

European Commission consultation on its Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

Response from Match Group, Inc.

31 October 2024

This is the response of Match Group, Inc. (“**Match Group**”) to the European Commission’s (“**Commission**”) consultation on its Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) to abusive exclusionary conduct by dominant undertakings guidance document published on 1 August 2024 (“**Draft Guidelines**”).

Match Group, through its portfolio companies, provides online dating services in over 40 languages to users across more than 190 countries via mobile applications and websites. Match Group’s portfolio of brands includes Tinder, Match, PlentyOfFish, Meetic, OkCupid, OurTime, Pairs, and Hinge, as well as other brands.

Match Group is a member of the Coalition for App Fairness (“**CAF**”), which it understands has also responded to, or intends to respond to, the Commission’s consultation. Match Group supports the CAF’s response to the Commission’s consultation.

Match Group supports the Commission’s important work in enforcing competition law within the European Union. In particular, Match Group has consistently supported efforts by the Commission to address competition issues in digital markets, which importantly led to the adoption of the Digital Markets Act (DMA) in 2022.

Match Group considers that Article 102 TFEU must continue to play a role alongside the DMA. Indeed, it would be paradoxical if the world’s very largest monopolists would not face strict enforcement under Article 102 TFEU because they are also subject to regulation. In other sectors, regulated undertakings have been the targets of abuse of dominance investigations (e.g., telecom, energy, rail and post). Digital markets must not be the exception.

Match Group sets out below some non-exhaustive comments on the Draft Guidelines. We generally support the approach taken by the Commission, which we consider sets a clear framework for the analysis of potentially abusive conduct and makes a coherent distinction between different types of exclusionary abuse.

Making the Draft Guidelines more future proof

The Draft Guidelines provide a helpful interpretation of existing case-law in relation to the enforcement of Article 102 TFEU. However, more could be done to stress that the practices of dominant undertakings will develop, and new practices can also fall within the scope of Article 102. Match Group has identified several instances where this could be made clearer.

First, the Draft Guidelines contain a helpful overview of existing case-law on the topic of “competition on the merits” (Draft Guidelines, paragraph 55). However, new conduct not yet

addressed by the case-law can depart from competition on the merits for different reasons. At present, the Draft Guidelines only contain the factors already accepted by the EU Courts as relevant to the assessment of competition on the merits. It is important to be more explicit about the fact that other factors may be relevant as well. Two examples that could be mentioned in this respect are (i) the use of non-public competitor data, which is prohibited under the DMA and was the topic of two Commission investigations (*Amazon – Use of non-public data* and *Facebook Marketplace*); and (ii) the specific targeting of competitors or competing technologies (other than through discriminatory self-preferencing).

Second, in the discussion of the concept of “capability to produce exclusionary effects” (Draft Guidelines, Section 3.3), the Commission distinguishes between (i) conduct for which it is necessary to demonstrate a capability to produce exclusionary effects; (ii) conduct that is presumed to lead to exclusionary effects; and (iii) naked restrictions. While the Commission presents examples of each of these categories of abuse based on the CJEU’s case-law, it is not clear how new potentially abusive conduct is to be categorised.

As the draft Guidelines are currently worded, it would appear that for new conduct, it would always be necessary to demonstrate a capability to produce exclusionary effects (that is to say, that new conduct would always fall into category (i), above). However, it can also be the case that new conduct is so egregious that it can have “*no economic interest for [the dominant undertaking] other than that of restricting competition*” and therefore be a naked restriction.¹ This should be made clearer by ensuring that the list included in paragraph 60(c) of the Draft Guidelines cannot be interpreted as being exhaustive.

If it is not a naked restriction, then it would be necessary to demonstrate a capability to produce exclusionary effects, since the CJEU would not yet have adopted a legal test for such conduct. However, new legal tests may be adopted by the CJEU in future cases (including in preliminary references). This may create additional conduct that is presumed to lead to exclusionary effects. This possibility should also be recognised to preserve the dynamic applicability of the Guidelines.

Addressing conduct aimed at competitors or competing technologies

In markets dominated by digital platforms, it is key for app developers such as those that are part of Match Group’s portfolio to be able to continually innovate to offer the best experience to their users. Therefore, it is important that conduct by dominant platforms that is aimed at discouraging innovation or quality enhancement, including by using alternative services to the ones offered by the dominant platforms, is explicitly discussed in the Guidelines. In particular:

- In their discussion of “conduct departing from competition on the merits”, the Guidelines should make clear that conduct that is aimed at preventing or discouraging business users from switching to competitors (e.g., another platform) or competing technologies is included in the factors relevant to determining whether conduct departs from competition on the merits.

¹ Draft Guidelines, paragraph 60(c). An example is the *European Superleague* case which the Commission itself cites in the Draft Guidelines, which featured conduct not seen in previous case-law of the CJEU but is nonetheless seen by the Commission as an example of a case involving naked restrictions.

- Similarly, conduct that involves the use of non-public data from competitors or customers should be included in those factors.
- In their discussion of “elements that may be relevant to the assessment of a conduct’s capability to produce exclusionary effects”, the Guidelines should at paragraph 70(f) focus not only on actual or potential competitors, but also on competing technologies and distribution models.

Conclusions

Match Group welcomes the draft guidelines and commends the Commission for the hard work it put into developing them.

Key to Match Group is that the Commission continues to enforce Article 102 TFEU vigorously alongside the DMA, especially considering that the DMA contains a limited list of obligations that may not capture all the practices that are pursued by dominant firms in the digital space.

Match Group would also encourage the Commission to reflect on other issues that may improve the enforcement of Article 102 TFEU, such as the more frequent use of interim measures and the shortening of the timeframe of Article 102 TFEU cases.
