postponing or cancelling the launch of products based on inputs offered by the dominant undertaking's competitors (referring to the *Intel* case[5]); or agreeing with distributors to replace a competing product with its own under the threat of withdrawing rebates benefiting the distributors (referring to the *Irish Sugar* case[6]). This type of conduct is presumed to infringe competition law. The dominant undertaking can try to rebut the presumption by providing evidence to the contrary, but the draft Guidelines indicate that, for naked restrictions, such rebuttal will be accepted only in exceptional circumstances.

Conduct Presumed to Lead to Exclusionary Effects

The draft Guidelines identify five types of conduct that, because of their high potential to lead to exclusionary effects, are also subject to a presumption regarding their capability to produce such effects, namely:

1. Exclusive supply or purchasing agreements,
2. Rebates conditional upon exclusivity,

3. Predatory pricing,
4. Margin squeeze in the presence of negative spreads, and
5. Certain forms of tying.

Once the Commission has established that the conduct at issue falls within one of these categories, if need be under the conditions established in the relevant legal test (see below), the burden of proof shifts to the dominant undertaking to try to rebut the presumption. The Commission will then have to assess the evidence submitted and either show that it is insufficient to rebut the presumption or provide itself evidence that the conduct was nevertheless capable of having exclusionary effects. Regarding the second possibility, the Commission notes that "the evidentiary assessment must give due weight to the probative value of a presumption, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects," thereby effectively raising the bar for the rebuttal by the dominant undertaking.

Other Conduct

For other types of conduct, it is for the Commission to demonstrate that the conduct is at least capable of producing exclusionary effects. While the effects in question must not be merely hypothetical, this demonstration does not require proof that the conduct has produced actual exclusionary effects. Conversely, the fact that a conduct has failed to produce actual exclusionary effects does not in itself disprove its capability to produce such effects. The analysis of the capability to produce exclusionary effects requires a comparison of the situation where the conduct was implemented with the situation absent the conduct. This can be done by comparing the market situation before and after the conduct was implemented. In some cases, it may, however, be necessary to use a hypothetical scenario as a basis for the comparison. According to the Commission, it is in such cases not necessary to account for all possible outcomes and circumstances that could have arisen absent the conduct, but sufficient to establish a plausible outcome among various possible outcomes.

The draft Guidelines then list a number of factors that may be relevant to the assessment of the capability to produce exclusionary effects, such as the extent of the dominant position held by an undertaking, the conditions of market entry and expansion (including economies of scale and network effects), the importance

of actual or potential competitors for maintaining effective competition, the position of customers and input suppliers, evidence of an exclusionary strategy, etc. The Guidelines also list elements that are not necessary to demonstrate the capability to produce exclusionary effects, such as evidence of direct consumer harm, proof that the conduct is enabled by the dominant position, or proof that the actual or potential effect was serious or appreciable.

Specific Categories of Abusive Conduct

Chapter 4 of the draft Guidelines provides guidance on certain specific categories of conduct, discussed below.

Exclusive Dealing

Exclusive dealing encompasses exclusive purchasing obligations, exclusive supply obligations, and exclusivity rebates (i.e., incentive schemes conditional on the customer purchasing or the supplier supplying all or most of their requirements from or to the dominant undertaking). As mentioned, exclusive dealing is presumed to be capable of having exclusionary effects. In cases where the Commission nevertheless has to carry out an assessment of the capability to produce exclusionary effects, relevant elements to be considered include the extent of the undertaking's dominant position on the market, the share of the market affected by the conduct, the duration of the exclusivity conditions, the value of the incentives granted in return for the exclusivity, and the possible existence of an exclusionary strategy.

Tying

Tying consists of offering a specific product (tying product) only together with another product (tied product). Tying is liable to be abusive where:

- The tying and tied product are two separate products,
- The undertaking concerned is dominant in the market for the tying product,
- Customers are not given a choice to obtain the tying product without the tied product (coercion), and
- The tying product is capable of having exclusionary effects.

The Commission considers that in certain circumstances, due to the specific characteristics of the markets and products concerned, tying has a high potential to produce exclusionary effects and those effects can be presumed.

Refusal to Supply

The draft Guidelines stress that refusal to supply is a type of abuse that differs from the access restrictions discussed below. A refusal to supply refers to situations where the dominant undertaking has developed an input exclusively or mainly for its own use and, when requested access by a third party, refuses to give access. According to the case law (i.e., the *Bronner* case[7] and its ilk), the conditions for finding that a refusal to supply is abusive and that an access obligation can therefore be imposed are strict: it must be shown that (1) the input is indispensable for the undertaking requesting access to compete in a downstream market (often referred to as an essential facility), and (2) the refusal is capable of eliminating all competition on the part of the requesting undertaking. An input is considered "indispensable" if there is no real or potential substitute for it—it is not sufficient that the substitutes are less advantageous for the requesting undertaking.

Access Restrictions

This refers to restrictions on access to inputs that are different than a refusal to supply, that is, where the dominant undertaking has not developed the input exclusively or mainly for its own use. This can, for instance, take the form of disruptions of supply to existing customers (in particular, customers that compete with the dominant undertaking on a downstream market), failure to comply with a regulatory obligation to give access, degradation or delaying of the existing supply of an input, or imposing unfair access conditions. Where the dominant undertaking charges excessive access prices, the margin squeeze test may be applied. In line with recent case law (e.g., the *Slovak Telekom* case[8]), the Guidelines identify "access restrictions" as a separate category of abuse from "refusals to supply," which do not have to satisfy the legal test for refusal to supply to be found to be abusive. Thus, access restrictions can be liable to be abusive even if the input is not "indispensable." The justification for the distinction is that, where the dominant undertaking

has developed the input for itself with its own means, the need to protect the undertaking's freedom of contract and investments is not so strong as in a refusal to supply situation. However, this leads to the paradoxical result that dominant firms that provide access to their inputs at least to some extent are judged more harshly than dominant firms that do not provide access at all.

Predatory Pricing

This refers to below-cost pricing strategies of a dominant undertaking. The assessment is based on a comparison of prices with relevant cost benchmarks (price-cost test): average variable cost (AVC), average avoidable cost (AAC), long-run incremental cost (LRAIC), and average total cost (ATC). If prices are below AVC (or AAC), the dominant undertaking can be presumed to pursue no economic objective other than eliminating competitors. If prices are below ATC (or LRAIC) but above AVC (or AAC), the conduct can be regarded as predatory if it is part of a plan to eliminate or reduce competition in the relevant market. Predatory pricing falls in the category of "conduct which has a high potential to produce exclusionary effects" and is as such subject to a (rebuttable) presumption.

Margin Squeeze

Margin squeeze is liable to be abusive where the undertaking concerned is vertically integrated and dominant on an upstream market, and the spread between the prices applied by that undertaking on the upstream and downstream markets prevents equally efficient competitors that rely on the dominant undertaking's upstream inputs from operating profitably on a lasting basis on the downstream market. If the spread is negative, it is not necessary to consider the downstream costs in detail, and the conduct is presumed to have exclusionary effects. If the spread is positive, it must be assessed whether it is sufficient to cover the relevant downstream costs. As a general rule, this price-cost test is based on the dominant undertaking's own prices and costs, although in some circumstances, the prices and costs of competitors may be taken into account. The (downstream) costs of the dominant undertaking are a proxy for the costs of an as-efficient downstream competitor.

Conditional Rebates Not Subject to Exclusivity

This refers to (monetary or non-monetary) incentives to reward customers for a particular purchasing behavior, but are not conditional on them purchasing all or most of their requirements from the dominant undertaking. The assessment should take into account factors such as the type of threshold triggering the rebate (volume, value, market share, growth compared to a previous contract period), whether the rebate is granted on all purchases in the reference period (retroactive rebates) or only on those in excess of the threshold (incremental rebates), and whether the rebates are individualized or standardized. Standardized volume-based incremental rebates are, in principle, considered not to depart from competition on the merits, unless they lead to pricing below cost (see Predatory Pricing). However, retroactive rebates have a higher capability of producing exclusionary effects (especially if combined with longer reference periods), and the same applies to individualized rebates.

Multi-Product Rebates

This refers to a practice whereby the dominant undertaking markets two or more separate products together with a rebate or other inducement, compared to the case in which the buyer purchases the products separately. This is also referred to as "mixed bundling" (N.B. "pure bundling," where the products are not offered for sale separately but only together, is assessed in the same way as tying). Multi-product rebates that are conditional on customers buying all or most of their requirements of at least one of the products form the dominant undertaking are assessed in the same way as exclusive dealing. Otherwise, multi-product rebates are liable to be abusive where they enable the dominant undertaking to leverage a dominant position from one market into one or more other markets. A price-cost test (see Predatory Pricing) can be applied to determine whether the incremental price that customers pay for each product in the bundle covers the cost incurred by the dominant undertaking for adding that product to the bundle.

Self-Preferencing

For the first time, the Commission's guidance recognizes self-preferencing as a self-standing type of abuse. It consists of

a dominant undertaking giving preferential treatment to its own products or services compared to those of competitors, mainly by means of non-pricing behavior (e.g., demotion of rival products or services in the ranking of search results). This is another type of conduct that aims to leverage market power from one market to another. Relevant factors in the assessment of whether self-preferencing deviates from competition on the merits include:

- The importance of the product provided by the dominant undertaking on the leveraging market for competitors (although this should not be understood as indispensability in the strict sense of the *Bronner* case law, see Refusal to Supply);
- Whether the preferential treatment is likely to influence the behavior of users of the leveraged product, irrespective of the intrinsic qualities of that product; and
- Whether the preferential treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's business activities in the leveraging market, for instance, because they are contrary to its interests of those of its customers in that market (N.B. these elements are mainly drawn from the General Court's judgment in the *Google Shopping* case,[9] recently upheld[10] by the Court of Justice).

Possible Justifications: The Necessity and Efficiency Defenses

Where the dominant undertaking has not been able to rebut the presumption that its conduct is capable of leading to exclusionary effects, or where the Commission has shown that such capability exists, the dominant undertaking may still be able to put forward an objective justification for its conduct. This will be possible only if the dominant undertaking can show that its conduct was objectively necessary and proportionate or that it led to efficiencies that outweighed the restrictive effects. In line with the Commission's broader political agenda, the draft Guidelines also mention the possibility of a public interest defense; for example, where "the conduct contributes to the Union's resilience as it is necessary to reduce dependencies and mitigate shortages and disruptions in supply chains." The draft Guidelines note that the Commission

will take into account whether the conduct is a naked restriction or has a high potential to produce exclusionary effects, suggesting that the threshold for justifying such conduct will be quite high.

Conclusion

The new draft Guidelines have been prepared against the background of increasing market concentration in various industries and the digitization of the EU economy, where network effects and "winner-takes-all" dynamics are increasingly widespread. Taking stock of the developments in the case law since 2009, they describe the principles and methodology that the Commission will apply in assessing such cases, including guidance on the determination of dominance, the relevant categories of exclusionary abusive conduct and their assessment, and possible defenses.

The draft Guidelines generally provide a useful summary of the case law and welcome clarifications on the Commission's conceptual approach to the analysis and treatment of exclusionary abuses. Thus, they contribute to legal certainty for dominant companies when they self-assess whether their conduct is liable to be abusive.

However, the greater reliance on presumptions—reversing the burden of proof with respect to "naked restrictions" and conduct "with a high potential to produce exclusionary effects"—appears to mark a clear shift away from a more effects-based legal analysis as provided for in the 2008 Guidance toward a more formalistic approach. This shift in the Commission's approach clearly stems from a desire for greater efficiency in the handling of its cases, but may undermine the rights of defense. While the draft Guidelines suggest that the presumptions will apply only in a limited number of circumstances, in practice, the Commission may be inclined to interpret the categories of conduct subject to the presumptions—which are not clearly defined—broadly. This may lead to stricter enforcement.

In an important development since the publication of the draft Guidelines, the Court of Justice handed down its judgment in the *Intel*[11] case on October 24, 2024. It will be interesting to see how the Commission deals with that judgment in the final Guidelines, as the Court appears to emphasize the importance of an effects-based approach, arguing that "the demonstration that conduct has the actual or potential effect of restricting competition . . . must be

made, in all cases, in the light of all the relevant factual circumstances" and that "[t]hat demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects." It may be difficult for the Commission to reconcile that position with the more formalistic approach proposed in the draft Guidelines.

The Commission had invited comments on the draft Guidelines by October 31, 2024, and, after reviewing this stakeholder feedback, aims to adopt the final guidelines toward the end of 2025.

Notes

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1. Commission, Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, draft version available at https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

2. Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45.

3. 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 (Amending Communication) and Annex to the Amending Communication, [2023] OJ C/2023 116/01.

4. Court of Justice of the EU (CJEU), CJEU 12 January 2023, Case C-42/21 P, Lietuvos geležinkeliai AB v. Commission, EU:C:2023:12.

5. General Court of the EU (GCEU), GCEU 26 January 2022, Case T-286/09 RENV, Intel Corporation v. Commission, EU:T:2022:19.

6. GCEU 7 October 1999, Case T-228/97, Irish Sugar v. Commission, EU:T:1999:246.

7. CJEU 26 November 1998, Case C-7/97, Bronner, EU:C:1998:569.

8. CJEU 25 March 2021, Case C-165/19 P, Slovak Telekom v. Commission, EU:C:2021:239.

9. GCEU 10 November 2021, Case T-612/17, Google and Alphabet v. Commission, EU:T:2021:763.

10. CJEU 10 September 2024, Case C-48/22 P, Google and Alphabet v. Commission, EU:C:2024:726.

11. CJEU 25 October 2024, Case C240/22 P, Commission v. Intel Corporation, EU:C:2024:915.