

Public Consultation on Article 102 Guidelines

28 October 2024

Introduction

We are writing on behalf of a group of browsers who share common concerns about practices that undermine users' choice in the desktop browser ecosystem. We welcome the opportunity to respond to the public consultation on the Guidelines on exclusionary abuses of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU).

Enforcement of Article 102 TFEU is a key tool in the EU's efforts to promote fair competition and prevent companies with dominant positions from harming business users and consumers. In our experience, the browser desktop space has been suffering from competition foreclosure, not only by preventing rivals from entering the market and growing but by hindering the users' experience and as a result lowering the quality of services.

Assessment of a market position of the undertaking concerned and of its competitors

Abuse of a dominant position can take different forms and, especially as technology evolves, it is important to understand what drives consumer choice. The Commission's approach to Article 102 enforcement should therefore consider how consumers behave. In particular, an economic cost-benefit analysis which attempts to balance anticompetitive and procompetitive effects, should therefore not limit itself to traditional industrial organization economic theories.

In Section 2.2.1, "*market position of the undertaking concerned and of its competitors*", the Commission guidelines rightly point that "*market shares that remain stable over time may still be a reliable indicator of dominance in these markets*". It will be important to consider adding to the guidelines where the undertaking has an ecosystem that allows for "applications barrier to entry"¹ which in turn add value to the dominant undertaking, further cementing its dominant position. As such, this should allow the Commission to also understand how a position can be leveraged on adjacent markets.

Ubiquity

When assessing market power, the Commission should consider characteristics in an ecosystem such as whether the dominant undertaking has adjacent products or services whose

¹ See Case COMP/C-3/39.530 – Microsoft (tying), Commission Decision (Dec. 16, 2009), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_5.pdf

presence is ubiquitous. Indeed, recognizing the ubiquitous presence of adjacent services² that are tied to a dominant operating system has allowed the Commission to intervene in the PC market. Where such ubiquitous presence is the result of tying and bundling, not the result of competition on the merits, the assessment by the Commission should consider how to prevent the same type of infringement happening in the future with other application software³. Therefore, we would welcome the Commission to make explicit reference to the assessment of ubiquity in the guidance for the assessment of a market position.

Consumer behavior

One area where the Commission should consider further guidance relates to the use of economic tools. Considering how consumers behave can allow the Commission to establish foreclosure or potential foreclosure, particularly in presence of tying and bundling, even where the undertaking does not hold a high market share in adjacent markets but where consumers/users are forced to use services of the dominant undertaking in their journey to access or download alternative services (for instance when users are forced to use Microsoft Edge to download an alternative browser for the first time as this is an artificial distribution advantage that other web browsers are unable to match⁴ or where users are forced to use Microsoft Edge, despite setting an alternative browser as a default).

Tying and bundling

The guidelines recognize that “*although dominant undertakings can defend themselves against their competitors, they must do so by using means which fall within the scope of competition on the merits*”. In our experience, there are a number of practices that deviate from competition on the merits on Windows devices.

Conduct such as creating obstacles to setting a new default service and using deceptive or misleading prompts (often called dark patterns) to discourage users from switching and forcing the use of own services (opening links) fall outside competition on the merits and therefore should be more explicitly mentioned in the guidelines.

² The Commission took the preliminary view that by tying Internet Explorer to Windows, Microsoft ensured that Internet Explorer was as ubiquitous on PCs world-wide as was Windows. Microsoft controls the distribution of Internet Explorer with Windows and does not afford competing web browser vendors access to that mode of distribution. Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. 1I-3601 (Ct. First Instance), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004TJ0201>

³ European Commission. (2024, June 25). *Commission sends Statement of Objections to Microsoft over possibly abusive tying practices regarding Teams*. https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3446 and “Furthermore, Microsoft had already faced proceedings in the United States for a practice similar to the abusive tying at issue, namely the tying of its Internet Explorer browser and its Windows client PC operating system, and the possibility cannot be precluded that it might commit the same type of infringement in future with other application software.” Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. 1I-3601 (Ct. First Instance), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004TJ0201>

⁴ European Commission. (2009, January 17). *Antitrust: Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows*, MEMO/09/15. https://ec.europa.eu/commission/presscorner/detail/en/memo_09_15

In the Commission's assessment of the requirement of paragraph 89(c), the above mentioned behavior should be considered as a form of coercion, as the choice of the consumer is undermined therefore limiting effective competition. As regards the requirement set out in paragraph 89(d), artificial consumer frictions (technical or by the user interface design) can result in exclusionary effects. The same applies to paragraph 94 d) where consumer inertia can be driven by conduct such as the use of the above mentioned tactics that aim at manipulating the user towards the tied service or discourage the user from using alternatives.

As some of these conducts can be a violation of other areas of law such as the Digital Services Act (DSA) or the Digital Markets Act (DMA), an explicit reference articulated in paragraphs 55 a) and c), as well as 60 b), is welcome.

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,

Opera



Waterfox



Wavebox



Vivaldi



Open Web Advocacy

