VAN BAEL & BELLIS

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The Commission's initiative on Article 102 TFEU guidelines

Acknowledging the effects-based approach in abuse of dominance cases, while retracting from a consumer welfare-based, rigorous economic effects analysis

On 27 March 2023, the European Commission ("Commission") launched a new legislative and policy initiative which aims to replace the Commission's 2008 guidance on its enforcement priorities in Article 102 cases involving allegedly exclusionary conduct (the "2008 Guidance Paper") with formal Article 102 Guidelines that would be binding on the Commission and should, in principle, provide greater legal certainty to market participants ("Guidelines"). In the context of this initiative, the Commission has also made a few, but highly relevant and immediately applicable changes to the 2008 Guidance Paper which foreshadow the approach in the forthcoming Guidelines. A policy brief provides useful explanations for the modifications to the 2008 Guidance and the proposed Guidelines ("Policy Brief").

The initiative to adopt Article 102 Guidelines marks a significant step in EU antitrust law. It is an acknowledgement of the recent case-law of the EU Courts, which have created solid support for an effects-based analysis across all Article 102 cases alleging anti-competitive foreclosure.

Yet, the – immediately effective – changes to the 2008 Guidance Paper also signal that the Commission is to some extent retracting from the ambitious goal of creating a coherent and predictable analytical framework for exclusionary 102 cases that is solidly grounded in the consumer welfare model and committed to a rigorous analysis of economic evidence. These changes provide a first (though not necessarily promising) indication on the direction of travel, as the Commission embarks on the Guidelines project.

THE TROUBLED HISTORY AND ULTIMATE VALIDATION OF THE 2008 GUIDANCE PAPER

The 2008 Guidance Paper marked the Commission's first attempt to introduce a consistent, evidenced-based effects analysis in exclusionary abuse of dominance cases. It was based on the central theme that conduct should be considered a competition law violation only if it excluded equally efficient competitors. It thus moved away from a largely formalistic approach which the European Court of Justice ("CJEU") had upheld on several occasions and on which the Commission had relied in its enforcement practice.

This was a controversial move at the time. The compromise was to adopt only a non-binding policy paper on enforcement priorities, rather than legally more meaningful guidelines, and there were at times rumours that even the policy paper should be retracted as it set the bar for finding an infringement too high, beyond what was required by the case-law.

Reflecting this controversy and compromise, the Commission's 2009 *Intel* decision based the finding that Intel's loyalty rebates infringed Article 102 TFEU on a formalistic per se approach, as supported by *Hoffmann-La Roche* and other judgments. The decision nevertheless included an as-efficient competitor ("AEC") test, which applied the 2008 Guidance Paper and purported to show that Intel's fidelity rebates were capable of excluding equally efficient rivals, but emphasized that this was done solely "for completeness" and without legal relevance for the outcome of the case.

The CJEU, however, subsequently annulled the *Intel* decision, declaring that the Commission's legal reasoning was insufficient and that the Commission was required to address *Intel's* arguments about the lack of capability of its rebates to foreclose through an economic analysis (Case C-413/14 P).

Subsequent CJEU judgments such as *Servizio Elettrico Nazionale and Others* (C-377/20) and *Unilever* (C-680/20) have solidified support for the effects-based approach to exclusionary conduct cases, and repeatedly emphasized that conduct that may eliminate less efficient rivals will normally not be considered a competition law violation. They have thus broadly validated the principles promoted in the 2008 Guidance Paper for both pricing and non-pricing conduct.

AMENDMENTS TO THE 2008 GUIDANCE PAPER AND THE FUTURE GUIDELINES

The CJEU's endorsement of a more disciplined effects-based approach has created unease within the enforcement community. This is clearly reflected in the Policy Brief's warning that "*an overly rigid implementation of the effects-based approach could set the bar for intervention at a level that would render enforcement [...] unduly burdensome or even impossible.*" Consistent with these concerns, the changes to the 2008 Guidance Paper signal that the Commission, as it contemplates the adoption of legally more meaningful Guidelines, seeks to protect the flexibility to use a less rigorous approach in Article 102 cases.

This is highlighted in the Policy Brief, which explains that the focus on economics-based consumer welfare goals should be replaced with a range of policy goals which would include consumer welfare, but also much more amorphous objectives such as protecting fairness, a level playing field, plurality, and democracy. How these additional objectives can be made operational in competition analysis and determine case outcomes, however, remains unclear.

The most notable changes in the 2008 Guidance Paper include:

- The notion of anti-competitive foreclosure is widened to encompass situations where the dominant undertaking's conduct is capable of adversely impacting the competitive structure of the market, without a need to show that market access for competitors has been undermined and the dominant undertaking is able to profitably raise prices.

- When examining whether an as efficient competitor likely would be foreclosed, the Commission no longer commits that it "*will*" examine economic data, but merely "*may*" do so. Related statements in the Policy Brief suggest that the Commission generally would not run an AEC test where it is not compelled by the case law to do so, such as in the case of exclusivity rebates. Of course, *Intel* compels the Commission to objectively examine an AEC test submitted by the defendant. Thus, the changes signal that the Commission would take a more legalistic approach and, where possible, rely on a presumption of unlawfulness while putting the burden of proving the absence of the capability to foreclose on the defendant. Along the same lines, the Commission is no longer willing to commit that it would likely not intervene if a data-driven AEC test shows that equally efficient competitors are not excluded by the dominant firm's pricing conduct.

- Taking advantage of the judgments in *Slovak Telekom* (Case C-165/19 P) and *TeliaSonera* (Case C-52/09), the Commission explains that when a dominant firm supplies its customers while imposing allegedly unreasonable supply conditions (known as "constructive" refusal to supply), there can be an Article 102 infringement even if the product or service supplied is not "indispensable." In other words, the strict *Bronner* conditions to identify an unlawful refusal to supply are only relevant in cases of an

outright refusal.

These changes find some support in the relevant case law. But they deviate from the more ambitious and coherent approach the Commission was willing to promote in 2008.

OBSERVATIONS

The Commission itself acknowledges that EU case-law on exclusionary abuse of dominance has now reached a level of maturity and clarity which calls for the adoption of guidelines that are legally binding on the Commission. From that perspective, the Commission's initiative is a welcome development.

Yet, the changes to the 2008 Guidance Paper send a clear signal that the Commission is retracting from the Guidance Paper's aspiration to consistently follow an effects-based approach grounded in solid competition economics to distinguish lawful from unlawful conduct. Thus, the forthcoming Guidelines will – and, in fact, must – acknowledge that an effects-based test is required in Article 102 cases. But they likely will also seek to retain maximum flexibility, within the confines of relevant case-law, on what an effects-based analysis actually means.

Critics have welcomed the Commission's changes to the 2008 Guidance Paper, claiming that they will make the enforcement of Article 102 TFEU less demanding and more "workable." But this view misses the very point of the role of guidelines. Guidelines are not a tool to make competition law enforcement "workable" by maintaining maximum flexibility in finding an infringement whenever a competition authority "does not like" market outcomes. Instead, they should make enforcement predictable and consistent with a clearly identified policy goal. The CJEU has repeatedly emphasized that EU competition law protects equally efficient rivals against anti-competitive foreclosure and does in principle not protect less efficient competitors. Thus, if there is evidence that a dominant firm's conduct is not likely to eliminate equally efficient competitors (even though it may affect those that are less efficient), it ought to be very demanding for a competition authority to establish infringement.

Solid guidelines must enable market participants to distinguish *ex ante* between unlawful and lawful conduct, and to anticipate how they can engage in competitive conduct that will most likely not result in enforcement action and the risk of quasi-criminal fines. It remains to be seen to what extent the forthcoming Guidelines will effectively serve this purpose. There will probably be Guidelines in a few years, but there is a risk that the useful guidance that they will provide to market participants will in fact be limited.

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