contrast



The force may be with you, but you may not exclude

Imagine...

You are sales director of a company that has slowly but surely gained market share by focusing on innovation, customer service and rewarding customers with exclusivity rebates. You have since far surpassed your competition, and your sales cover about half the market.

When discussing the business plan for the next few years, your legal team questions your commercial policy. It is possible your company occupies a dominant position and you should no longer expect your customers to buy products from you exclusively in exchange for a rebate. Exclusivity rebates could constitute an abuse of your dominant position. In case of complaints from your competitors to the competition authorities, you could face a severe fine.

That rebates would be prohibited surprises you. You ask for more explanation from your legal team.

A brief clarification.

An undertaking may hold a dominant position. In that case, however, it has a special responsibility. It may only compete on its merits and not impair effective competition on the market by using commercial methods that have exclusionary effects on competitors or that exploit customers.

The European treaties do not contain ready-made definitions of the concepts of dominance, special responsibility, competition on the merits, abuse, exclusionary effects, etc. These concepts have been fleshed out over the years based on the case-law of the European courts.

For example, it is now generally accepted that a firm is presumed to be dominant if it has a stable

market share of 50% or more.

Less clarity exists on the conditions for the existence of an abuse, despite breaches of the prohibition of abuse of dominance being heavily fined. A general distinction is made between exclusionary abuses and exploitative abuses. The latter entail imposing commercial conditions on customers that are not reasonably related to the economic value of the product provided. Examples of exploitative abuses are less frequent and have mainly arisen in the pharmaceutical sector.

Exclusionary abuses, which prevent the expansion or entry of competitors into the market, are more common. Therefore, the European Commission had already published guidance on its enforcement priorities regarding abusive exclusionary conduct by dominant undertakings in 2008.

In March 2023, the Commission announced that it would update its 2008 enforcement priorities in light of the more than 30 judgements on exclusionary abuses delivered by European courts over the last 15 years. This occurred on 1 August 2024, when the Commission published its draft guidelines on abusive exclusionary conduct by dominant undertakings.

With the draft, the Commission aims to provide firms with a predictable, consistent and workable framework for assessing exclusionary abuses. For example, the draft guidelines elaborate on the evidence needed to show that certain conducts may have exclusionary effects. For some types of conduct, potential exclusionary effects have to be demonstrated; other types of conduct are presumed to produce exclusionary effects; and finally, there are so-called "naked restrictions" that automatically lead to exclusionary effects and for which the dominant firm will only be able to show in exceptional circumstances that they do not produce such effects.

The draft guidelines also provide the analytical framework for conduct that may or may not be subject to a specific legal test in EU case-law. For example, exclusivity arrangements, refusal to supply and the application of predatory pricing are examples of conduct subject to a specific legal test.

Returning to the example of exclusivity rebates, they are presumed under EU case-law to produce exclusionary effects. They generally have an exclusionary effect by making it more difficult for competitors to access the dominant firm's customers. If a dominant firm claims that this is not the case, it has to prove it. The draft guidelines set out the elements that the Commission will consider, including the dominant firm's market share, the market share affected by the conduct (the higher that share, the more likely the exclusivity rebate has exclusionary effects), and the terms of the exclusivity rebates (such as their duration and level).

Concretely.

- An undertaking may have a dominant position, but it has a special responsibility not to abuse it.
- The case law of the European courts plays an important role in defining the conditions for the existence of dominance and abuse.
- There are both exclusionary abuses and exploitative abuses. The former occur more often than the latter. Exclusivity rebates are presumed to have exclusionary effects.
- The European Commission published draft guidelines on 1 August 2024 that aim to provide firms with a predictable, consistent and workable framework for assessing exclusionary abuses.
- Until 31 October 2024, all stakeholders can provide feedback on the draft guidelines. The

Commission aims to finalise the guidelines in the fourth quarter of 2025.

Want to know more?

- The 2008 guidance on the Commission's enforcement priorities regarding abusive exclusionary conduct by dominant undertakings can be found here. The amendment to these enforcement priorities can be found here.
- The new draft guidelines, published on 1 August 2024, can be found here.

Authors

Filip Tuytschaever, Lise Ryckaert