



MFE - MEDIAFOREUROPE N.V.'s contribution to the public consultation on

Guidelines on exclusionary abuses of dominance

Introduction

1. On 27 March 2023, the European Commission ("**Commission**") launched a Call for Evidence¹ seeking feedback on the adoption of Guidelines on exclusionary abuses of dominance in the context of Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**").
2. On 1 August 2024, the Commission published draft Guidelines on exclusionary abuses (the "**Guidelines**") and launched a public consultation seeking feedback on the proposed text.²
3. MFE - MEDIAFOREUROPE N.V. ("**MFE**") welcomes the opportunity to comment on the Guidelines. MFE welcomes in particular the Commission's intention of applying Article 102 TFEU vigorously also taking into account "*the digitalisation of the Union economy, which makes strong network effects and "winner takes all" dynamics increasingly widespread*".³
4. MFE is the holding company of one of the largest radio and TV broadcasting groups in Europe. It is the leading commercial TV operator in the Italian and Spanish commercial TV sector both in terms of audience and advertising market share.
5. MFE welcomed the adoption of Regulation (EC) 2022/1925 ("**Digital Markets Act**" or the "**DMA**")⁴ because its activities in the media sector put MFE in relation with undertakings designated as being "gatekeepers" under the DMA. MFE is a business user for these gatekeepers and often also a competitor.
6. Thus, MFE approaches this consultation primarily with a view to draw the Commission's attention on the need to ensure a better interplay between the DMA and antitrust enforcement under Article 102 TFEU.
7. The consultation is indeed a perfect opportunity to rethink the application of Article 102 TFEU, bearing in mind the lessons learnt in enforcing this provision vis-à-vis gatekeepers, the shortcomings

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en.

² https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3623.

³ See para. 4 of the Guidelines.

⁴ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

of such enforcement in the past, and the need to future-proof such enforcement.

8. It is MFE's firm belief that the best way to ensure that Article 102 TFEU remains relevant in an increasingly digitalized context is to infuse its enforcement with a strong dose of complementarity with the DMA.
9. Moreover, MFE recalls that EVP Margrethe Vestager stated that competition policy should be able of ensuring "*plurality in a democratic society*".⁵ MFE is particularly sensitive to this goal. Through its long-standing presence at the forefront of the European media scene, MFE has experienced first-hand the deterioration of the conditions of competition and the related detrimental impact on pluralism and democracy.
10. Therefore, the combined application of Article 102 TFEU and DMA is warranted for the protection of competition **and** pluralism.
11. With this premise in mind, in the remainder of this document, MFE will make the following points:
 - A. The Court of Justice recently confirmed that **self-preferencing** by dominant undertakings is a red-line in competition law. The Guidelines should be reflective of this evolution in the case law, stating that self-preferencing is presumed to lead to anticompetitive exclusionary effects.
 - B. The Guidelines should clearly include breaches of the DMA as examples of infringements of a regulatory obligation which can give rise to **coordinated enforcement action** under (i) the DMA (by the Commission or national competent authority for non-compliance) **and** under (ii) Article 102 TFEU (by the Commission or national competition authority for exclusionary effects).
 - C. The Guidelines should take into account that **tying** is widely used by gatekeepers. The legal test in the Guidelines for making a finding of abuse in this connection seems ill-suited, as it requires a level of coercion that is unduly high to prove. Thus, MFE proposes to introduce an additional test which is better designed to capture dynamics in the platform economy.

Self-preferencing should be included among the conducts that benefit from a presumption of exclusionary effects

12. At paras. 60, the Guidelines make a broad distinction between

⁵ See EVP Margrethe Vestager's Keynote "*A Principles Based approach to Competition Policy*" at the European Competition Law Tuesdays of 15 October 2022. See also judgment of 14 September 2022, *Google and Alphabet / Commission (Google Android)* (T-604/18, EU:T:2022:541), where the General Court held that the anticompetitive behaviour at stake "*restricted the development of search services directed at those segments of consumers that attached particular value to, inter alia, the protection of privacy or specific linguistic features within the EEA. Such interests were not only consistent with competition on the merits, in that they encouraged innovation for the benefit of consumers, but were also necessary in order to ensure plurality in a democratic society*" (para. 1018 - emphasis added).

- conducts for which it is necessary to demonstrate a capability to produce exclusionary effects and
 - conducts that is **presumed** to lead to exclusionary effects.
13. The basis for this distinction is an interpretation of the case law of the Union Courts and whether there is a specific legal test for the conduct at issue in the case law.
14. Self-preferencing is currently categorized in the group of conducts for which the presumption does not apply. As a consequence, the burden of proof is higher.
15. However, MFE believes that self-preferencing warrants being included in the group of conducts for which the presumption applies because in the judgement of **10 September 2024**, *Google Shopping*, case C-48/22 P⁶ (issued after publication of the draft Guidelines), the Court of Justice endorsed a specific legal test also for this type of conduct.
16. Indeed, in commenting about this judgment, EVP Margrethe Vestager stated that *“the favourable treatment of its own services by a dominant company can be a breach of Article 102 TFEU”* and that *“[g]oing forward, the Commission will make sure that the principles enshrined in this judgement – which is now final – are upheld for the benefit of all European consumers”*.⁷
17. In the following paragraphs, MFE will show that, based on the Court of Justice’s recent judgement, self-preferencing meets the criteria for being included in the group of conducts which should be presumed as having a high potential to produce exclusionary effects.
- 18. Self-preferencing is not competition on the merits.**
19. According to para. 14 of the Guidelines, for a conduct to be abusive, it must (i) depart from competition on the merits and (ii) being capable of having exclusionary effects.
20. As regards self-preferencing departing from competition on the merits, the Court of Justice could not have been clearer in confirming the General Court’s holding that (i) *“the more favourable positioning and display of Google’s own specialised results in its general results pages”* and (ii) *“the simultaneous demotion, by adjustment algorithms, of results from competing comparison shopping services”* departed from the competition on the merits (para. 171 of the judgment).
21. In particular, the Court of Justice held (in para. 172 of the judgment) that it was correct to classify in law self-preferencing “as [a practice] *deviating from competition on the merits*”.
- 22. Self-preferencing should be presumed as being capable of having exclusionary effects**
23. According to para. 167 of the judgment in case C-48/22 P, a conduct may be categorised as ‘abuse of a dominant position’

⁶ EU:C:2024:726.

⁷ See press release of 10 September 2024 “Remarks by Executive Vice-President Vestager following the Court of Justice rulings on the Apple tax State aid and Google Shopping antitrust cases”: https://ec.europa.eu/commission/presscorner/detail/en/speech_24_4624.

“where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those 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”.

24. As noted above, it is settled that self-preferencing departs from competition on the merits. In para. 226, the Court of Justice held that it had been demonstrated to the required legal standard that self-preferencing *“had led to a decrease in generic search traffic to almost all of the competing comparison shopping services”*, hence it was a blocking measures for rivals, preventing their growth *‘to the detriment of consumers, by limiting production, product or alternative service development or innovation’*.
25. On this basis, one can interpret the judgment as setting out a specific legal test for self-preferencing. In particular, it is enough to establish that an instance of self-preferencing is a blocking measure to prevent competitors’ growth, *‘to the detriment of consumers, by limiting production, product or alternative service development or innovation’*, to ascertain that the practice is an abuse of dominance.
26. Thus, paras. 53 and 60, lett. b), of the Guidelines should be amended to include also self-preferencing and paras. 156-162 of the Guidelines should be moved to section 4.2.
27. In addition, the following clarification/changes to such paras. 156-162 are suggested, to take into account the judgment of the Court in case C-48/22.
 - Paragraph 157 should reflect that self-preferencing practices by dominant undertaking are **in law** capable of deviating from competition on merits;
 - Paragraph 160 should be amended to take into account the specific legal test upheld by the Court of Justice.
 - Paragraph 162 should be amended with the aim of specifying that the dominant company bears the burden of demonstrating that the conducts do not deviate from competition on merits based on its effects.
28. In sum, self-preferencing by a dominant company should be included within the practices for which there is a presumption of exclusionary effects. MFE underlines that this change would not only be fully reflective of the recent case also, but it would also send a powerful signal to gatekeepers.

Failure to comply with an access obligation under the DMA should be clearly marked as being abusive, empowering National Competition Authorities

29. Para. 163 et seq. of the Guidelines deal with access restrictions as a form of exclusionary abuse.
30. Para. 166 of the Guidelines provides a (non-exhaustive) list of examples of access restrictions that may be considered in breach of Article 102 TFEU. Para. 166, lett. b), includes in the list the dominant undertaking’s failure to comply with *“a regulatory obligation to give access”*.

31. MFE believes that the Guidelines should clearly spell out that such regulatory obligations include also access obligations under the DMA.⁸
32. In particular, the DMA mandates gatekeepers to comply with several access obligations in the form of a mandatory provision of certain **data**. In particular, MFE notes the following provisions:
- a. **Article 5(9) and 5(10) of the DMA** set out several transparency obligations by allowing advertisers and publishers (or third parties authorised by them) to access detailed information related to the online advertising services provided to them.
 - b. **Articles 6(8) of the DMA** obliges the gatekeeper to grant access to its performance measuring tools and the data necessary for advertisers and publishers to carry out their independent verification of the ad inventory – and to do this free of charge.
 - c. **Article 6(10) of the DMA** requires gatekeepers to give business users access to and use of detailed data associated with their services.
33. Moreover, **Article 6(12) of the DMA** obliges gatekeepers to offer fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision.
34. The obligations to provide data play a central role in lowering barriers to entry in the advertising sector and providing transparency,⁹ while the obligation to provide FRAND access can directly contribute to mitigate the existing market power connected with entrenched positions of the gatekeepers.
35. Failure to comply with the access obligations under the DMA may result in non-compliance proceedings by the Commission or by national competent authorities.¹⁰
36. However, to boost the effectiveness of the DMA, it would be highly advisable to take advantage of the complementary role of DMA and Article 102 TFEU and **stating in para. 166, lett. b), of the Guidelines that failure to comply with an access obligation under the DMA can also trigger an antitrust breach.**

⁸ In principle, any breach of the DMA could be also prosecuted under Article 102 TFEU, not just access obligations under the DMA. However, the focus here is on DMA access obligations because there is guidance in the case law on failure to grant access as a form of abuse of dominance. Moreover, some of the obligations under the DMA aim at enjoining gatekeepers from pursuing a certain conduct rather than mandating a positive obligation to provide an input. See, e.g., Article 6(2) of the DMA (“*The gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users*”).

⁹ In this respect, recitals 45 and 58 of the DMA indicate that the “*conditions under which gatekeepers provide online advertising services to business users, including both advertisers and publishers, are often non-transparent and opaque*”.

¹⁰ See Article 38(7) of the DMA (“*Where it has the competence and investigative powers to do so under national law, a national competent authority of the Member States enforcing the rules referred to in Article 1(6) may, on its own initiative, conduct an investigation into a case of possible non-compliance with Articles 5, 6 and 7 of this Regulation on its territory. Before taking a first formal investigative measure, that authority shall inform the Commission in writing*”).

37. There are several reasons that justify this clarification:
- a. Clearly signalling that a failure to comply with the DMA may result in a breach of Article 102 TFEU is a tool to empower National Competition Authorities (“NCA”).
 - b. In turn, empowering NCAs would give concrete meaning to the declaration of principles enshrined in Article 1(6) of the DMA that *“This Regulation is without prejudice to the application of Articles 101 and 102 TFEU”*.
 - c. As the enforcement of the DMA enters its second year, it has become clear that policing gatekeepers’ behavior requires “all hands on deck”. NCAs have an important role to play. But so far there has been limited involvement of NCAs in matters falling within the DMA’s scope. It is time to rectify this situation.
 - d. Finally, clearly associating DMA and Article 102 TFEU would send a powerful signal to gatekeepers.
38. Thus, the Guidelines should make clear that it is possible for an NCA to open proceedings for breach of Article 102 TFEU when the conduct at issue is a non-compliance with a DMA access obligation.
39. While boosting effectiveness, this complementarity would be fully in line with the *ne bis in idem* principle, should the Commission (or a national authority) decide to open non-compliance proceedings in parallel with an NCA opening proceedings under Article 102 TFEU. This is because the principles in the *bpost* case law would be observed.¹¹
40. ***(i) there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties,***
41. As the Guidelines recall in para. 13, “Article 102 TFEU may also apply to conduct which falls within the scope of other regulations, Union or national, that govern the behaviour of undertakings in the market”, quoting well-established case law and, indeed, also a more recent case involving the simultaneous application of the GDPR and Article 102 TFEU.¹²
42. Also, Article 1(6) of the DMA clearly states that the DMA is without prejudice to the application of Article 102 TFEU.
43. Thus, the case-law, the Commission practice and the wording of the DMA constitute “clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties”.
44. ***(ii) There are clear and precise rules making it possible also to predict that there will be coordination between the two competent authorities.***

¹¹ Judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paras. 40 et seq.

¹² Judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, EU:C:2023:537, paras 47-54.

45. The Commission has competence to enforce both Article 102 TFEU and the DMA. In turn, as regards the enforcement of Article 102 TFEU, the Commission coordinates with NCAs through well-established legal channels. The same is true with respect to non-compliance proceedings pursuant to the provision of Article 37 of the DMA.
46. Therefore, there are clear and precise rules, making it possible also to predict that there will be coordination between the authorities running parallel proceedings under the DMA and Article 102 TFEU.
47. ***(iii) The two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe.***
48. This condition would be met by virtue of the coordination between the Commission, NCAs and/or national competent authorities under Articles 37 and 38 of the DMA.
49. ***(iv) The overall penalties imposed correspond to the seriousness of the offences committed.***
50. The DMA has clear rules on the duty to take into account the gravity of an infringement when setting fines (Article 30 of the DMA). These rules in fact mirror the rules on the criteria of setting fines for breaching Article 102 TFEU set out in Commission Guidelines (subject to scrutiny of the Courts).
51. Therefore, in case of parallel proceedings, the overall penalties will correspond to the seriousness of the offences committed.
52. In conclusion, MFE believes that the Guidelines should include a clear reference to the possibility that breaches of the access obligations under the DMA can be prosecuted also as being an abuse of dominance, fully leveraging on the complementarity between the two instruments.

The coercion requirement in tying abuses should be updated

53. Paras. 84 et seq. of the Guidelines deal with tying and bundling as a form of abusive conduct for which a legal test has been established, hence there is a presumption about exclusionary effects.
54. On this basis, para. 89 of the Guidelines goes on to set out the legal test, listing the requirements for a practice to fall in the tying category. These requirements are the following:
 - a) the tying and tied products must be two separate products;
 - b) the undertaking concerned must be dominant in the market for the tying product;
 - c) the undertaking concerned must not give customers a choice to obtain the tying product without the tied product (a situation referred to as “coercion”); and
 - d) the tying conduct is capable of having exclusionary effects.
55. As regards the coercion requirement, para. 92 of the Guidelines puts forward some further clarification. However, MFE notes that the Guidelines rely on case-law that predates the platform economy. As a consequence, the test for a finding of coercion seems ill-adjusted to capture current

market dynamics in a digital environment and may lead to under-enforcement.

56. More particularly, the Commission refers to the *Microsoft v Commission* and *Hilti v. Commission* judgments, dating from 2007 and 1991, respectively.
57. Moreover, focusing on whether the dominant company offers customers a choice, belies the technological interdependence between services/devices in an eco-system, and the related self-reinforcing effects.
58. For instance, in both on-platform and cross-platform tying practices¹³ customers may still have the choice to obtain the tying product without the tied product. Nonetheless, the overall quality of the services in the tied and/or tying market may be demoted in a way that customers either end up in accepting the tying services for convenience reasons or suffer from substantial loss in revenues.
59. This might be the case, for instance, if a dominant undertaking ties its payment services to its online marketplace only with respect to one part of the multi-side platform (i.e. end users).
60. In this case, the other side of the platform (i.e. intermediaries) either will end up accepting the method of payment or will exit the platform, suffering a severe loss in terms of discoverability and, therefore, a loss in revenues.
61. The same could apply a fortiori when the tied or the tying services is the display of customers' proprietary content in the page results of the search engine of a dominant undertaking where discoverability is even more crucial.
62. The DMA already provides for some anti-tying provision. In particular, Article 5(8) of the DMA prevents gatekeepers from making access to any of its Core Platform Services ("CPS") conditional to the subscription or registration to any of its other CPSs.
63. However, this provision has a limited impact to the extent that it can only tackle tying practices within the perimeter of the designated CPSs.
64. In this respect, MFE believes once again that the complementarity between the DMA and Article 102 TFEU enforcement is essential. Therefore, the legal test for coercion should be updated, introducing also a formulation that could better capture forms of coercion in the platform economy.
65. In particular, it could be added that coercion is present when:
 - a customer is de facto obliged to acquire the product/service in the tying service because otherwise the value of its product/service in the tied market will be severely reduced; and/or when
 - by not accepting the tying product/service, the customer's ability to enjoy the tied product/service is severely degraded.
66. In sum, MFE believes that the criteria for coercion should be updated, to take into account significant

¹³ See D. Mandrescu, "Tying and Bundling by Online Platforms - Distinguishing between Lawful Expansion Strategies and Anti-competitive Practices", (2021) Comp L Sec Rev 1, 1.



developments. By contrast, the test as currently formulated is likely to lead to significant under-enforcement as regards gatekeepers (unfortunately) widespread tying practices.

Conclusion

67. MFE believes that, when issued, the Guidelines will contribute to a stronger enforcement of Article 102 TFUE. Since such enforcement should go hand in hand with more enforcement of the DMA, the Commission should be mindful of the complementarity between the two instruments.