

The Consumer Voice in Europe

GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS

BEUC's response to the public consultation



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Why it matters to consumers

Abuse by dominant companies of their market power can be very harmful to consumers. Dominant companies' abuse in breach of Article 102 TFEU has led to higher prices for consumers, for example in relation to chocolate and beer, medicines and digital services like music streaming or dating apps, or reduced choice when searching online. It is therefore essential that competition law enforcers swiftly and effectively tackle abuses of dominance to ensure that these abuses stop and to deter future abuses. The Commission's proposed Guidelines are a step in the right direction to achieve this, in particular as they set out which categories of conduct can be presumed to cause harm. This could lead to a speeding up of enforcement cases and the ability to bring more cases to stop such abuses. Where such abuses are proven, consumers should also be able to claim compensation for the harm caused to them.

Summary

BEUC strongly welcomes the proposed Article 102 Guidelines. These are a necessary step to make Article 102 TFEU enforcement effective for the benefit of consumers, the intended ultimate beneficiaries of this Treaty Article.

We welcome in particular that the Guidelines set out the case law of the European Courts and identify categories of conduct that can be presumed to lead to exclusionary effects and conduct that amounts to naked restrictions. This should form the basis for a more workable effects-based approach, for an administrable evidentiary framework, built on extensive case law to enable more effective and swifter enforcement of Article 102 which is currently unacceptably slow.

BEUC would suggest making some amendments to the draft Guidelines in the final version, notably in relation to:

- The description of the **scope of interests protected by Article 102** – the broad scope of these, as identified in the case law, should be set out more clearly in the Guidelines.
- The explicit inclusion of **exploitative abuses** in the Guidelines – these constitute an important category of abuses for consumers. While fewer exploitative cases have been brought in recent times than exclusionary abuse cases, exploitative cases have been pursued by both the Commission and national competition authorities and confirmed by the European Courts. Exploitative abuses must therefore be included in the Guidelines to promote legal certainty and self-assessment by dominant companies.

- Some clarifications on the **assessment of dominance**, notably in relation to digital markets.
- Some clarifications on the **assessment of abuse**, in particular in relation to the relevant legal (and economic) tests.
- The Guidelines should recognise that **consumer behaviour (behavioural biases)** can constitute a relevant element of abuses of dominance beyond tying and self-preferencing and should be considered as a potentially relevant element of any case involving consumer-facing markets.

Table of Contents

1. Introduction..... 4

2. The scope of Article 102..... 5

2.1. Notion of “welfare of consumers” 5

2.2. Exploitative abuses 6

3. General principles applicable to the assessment of dominance..... 7

4. General principles to determine if conduct by a dominant undertaking is liable to be abusive 7

4.1. Introduction..... 7

4.2. Conduct departing from competition on the merits 7

4.3. Capability to produce exclusionary effects..... 8

5. Keeping the Guidelines up to date..... 9

1. Introduction

BEUC welcomes the opportunity to contribute to the consultation on the draft Guidelines published by the Commission (“Guidelines) on the application of Article 102 TFEU (Article 102).¹

For victims of the abuse of dominance, including consumers, the enforcement of Article 102 is not currently working as it should. This needs to change.

BEUC has been a party in several abuse of dominance cases in recent times² and the speed of these cases is unacceptable from the victims’ perspective. Abuse of dominance cases, not only in digital markets, take far too long to be decided by the Commission, the European Courts and national competition authorities.³ It is well known that justice delayed can be justice denied. In some cases, the damage to competition has become almost irreversible.

Furthermore, unnecessary, over-complicated analysis of clear abuses in increasingly lengthy decisions (and judgements) ties up enforcers’ resources which is likely leading to some abuse cases not being brought at all, further undermining the deterrence effect of Article 102.⁴

This situation has harmed consumers and the effective functioning of markets, including innovation opportunities.

We need to recognize that under-enforcement is a policy choice. Under-enforcement and slow enforcement are not only harmful in a specific case of abuse but also in terms of deterrence of further abuses, and more generally as concerns the concepts of the rule of law and justice. A lack of cases also inhibits Article 102 enforcement from developing to keep pace with new harmful conducts and challenges.

BEUC therefore strongly supports the approach taken in the Guidelines which is well supported by the case law of the European Courts as a step towards more effective enforcement of Article 102. In particular, BEUC welcomes the Guidelines’ approach in identifying categories of conduct that can be presumed to lead to exclusionary effects and conduct that amounts to naked restrictions. This approach should form the basis for a proportionate evidentiary burden on enforcers where conduct is likely to cause consumer harm and provide for a better balance between false positives and false negatives than resulted from the previous 2008 Article 102 Guidance on enforcement priorities.⁵

¹ See [2024 article 102 guidelines - European Commission \(europa.eu\)](#)

² These include cases before the Commission and the EU Courts such as *Google Shopping* - from Case AT.39740 to Case C-48/22 P, *Google Android* - from AT. 40099 to Case C-738/22 P, *Apple App Store Practices (Music Streaming)* - Case AT. 40437, *Amazon Marketplace/BuyBox* - Cases AT. 40462/ 40703, and the *Aspen* (pharmaceuticals) – Case AT.40394 and *Renfe* online rail ticketing distribution – Case AT.40735 commitments cases.

³ See also “How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission’s Future Guidelines on Exclusionary Abuses”, by Heike Schweitzer, Simon de Ridder, June 2024, <https://academic.oup.com/jeclap/article/15/4/222/7690940?login=false>

⁴ Ibid.

⁵ [EUR-Lex - 52009XC0224\(01\) - EN - EUR-Lex \(europa.eu\)](#)

BEUC also welcomes that the Guidelines set out the European Courts' position in relation to a number of legal issues which have been lengthily debated in various cases, delaying enforcement to the detriment of consumers. These legal arguments have now been decided by the recent case law of the Court of Justice, as usefully detailed in the draft Guidelines.⁶

In taking this approach, the Guidelines not only set out the Court's case law, providing greater legal certainty for companies, enforcers and courts (also in the private enforcement of Article 102), but also the Commission's enforcement policy for the present and the future.⁷

The Guidelines once adopted should make a significant contribution to more effective enforcement of Article 102. They should furthermore be complemented by the revision of Regulation 1/2003, the regulation governing competition law enforcement procedures, to speed up enforcement procedures and make them more fit for purpose for today's challenges and better serve consumers.

An effective approach to Article 102 enforcement is even more important today, where markets in the EU have become more concentrated as demonstrated in the Commission's recently published study: "Protecting competition in a changing world."⁸

In the following, BEUC sets out its views on some specific points in the Guidelines from the consumer perspective.

2. The scope of Article 102

2.1. Notion of "welfare of consumers"

The EU Courts have consistently found that Article 102 does not have a narrow consumer welfare standard.⁹ Article 102 protects multiple interests. These include choice, quality and innovation, at the lowest prices for consumers, as set out in paragraph 1 of the Guidelines but is not limited to this. The Courts have found that Article 102 also protects "consumer well-being", with "the well-being of both intermediary and final consumers [...] as the ultimate objective"¹⁰, including, for example, "plurality in a democratic society",¹¹ "the functioning of the internal market" and "an effective structure of competition".¹²

The broad scope of interests protected by Article 102 is well summarised more recently for example in the *European Superleague* judgement¹³ stating that "the purpose of that provision is to prevent competition from being restricted to the detriment of the public

⁶ For example, whether the AEC test is required is now set out, for example, in *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraphs 264, 266, 269; *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 129-131 (both judgements of the ECJ Grand Chamber); and *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 78, 91 and 92; *Unilever*, C-680/20, EU:C:2023:33, paragraphs 56-60; *Post Danmark II*, Case C-23/14, ECLI:EU:C:2015:651, paragraphs 59-62;

⁷ As was the case for the 2008 Article 102 Guidance on enforcement priorities, see footnote 4.

⁸ [KD0924494enn_Protecting_competition_in_a_changing_world_staff_report_2024.pdf](#) (europa.eu)

⁹ Or "welfare of consumers" (paragraph 5, Guidelines).

¹⁰ *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 46.

¹¹ *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 1028.

¹² *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 41-44, 68.

¹³ *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 124.

interest, individual undertakings and consumers, by sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition”, which is repeated by the ECJ in the *Google Shopping* case.¹⁴ The *European Superleague* judgement also notes that Article 102 covers restrictions placed on competitors from “entering [...] market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation”.¹⁵

This scope of interests protected by Article 102, including dynamic competition, should be made more explicit in Section 1.1 of the Guidelines¹⁶ – also for the stated purposes of (1) ensuring consistency of approach in the decentralised enforcement of Article 102 in the EU¹⁷ and (2) enabling companies to self-assess their compliance with Article 102.¹⁸ These concepts of harm within the scope of Article 102 should also be referenced in paragraph 51 of the Guidelines. They illustrate clearly that the approach of the Guidelines to not only focus on effects of dominant companies’ conduct on as efficient competitors¹⁹ is supported by the case law.

Finally, the content of footnote 4 of the Guidelines which describes the notion of “quality” (including sustainability) could also usefully be moved into the main body of the Guidelines for greater clarity. More guidance should be provided on abuse of dominance in relation to sustainability as in the Horizontal Guidelines under Article 101 TFEU.²⁰

2.2. Exploitative abuses

While the Guidelines contain an acknowledgement of exploitative abuses²¹, the Guidelines should make clear that exploitative abuses can and will be pursued, as in the recent EU Apple App Store Practices (Music Streaming) case²², Aspen Pharmaceuticals²³, and several cases brought by national competition authorities. Again, this is important for legal certainty and the Guideline’s stated goal to assist with self-assessment. Legal principles and examples should be set out in the Guidelines for exploitative abuses in the same way as for exclusionary abuses, based on cases brought by the Commission, the national competition authorities and judgements of the European Courts including in *Meta Platforms and Others*, Case C-252/21.²⁴

¹⁴ *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraph 87.

¹⁵ *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 131.

¹⁶ See also: European Commission: Directorate-General for Competition, McCallum, L., Bernaerts, I., Kadar, M., Holzwarth, J. et al., A dynamic and workable effects-based approach to abuse of dominance, Publications Office of the European Union, 2023, <https://data.europa.eu/doi/10.2763/731952>.

¹⁷ Paragraph 4, Guidelines.

¹⁸ Paragraph 8, Guidelines.

¹⁹ Cf. the 2008 Article 102 Guidance on enforcement priorities -see footnote 4 above.

²⁰ Guidelines for the assessment of horizontal cooperation agreements, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.259.01.0001.01.ENG&toc=OJ%3AC%3A2023%3A259%3ATOC.

²¹ See paragraph 11, Guidelines.

²² *Apple App Store Practices (Music Streaming)*, Case AT. 40437.

²³ *Aspen*, Case AT.40394.

²⁴ *Meta Platforms and Others*, Case C-252/21, ECLI:EU:C:2023:537.

3. General principles applicable to the assessment of dominance.

BEUC broadly supports the approach taken in this section of the Guidelines but sets out below a few points of detail.

Paragraph 20 and footnote 32 refer to the SSNIP test. This will not be relevant to many abuse cases in digital markets with zero monetary price markets or cases characterised by ecosystems. This section should therefore be aligned more closely with the Market Definition Notice.²⁵

Paragraph 26 and footnote 41 appear to suggest that dominance could exist at a market share below 10%. While it is noted that this would require exceptional circumstances, without any examples of what is contemplated here (beyond reference to *Metro SB-Großmärkte GmbH & Co. KG v Commission, Case 75/84*), this does not appear very helpful in terms of guidance for self-assessment.

Paragraph 30 notes the importance of considering behavioural biases in identifying dominance which is to be highly welcomed. The importance of behavioural biases (and thus the consideration of behavioural economics) should however also be recognised more generally, in particular in relation the concept of abuse (see section 4.3 below).

This paragraph also makes reference to data-driven advantages. This concept should be considered in a broad manner, beyond the data itself to include the ability to make use of data, for example other resources required in relation to the development of AI.

We welcome that the Guidelines also set out principles on collective dominance, particularly in light of the Commission's findings that markets have become more concentrated in the EU.²⁶

4. General principles to determine if conduct by a dominant undertaking is liable to be abusive

4.1. Introduction

BEUC supports the two-step approach taken by the Guidelines which is in line with the majority of the Court's case law, in particular two recent judgements of the ECJ Grand Chamber.²⁷

4.2. Conduct departing from competition on the merits

BEUC supports the approach taken in this section of the Guidelines but sets out below some points of detail.

²⁵ See paragraph 30 of the Commission Notice on the definition of the relevant market for the purposes of Union competition, [EUR-Lex - 52024XC01645 - EN - EUR-Lex \(europa.eu\)](#).

²⁶ See [KD0924494enn Protecting competition in a changing world staff report 2024.pdf \(europa.eu\)](#).

²⁷ *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 129-131 and *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraphs 165-167; see also *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 103.

Paragraph 55 e) should now also make reference to the ECJ judgment in *Google Shopping* (recital 186).

Paragraph 57 where it defines “all legal and factual elements” should explicitly note that consumer behaviour (behavioural biases) can constitute a relevant element of market dynamics and/or the specific features of the conduct at stake.²⁸ Similarly the Guidelines should recognise that financial analysis could be relevant to establishing all legal and factual elements in a case.

4.3. Capability to produce exclusionary effects

BEUC strongly supports the approach in the Guidelines to identify categories of conduct which can (1) be presumed to lead to exclusionary effects and (2) constitute naked restrictions, in addition to conduct for which, as a general rule, it is necessary to demonstrate a capability to produce exclusionary effects. This approach is highly welcomed to improve the effective and timely enforcement of Article 102 in the interests of consumers, and to facilitate self-assessment by dominant companies.

While the draft Guidelines may require some adjustment in relation to specific issues²⁹, they are – at last - a very welcome step in the right direction to improve the current situation – to set out a workable effects-based approach, an administrable evidentiary framework, built on extensively cited case law.

BEUC welcomes the recognition in **paragraph 60 (b)(i)** that the actual competitive reality of the market must take precedence over arguments based on theoretical assumptions; the approach to the “counterfactual” set out in **paragraph 67** which is supported by the case law, most recently also by the ECJ in the *Google Shopping* case³⁰ (which could be added to the Guidelines); and to the as efficient competitor (AEC) principle and test in **paragraph 73 and 144**, also considered in *Google Shopping*.³¹ Further details could be added on when protecting less efficient competitors is relevant.

BEUC also welcomes that **paragraph 72** of the Guidelines sets out the case law³² that to fall within the Article 102 prohibition, harm to consumers can be either direct or indirect.

As set out above, the recognition of the relevance of behavioural biases in the Guidelines is welcome. However, the potential significance of behavioural biases must also be mentioned more broadly in relation to the finding of an abuse where behavioural biases/user behaviour have now been recognised numerous times by the Court – implicitly or explicitly – and most recently by the Court of Justice in *Google Shopping*.³³ The Guidelines mention user behaviour only in relation to tying in **paragraph 94**³⁴ and self-

²⁸ *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraphs 160, 166, and 168.

²⁹ Including following the judgment in *Intel*, Case C-240/22 P, ECLI:EU:C:2024:915.

³⁰ *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraphs 218-231.

³¹ *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraphs 264, 266, 269.

³² *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 44 and 47; *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraph 87.

³³ *Google Shopping*, Case C-48/22 P, ECLI:EU:C:2024:726, paragraphs 141, 160, 171-2.

³⁴ Referencing *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 1041 – 1042; *Google Android*, T-604/18, EU:T:2022:541, paragraphs 583 and 593; Commission decision of 16 December 2009, Case COMP/39.530 — *Microsoft (Tying)*, paragraphs 47-54.

preferencing in **paragraph159**.³⁵ They should make clear explicitly that behavioural biases could also be relevant in other potential abuses where consumer behaviour could be part of the specific circumstances in the case.

5. Keeping the Guidelines up to date

In light of the objectives of the proposed Guidelines, in particular to set out the Court's case law, providing greater legal certainty, it would be advisable to provide for regular review of the Guidelines and to update them where necessary.

³⁵ Referencing Commission decision of 27 June 2017 in Case AT. 39740 - *Google Shopping*, section 7.2.1 and *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 283; Commission decision of 20 December 2022 in Case AT.40462 - *Amazon Marketplace* and AT.40703 - *Amazon Buy Box*, paragraph 203. And by analogy *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 96-99.



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