

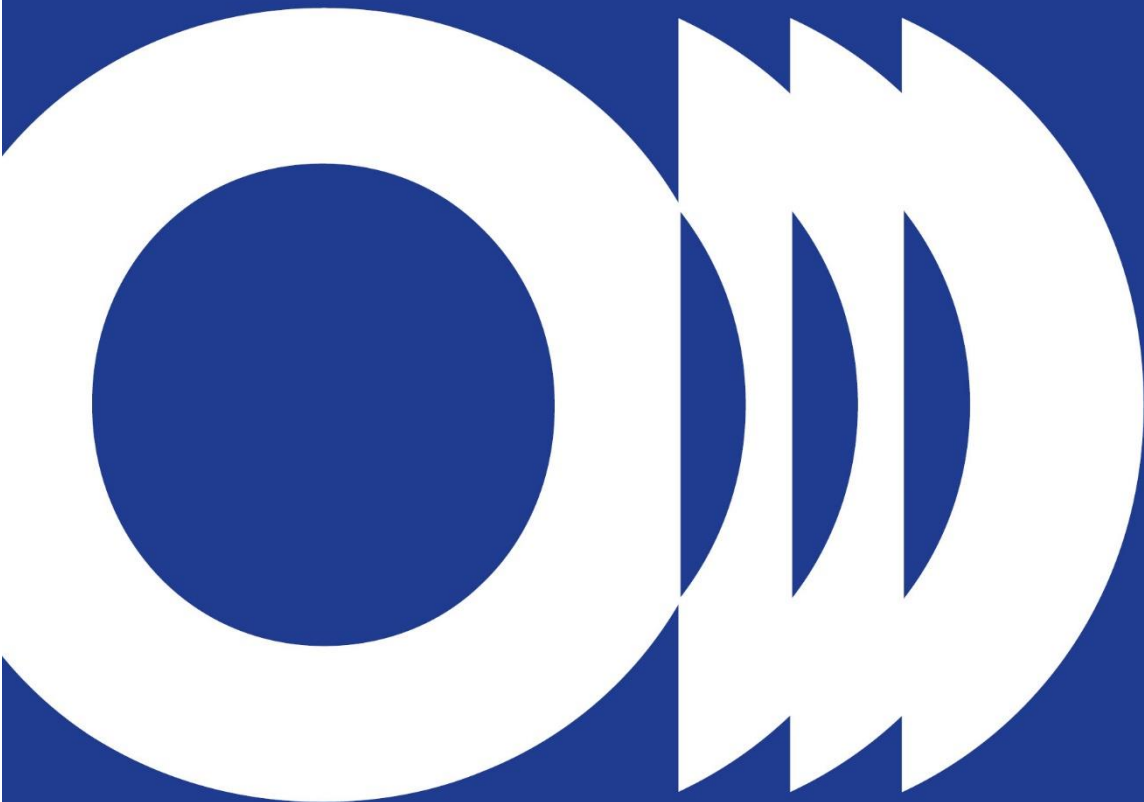
EBU

OPERATING EUROVISION AND EURORADIO

POSITION PAPER

EBU's comments on the European Commission's draft guidelines on the application of Article 102 TFUE to exclusionary practices

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EBU'S COMMENTS ON THE EUROPEAN COMMISSION'S DRAFT GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFUE TO EXCLUSIONARY ABUSES

ABOUT THE EBU

The European Broadcasting Union is the world's leading alliance of public service media (PSM). The EBU has 115 member organizations in 56 countries who operate nearly 2,000 television, radio and online channels and services and reach an audience of more than one billion people in 160 languages. PSM organizations are entrusted with the performance of a service of general economic interest, which consists, *inter alia*, of the provision of high-quality content that fulfils the cultural and democratic needs of the society they serve.

The EBU and its Members welcome the opportunity to provide comments on the Commission's guidelines on the application of Article 102 TFUE to abusive exclusionary conducts. The following paper brings to the European Commission's (the Commission) attention certain issues that are common to EBU Members.

We welcome the fact that the Guidance on the Commission's enforcement priorities in relation to abusive exclusionary conduct¹ have been updated and translated into formal Guidelines on abusive exclusionary conducts (the Guidelines) and reflect the EU Courts case law. We welcome the identification of categories of conduct that are presumed to lead to exclusionary effects and constitute naked restrictions. This approach will lead to a more effective enforcement of Article 102 TFUE. That said, we identified certain areas where the draft could be improved.

1. General considerations

First, while exclusionary conduct—where dominant companies attempt to exclude rivals—is essential to address, exploitative abuses can directly harm business users, innovation, and competition by enabling dominant firms to take advantage of their market position. Various recent cases and court rulings show that these types of abuses are extremely frequent in the digital sector (in particular in relation to data combination² and unfair access terms³). Addressing exploitative practices—such as imposing unfair data access requirements, non-transparent terms and conditions, or restrictive interoperability policies—is essential to protecting both consumers and business users from unfair treatment by dominant digital players. The lack of clear and comprehensive guidance on exploitative abuse could in turn create uncertainty for business users.

Second, the digital ecosystem is characterized by rapid innovation, network effects, data-driven economies, and high barriers to entry. Dominant players often operate multi-sided platforms, making traditional analyses under Article 102 TFEU more complex. The Guidelines should therefore allow the Commission to investigate new types of abuse practices (*i.e.* conduct not covered by the Guidelines) and that should be subject to competition law scrutiny. The focus should include leveraging data, algorithms, and interoperability requirements.

¹ European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, *OJ C 45*, 24.2.2009, p. 7–20.

² Case C-252/21, *Meta Platforms and Others*, 4 July 2023.

³ Case AT. 40437, *Apple App Store Practices (Music Streaming)*.

Besides, the guidelines should recognize non-price-based abuses, beyond practices such as discriminatory access to digital infrastructure and restrictive platform policies that limit PSM's ability to reach audiences (see below).

Third, the guidelines should actively promote faster decision-making, especially in fast-moving sectors like digital and AI related markets. Current Art. 102 proceedings can be excessively long, reducing their deterrent effect and allowing harm to continue unchecked. The duration of Article 102 proceedings has increased significantly over the years, particularly in cases involving complex digital markets (for instance, the *Google Search case (Ad Sense)* lasted more than 9 years).⁴ This delay undermines the efficacy of enforcement, especially in fast-moving industries where market conditions can change drastically during prolonged investigations.

The Commission should prioritize cases in the digital sector where delays in enforcement can cause irreversible damage to competitive structures and consumer choice. In particular, the evolving role of digital platforms warrants a recalibration of the guidelines to account for unique dynamics in online environments where traditional economic tools may no longer apply effectively.

Finally, we think that the EC should also provide guidance or a framework on how to enforce remedies (structural or behavioral). Remedies adopted in the context of the digital sector have in certain instances only partially addressed the competition concerns raised by business users. For instance, the *Google Shopping* remedies failed to dismantle Google's underlying incentives to self-preference its own services, nor did it compel Google to significantly change its search algorithms or ranking processes that prioritize its own content)⁵. This regulatory gap, in turn, was partially filled by the Digital Markets Act.

2. Improvement / suggestions

- **Cross- market power that arises in digital ecosystems**

The current draft guidelines on the application of Article 102 TFEU largely focus on traditional concepts of dominance within narrowly defined markets. However, in the context of digital platforms and ecosystems, this approach falls short of capturing the true extent of the market power held by these entities. Dominance in digital ecosystems often stems not from a single market, but from the interconnections between multiple products and services offered by a platform. This cross-market power, which is based on the ability of platforms to leverage their presence across multiple interrelated markets, poses unique competitive risks that the current guidelines do not adequately address.⁶

In digital ecosystems, companies such as Google, Apple, and Amazon control a network of interdependent services, including operating systems, app stores, voice assistants, cloud

⁴ Heike Schweitzer, Simon de Ridder, "How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses", *Journal of European Competition Law & Practice*, Volume 15, Issue 4, June 2024, p. 222–243.

⁵ The behavioral remedies imposed in the European Commission's Google Shopping decision have not effectively addressed the core issue of self-preferencing (Case AT.39740 –*Google Search (Shopping)*, C(2017) 4444 final). See [Open letter](#) of 12 November 2020 to EU competition commissioner Margrethe Vestager, signed by 135 companies and 30 industry associations and *Commission Staff Working Document*, Impact assessment report accompanying the document Proposal for a regulation of the European Parliament and of the Council, on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, p.42.

⁶ Budzinski, Oliver; Stöhr, Annika (2024), "Dynamic competition, exclusionary and exploitative abuses, and article 102 TFEU: Towards a concept of systemic market power?", *Ilmenau Economics Discussion Papers*, No. 186, Technische Universität Ilmenau, Institut für Volkswirtschaftslehre, Ilmenau.

services, and more.⁷ These interconnected services provide a competitive advantage that goes beyond the firm's position in any single market. Dominance in one area, such as an operating system, allows the platform to leverage that power across other areas, such as app distribution or media content delivery.⁸ The power these firms hold lies in their ability to integrate services and control access to critical infrastructure that competitors, including public service media (PSM), rely on to reach audiences.

This cross-market power is built on network effects and economies of scale. For example, a dominant platform may control the operating system on which a voice assistant or app store functions, thereby determining which apps and services are easily discoverable by users. These platforms, by leveraging their control across multiple layers of the digital value chain, can foreclose competitors in related markets, even when those competitors do not directly compete in the market where the platform's dominance originates. The result is a form of market power that spans multiple markets, making it harder for smaller players to compete fairly.

Accordingly, the traditional approach of defining markets narrowly and assessing dominance in each market separately fails to recognize the cross-market power that digital platforms possess. This narrow focus risks overlooking the cumulative impact of a firm's activities across its ecosystem. Digital platforms are not just dominant in isolated markets; they create interdependent environments where success in one market supports and strengthens their position in others. The principles for the assessment of dominance (section 2) should embrace this paradigm shift in order to account for dynamic economic thinking as well as the roles of digital ecosystems.⁹

- **Accounting for zero monetary price markets (in the digital sector)**

In certain markets (and notably in the digital sector), services may be offered at zero monetary cost (or at very low prices).¹⁰ When there is no price expressed in money, and output does not play a decisive role (since marginal costs are often very low), there is a strong case for competition law to focus on the other three parameters of competition: quality, choice and innovation.¹¹ Certain Commission *soft law* instrument recently factored in such non-monetary considerations (see e.g. the Market Definition Notice¹²). However, the Guidelines measure the effects of exclusionary conduct mainly based on price (see in particular categories of conduct listed under section 4). Accordingly, the Guidelines fail to provide a blueprint to assess harmful behavior towards consumers and competitors (in particular data-related practices).

It is widely being acknowledged that competition in digital markets is primarily driven by quality, variety and disruptive innovation. Competition analysis must therefore focus on assessing the effects of a firm's conduct on non-price parameters. Only then can a decision adequately consider the specific conditions of the affected markets. Exclusionary behavior may manifest through practices like cross-subsidization or locking users into ecosystems. For example,

⁷ See recent designation decisions adopted in the context of the Digital Markets Act – e.g. designation of [Alphabet](#), DMA. 100004.

⁸ H. Schweitzer, J. Haucap, W. Kerber & R. Welker, *Modernising the Law on Abuse of Market Power - Summary* of the Report's Recommendations, 2018.

⁹ A consistent implementation of this concept also implies considering systemic market power in the context of merger control.

¹⁰ There are various types of "zero-price" markets, such as markets for open-source software, other digital services, TV and radio, some sports competitions, and certain waste management and recycling markets.

¹¹ OECD, *Quality considerations in the zero-price economy* – Note by the European Union 28 November 2018.

¹² See Commission Notice on the definition of the relevant market for the purposes of Union competition, para. 30.

dominant platforms may harm business users and consumers by collecting and processing a vast amount of personal data.¹³ Similarly, scraping third-party content (e.g. news produced by another organization) may harm innovation (e.g. original investigative journalism) in news markets and therefore have wider ramifications for society and democracy more generally. The Guidelines must reflect how markets work in practice and capture how intangible assets (e.g. attention, data) and non-price practices (e.g. restrictions on multi-homing) affect competition.

To address this gap, the guidelines should provide a more detailed framework to assess the impact on competition of non-price parameters. For instance, instead of assessing whether a dominant platform is pricing below cost, the analysis could focus on whether the platform's practices—such as providing free services to lock users into its ecosystem—are capable of excluding competitors or preventing them from developing a sustainable business model (e.g., platform's user acquisition strategies, data-driven advantages, or network effects that entrench its dominance and limit opportunities for competitors to compete effectively).

- **End user biases**

A third area for improvement in the draft guidelines relates to customer behavior. In digital markets, users often exhibit behavioral biases that influence their decisions, such as a preference for default options or choices influenced by the platform's design. For instance, when a virtual assistant like Siri or Google Assistant is asked to play a news service or a radio station, default settings (*status quo* bias) or display may nudge them toward the platform's own services, reinforcing the platform's dominance and reducing the visibility of competing services.

The Guidelines should also consider more broadly the impact of end user biases, which can exacerbate the anticompetitive effects. As a result, the Guidelines take into account how default options and display influence user decisions and entrench the dominant firm's position.¹⁴

In conclusion, the draft guidelines for exclusionary abuses under Article 102 TFEU represent an important step toward addressing the challenges posed by dominant platforms in digital markets. However, there are several areas where the guidelines could be strengthened.

By incorporating these improvements, the guidelines would provide a more robust framework for addressing exclusionary abuses in digital markets and ensuring fair competition in sectors critical to democracy, such as media and communications

Last but not least, the Commission should not lose sight of the 102 enforcement in relation to exploitative abuses which are detrimental to the media sector (data practices, unfair pricing etc.).

Should you have any questions or remarks, do not hesitate to contact us.

¹³ Case C-252/21, *Meta Platforms and Others*, 4 July 2023.

¹⁴ See *Google and Alphabet v Commission (Google Shopping)*, T-612/17, para 172.