

The Consumer Voice in Europe

Ref.: BEUC-X-2023-049

24 April 2023

Subject: BEUC input on the Call for Evidence on guidelines on exclusionary abuses by dominant undertakings

Dear DG Competition – Unit A1,

We are writing on behalf of BEUC, the European Consumer Organisation, to submit comments in response to the Call for Evidence on the proposal for guidelines on exclusionary abuses by dominant undertakings.

BEUC welcomes the initiative of the European Commission to amend its Guidance on the Commission's Article 102 enforcement priorities¹ to reflect the case law of the EU courts and its proposal to ultimately replace this guidance with guidelines on exclusionary abuses by dominant undertakings. This is important to provide greater legal certainty to undertakings in support of their self-assessment on compliance with Article 102 TFEU and to ensure that enforcement of this Treaty article fulfils its broad purpose effectively.

We agree with Executive Vice President Vestager that under the EU Treaties "EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy"² and that the concept of consumer welfare under EU law encompasses more than prices.³

EU competition law is in constant evolution as a result of cases brought by the European Commission over the last decades and the important case law developed by the EU courts. The guidelines should provide for greater legal certainty and transparency in enforcing Article 102 TFEU at Commission level and across the EU and therefore better protect consumers in the EU. This has become more important than ever in light of the increasing levels of market concentration across some sectors in the EU⁴ and the development of new markets, in particular digital markets, evidencing the application of traditional forms of abuse to new situations.⁵

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¹ Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7.

² Margrethe Vestager, 'Keynote of EVP Vestager at the European Competition Law Tuesdays: A Principles Based approach to Competition Policy' (SPEECH/22/6393, Brussels, 25 October 2022). The General Court explicitly recognised the importance of consumer choice "to ensure plurality in a democratic society", Case T-604/18 *Google Android*, point 1028.

³ See BEUC report, The Role of Competition Policy in Protecting Consumers' Wellbeing in the Digital Era, https://www.beuc.eu/sites/default/files/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf, in particular pages 11-13.

⁴ See footnote 5 of the Competition Policy Brief: A dynamic and workable effects-based approach to abuse of dominance, Issue 1, March 2023.

⁵ See BEUC report, The Role of Competition Policy in Protecting Consumers' Wellbeing in the Digital Era, https://www.beuc.eu/sites/default/files/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf

In this regard, the case law shows that an abuse of a dominant position can take different forms, and therefore it is important to ensure the guidelines are future proof by taking a broader approach in the way companies would need to assess whether a certain practice is likely or not to raise competition concerns. The guidelines should help companies in their self-assessment but should not restrict the scope of appreciation by the European Commission of new iterations or future types of abuse practices. Thus, conduct not covered by the guidelines can and should be subject to competition law scrutiny if competition concerns have been identified.

We would also like to stress that while exclusionary practices have been the focus of EU enforcement, it is important to not lose sight of the harms caused by exploitative practices, as recognized in Article 102(a) TFEU. These can be as detrimental to consumers as exclusionary practices, having a direct impact on consumers' interests.

The Commission's approach to Article 102 enforcement should encompass an update not only of the substantive case law, in such a way as to ensure that it is sufficiently future proof, but also consider up-to-date enforcement practices, whether these enforcement practice elements are included in the guidelines or elsewhere. This applies first to the types of evidence that the Commission will consider in the enforcement of Article 102 TFEU. The Courts have recognized that economic evidence should not be limited to industrial organization economic theories based on *homo economicus* but also include behavioral economics – how consumers actually behave.⁶ The Commission should second, also consider its enforcement practice in relation to the design of effective remedies under Article 102 TFEU. It is essential that the Commission sets out how it will undertake strong, effective and timely enforcement of Article 102 TFEU across all its dimensions.

We would be happy to expand on the above points during the continuing consultation on the proposed guidelines. Should you have any questions on our remarks, please do not hesitate to contact us.

Yours sincerely,

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⁶ For example, most recently, in Case T-612/17 *Google Shopping* and Case T-604/18 *Google Android*. This has also been recognised in recent legislation, notably in the Digital Markets Act (Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector).