

From Guidance to Guidelines: lessons and prospects

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Summary

- As the Commission reconsiders its policy on exclusionary abuses, it is worth raising the following issues:
 - Positive lessons to draw from enforcement under the Guidance
 - Areas where a refinement or a rethink may be warranted
 - What the implementation of these refinements would look like
 - Areas of particular attention in the review process

Enforcement under the Guidance

- Enforcement under the Guidance Paper is a success story from a number of perspectives:
 - **Robust enforcement:** the ‘more economics-based approach’ has not deterred enforcement
 - **Wiser enforcement:** Article 102 TFEU policy under the Guidance has more solid intellectual foundations, reflected in prioritisation decisions
 - **More predictable enforcement:** the boundaries of the notion of abuse were undefined in the days of *Michelin II* and *British Airways*

Enforcement under the Guidance

- It would be reasonable to preserve some core principles in any review of Article 102 TFEU policy...
 - **Consensus-based exercise**, driven by the best available expertise (EAGCP)
 - The **analysis of effects is crucial** in most cases, not a luxury or an indulgence
 - Attempt to articulate **legal tests**
 - Definition of **meaningful boundaries** on administrative action
- ...if only because the Court of Justice has embraced them

Rethinking Article 102 TFEU enforcement

- On the other hand, it is worth reflecting on a number of concerns raised:
 - Is the Guidance overly focused on avoiding **Type I errors**?
 - It is often claimed that the analysis of effects is **too demanding**
 - Similarly, it is argued that Article 102 TFEU enforcement takes **too long**
 - The legal tests crafted are not necessarily **operational**

Refining enforcement in practice

- Is it possible to preserve the core principles underpinning the Guidance while addressing these concerns?
 - Structured legal tests (e.g. Vertical Block Exemption Regulation)...
 - Dispense from the need to engage in lengthy case-by-case analysis
 - Preserve legal certainty
 - ...structured around proxies, including:
 - Coverage of the practice
 - Extent of the dominant position
 - Position of rivals
 - Would the practice force rivals to sell at a loss?

Refining enforcement in practice

For instance, a set of exclusivity agreements by a dominant firm is more likely to restrict competition where the coverage of the practice is above 30%

Areas of particular attention

- As the Commission's approach to Article 102 TFEU enforcement is reviewed, it is worth paying attention to the following issues:
 - **Predictability vs effectiveness:** the effectiveness of enforcement should not come at the expense of predictability
 - *A legal test that is always fulfilled is a bad legal test*
 - Exceptions to principles should be well-defined (e.g. legal monopoly in *Post Danmark II*)
 - Hard questions cannot be avoided, including:
 - The meaning of **anticompetitive effect**
 - The applicable **threshold** when potential effects are at stake: **likelihood** (see AG Kokott)
 - **Causality:** anticompetitive outcomes must be attributable to the dominant firm