

Consultation guidelines on the application of Article 102 TFEU to exclusionary abuses of dominance

Introduction

Cloud and software are critical components of the modern digital economy. Market studies conducted by the Dutch and French competition authorities have highlighted significant issues within these markets.¹ Excessive strategic dependencies pose risks to business users of digital technology, and in turn to the broader European economy and society. The application of article 102 TFEU has an important role to play to address problems with market power that stem from dependence.

High levels of dependence and lock-in have exclusionary effects, preventing new entrants or smaller players to challenge the incumbents in the market for digital (cloud) technologies. The current draft Guidelines on the application of Article 102 TFEU ('the guidelines') can be improved by increasing clarity on this topic. We call on the European Commission to address dependence as a metric through which market power can be demonstrated.

Strategic dependencies in cloud- and software markets

Cloud and software markets are characterized by a lack of competition once a customer has chosen a provider.² Business users are locked in as a result of dependence. Dependence manifests in two ways:

1. Vendor lock-in means that users cannot switch to products and services from another supplier. Switching to another tech supplier is either prohibitively expensive or not supported technically.
2. Many technologies are fundamental to organizations as they are deeply integrated into their operations. This means that if the technology fails, the organization can hardly function. In this sense, dependency leads to risks to business continuity.

¹ ACM Market study into cloud services (5 September 2022) <https://www.acm.nl/en/publications/market-study-cloud-services>; Autorité de la concurrence market study on competition in the cloud sector (29 June 2023) [Cloud computing: the Autorité de la concurrence issues its market study on competition in the cloud sector | Autorité de la concurrence](#).

² ACM Market study into cloud services (5 September 2022) <https://www.acm.nl/en/publications/market-study-cloud-services>.

Business users experience that these forms of dependence lead to unfair market behavior by providers.³ Providers often increase prices without making clear what the added value is for customers or what the underlying increase of costs is. Additionally, services are rebundled, forcing customers to repurchase licenses. Licensing structures are changed unilaterally from the side of the provider: perpetual licenses, support contracts are discontinued or even entire business relationships which are terminated, severely exposing the business customer who has no alternative.

Of course, technological vendor lock-in will be addressed by the Data Act, to a certain extent. It remains to be seen what software services will be covered by the concept of data processing services.

The problem with regard to business continuity will remain however, due to ever-increasing digitalization and the embeddedness of cloud and software in organizations. Without competitive pressure for digital providers, customers of cloud- and software services are reliant on the willingness of the providers to adhere to fair business standards.

The application of Article 102 TFEU

Article 102 TFEU needs to be applied to tackle the issues in the cloud and software markets. This is crucial as the problems extend beyond the cloud market alone. What follows from the problems set out above, is that dependence should be introduced in the guidelines as a separate metric to define market power. We note that using dependence as a metric to establish economic power that can be abused is already current practice in Germany, France, Italy and Belgium.⁴

Providers with a small market share can exercise significant bargaining power due to technological vendor lock-in and the risk that customer's face for their business continuity. Focusing on market shares in these situations will not be representative for

³ In 2022 CIO associations from Belgium, France, Germany and the Netherlands have published their [11 fair principles in B2B relationships between business users and their cloud providers](#).

⁴ Section 20 of the Act against Restraints of Competition; Article L. 420-2, paragraph 2 French Commercial Code; Article 9 of Law no. 192 of 18 June 1998; Royal Decree of 31 July 2020 amending books I and IV of the Belgian Code of economic law as concerns the abuse of economic dependence, BS/MB 12 August 2020.

the power dynamics that are actually at play. With dependence as a metric to establish market power, both exclusionary and exploitative abuses can be addressed.

Conclusion: introduce dependence as a metric to establish market power

The cloud and software markets face significant challenges due to technical lock-in and skewed power dynamics. Regulatory measures like the Data Act and the application of Article 102 TFEU are essential to address these issues. The introduction in the guidelines of dependence as a metric to establish market power are necessary steps to ensure a competitive and fair market environment. Enforcement is paramount, not only for the effects in individual cases but also because we observe that market behavior by one provider has a strong precedent-effect on other providers.

CIO Platform Nederland & Beltug

With the largest Dutch and Belgian companies, knowledge institutions, and government organizations, CIO Platform Netherlands and Beltug form the largest Dutch and Belgian community of business users of digital technology. These organizations span nearly every sector: retail, manufacturing, healthcare, construction, banking, education, (health) insurance, logistics, transport, and government, driving the digitalization of Dutch, Belgian and European society and economy.

Inquiries

For questions regarding this position paper, please contact Ronald Verbeek, Director of CIO Platform Nederland, at Ronald.Verbeek@cio-platform.nl.