Varieties of an Effects-Based Approach to Abuse of Dominance

Understanding the Two Concepts of Presumptions in the Commission's Draft Guidelines on Exclusionary Abuses

Simon de Ridder, Humboldt University of Berlin

BECCLE Conference, 5 June 2025

– "as a general rule, in order to conclude that a conduct is liable to be abusive, it is necessary to demonstrate […] that such *conduct is capable of having exclusionary effects*" (60a)

– "certain types of conduct are *generally recognized as having a high potential* to produce exclusionary effects. Accordingly, *they are subject to a presumption* concerning their capability of producing exclusionary effects" (60b)

– "certain types of conduct by a dominant undertaking have *no economic interest* for that undertaking, other than restricting competition. These types of conduct are *by their very nature capable of restricting competition*" (60c)

“certain types of conduct are *generally recognized as having a high potential* to produce exclusionary effects. Accordingly, they are subject to a presumption concerning their capability of producing exclusionary effects” (60b)

rationale: (economically informed) experience suggests that there *typically* is some capability to produce exclusionary effects

"certain types of conduct are ***generally recognized as having a high potential*** to produce exclusionary effects. Accordingly, they are subject to a presumption concerning their capability of producing exclusionary effects" (60b)

this rationale brings with it immediately the possibility to 'rebut' the presumption if a case lacks said 'typicality'

undertakings can submit based on supporting evidence that the situation at hand differs from the underlying assumptions

"The ***submissions put forward by the dominant undertaking*** during the administrative procedure ***determine the scope of the Commission's examination obligation***" (60b)

Com. can (1) show that the evidence submitted does not suffice to rebut, or
(2) provide evidence of exclusionary effects

“certain types of conduct by a dominant undertaking have *no economic interest* for that undertaking, other than restricting competition. These types of conduct are *by their very nature capable of restricting competition*” (60c)

rationale: behavior may come with no pro-competitive (= socially valuable) rationale whatsoever (normative rather than empirical)

"certain types of conduct by a dominant undertaking have ***no economic interest*** for that undertaking, other than restricting competition. These types of conduct are ***by their very nature capable of restricting competition***" (60c)

a rebuttal of this presumption ("in very exceptional cases") would require the undertaking to positively show the lack of a capability to produce effects

which defenses are left?
– argument that conduct is not "naked"
– objective justification / efficiency defense

presumption in cases of specific legal tests, namely:

– exclusive dealing

– predatory pricing

– margin squeeze (negative spread)

– “certain forms of tying”

effects must be assessed “in the light of *all the relevant factual circumstances* [...] on the basis of *specific, tangible points of evidence*” (e.g. European Superleague, para. 130)

presumption in cases of specific legal tests, namely:

– exclusive dealing

– *predatory pricing*

– *margin squeeze* (negative spread)

– “certain forms of tying”

underlying price-cost tests are thoroughly grounded in the peculiarities of the individual case → likely sufficient

presumption in cases of specific legal tests, namely:

– *exclusive dealing*

– predatory pricing

– margin squeeze (negative spread)

– "*certain forms of tying*"

underlying price-cost tests are thoroughly grounded in the peculiarities of the individual case → likely sufficient

fairly superficial and abstract analytical templates

→ Com. should consider widening its assessment to (some of) the factors it holds relevant for effects analysis in these cases

presumption in cases of specific legal tests, namely:

– *exclusive dealing*

– predatory pricing

– margin squeeze (negative spread)

– “certain forms of tying”

<u>for exclusive dealing:</u>

– extent of the dominant position

– affected share of the market

– conditions of agreement, such as duration

– possible exclusionary strategy

presumption in cases of specific legal tests, namely:

– exclusive dealing

– predatory pricing

– margin squeeze (negative spread)

– “*certain forms of tying*” →

no presumption if:

– tied product is available for free

– alternatives to the tied product are easy to obtain

→ then: it is not obvious that customers are deprived of their choice

presumption in cases of specific legal tests, namely:

– exclusive dealing

– predatory pricing

– margin squeeze (negative spread)

– “*certain forms of tying*”

no presumption if:

– tied product is available for free

– alternatives to the tied product are easy to obtain

→ then: it is not obvious that customers are deprived of their choice

<u>factors to assess include:</u>

– dominance on the market for the tied product

– significance of the link between the products

– barriers to entry in the tied market

– consumer inertia or bias in the tied market

– duration of the conduct

– share of customers tied

– actual exclusionary effects

presumption in cases of naked restrictions, for example:

– payments conditional upon postponing the launch of product feat. competitors' products (Intel)

– agreements obligating distributors to swap a competing product with the dominant undertakings' (Irish Sugar)

– dismantling by the dominant undertaking of an infrastructure used by its competitors (Baltic Rail)

'sacrifice' borne by the dominant undertaking	obvious deviation from comp. on the merits	conduct referencing a specific competitor
e.g. predatory pricing below AVC	e.g. Astra Zeneca or Facebook abuses	clear limitations, e.g. exclusive dealing