THE CHALLENGES OF FORM-BASED ENFORCEMENT APPROACHES IN DOMINANCE CASES

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CPI ANTITRUST CHRONICLE June 2025

CPI Antitrust Chronicle June 2025
www.competitionpolicyinternational.com

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The role of economic effects analysis in dominance or monopolization cases has come under increasing scrutiny in recent policy debates on both sides of the Atlantic. Some advocate a more form-based approach, reducing the role of consumer welfare analysis and efficiency considerations. This article explores the limitations of heightened formalism, emphasizing the unintended consequences that may arise when dominant firms adapt to formalizations that are not anchored in clear economic theory. Focusing on the European Commission's Draft Guidelines on Article 102 TFEU, the article examines the reliance on formal distinctions – such as "refusal to supply" versus "access restrictions" – alongside a growing emphasis on normative concepts like "competition on the merits." The central argument is that, while goals such as simplification and more effective enforcement can be legitimate, they must be pursued within rigorous analytical frameworks. Only then can theories of harm remain economically coherent and, ultimately, testable and falsifiable through scientific methods. Accordingly, formal criteria and normative notions such as "competition on the merits" should be understood as proxies for underlying economic reasoning – not as opaque or idiosyncratic ends in themselves.

The role of economic effects analysis has emerged as a focal point in recent policy debates on both sides of the Atlantic. Some scholars and practitioners advocate for a more form-based approach, proposing to reduce, to some extent, the emphasis on consumer welfare analysis and efficiency considerations. This article adopts a neutral stance regarding the motivations behind this shift. Specifically, it does not address whether enforcement – particularly in dominance and monopolization cases – has historically been too lenient, nor whether increasing complexity due to economic effects analysis has hindered agencies' ability to demonstrate foreclosure.

For the sake of argument, this article assumes that reducing complexity is both achievable and desirable by adopting more form-based rules regarding the harmfulness of certain types of conduct. However, if such an approach is pursued, it is essential that the definition of such forms aligns with the underlying economic assumptions about the competitive harm they intend to address. Formalization should not become an end in and of itself.

I will explore this issue by examining some aspects of the EU Commission's Draft Guidelines on Article 102 TFEU.[2] The Commission deserves recognition for its efforts to structure existing case law and provide form-based guidance for assessing various theories of harm. However, some of the criteria proposed therein raise questions about how they are linked to the economic foundations of certain foreclosure theories. This can lead to problems when basing concrete enforcement decisions on such form-based distinctions.

I. WHY A CLEAR THEORY BEHIND THE NOTION OF FORECLOSURE IS SO IMPORTANT IN LEGAL TERMS

The role of consumer welfare analysis has been a cornerstone of policy discussions in recent years. It is not possible to cover all facets of the debate. In the U.S., the Neo-Brandeisians have voiced criticism against a fixation of antitrust enforcement on the quantification of price effects, and even consumer welfare metrics in general, allegedly having rendered antitrust law ineffective.[3] Similar concern has been articulated by pro-enforcement scholars and enforcers who are not Neo-Brandeisian.[4] Under the Biden administration those views have percolated into enforcement policies. With respect to Section 5 of the U.S. Federal Trade Commission ("FTC") Act, for example, the FTC advocated a shift away from a consumer welfare-oriented construal in analogy to the U.S. Sherman Act instead resorting to a broader and more nebulous interpretation of "fairness."[5] In the EU, a partly similar discussion around the role of quantitative consumer welfare analysis has gained traction. Some regard the EU Commission's draft guidelines on Article 102 TFEU as a reflection of a more form-based approach, which diminishes the role of economic analysis in quantifying harm and assessing efficiencies. For example, the Commission wants to distinguish between "refusal to supply" cases on the one hand and "access restrictions" on the other hand based on structural elements of the case, such as whether a business relationship between the dominant firm and the customer already existed or not. What is more, with the notion of "unfairness" invoked at a critical juncture[6] and "competition on the merits" serving as a recurring narrative,[7] reliance on these concepts might, upon superficial consideration, suggest a departure from a strictly consumer welfare-oriented quantification of effects.

As to intended benefits of this approach, more form-based guidance to foreclosure effects may limit the agency's burden to deal with a quantification of case-specific consumer harm and efficiencies. Instead, the agency can, to a greater extent, rely on form-based presumptions or indicators as proxies for concrete effects, thereby enhancing enforcement efficiency. Importantly, though, and in contrast to what a superficial view might suggest, such a more form-based approach should not be seen as a contradiction with an overarching consumer-welfare principle

2 Commission, 2024, Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, available at: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en (hereinafter "Draft guidelines Article 102").

3 See e.g. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate* 9 Journal of European Competition Law & Practice 131-132 (2018); Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 Yale Law Journal Forum 980-995 (2018).

4 Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779, 822 (2022): "Fetishizing quantification . . . is affirmatively harmful."; FTC Commissioner Mark Meador, Antitrust Policy for the Conservative (remarks of May 1, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/antitrust-policy-for-the-conservative-meador.pdf 26-27 (last visited 5 May 2025): "[A]ntitrust law today has strayed into exactly the kind of 'economic extravaganza' that Bork warned against. One of the first tasks for conservatives dedicated to reforming antitrust law must be to reverse this trend."

5 See Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, 10.11.2022, p. 1: "…this statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions." https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf (last visited 6 May 2025). This approach moves away from previous policies which aligned Section 5 more closely with the principles underlying the Sherman Act, see FTC Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act (August 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (last visited 5 May 2025).

6 Draft Guidelines Article 102 on access restrictions at 166 lit. c): "imposing unfair access conditions."

7 Draft Guidelines Article 102 on conduct "departing from competition on the merits" at 49-58.

on a conceptual level.[8] Equally, it should not be seen as negation of the idea that efficiencies matter.[9] It is merely a way of rendering the evidence-side of enforcement more efficient,[10] which is an important goal in the interest of the protection of competition.

However, the following analysis seeks to demonstrate that it is of utmost importance, when pursuing such a goal, to maintain meticulous transparency regarding how the economic underpinnings of these forms translate into legal enforcement actions. Such transparency is essential to minimize enforcement errors and to prevent collateral damage that may arise when firms adjust to suboptimally designed form-based rules, thereby producing less efficient market outcomes.

II. THE ROLE OF CONSUMER HARM AND BENEFIT

An integral part of enforcement guidelines should be a clear definition of the role of efficiencies in case analysis. The Commission rightly recognizes the potential for efficiencies to offset competitive harm, thereby reflecting the jurisprudence of the European Court of Justice ("ECJ").[11] Yet for a coherent approach, the relationship between harm and efficiencies should be transparent, even if it has solidified into form-based rules. While the Commission emphasizes the distinction between harm and efficiencies as a consistent theme in its Draft Guidelines, it is pivotal to bear in mind that very often harm can only be defined as a lack of efficiencies. The negation of one element is the definition of the other, if welfare is the overarching metric.[12] If efficiencies, though, are considered a potentially offsetting factor, consumer welfare as the benchmark to measure such efficiencies, must be, in conceptual terms, the overarching concept also for the determination of harm.

Therefore, any attempt to define harm in isolation should be treated with skepticism, notably if this happens by recourse to opaque notions like "competition on the merits." Even though this notion can, indeed, be found in the ECJ's case law from time to time, it should be treated as a mere "placeholder" for a reasoning, which must be based on a theory.[13] In a predatory pricing case, for example, prices below average variable cost or average avoidable cost can be seen as harmful to competition.[14] Yet this is not because such low prices have the propensity to drive rivals out of the market and that such would "not be on the merits." The underlying rationale for it to be considered harmful, in fact, is the likely absence of an increase in consumer rent. Predatory prices can be conceived of as a "sacrifice" which the dominant firm is only willing to make because of the expectation of recouping losses thanks to a subsequent monopolization of the market. This demonstrates that, very often, the finding of harm entails the implicit acknowledgment of a lack of offsetting efficiencies thereby comprising both analytical steps. This analytical method should not be obscured by reliance on notions such as "competition on the merits," which add no further transparency to the reasoning.

Of course, it can make sense to use the finding of a "sacrifice," e.g. pricing below average variable or average avoidable cost, as an indicator for the likeliness of subsequent recoupment hereby rendering the pricing strategy as likely harmful. What is decisive, though, is that such a form-based rule should be strictly interpreted as carrying, in itself, a stylized consumer welfare analysis in the forementioned sense and not to be the emanation of some opaque normative standard of "merit" in competition. Otherwise, the role of efficiencies becomes opaque as well because if one does not know the measure in which harm is expressed one cannot assess the amount of efficiencies required to offset such

8 Notably, when homing in on what competition on the merits is supposed to mean, the Commission, in its Draft Guidelines, resorts to beneficial effects on consumers, Draft Guidelines on Article 102 TFEU at 51: "The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. Article 102 TFEU does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation" (footnotes omitted). This demonstrates how even the Commission finds it difficult to provide an abstract definition of 'competition on the merits' without at least seeking some guidance in the principles of consumer welfare.

9 The Draft Guidelines make reference to efficiencies on many occasions and entail a chapter on efficiency defenses, *see*, e.g., Draft Guidelines on Article 102 TFEU at 167.

10 See Stefan Thomas on why the Draft Guidelines should not be considered a negation of consumer welfare as an overarching enforcement paradigm, Promarket Column 14 January 2025, available at: https://www.promarket.org/2025/01/14/the-trends-and-cases-that-will-define-european-antitrust-in-2025/ (last visited 5 May 2025).

11 ECJ of 15 March 2007, case C-95/04 P, ECLI:EU:C:2007:166 [British Airways] at 86.

12 See for example, Louis Kaplow RETHINKING MERGER ANALYSIS, MIT Press (2024), 213-214 (with respect to merger analysis, but his point is of a general nature): "Most problematic is the sequential siloing of analysis, starting with anticompetitive effects and only later, when they appear to be established, proceeding to the consideration of efficiencies […]. The best way to determine which way a balance tips is not to zoom in on one side to the exclusion of the other." ; see also Stefan Thomas, *The Known Unknown – In Search of a Legal Structure of the Significance Criterion of the SIEC-Test*, 13 Journal of Competition Law & Economics 346–387 (2017) at 366: "As a hypothesis, this approach would integrate the efficiency analysis into the theory of harm. Efficiencies would not constitute a mere defense. Rather, the lack of efficiencies would be part of the theory of harm itself."

13 See also Daniel Francis, *Antitrust Without Competition*, 74 Duke L.J. 353 (2024) arguing: "There is no single value or quantity, in economics or antitrust law, that competition just is."

14 See the chapter on predatory pricing in Draft Guidelines on Article 102 at 110.

harm. Interestingly, the Commission states that a conduct can be conceived as being on the merits if its exclusionary effects are offset by efficiencies.[15] If that is the case, though, it becomes difficult, on a general level, to see the inherent quality of a merits test besides the exclusionary test.

III. THE PROBLEM WITH TOO GRANULAR FORM-BASED RULES

Additional problems arise when theories of harm – in describing the element of harm – do not explain how they reconcile with the consumer-welfare rationale and instead lean on qualitative criteria without those criteria being supported by a transparent consumer-welfare rationale. This problem can particularly occur if specifics of a given case, as emanating from a court judgment, are directly translated into form-based criteria which are then supposed to define the competitive harm likely to arise in any case that features such criteria. To put it differently: an overly granular transposition of case law into guidelines risks detaching the emerging forms from their underlying economic rationale. This, in turn, can make it difficult to construe such form-based criteria meaningfully and to adapt them to new cases.

To illustrate this, two categories from the Draft Guidelines will be examined, that is the dealings with "refusal to supply"[16] on the one hand and "access restrictions" on the other.[17] As decided by the ECJ in *Bronner*[18], the refusal to supply a potential customer with an input can amount to an abuse if this input is "indispensable" to compete on a downstream market and where the refusal to grant access is capable of eliminating all downstream competition.[19] In its Draft Guidelines the Commission argues that mere "access restrictions" must be treated differently.[20] In cases where a dominant firm has already been in a business relationship with a customer and downstream rival, this is supposed to constitute a different type of case, i.e. a mere "access restriction." In an "access restriction" case the indispensability criterion, which rules in "refusal to supply" cases, is supposed to become immaterial. The dominant firm, under these conditions, must not apply unfair access terms when selling this input.[21] Otherwise it can be liable to an abuse in the guise of an "access restriction" independent of the indispensability of the input. In a similar way, the Commission will eschew the indispensability criterion if a firm seeks access to a network infrastructure if that network has not been created for the dominant firm's exclusive own use but initially been intended to grant access to third parties.[22] Also this type of case is supposed to qualify as a mere "access restriction," not as a "refusal to supply."

The Commission does cite ECJ case law in which such distinguishing criteria have been applied.[23] However, when formulating guidelines, it is important to articulate how and why these case-specific criteria can be generalized into suitable form-based categories. The difficulty with such distinctions is that, once removed from the specific contexts in which they arose, they invite the question of why they should serve as a convincing basis for distinguishing a broader set of cases that are supposed to share a common paradigm regarding the likelihood of harm

Behind all theories of harm in which a dominant firm restricts or refuses to grant a downstream rival access to an input which is relevant for downstream competition is a comparable paradigm. A dominant firm sacrifices potential revenue by limiting sales on the upstream market (for the input or infrastructure access) so to be able to recoup those losses through monopolization on the downstream market. The degree to which such monopolization strategy can be effectively established will hinge on the relevance of the input/the infrastructure for accessing the downstream market and the level of competition on the downstream market by rivals which may resort to substitutable infrastructures or input sources. The greater the dependence of the downstream rival on this input/network, the more meaningful the impact on downstream competition can be.

Whether or not the downstream rival already is in a business relationship with the dominant firm or whether a network was designed only for proprietary use of the dominant firm, on the other hand, is not something which can be seen as to have direct impact on the assessment of anticompetitive effects pursuant to the aforementioned paradigm. Nevertheless, the Guidelines elevate these form-based criteria as distinctive features that will influence case assessments.

15 Draft Guidelines on Article 102 at 58: "If a dominant undertaking argues that its conduct amounts to competition on the merits because, in the specific case, the actual or potential exclusionary effects produced by the conduct are counterbalanced or outweighed by advantages in terms of efficiencies that benefit consumers, this argument is evaluated as part of the assessment of the objective justifications…"

16 Draft Guidelines on Article 102 at 96-106.

17 Draft Guidelines on Article 102 at 163-166.

18 ECJ of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, at 41.

19 As reflected in the Draft Guidelines on Article 102 at 99.

20 Draft Guidelines on Article 102 at 97: "Refusal to supply is a self-standing type of abuse, which is different from the access restrictions that are described in section 4.3.4."

21 Draft Guidelines on Article 102 TFEU at 166 lit. c).

22 Draft Guidelines on Article 102 TFEU at 166 lit. d).

23 E.g. ECJ of 25 March 2021, *Slovak Telekom v. Commission*, C-165/19 P, EU:C:2021:239.

The Commission argues that the fact that a dominant firm is already in a business relationship with an input purchaser shows how the obligation to grant fair access is a less intense interference with the dominant firm's business freedom as opposed to an obligation to supply an input in a "refusal to supply" case in which there is no pre-existing business relationship and the dominant firm would be supposed to engage in a supply relationship for the first time.[24] Yet even if the intensity of interference through enforcement of Article 102 TFEU would possibly be less intense in one case than in the other[25], such does not in and out of itself explain whether the propensity to create competitive harm in terms of foreclosure is so fundamentally different in one case from the other that the indispensability test should hinge on those criteria.

Forming categories out of case-specific criteria without articulating an overarching economic theory can also lead to tensions between those categories. Effectively, a "refusal to supply" is subject to criteria that are more favorable to the dominant firm than cases in which the addressee has already agreed to supply the input and therefore falls within the "access restriction" category. In "access restriction" cases, the input does not need to be indispensable, according to the Draft Guidelines, for an abuse to arise, e.g. through "unfair" commercial terms.[26] This, however, invites the question of why the potential or likelihood of foreclosure would be greater in the second type of case than in the first, thereby justifying the application of the indispensability test only in the first category and not in the second.

With such distinctions ingrained in the form-based criteria, it also becomes difficult to counterbalance potential efficiencies. A notable efficiency that can possibly be invoked against an access or supply claim raised by a downstream rival is the interest of the dominant firm to reap the fruits of previous investments into the development of the infrastructure or the production of the desired input. It is for the current and future protection of this type of dynamic efficiency why access claims must be limited to exceptional cases in order not to sacrifice long-term dynamic efficiencies. The Commission rightly emphasizes this in its draft guidelines when discussing refusal to supply cases.[27] Yet it can be equally relevant in "access restrictions" settings. Weighting offsetting efficiencies of this kind, however, becomes difficult if the alleged harm arising from access denial/refusal to supply hinges on criteria that appear indifferent to the severity of the actual foreclosure effects.

Eventually, establishing such form-based criteria entails the risk that firms adapt to those standards in ways that lead to less favorable market outcomes. Assume that the producer of a desired, albeit not "indispensable" input, faces a supply query from a potential first customer. Entering into a supply relationship with that potential customer would, now, make for an almost "tectonic shift" in the enforcement paradigms which will apply in the future. The dominant firm will switch from the "refusal to supply bracket" into the "access restriction bracket" and forfeit the argument that the input is not indispensable. A similar issue would arise for a dominant firm which establishes a network that is not indispensable. Should it do this with the documented intention to let third parties participate? Or would it be wise to develop it as a proprietary network in order for the firm to avoid running into an eternal sharing obligation under the "access restriction" paradigm? These considerations demonstrate how a form-based approach - though intended to strengthen the agency's enforcement capabilities - may produce unintended consequences that ultimately reduce competition in downstream markets.

IV. CONCLUSIONS

For enforcement guidelines to be fully effective, it is therefore essential, despite any reliance on form-based criteria, to allow for reflection on the welfare-related nuances of cases that deviate from established case law. As a matter of fact, the Draft Guidelines appear to leave room for such considerations by upholding the consumer welfare paradigm as at least one governing principle and by explicitly acknowledging the role of efficiencies. Despite emphasizing a greater form-based approach and its benefits in improving enforcement efficiency, the Draft Guidelines do not, therefore, preclude case-specific assessments of economic effects. Such quantitative and qualitative analyses remain areas in which the Commission has developed significant expertise through its past decisional practice and will, consequently, continue to hold relevance.

24 Draft Guidelines on Article 102 TFEU at 165: "Access restrictions can be liable to be abusive even if the input at stake is not indispensable, as the need to protect the undertaking's freedom of contract and incentives to invest does not apply to the same extent as in a refusal to supply setting."

25 To support its position, the Commission refers to "access restriction" cases where public funds supported the creation of the input or where the dominant firm was not the owner of the network (see Draft Guidelines on Article 102 TFEU, para. 165, footnote 342). However, it is still unclear whether all "access restriction" cases are necessarily better intervention sites than "refusal to supply" cases. A dominant supplier may have legitimate reasons to lawfully terminate or amend inefficient supply contracts with a customer in order to reposition its own business.

26 See e.g. Draft Guidelines on Article 102 TFEU at 166 arguing that an abuse can take place "Where the commercial practices of the dominant undertaking may lead to the disruption of supply of existing customers."

27 Draft Guidelines on Article 102 TFEU at 97: "This obligation directly impinges on freedom of contract and the right to property of the dominant undertaking. It may also affect the incentives for competitors to develop competing inputs and the incentives for the dominant undertaking to invest in inputs."

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