Joint submission to Call for Evidence on TFEU Article 102 Guidelines

April 2023

Introduction

We, a group of civil society organisations, welcome the opportunity to respond to the European Commission's Call for Evidence on the forthcoming Guidelines on exclusionary abuses of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU).

Enforcement of Article 102 TFEU is a key tool in the EU's efforts to promote fair competition, and it is critical that civil society has a stake and voice in this process to ensure it reflects a wide set of interests and perspectives. Much has changed since the Commission published its 2008 Guidance on Article 102 TFEU (formerly Article 82 of the EC Treaty) enforcement priorities, including growing market concentration in digital and other sectors, and higher levels of inflation, and it is important that this context is reflected in the Commission's approach to enforcement. [1]

Our submission makes a number of points regarding both the amended 2008 Guidance and the accompanying policy paper, which we assume illustrate the Commission's thinking on the upcoming Guidelines. We welcome many of the changes the Commission is proposing, above all moving away from the 'as efficient competitor' test and the narrow economic perspective this entails. But we believe that both the amended Guidance and upcoming Guidelines should go further, as we explain below.

The 'as efficient competitor' test and effects-based approach

We strongly support the shift away from the price-driven 'as efficient competitor' (AEC) test as a means of establishing exclusionary abuses. As the Commission notes, "a less efficient competitor may also exert a constraint which should be taken into account" when investigating the potential for anti-competitive foreclosure. We also strongly agree with the observation in the policy brief that the efficiency of competitors in a given market is itself often influenced or determined by the abusive conduct of dominant firms – such as degrading access to critical inputs – that seek to suppress the emergence of rivals.

As reflected in the amendments to the 2008 Guidance, we also welcome the Commission's shift towards more realistic standards of harmful behaviour, whereby a "weakening" of

[1] See Bajgar et al (2023).

competition – and not just "full exclusion or marginalisation of competition" – is enough to justify enforcement action.

The price-focused AEC test has led the Commission – and the companies it investigates – to rely excessively on economic analysis in Article 102 TFEU cases. While economic analysis has an important role to play in antitrust enforcement, it cannot deliver the entire picture, and should be supplemented by other methodological tools. Furthermore, heavy reliance on economic analysis has often had the effect of favouring large corporations, given their ability to 'spam' regulators with favourable economic evidence that they themselves commission.[2] Moving away from the AEC test is thus a helpful and welcome step.

More generally, we believe the Commission remains overly wedded to an 'effects-based' approach to enforcement, of which the AEC test is just one part. While understanding the effects of anti-competitive practices is important, the Commission should not hesitate to take action against behaviour – such as predatory pricing and unfair trading practices – that has as its object the restriction of fair competition. Trying to prove actual or potential harmful effects in such cases risks slowing down the Commission's ability to stamp out abuses before they inflict irreparable damage, while giving companies additional opportunities to 'spam' enforcers.

Finally, we do not agree with the Commission's view that the profitability of dominant firms should no longer guide the Commission's enforcement priorities. While profitability should be one among several indicators that the Commission uses to guide enforcement, downplaying its significance risks under-enforcement of Article 102 TFEU, given the well-established link that exists between high profit margins and market power.[3]

Recommendations

- The upcoming Guidelines and the amended Guidance on Article 102 TFEU should encourage a balanced approach to enforcement involving both effects and object-based analysis.

Moving beyond the consumer welfare standard

We are encouraged by the recognition in the Commission's policy brief that "the enforcement of competition rules also contributes to achieving objectives that go beyond consumer welfare" including "fairness and level-playing field, market integration, preserving

[2] See Corporate Europe Observatory (2023) and Bryson et al (2023).

[3] See De Loecker and Eeckout (2021) and Calligaris, Criscuolo and Marcolin (2018).

competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy".

Consumer welfare should not be the sole or even primary goal of competition policy, even when not "defined strictly in economic terms".[4] Neither Article 102 TFEU nor the EU treaties in general make any reference to the concept of consumer welfare or the need to protect it. As has been repeatedly argued, over-reliance on the consumer welfare standard – with welfare defined primarily in terms of lower prices – has weakened competition enforcement in both Europe and the United States in recent decades, particularly in digital markets.[5]

It has done so by legitimising anti-competitive practices and acquisitions that, while superficially beneficial for consumers in economic terms, inflicted deeper harms in other areas including the competitive process, innovation and data protection. For example, the lower prices offered by dominant firms that may appear harmless from a consumer welfare perspective can become more problematic when the interests of suppliers and workers are taken into account, if the result is lower wages and reduced bargaining power. Moreover, a price-based perspective is inappropriate in the increasing number of markets in which products or services are offered 'for free' and paid by consumers through non-monetary means, such as through personal data.[6]

Despite the encouraging comments in the policy paper, the amendments to the 2008 Guidance do not correct its heavy reliance on the consumer welfare standard. It continues to state that "the aim of the Commission's enforcement activity… is to ensure that dominant undertakings do not impair effective competition…thus having an adverse impact on consumer welfare".

Recommendations

- In addition to analysis of price-based effects and consumer welfare, both the upcoming Guidelines and amended Guidance should set out methodological tools and theoretical frameworks that better reflect the wide range of potential objectives for competition policy.

- In selecting its enforcement priorities, we urge the Commission to pay particular attention to: small businesses and workers, which are vulnerable to exploitation by dominant firms; innovation, which dominant firms can stifle through their exclusionary

[4] Ibid.

[5] See Lancieri, Posner and Zingales (2023) and Samuel and Scott Morton (2022).

[6] See Privacy International (2022).

or exploitative practices; supply chain resilience, which is threatened by excessive concentration of key inputs (such as advanced semiconductors) by a few firms; freedom of expression and privacy, which can be undermined when a few dominant firms impose exploitative terms and conditions that do not adequately guarantee individual rights.

Exploitative abuses matter, too

One area of Article 102 TFEU enforcement that the Commission does not envision changing is its prioritisation of 'exclusionary' over 'exploitative' abuses. The call for evidence and policy paper simply take this as a given, without explaining the continued neglect and under-enforcement of exploitative abuses. Yet exploitative abuses, which feature heavily in the wording of Article 102 TFEU itself, are extremely damaging and can harm competitors and consumers alike. In addition, as an increasing number of markets become heavily concentrated, exploitative abuses have become easier to inflict. Stopping these practices should be an enforcement priority for the European Commission, and duly reflected in the upcoming Guidelines.

There are several compelling reasons to include exploitative abuses of dominance in the Commission's enforcement priorities.

First of all, in recent years there has been a clear under-enforcement of these abuses by the Commission, which only pursued a one major exploitative case: the 2017 investigation into Aspen Pharma. National authorities have been more active, including the German competition authority's investigation into Facebook's data practices[7], the Dutch authority's investigation into Apple's treatment of online dating app providers,[8] and investigation of exploitative practices in national energy markets.[9] But overall, investigations into exploitative conduct remain too rare. To dedicate more attention to exploitative abuses would also be in line with what was announced in 2016 by Commissioner Vestager, who already then stated that the Commission would seek to "intervene directly to correct excessively high prices", with unfair pricing being a key form of exploitative abuse.[10]

Competition policy, as argued above, should not limit itself to analysis of price effects. Nonetheless, the current and recent economic context – including Covid-19[11], disruption in global supply chains, the energy crisis[12], and stubbornly high levels of inflation – mean they

[7] See Bundeskartellamt (2019).
[8] See Authority for Consumers and Markets (2022)
[9] See Botta and Karova (2017)
[10] See Vestager 2016 speech.
[11] See European Competition Network (2020).
[12] See Bloomberg (2023)

remain an important analytical tool. A growing body of evidence suggests that market concentration has contributed to inflation, whereby dominant firms raise prices – for both consumers and businesses – beyond what is justified by rising costs.[13] Enforcement of Article 102 TFEU has a crucial role to play in investigating and, where necessary, penalising such exploitative practices by dominant firms.

Third, digital markets – and the rise of dominant gatekeepers within them – have increased the prevalence and relevance of exploitative abuses. Article 102 TFEU references unfair prices and trading conditions, both of which apply to practices and strategies commonly pursued by digital gatekeepers. For example, some have argued that consumers are required to pay an excessive 'price' (in terms of personal data) for access to digital platforms, and that a combination of artificial intelligence and data collection have made it easier for dominant platforms to discriminate between users in terms of price and service quality.[14]

Digital gatekeepers – whose users (both consumers and businesses) are often 'locked in' – also have the power to impose, and arbitrarily change, conditions of service use and access in ways that are exploitative. This can be seen clearly, for instance, in the relationship between Amazon and third-party sellers. Amazon is overwhelmingly dominant in ecommerce in many EU countries, leaving third-party sellers with no viable alternative. This dominance enables Amazon to impose exploitative fees on sellers, which now represent up to 50% of third-party sellers' revenues.[15].

Recommendations

- The European Commission should include exploitative abuses in its enforcement priorities. This should be reflected through new sections on exploitative abuses in both the amended 2008 Guidance and the upcoming Guidelines.

Tackling dominance at source

While Article 102 TFEU is about tackling abuse by dominant firms rather than dominance itself, we believe that there is a key role for the Commission to play in directly addressing – and preventing the emergence of – dominant positions. Fewer dominant firms ultimately means fewer opportunities to abuse that dominance.

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[13] See comments from Isabel Schnabel, ECB board member, and Andrew Bailey, Bank of England governor, in the Financial Times (2023) and Wasner and Weber (2023)

[14] See Botta and Wiedemann (2019)

[15] See Bloomberg (2023)

When imposing remedies on companies at the conclusion of Article 102 TFEU investigations, the Commission should give more consideration to structural measures – including firm breakups – as a means of addressing the dominance that gives rise to abusive behaviour. The Commission has historically relied on fines and behavioural commitments to address its concerns, despite a growing consensus that they are often ineffective and difficult to enforce.[16]

Tackling dominant firms' market power at source through structural remedies would not only reduce the likelihood of future abusive conduct by these companies, but also help address the rising levels of harmful market concentration that have been observed across the European economy.[17] And while beyond the scope of Article 102 TFEU, robust EU merger control has a critical role to play in preventing companies from using acquisitions as a means of securing or entrenching dominant positions.

Recommendations

- The upcoming Guidelines should cover structural as well as behavioural remedies, and provide a clear and transparent framework for the Commission's monitoring and evaluation of behavioural commitments.

- The Commission should make full use of its merger control powers to prevent mergers and acquisitions from securing or entrenching dominant positions.

[16] See Competition and Markets Authority (2019)

[17] See De Loecker and Eeckhout (2021)

Signatories

Article 19

Balanced Economy Project

Foxglove

Irish Council for Civil Liberties

Open Markets Institute

Privacy International

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