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I. Introduction

The European Commission is about to publish new guidelines for the analysis of exclusionary abuses, following the public consultation on the Draft Guidelines ("DGs") held in August 2024. The DGs aimed "to enhance legal certainty, help firms to self-assess, and guide National Competition Authorities ("NCAs") and National Courts."[1] The final guidelines are expected to be adopted during the next weeks. This paper summarizes the main economic concerns raised by the DGs and identifies the questions the guidelines should address to become an effective and useful instrument.

The DGs risk falling short of their stated objectives. The DGs imply a departure from the current framework for assessing of exclusionary abuses, notably by moving away from economic principles. For instance, the proposed approach grants the European Commission broader discretion in analyzing and sanctioning. This shift —from economic analysis to more abstract references—introduces ambiguity and legal uncertainty, undermining the clarity and predictability that the Guidelines aim to promote.

The new Guidelines replace the controversial guidance paper that the Commission published in 2009.[2] The Guidance Paper reflected a bet of the European Commission for a "**more economic approach**" in the enforcement of competition law and, in particular, into Article 102 TFEU, bringing EU competition policy into line with contemporary economic theory. The Guidance Paper marked a change in the EU Commission's approach to article 102. The initiative was not absent of controversy and some commentators anticipated that the new approach could be in conflict with the European Courts' case law. The very title of the document reflected the informal and non-binding nature of its content. Traditionally, the European Commission had issued "guidelines" to guide the practical implementation of competition law. The word "guidance" reflected the

[1] European Commission Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings. August 2024 (hereafter, DGs), para 8. Available at https://competition-policy.ec.europa.eu/document/download/39c8d72e-5756-4feb-9c24-ab0885dec6bf_en?filename=guidelines_application_of_article_102_TFEU.zip.

[2] Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.
Official Journal C 45, 24.2.2009, p. 7–20. (hereafter, the Guidance Paper).

informal, controversial and uncommitted nature of the document.

The Guidance Paper made its way through the Courts, not without difficulties. Several judgments such as *MEO*, *Intel*, *Post Danmark I*, and *Cartes Bancaires* suggested that, to some extent, the European Courts had assumed the "more economic approach," understanding that markets are economic phenomena and that the analysis of the impact of firms' strategies on consumer welfare should be guided by economic principles and measured through economic tools and metrics.

The Guidance Paper needed to be updated in two directions: First, to provide further clarifications to make the exclusionary tests more operational and to incorporate clarifications made by Courts in the analysis of exclusionary practices. Second, to incorporate the analysis of relevant practices that were not considered by the Guidance Paper, mostly non-price related practices (such as self-preferencing or innovation-related conducts) and to adapt the guidelines to market features and new markets that have gained relevance regarding exclusionary practice during the last decades (such as digital markets, innovation-driven industries or environmental sustainability considerations).

The DGs did not build on the 2009 Guidance Paper. Under an alleged attempt to "codify case law"[3] and to adopt a "workable and effects-based approach" lowering the bar for intervention,[4] the DGs did not establish a clear and measurable objective for the analysis of exclusionary abuses, did not set a clear methodology to guide businesses and regulators in the assessment of potentially anticompetitive business practices, and departed from economic theory both with regard to the principles guiding the analysis and to the tools used for such analysis.

The DGs established that conduct by a dominant firm consists in an exclusionary abuse if it satisfies a two-limbed test:[5] (i) it departs from "competition on the merits," and (ii) it is capable of producing exclusionary effects. The DGs categorized a number of potentially exclusionary conducts according to their potential to cause exclusionary effects. Based on this categorization, the DGs established that some conducts "are by their very nature capable of restricting competition" and for some others exclusionary effects are presumed, subject to rebuttal by the dominant undertaking.[6] For all other potentially exclusionary conducts, the

[3] European Commission, Call for Evidence for the Initiative "Guidelines on Exclusionary Abuse by Dominant Undertakings." March 2023. Available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-Guidelines-on-exclusionary-abuses-of-dominance_en.

[4] McCallum, et al. (2023) "A dynamic and workable effects-based approach to abuse of dominance" European Commission, Competition Policy Brief, Issue 1, March 2023, page 4. Available at https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf.

[5] DGs, para 45.

[6] DGs, para 60.

Commission will apply the two-limbed test. The criteria to include a specific conduct within a category is based on a selective interpretation of the case law.

In order to be clarifying and helpful for all stakeholders, the new guidelines should set measurable **objectives**, offer clear and consistent **methodologies** to assess potentially exclusionary conduct, based on well-established concepts and metrics**;** and establish a **toolbox** that allows businesses and regulators to (self)assess potentially anticompetitive business strategies.

This exercise should acknowledge that **markets are economic phenomena**. The legal analysis of markets should be consistent with the latest developments of economic theory and empirical economic analysis. Ignoring this would be equivalent to regulating drugs irrespective of the state of medical science. The analysis of exclusionary abuses should be based on economic principles and make use of economic tools. Economics does not tell what is legal and what is not. Thus, there is a need for legal criteria to delimit the potential illegality of a specific conduct. Such legal thresholds should be applied on top of the results obtained from the economic analysis of evidence.

Failing to incorporate economic principles and analysis into the assessment of exclusionary abuses, the new guidelines might risk legal certainty leaving room to discretionary and unpredictable outcomes. The Guidance Paper offers robust economic foundations for a consistent and coherent analysis of exclusionary abuses. The DGs however need to be reframed and made more precise in order to make them consistent with economic thinking and coherent with case law. Only by doing this, the new guidelines will meet their alleged aim of enhancing legal certainty, helping firms to self-assess, and guiding National Competition Authorities ("NCAs") and National Courts.

II. Measurable Objectives: Consumer Harm

The Guidance Paper established that the objective of the paper is to assess if a "conduct in question is likely to result in consumer harm."[7] Consumer harm is thus set as the standard for the existence of anticompetitive exclusionary effects. The DGs focused on "harm to competition,"[8] making explicit that it is "not necessary to prove that the conduct resulted in direct consumer harm."[9] The DGs established that exclusionary effects exist when a dominant firm hinders "through recourse to means or resources different from those governing *normal competition*, the maintenance of the degree of competition existing in a market or the growth of that competition."[10] In addition, the two-limbed test proposed by the DGs set that the departure from "*competition on the merits*" is a prerequisite for the existence of an

[7] Guidance paper, para 22.

[8] DGs, para 71.

[9] DGs, para 72.

[10] DGs, para 6.

exclusionary abuse. However, neither "*normal competition*" nor "*competition on the merits*" are well-defined and measurable economic concepts. Not even the DGs clarified these concepts. Moreover, the harm to competition does not necessary results in consumer harm. Using harm to competition as a proxy to consumer harm might lead to type I errors, i.e. to sanctioning conducts that do not harm consumers.

Consumer welfare is however a well-established and measurable economic concept to assess consumer harm. The impact of a specific conduct on consumer welfare determines whether or not such conduct harms consumers.

While the Guidance Paper focused on a price/output centric concept of consumer harm, consumers might also be harmed by other non-price/output related conducts, such as conducts that reduce choice and quality or stifle innovation. There is room for the new guidelines to expand the scope of the effects on consumer welfare.

In order to be clarifying and helpful for all stakeholders, the new guidelines should set clear and measurable objectives and use well-established, consensual and consistent language and concepts. In some cases, harm to competition may be a proxy for consumer harm, but not always. The new guidelines should make clear that consumer harm should be the standard for the existence of exclusionary abuse. Complementarily, the DGs could specify when proving harm to competition is sufficient to prove consumer harm (i.e. under which circumstances, harming competition would almost certainly lead to harming consumers). Additionally, the DGs should clearly determine how to measure harm to competition, based on well-established economic concepts and standards. Setting vague objectives based on ill-defined concepts poses the risk of increasing legal uncertainty, leaving room to discretionary and unpredictable outcomes.

III. Sound Methodology: The Theory of Harm

In order to clarify how the Commission will analyze any potentially exclusionary conduct, the new guidelines need to specify the analytical strategy that the Commission will apply to the assessment of all potentially exclusionary conducts. That strategy is the so-called "theory of harm," i.e. a narrative explaining how a specific conduct or market situation might adversely affect competition and harm consumers.

The theory of harm establishes the link between the conduct and the harm to consumers. The formulation of an explicit theory of harm is a prerequisite for the analysis of any potentially exclusionary conduct. The theory of harm provides stakeholders with the underlying economic "logic" for the analysis of potentially exclusionary effects of certain conducts and allows them to identify the necessary evidence to prove such exclusionary effects. Equally, the theory of harm allows stakeholders to categorize conducts according to the risk of harming consumers.

The Guidance Paper provided, in the analysis of some illustrative conducts, a theory of harm explaining how those

conducts were able to harm consumers.[11] The theory of harm guides the subsequent analysis and establishes the relevant hypotheses to be tested in the analysis of potentially exclusionary conducts.

The DGs contained no reference to the theory of harm, which means that they provided little guidance to stakeholders on how to proceed in the analysis of exclusionary effects. The categorization of conducts of the DGs was not based on an economic theory of harm that allowed to categorize conducts according to their likelihood to harm consumers. The lack of an explicit theory of harm based on contemporary economic theory might turn the analysis of different conducts inconsistent and might lead to arbitrary and unpredictable outcomes. For example, the economic effects of a refusal to supply an input, or supplying that input at high prices, or delaying the supply, or reducing the interoperability of the input follow share the same theory of harm. Therefore, it makes no sense to treat or categorize them differently.

Theories of harm establish the roadmap for the analysis of anticompetitive practices. Therefore, theories of harm should constitute a crucial element of the new guidelines for the analysis of exclusionary abuses.

IV. Toolbox: Economic Analysis

The Guidance Paper acknowledged that markets, as economic phenomena, should be analyzed using economic principles and tools. The Guidance Paper established a theory of harm based on economic principles and established a number of tests (mostly based on the so-called "as-efficient-competitor test" or AEC test) to verify the relevant hypotheses established by the theory of harm, i.e. whether or not a specific conduct caused exclusionary effects.[12]

Testing through economic evidence the relevant hypotheses established by the theory of harm is crucial to adopt legal decisions. There is no such a thing as a "legal test" which is not based on economic theory and empirics. Legal tests in antitrust matters should be necessarily applied over the results of economic analysis and tests.

Rather than departing from economic analysis, the new guidelines should shed further light on how to implement economic tests and on the link between legal criteria (or legal tests) and economic tests, i.e. how legal criteria will apply to the outcome of economic tests. For example, the implementation of the AEC test might need further clarification on the characterization of an "as-efficient" competitor, which is case-specific and depends on the relevant competitive parameters of each market. It may also be useful to specify how to apply the AEC test to non-pricing practices. Departing from the AEC test or limiting its application might lead to inconsistent and arbitrary analysis of potentially exclusionary abuses.

[11] DGs, para 6.

[12] DGs, para 143.

V. Conclusions

The DGs allegedly sought to codify the case law on Article 102 to enhance legal certainty. However, such alleged codification should be consistent with the economic principles that guide the functioning of markets. Otherwise, the new guidelines risk falling short of their stated objectives. Markets are economic phenomena and the legal analysis of markets should be consistent with the latest developments in economic theory and empirical economic analysis.

The new guidelines should set measurable **objectives**, offer clear and consistent **methodologies** to assess potentially exclusionary conduct, based on well-established economic concepts and metrics; and establish a **toolbox** that allows businesses and regulators to (self)assess potentially anticompetitive business strategies. In practice, this means setting consumer harm as the focus of the analysis, establishing theories of harm based on economic principles and using economic tools for the analysis of business strategies and market dynamics.

The challenge faced by the European Commission in the new guidelines is to codify the case law and to increase procedural efficiency in consistency with economic principles. The DGs focused on the codification of the case law and on reducing the burden of proof, but failed to add consistency with economic principles.

The final version of the guidelines should incorporate measurable objectives, consistent methodologies, and effective analytical tools — each aligned with sound economic principles — to ensure that the new guidelines constitute a useful and effective instrument for consistent and predictable competition law enforcement.