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The EU is Lowering the Bar for Dominance-Abuse, But New Guardrails Will Emerge

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The EU's antitrust division, located in Madou Tower in the northern corner of the European Quarter in Brussels, is arguably the branch of the EU's institutions most likely to appear on a corporate boardroom's agenda. However, in past decades officials have operated under a strict set of constraints. There has been a high bar for determining which behaviors by dominant companies could be deemed anti-competitive and subjected to a fine of up to 10% of global turnover.

The guidelines on the application of Article 102 of the EU Treaty, which provides the legal basis for combating dominance abuse, are now being loosened. In the document outlining the proposed changes, the European Commission acknowledges that the current guidelines make it "unduly burdensome or even impossible" to tackle abusive behavior by dominant firms.

This shift is setting off alarm bells for companies that hold a large market share and is exciting smaller competitors who are eager to attribute their lack of success to the nefarious behavior of a larger rival. The main point of contention is the so-called 'as efficient competitor' test. This test implies that EU competition rules should not be a crutch for inefficient companies to continue plying their trade. But in markets where network effects apply such as for many online services, or barriers to compete are high due to investments, permitting or other overheads, it may be difficult to be 'as efficient' as the competitor that a startup wants to challenge. Getting this balance right as the rules are revised will be critical to the new rules that will emerge.

Google, at the receiving end of numerous antitrust investigations, unsurprisingly suggests that loosening the test for dominance-abuse is dangerous, and that companies "should not be punished for conduct resulting from their superior efficiency and/or attractiveness." Consumer group BEUC, meanwhile, applauds the move to "ensure the guidelines are future proof by taking a broader approach."

However, the ripples from a more liberal application of dominance abuse rules will spread beyond the officials working with Article 102. Officials in charge of merger control, normally considered fiercely independent from other influences, may get a windfall benefit from changes elsewhere in the antitrust world. The European Commission's approach to mergers has been restrictive,

especially in sectors like telecoms. Such caution is understandable when a wrong decision on a merger is difficult to reverse later using dominance-abuse rules. However, if it becomes easier to keep dominant companies in check, merger officials might be more open to approving mergers that would have previously been blocked. The need for officials to predict the future outcomes of mergers will become less critical. The influence of a change in dominance abuse may prove more powerful at a time when merger officials need to contend with interference from other novel antitrust tools, such as the control of foreign subsidies.

Inevitably, broadening the possibilities to apply dominance abuse rules will trigger a greater need for exemptions, such as security exemptions in telecoms, health exemptions for vaccines or protective equipment, sustainability exemptions for energy companies and strategic autonomy exemptions for producers of critical raw materials. EU antitrust law already provides a number of exemptions for state aid notification and collusion, so it’s not a long stretch to envisage exemptions becoming relevant also to dominance-abuse rules. Whether these exemptions are spelled out or inferred are for a later stage in the debate, but the trenches are being dug now for the battles to come.

Additionally, the recently adopted rules targeting digital platforms may, when combined with more aggressive enforcement against dominance abuse, lead to companies facing action under both sets of rules. Indeed, the possible overlap between different antitrust-law instruments and competition for primacy among officials in different branches of DG Competition, or indeed the European Commission and its agencies, will provide additional fodder for conflict, controversy and political horse-trading.

These points have all been presented in the responses to the European Commission’s proposals. It remains to be seen which arguments will prevail as they are evaluated and influenced by political imperatives and external events. The drafters within the EU maintain that the review is a technical adjustment to ensure that the guidance aligns with the standards set by the EU courts over the years.

The rapid evolution and adoption of digital technology has facilitated the rise of companies that dominate particular market segments. These dominant players create markets with high entry barriers and a necessity for significant scale to be profitable. Financing models for startups and expanding businesses reflect this and regulators recognize that in many markets dominance is the norm and vigorous competition is fleeting.

In light of these changes, it is logical for regulators to seek improved tools to address the abuse of dominance. However, more flexible tools may also be susceptible to manipulation by various forces in politics, the economy and society. How the changes pan out will largely depend on who is enforcing them, so the choice of next EU competition commissioner to replace Margrethe Vestager will be critical. This is especially true when considering that the next commissioner will be the one who sets the pace on how far and deep the changes to the Article 102 guidelines will be.

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In any event, and regardless of the outcome, this shift in regulatory approach creates uncertainty for companies. Uncertainty that presents both opportunities and risks that must be carefully analyzed and understood. With increased potential for outside influence, companies will need to be more strategic in their communication, as the court of public opinion may play a significant role in determining success or failure in EU antitrust matters.

Author

Magnus Franklin
Managing Director

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