

TRAINLINE'S RESPONSE TO INVITATION FOR PUBLIC CONSULTATION

To Directorate-General for Competition – Unit A1

Ref. HT.100055 Guidelines on exclusionary abuses

From Trainline

Date 31 October 2024

INTRODUCTION AND STANDING OF CONTRIBUTOR

- (1) We note that from the period of 01 August 2024 to 31 October 2024, the European Commission (the “**Commission**”) has invited all interested citizens, organisations and public authorities to contribute to the public consultation¹ regarding the Commission’s Guidelines on the application of Article 102 TFEU² to abusive exclusionary conduct by dominant undertakings³ (the “**Guidelines**”). We further note that contributions are particularly sought from companies with business operations in the EU in all sectors of the economy.
- (2) This document is submitted by Trainline for the attention of Unit A1 of the Directorate-General for Competition (“**DG Comp**”) with such to be considered as Trainline’s contribution to the aforementioned public consultation on the Guidelines.
- (3) Trainline is a leading independent European online retailer of rail and coach tickets, selling tickets to millions of travellers worldwide and is Europe’s number one most downloaded rail travel app⁴. Through Trainline’s website and mobile app, users can search, book and manage domestic and cross-border, multimodal journeys in one place. Trainline sells tickets on behalf of more than 300 rail and coach companies in over 40 countries, including Rail Undertakings (“**RUs**”) across Europe.
- (4) Trainline helps customers find the best value fares for their journey, with an aim is to make rail and coach travel easier and more accessible, encouraging people to make more environmentally sustainable travel choices. Trainline remains committed to solving the booking complexity inherent in rail which often makes modal shift challenging and stifles growth of the passenger rail market. The survival of independent ticketing platforms on the online rail passenger ticketing market is essential in order to achieve the Commission’s goals of sustainable transport to the Green Transition.
- (5) Independent online retailers like Trainline play a crucial role in attracting travellers to rail services thanks to their substantial investment in technology and online marketing. To do so effectively, all players need to be able to compete on a level playing field.

¹ Guidelines on exclusionary abuses of dominance: 2024 article 102 guidelines - European Commission (europa.eu)

² Treaty on the Functioning of the European Union

³ COMMUNICATION FROM THE COMMISSION Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings

⁴ Trainline is the first result of recommended app by both App store and Google Play when we search online the “Europe’s number one most downloaded rail travel app”.

- (6) With the emergence of independent ticketing platforms, consumer experience in the rail passenger ticketing market has improved considerably. Independent platforms have led the shift to ticketing digitalisation and continue to pioneer new technology and functionality for consumers.
- (7) However, the survival of independent ticketing platforms, like Trainline, remains challenging, where regulatory reform for retailer competition on the online rail ticket distribution market remains slow to evolve. Trainline and others have, however, persisted and national competition authorities of various Member States⁵ as well as the Commission⁶ have recognised the importance of the presence of independent ticketing platforms on the Market; and the necessity of a level playing field to ensure the latter's continued survival.
- (8) Given Trainline's operation in a market which is characterised by the presence of dominant, near monopolistic undertakings, and Trainline's experience in challenging the anti-competitive behaviour of EU rail incumbents⁷ at national and EU level under Article 102 TFEU, Trainline particularly pleased to see the Commission's draft Guidelines published and is well placed to contribute to the public consultation.
- (9) The legal certainty and guidance which the Commission's draft guidelines afford Trainline, and others, are necessary to safeguard the still precarious position of independent ticketing platforms on the online rail passenger ticketing market. With that in mind, Trainline calls upon the Commission to give particular attention to the points of feedback as regards the Guidelines raised herein.
- (10) Trainline wishes to address a number of points raised in the current version of the draft Guidelines, namely:
1. **Recommendation:** Data
 2. **Recommendation:** Margin Squeeze
 - 2.1. **Recommendation:** Method of Calculation
 - 2.2. **Recommendation:** Interplay between Margin Squeeze and Refusal to Supply
- (11) Additionally, Trainline wishes to respectfully propose the inclusion of new material in the Guidelines, namely:
3. **Recommendation:** Digital Markets

1. RECOMMENDATION: DATA

- (12) Trainline considers that the Guidelines present a unique opportunity to explicitly underscore the general indispensable nature of data, both in business-to-business ("B2B") and business-to-consumer ("B2C") situations, particularly in cases of vertically integrated companies. Whilst the Guidelines implicitly do so, they fall just short of a more expansive consideration of data as *indispensable*. Under Section "4.2.3: Refusal to Supply", an "input" is held to be indispensable

⁵ BKartA decision of 26 June 2023 (B9-144/19) published on 18 July 2023: Open markets for digital mobility services – Deutsche Bahn must end restrictions of competition.

⁶ European Commission: Commission accepts commitments by Renfe opening up competition in online rail ticketing in Spain, 17 January 2024 (https://ec.europa.eu/commission/presscorner/detail/en/ip_24_201).

⁷ Notably Renfe, Deutsche Bahn, Trenitalia and ÖBB

where “*there is no real or potential substitute to it*”.⁸ In stating this, the Commission relies on its own Renfe Commitments Decision.⁹

- (13) Per the Commission, the Renfe Commitments address its competition concerns relating to Renfe's refusal to supply rival ticketing platforms with (i) **full content** concerning its range of tickets, discounts, and features; and (ii) **real-time data** (pre-journey, on-journey, or post-journey) related to its passenger rail transport services. The Commission preliminarily found that Renfe's refusal to provide its full content and real-time data may have prevented rival platforms from competing with Renfe's own direct digital channels to the detriment of consumers, **contrary to Article 102 TFEU**. Given its subject matter, the relevance of the Renfe Commitments Decision to the Guidelines is obvious – however, **Trainline considers that the Guidelines would benefit from importing the finer points of the decision as regards the indispensable nature of the data in question.**

- (14) The necessity of data has been noted by the Commission itself, with the then Director of Transport, Henrik Morch, noting that the Commission's specific concerns which the Commitments are intended to remedy:

*“To compete effectively with Renfe's own online sales channels, third party ticketing platforms need access to certain data: first they need access to all the tickets, discounts, special offers displayed by Renfe on its online channels; second they need access to Renfe's functionalities, for example to allow consumers to change or reschedule tickets or to process reimbursement claims in case of delays; and third, they need access to Renfe's real time data such as information on delays, disruption of services or on platform numbers.”*¹⁰

- (15) As noted by the Commission, access to all this data allows third party ticketing platforms to create a product adequately addressing consumers' needs when searching for a trip on a website or app: “*Renfe has now committed to make available to third-party ticketing platforms, irrespective of the channels they use to access Renfe content and real time data, all the current and future content and real-time data displayed on any of its own online channels.*”

- (16) Most importantly however was the assertion that the Renfe Commitments “*will also set a precedent for other rail incumbents in the EU*”¹¹. Indeed, the Renfe Commitments are representative of a jurisprudential traction in the EU which has been in motion concerning access rights in relation to the online rail passenger ticketing market.

- (17) The same sentiment was echoed by the Executive Vice-President in charge of competition policy – who acknowledged the important role that independent ticketing platforms play and the necessity of access to information in order for them to compete on the market:

*“Today's decision opens up competition in online rail ticketing services in Spain. From now on, independent ticketing platforms will have access to all the information necessary to innovate and compete effectively with Renfe's online distribution channels. **This is crucial***

⁸ Para. 101 of the Guidelines

⁹ Footnote 243 of the Guidelines.

¹⁰ Directorate General of Competition: “COMP Flash | Renfe's commitments to improve online ticket distribution”, 17 January 2024: <https://www.youtube.com/watch?v=c4fRXdNEGoo>

¹¹ Ibid.

*for more affordable rail services and promoting environmentally friendly means of transport."*¹²

- (18) From this it can be derived that **data amounts to an input, which, in cases where there is no real or potential substitute that exists for it, is indispensable**. Trainline's proposal is that it would therefore add certainty and clarity to this position if this was to be explicitly included in the Guidelines.
- (19) The Guidelines may be further enhanced on this point where the indispensable nature of data means that it represents a potential flash point which can result in abuses such as:
- i. barriers to entry;
 - ii. refusal to supply; and
 - iii. access restrictions.
- (20) Trainline considers that the inclusion of concrete, scenario-based examples of such abuses arising in a data related context may also be particularly valuable and suggests the following:

1.1 Example 1 – Barriers to Entry

- (21) Both the French and German national competition authorities have acknowledged that "the collection of data may result in entry barriers when new entrants are unable either to collect the data or to buy access to the same kind of data"¹³. As regards the online rail passenger ticketing market, the marginalisation of independent ticketing platforms such as Trainline occurs as a result of differentiated data access. This results in the entrenchment of already dominant rail incumbents, who, often control access to the data, are in a position to provide better services which in turn attracts more customers (and by extension more data). By contrast, smaller ticketing platforms might attract fewer consumers and as a result have less data.
- (22) As the gap in market share increases, so might the gap in data collection, which could further increase the gap in the quality of services proposed to customers. Finally, the higher revenues earned by larger undertakings could fuel higher investments (such as new algorithms, new functionalities, entry on adjacent markets, etc.), thereby attracting even more customers and more data. Such a trend represents the possibility to seriously harm competition by converging towards a monopolization of data-related markets. The result on the online rail passenger ticketing market is a self-reinforcing market position for the dominant rail undertakings at the expense of independent ticketing platforms such as Trainline.

1.2 Example 2 – Refusal to Supply

- (23) The abusive behaviour of RUs in refusing to supply third-party ticketing platforms with pre/during/post journey planning and ticketing data which is essential to the latter's operation on the market impedes platforms' ability to compete on this market. This refusal by RUs thus harms not only the platforms themselves but also the end consumer in reducing their choice.

¹² European Commission: Commission accepts commitments by Renfe opening up competition in online rail ticketing in Spain, 17 January 2024 (https://ec.europa.eu/commission/presscorner/detail/en/ip_24_201)

¹³ Autorité de la concurrence and Bundeskartellamt, 'Competition Law and Data' (2016), p. 11: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=4

- (24) Indeed, the Renfe Commitments and the Commission's endorsement of the same constitute a recognition that access to such data constitutes an "objectively necessary" input, and without which (in situations where a RU refuses to supply) third-party ticketing platforms cannot compete on the market, which as noted by the Commission is to the "*detriment of consumers*".
- (25) This decision practice makes clear that the denial of access to this data for independent ticketing platforms results in the erosion and elimination of effective competition on the online rail passenger ticketing market

1.3 Example 3 – Access Restrictions

- (26) Unfairly restrictive conditions tied to the access of data may be discriminatory. This is a particular risk where vertical integration is concerned, as discriminatory access to strategic information or data can have the effect of distorting competition.
- (27) For instance, an incumbent rail service provider operator also operating as an online ticket vendor may get access to information about its competitors selling on that marketplace and about the behaviour of consumers. By identifying the range of tickets that are more in demand, an integrated platform could then be able to more efficiently adjust the range of products it sells as well as the pricing of its products. A similar effect could be achieved by such a platform, if it restricted the information that its competitors operating on the marketplace get about the transactions it is involved in. Such information transfers and limitations could make the integrated platform operator more competitive than its competitors operating in its marketplace.

2. RECOMMENDATION: MARGIN SQUEEZE

- (28) We note that in the section in the Guidelines pertaining to Margin Squeeze ("**MSQ**"), abuse is defined in a somewhat narrow sense and may benefit from further clarification:

*"Margin squeeze refers to a situation where an undertaking that is active in an upstream input market and an associated downstream market sets its upstream or downstream prices at a level that prevents downstream competitors relying on that input from operating profitably on a lasting basis."*¹⁴

- (29) Trainline is concerned by the lack of acknowledgment in the Guidelines of a MSQ abuse occurring where a dominant company, which is active in an upstream market, is paying companies present on the downstream market (on which said dominant company also operates) at a level which does not allow the downstream companies to cover their costs, and which is lower than costs incurred by its own distribution arm active on the downstream market.
- (30) Whilst Trainline considers that such a situation already fits within the existing MSQ definition, it is not necessarily obvious or easily recognised by national competition authorities. The Commission could clarify that a scenario whereby a dominant undertaking abuses its position through means such as remuneration of its competitors (in which case remuneration is the equivalent to the "prices") that does not allow the latter to cover their long run average incremental costs, qualifies as abuse of MSQ.

¹⁴ Para. 121, Guidelines.

- (31) Indeed, such a MSQ scenario is often seen in action in the online rail passenger ticketing market whereby an incumbent rail operator benefits from its dominant position in the sale of train tickets and the dependence on it of all ticketing platforms seeking to maintain an economic activity and compete with said incumbent's distribution arms on that same market.
- (32) As regards the economic relationship between an incumbent rail operator and independent ticketing platforms, platforms such as Trainline charge customers the full retail price and transfer that revenue, minus its commission rate, to the incumbent rail operator. **This transfer is equivalent to "prices" per the MSQ definition.** In other words, the retail price equals the price of the ticket paid by the consumer minus the commission rate and finally, the retail margin equals the commission granted to the independent ticketing platform by the rail operator minus its costs. Thus, if a commission rate is fixed for example at 2%, so long as it does not cover retail costs, there exists a MSQ.
- (33) This should be **further clarified in the Guidelines** since this intermediation model is growing and is particularly problematic in sectors such as rail where independent platforms are not the dominant players.
- (34) In this scenario, an incumbent rail operator, being a vertically integrated firm and in a dominant position in the upstream market, can indeed influence both the capacity of competitors such as Trainline to cover their costs whether directly (through the commission fixed amounts and the **profits** that competitors may earn) and indirectly (insofar as the dominant undertaking's own retail price without any margin of manoeuvre on the maximum price that can be charged by rivals.)
- (35) It can thus be concluded that MSQ can arise whenever the gap between the "price" charged for the product on the upstream market compared to the price charged on the downstream market, does not allow an equally efficient competitor such as an independent ticketing platform to trade profitably in the downstream market on a lasting basis by covering the retail costs it incurs when it sells tickets online.

2.1 Method of calculation

- (36) Trainline notes under Section 4.2.5. (para.122) concerning MSQ that the Guidelines provide the following:

margin squeeze is considered as liable to be abusive where the following conditions are met:

- a) the undertaking concerned is vertically integrated and is dominant on the upstream market;*
- b) the spread between the upstream and downstream prices prevents equally efficient competitors that rely on the dominant undertaking's input from operating profitably on a lasting basis on the downstream market; and*
- c) the conduct is capable of producing exclusionary effects.¹⁵*

- (37) As regards condition b), the Guidelines provide that said condition is established by means of a price-cost test where "the spread between the price that the dominant undertaking charges to competitors upstream and the price that it charges to its customers downstream is either negative

¹⁵ Para 122, Guidelines.

or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs that that undertaking has to incur to supply its downstream products.”¹⁶

- (38) Trainline notes however that no specific calculation method is prescribed in the Guidelines for the price-cost test to be employed in determining whether a MSQ exists.
- (39) With that in mind, Trainline proposes the explicit inclusion of the Long-Run Average Incremental Cost calculation method (the “**LRAIC**”) as **one of the bases** for the MSQ price-cost test.
- (40) We note the Guidelines themselves define LRAIC as the:

“Average of all the variable and fixed costs incurred in producing a particular product during its lifecycle, which therefore include product specific fixed costs incurred before the period in which the allegedly abusive conduct took place, including costs that are sunk. LRAIC can be understood as including not only all variable costs and fixed costs directly attributable to the production of the total volume of output of the product in question, but also the increase in all common costs insofar as the increase is caused by the production of that product. As regards common costs, the mere fact that a certain cost is common to several operations does not necessarily imply that the LRAIC due to the activity in question is zero for any individual product. It is necessary to assess whether such a common cost would have been incurred, partially or totally, if the undertaking had decided not to provide the product in question“ ¹⁷

- (41) The Commission also has defined LRAIC as:

“...the difference between the total costs incurred by the undertaking when producing all products, including the individual product under analysis, and the total costs of the undertaking when the output of the individual product is set to zero, holding the output of all other products fixed. Such costs include not only all volume sensitive and fixed costs directly attributable to the production of the total volume”. ¹⁸

- (42) Trainline notes that the use of the LRAIC calculation model is explicitly recommended by the Guidelines in the context of predatory pricing: *“the notions of average avoidable cost (“AAC”) and LRAIC may better capture the relevant dominant undertaking’s costs, depending on the circumstances” ¹⁹*
- (43) Trainline **requests that the same explicit reference to the LRAIC calculation model be made in the Guidelines in the context of establishing the existence of a MSQ** by means of determining that the spread between the upstream and downstream prices prevents equally efficient competitors, reliant on the dominant undertaking’s input, from operating profitably on a lasting basis on the downstream market.

¹⁶ Para. 124, Guidelines.

¹⁷ Para 116 - Guidelines

¹⁸ Commission Decision of 15.10.2014 on Case AT.39523 – Slovak Telekom, para 861.

¹⁹ Para. 110

(44) LRAIC is a well-known method for determination of regulated prices in different industries).²⁰ The benefits of employing an LRAIC model include the following:

- It can provide incentives for efficient investment and utilization of existing infrastructure.
- When bottom-up modelling is used, the costs of obsolete investments, sunk costs and historical inefficiencies can be avoided.
- It is a cost reflective approach based on the current costs of the modern equivalent asset for the optimization of the transmission and distribution network.
- It is a predictable approach based on the transparent technology optimization, costing and demand forecast.²¹

2.2 Interplay between MSQ and Refusal to Supply

(45) Trainline notes that the Guidelines hold that “*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.*”²² and that the Commission has previously articulated that “*a margin squeeze is not a type of refusal to supply but an independent form of abuse that is subject to different criteria of assessment*”²³

(46) Trainline welcomes the statement that “*it is not appropriate to pursue as a matter of priority margin squeeze cases only when those cases involve a product or service that is objectively necessary to be able to compete effectively on the downstream market*”²⁴. Accordingly, Trainline understands that whilst MSQ and refusal to supply constitute two separate and distinct abuses, MSQ may still involve a product or service that is objectively necessary to be able to compete effectively and there still exists a capacity for a refusal to supply and MSQ to be established **concurrently, albeit distinctly**.

(47) Trainline therefore considers that the **inclusion of a clarification as regards the fact that the abuses are not mutually exclusive and may be established in parallel** would be welcome.

3. RECOMMENDATION: DIGITAL MARKETS

(48) Trainline welcomes the provisional guidance provided in the Commission’s guidelines. As a scaling European digital platform, Trainline, has experienced the threat and harm of under regulated, so called “gatekeeper” entities entering the Market and, for example, engaging in self

²⁰ Mainly in regulated sectors that large proportion of joint and common costs and long investment cycles and where a promotion of incentives for the efficient investments and utilisation of assets is needed.

²¹ Long-run Average Incremental Costing (LRAIC) Model for TSO and DSO Methodology guidelines, PwC.

²² Para. 97 – Guidelines.

²³ Annex to the communication from the commission – Amendments to the 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, **27.03.2023**, p.3 ([link](#)).

²⁴ Annex to the communication from the commission – Amendments to the 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, **27.03.2023**, p.3 ([link](#)).

preferencing behaviour – exacerbating the competitive challenges faced more broadly in online These concerns have previously been brought to the attention of the Commission.²⁵

- (49) With that in mind, Trainline noted with interest the prominence with which the successful “*Google Shopping*”²⁶ case and the principles set out therein feature in the Guidelines. Trainline is however **concerned by the absence of a dedicated section of the Guidelines addressing 102 TFEU in digital markets** capitalizing on the most recent case-law. Aside from a limited number of brief references to digital markets as examples, there exists no dedicated address of the unique issues faced on digital markets in the Guidelines. Trainline considers there should be a specific paragraph **highlighting the articulation between the Digital Markets Act (“DMA”) and Article 102 TFEU and the fact that the latter still applies – and will be applied - to the digital sector.**
- (50) The need for a standalone section of the Guidelines specifically addressing digital markets is underscored by the extensive reliance of the Guidelines on the Google Shopping case. The employment of novel and digital related jurisprudence and decisions marks a departure from the historic economic sectors on which issues such as abusive dominance and Article 102 TFEU violations were most prevalent, namely telecommunications.
- (51) Whilst Trainline understands that the Guidelines are not sector specific, Trainline nonetheless considers that the Guidelines represent a unique opportunity to provide an initial framework of guidance on Article 102 TFEU’s operation for digital markets, given the important role of digitalization.
- (52) Indeed, addressing digital markets in the Guidelines would be consistent with the Commission’s pioneering and recent work on competition concerns in the digital sphere. Since the start of 2023, the Commission has implemented the world’s first *ex ante* competition regulation in the digital sector, the Digital Markets Act (DMA), and opened the first investigations into suspected non-compliance with it. At the same time, beginning of 2024 the Commission published its new Notice on the definition of the relevant market for the purposes of Union competition law. For this text, although the guidelines are intended to be of use to all sectors, the Commission has taken care to address the specific issue of digital platforms²⁷.
- (53) In parallel, the Commission and competition agencies of several member states have continued active enforcement of traditional competition rules, pushing ambitious investigations into the conduct of major digital platforms and closely scrutinising digital mergers, while beginning to actively probe competition issues in frontiers such as generative artificial intelligence (AI) and virtual worlds.
- (54) Given that the Commission has already launched investigations targeting alleged abuses of dominance by major tech companies, the Commission’s current approach to dealing with these digital markets and platforms in the context of Article 102 TFEU investigations should be reflected in the Guidelines. These investigations cover a variety of practices, ranging from the use of data, algorithms, technology and platform rules, to tying and self-preferencing.

²⁵ Paper entitled “Google’s Train Module is not DMA Compliant” submitted by email to DG Comp on 5 March 2024.

²⁶ *Google and Alphabet v Commission (Google Shopping)*, Case T-612/17, EU:T:2021:763

²⁷ Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C, C/2024/1645, 22.2.2024.

- (55) In parallel, at a national level the competition authorities of Member States are also taking action against the practices of smaller, but nonetheless abusive, platforms. Trainline thus considers that the current practice and investigative priorities of the Commission and national competition authorities should be reflected in the Guidelines.

4. CONCLUSION

- (56) Trainline respectfully calls on the Commission to consider the recommendations outlined in this document. Trainline considers that owing to its operation in the online rail passenger ticketing market, a growing market but one which is dogged by anticompetitive behaviour perpetrated by rail incumbents, its contributions are particularly valuable. Having been at the coalface of anticompetitive behaviour, Trainline is ready and willing to assist the Commission in establishing clear and effective Guidelines. To that end, Trainline is available to further discuss any of the above matters or others with the Commission at its convenience.