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EU Antitrust Rules Set To Pose Challenges To US Businesses

By **Andrea Pomana and Sarah Wilks** (September 13, 2023, 12:30 PM BST)


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High-profile comments about the importance of convergence between authorities in the antitrust enforcement sphere are easy to find.[1] However, if one were to draw up a list of key differences between U.S. and European Union antitrust laws, it would be long and complicated. Pinpointing how the biggest players are regulated on either side of the Atlantic is especially intriguing.

While neither jurisdiction prohibits the holding of significant market power, and only step in when such power is abused, the EU's view of dominance is broader than monopoly in the U.S. The EU places a special responsibility on dominant firms not to distort competition in any market, which the U.S. does not.

Additionally, enforcement in Europe is primarily the prerogative of the European Commission. This contrasts starkly with the U.S., where the U.S. Department of Justice and the Federal Trade Commission must persuade a judge in court to make an order both on the substance of the alleged violation and on the scope of the remedy.

On top of these differences come varying standards of judicial intervention, making the antitrust picture for dominant players look quite different in the U.S. compared with the EU.

Nevertheless, businesses operating in both jurisdictions need to comply with both regimes. It is therefore important that U.S. businesses and their advisers take note of key recent EU developments relating to the prohibition of abuse of dominant power, which this article summarizes. Compliance on one side of the Atlantic is no guarantee of safety on the other.

Legal Challenges

The web of legal challenges that market-dominant companies face under EU competition rules has never been so complex.[2] The steps authorities must take to have a dominance finding upheld in court have never seemed so steep.[3]

Gone are the days when the EU rules prohibiting the abuse of a dominant position might only be considered of application in cases of egregious behavior by a small number of extremely large players, with a strictly legal and formal application of per se prohibitions of certain practices.[4]

In the past, dominance has been used as a quick way to find anti-competitive effects, with large market shares reducing or even removing the need for deeper analysis of market behavior and dynamics.

However, economic theory and practical experience have shown that competitive dynamics can function well even on a market with large players. Certain behavior can have positive market effects leading to efficiencies and increased innovation, even if practiced by dominant firms.

However, the power of some of the largest market players is now arguably more extreme than ever before, notably in the technology sphere with new kinds of alleged abuse emerging, such as data leveraging and self-preferencing.

Concurrently, the competitive process, competitors and consumers have possibly never been so vulnerable. As such, it is hardly surprising that the commission, like several other authorities, has stepped up its work in this area.

To this end, it is seeking to better equip itself to handle the challenges it faces in the dominance arena, recently launching several initiatives, which this article explores.

Recent Trends

A review of recent decisions applying EU dominance rules flags several trends.

While much of the commission's recent work in alleged abuses of dominant positions has been in the digital sphere, this is far from exclusively the case.[5]

Indeed, the commission has publicly stated that in light of the current cost of living crisis, its enforcement of dominance rules will rest largely on the basic industries and pharma.[6]

In this vein, in January, the European Court of Justice handed down a judgment in relation to dismantling a train track in Lietuvos geležinkeliai v. Commission, and before that, on the transfer of customer details in the context of the liberalization of energy markets in Servizio Elettrico Nazionale SpA and Others v. Autorità Garante della Concorrenza e del Mercato and Others in May 2022.[7]

Many dominance cases are either closed with commitments or appealed. This may be partly due to the absence of a well-established settlement tool, unlike in the cartel arena, leading to a somewhat confusing body of decisions and case law.[8]

No fines have been imposed by the commissioner based on EU dominance rules for the past three years.

Several notable dominance cases have emerged at national competition authority level, for example in the U.K. and France.[9]

Reform Package

In March, the commission released a package of reforms on the application of EU dominance rules to exclusionary conduct, seeking to update the existing rules that are over 15 years old.

The aim is to account for legal and market developments, and to introduce more certainty for businesses and enforcers. The commission's program comprises:

- Amendments to its existing 2008 guidance on enforcement priorities regarding the application of EU dominance rules to abusive exclusionary conduct by dominant undertakings, set out in a communication and an annex, and taking immediate effect;[10] and

- A call for evidence, seeking feedback on the adoption of new guidelines on exclusionary abuses of dominance, which will supersede the 2008 guidance as amended, expected to be adopted in 2025.

Updating the guidance and producing new guidelines allows the commission to capture and codify this case law and will potentially have significant effects on allegedly dominant players, including U.S. actors with business activities in the EU.

This is particularly important, given that — unlike in the U.S. — the commission does not have to go to court to impose a penalty or require intrusive remedies from businesses.

Coupled with a comparatively light touch judicial review that does not insist on the application of the as-efficient competitor test in all cases, these reforms have the potential to turbocharge the commission's appetite for intervention.

Amendments to Existing Guidance

While in the U.S. the focus of the Sherman Act has always been economic, specifically the preservation of competition and the promotion of efficiency and consumer welfare, the 2008 EU guidance shifted from a formal legalistic approach of per se abuses, which do not require the establishment of adverse competitive effects, to a more economic approach for analysis.

EU dominance rules now focus more on the effects of the potentially abusive conduct on the competitive process and consumers. The guidance sought to orientate the commission's case selection to cases resulting in significant anti-competitive foreclosure by a dominant company.[11]

The new annex to the amended communication sets out some of the key changes to note until the adoption of the new guidelines.

The commission will no longer consider the profitability of the dominant company's abuse as relevant for its enforcement priorities.

Rather, the key factor will be whether its conduct adversely affects an effective competitive structure, allowing it to negatively influence "prices, production, innovation, variety or quality of goods and services" to its own advantage and the detriment of consumers.

The commission considers that the price-cost as-efficient competitor test is optional, and may — not will — examine economic data relating to cost and sales prices.

The commission will generally — not normally — intervene where the dominant company threatens an as-efficient competitor, deeming that genuine competition may also come from undertakings that are less efficient than the dominant firm, in terms of their cost structure.

The commission has also updated its assessment of input foreclosure, with an input no longer needing to be indispensable in cases of constructive refusal to supply and margin squeezes.

These changes reflect the need for swift and significant changes while more detailed guidelines are required to give businesses greater clarity and predictability and ensure enhanced legal certainty.

New Guidelines

The draft new guidelines are due to be published in 2024. It will be interesting to see how the commission updates its approach to both classic exclusionary behavior, such as fidelity-inducing loyalty rebates, tying and bundling, and refusal to supply, and more modern exclusionary practices that the current guidance does not address — such as self-preferencing and data leveraging.

Objective Justification and Efficiencies

Under EU law, behavior of an allegedly dominant firm that is in principle abusive may still escape prohibition, albeit in limited circumstances — either by way of objective justification or efficiencies.

These ways out are important, since in practice, the distinction between abusive and legitimate conduct by a dominant undertaking is gray. For example, a legitimate price reduction resulting from production efficiencies or economies can be hard to distinguish from an abusive predatory price cut.

Dominant undertakings are permitted to compete aggressively, but their behavior should reflect competition on the merits, i.e., reflecting their competitive advantages rather than resulting from restrictive practices.

When applying EU dominance rules, the commission will assess whether there is an objective justification for any such conduct, even though that concept has yet to be defined in case law.

Instead, the European Court of Justice has relied on vague statements such as "an undertaking may demonstrate that its conduct is objectively necessary" in the 2012 case of Post Danmark A/S v. Konkurrencerådet in.[12]

The commission's guidance does not clarify the concept, but states that health and safety concerns related to the product in question may constitute such justifications.

Conclusion

The recent updates in the application of EU dominance rules are timely, but incomplete. We might see some answers to the regulation of largest players, at least in the digital sphere, with the EU Digital Markets Act — the commission's default tool in digital markets — having come into force in November 2022 and becoming applicable, for the most part, in May this year.

This new legislation seeks to ensure that gatekeepers in digital markets behave fairly online, and that is, in part, a response to the perceived inability of competition law, particularly EU dominance rules, to tackle specific types of behavior of big, digital companies.

As the Digital Markets Act has little room for economic analysis, in terms of enforcement, there may be some tension between the Digital Markets Act on the one hand and EU dominance rules on the other.

The latter leaves scope for innovative use to fill potential gaps in existing regimes, for instance to assess

transactions falling outside of EU or national merger control thresholds.

This patchwork of different rules must be considered strategically, with the abuse of dominance labyrinth in Europe requiring careful navigation.

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[1] See comments of DG Comp policy lead Inge Bernaerts with former US Assistant Attorney General Bill Baer at an ABA Antitrust Law Section global seminar in Brussels on 10 May 2023.

[2] Principally, Article 102 of the Treaty on the Functioning of the EU along with associated guidance, as explained in this article.

[3] See comments of President of the General Court, Marc Van der Woude, "Judicial Control in Digital Markets: How to be Fair and fast?" 17 March 2023 Brussels.

[4] Case C-62/86 – AKZO v Commission, paragraph: 71: "prices below average variable costs […] must be regarded as abusive […] since each sale generates a loss".

[5] Recent investigations include the advertising technology industry, online shopping, search engines, music streaming and the electronic software sector.

[6] Comments of Linsey McCallum, Deputy Director-General for Antitrust at DG COMP's "Let's Talk Competition" on 22 May 2023.

[7] Cases C-42/21 P – Lietuvos geležinkeliai v Commission; and C-377/20 – Servizio Elettrico Nazionale and Others.

[8] European Commission Fact Sheet: Cooperation – FAQ. https://ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

[9] UK CMA decision: Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, Case 50908 (21 July 2022), https://assets.publishing.service.gov.uk/media/64c7d68a5c2e6f0013e8d7d8/Phenytoin_Decision_-_Redacted_1__.pdf; and the French Competition Authority's decision 22-D-26 of 22 December 2022 on practices implemented in the roadworthiness testing of heavy goods vehicles in Guadeloupe. https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-du-controle-technique-des-poids.

[10] Communication: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, https://competition-policy.ec.europa.eu/system/files/2023-03/20230327_amending_communication_art_102_0.pdf; and Annex (27 March 2023). https://competition-policy.ec.europa.eu/system/files/2023-03/20230327_amending_communication_art_102_annex.pdf.

[11] Paragraph 20 of the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), which sets out the factors the Commission took into consideration to assess anticompetitive foreclosure. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

[12] Case C-209/10 – Post Danmark A/S v Konkurrencerådet, paragraph 41.