

Consultation Response to the Public Consultation on the on the European Commission's draft antitrust Guidelines on exclusionary abuse of dominance

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Consultation Response on the European Commission's draft antitrust Guidelines on exclusionary abuses of dominance

The Danish Press Publishers' Collective Management Organisation ("DPCMO")¹ is a collective management organization representing approx. 99 pct. of the Danish media and press publishers. The board of DPCMO consist of thirteen representatives of Danish media houses.

The overarching purpose of DPCMO is to ensure a free and independent press to support democracy and social cohesion in Denmark and the EU. DPCMO's raison d'être is therefore to ensure a level playing field and fair remuneration for Danish media in a digital context, where Danish media face new challenges and where international market have their own agenda, which risk creating a significant value gap and threaten the democratic exchange of information.

The members of DPCMO have granted DPCMO the right to represent them negotiations with Big Tech-undertakings on the press publishers' right under Section 69(a) of the Danish Copyright Act granting press publishers an exclusive right for the digital use of their press publications. Accordingly, DPCMO seeks to enter into agreements with providers of information society and online content sharing services to protect and enforce publishers' rights under Section 52(c) and Section 69(a) of the Danish Copyright Act. Section 69(a) and Section 52(c) transpose article 15 and article 17 of the Directive on Copyright in the Digital Single Market². DPCMO is approved by the Danish Ministry of Culture to enter into collective license agreements

Moreover, as of May 2024, the members have also joined forces on the topic of generative artificial intelligence and text and data mining. On 1 July 2024, the Danish Copyright Act was amended to allow mediation in connection with negotiations under the general extended collective license and in October 2024, DPCMO requested mediation with OpenAI by the Danish Ministry of Culture as OpenAI has informed DPCMO that OpenAI will not prioritise negotiations with DPCMO. We are now awaiting the Minister's appointment of a mediator.

Although DPCMO is predominantly active within the realm of copyright and related rights, in negotiating with Big Tech-undertakings, DPCMO is faced with the consequences of markets dominated by few market actors. On behalf of the rights holders DPCMO represents, DPCMO

¹ To read more about DPCMO please visit DPCMO's website: <https://dpcmo.dk/en>

² Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directive 96/9/EC and 2001/29/EC

considers it of outmost importance to ensure an effective competitive landscape by regulating the behaviour of said large market players.

On 1 August 2024, the EU Commission launched a public consultation inviting all interested parties to comment on draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings ("the Guidelines").

DPCMO welcomes the Guidelines with great optimism and confidence that they represent an important step in the right direction for creating a more effective framework for the development and implementation of Article 102 TFEU to the benefit of competition as such. DPCMO believes that the Guidelines in its current draft form appears well-constructed and addresses some key concerns. However, DPCMO is convinced that the Guidelines could be further improved. Thus, DPCMO hereby offers its comments on the Guidelines.

1 Competition on the merits

In understanding European Competition Law, it is equally important to understand the notion of "*Competition on the merits*". The concept is essential in the assessment of whether conduct by a dominant undertaking is abuse of dominance or legal by competing on the merits.³

The EU Commission explains in more detail in the Guidelines what is to be understood by the concept of competition on merits.

*"The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services."*⁴

DPCMO agrees with the approach by the EU Commission, and DPCMO appreciates the Guidelines' definition of the notion of competition on the merits. Considering the stakeholders, who DPCMO represents, DPCMO hereby contributes with the following remarks to the definition of the notion of competition on the merits.

1.1 Interplay with Other Legislation

It is DPCMO's understanding that the decisive factor is that the competition takes place on normal terms, so the conduct falls within the scope of *normal competition*.

However, as stated in the Guidelines, dominant undertakings can harm consumers by hindering, through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition.⁵

³ Cf. Section 45

⁴ Cf. Section 51

⁵ Cf. Section 6

This was the case in the European Court of Justice judgement of 4. July 2023, *Meta Platforms and Others*.⁶ In this decision, Meta Platforms (Facebook) collected data about user activities on and off the social network and linked them with the Facebook accounts of the users concerned. The data collected was used to create personalized advertising messages targeting the Facebook user. The Court of Justice stated that, in the context of the examination of an abuse of a dominant position by an undertaking, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules laid down by the GDPR.

It is DPCMO's belief that the judgment in question should not be limited to GDPR but should set a legal precedent for other areas of legislation as well. This would be of significant importance to DPCMO.

DPCMO protects the publishers' rights, when the publishers' media content and publication is used on online platforms such as Google's search engine, Alphabet's YouTube, Meta's Facebook and ByteDance's TikTok. Some dominant undertakings use the content from the publications by members of DPCMO without prior agreement. For instance, an article on a specific topic protected by copyright law and neighbouring rights may be used without permission or fair remuneration. The legal framework granting said exclusive rights is based on the fundamental principle that use of protected works must be subject to fair remuneration of the rights holders as enshrined in article 17 of the EU Charter of Fundamental Rights: intellectual property shall be protected. If this right to fair remuneration is not respected, this will create a decline in publishers' incentive to produce quality journalism for the benefit of democracy and society as such. To DPCMO, the unauthorized use or use on unfair terms in non-compliance with the underlying regulation on intellectual property rights and related rights may constitute an abuse of dominant position. This is particularly the case for digital markets, where a few dominant undertakings hold near-monopolistic positions allowing them to act independently of the competitive pressure which is characteristic to a well-functioning market with "normal" and effective competition.

The French Competition Authority has recently confirmed this approach in a dispute between Google and French press publishers. This is addressed in more detail in Section 2 below.

It is a prerequisite for the media to remain independent and maintain a certain standard of journalistic quality that dominant undertakings respect copyright law and do not, merely due to their market position, use journalism without having an agreement with the publisher. DPCMO's assessment is that dominant undertakings such as Meta and Google, do not compete on the merits in doing so. Within the scope of a normal competitive situation, an agreement would be made between the dominant undertaking and the publisher to display an article, story, etc., on their platform. Therefore, it is DPCMO's understanding that this conduct is an abuse of dominance, which the draft Guidelines confirm as it states that conduct that deviates from competition on the merits can constitute an exclusionary abuse within the meaning of Article 102 TFEU.⁷

⁶ Judgment of 4 July 2023, *Meta Platforms and Others* (General terms of use of a social network), C-252/21, EU:C:2023:537, paragraph 47

⁷ Cf. section 50

Accordingly, the DPCMO encourages the EU Commission to provide further guidance, including illustrative example, of how the doctrine from *Meta Platforms and Others* may apply to other cases of non-compliance, including in the area of exploitation of exclusive rights on digital markets. Moreover, DPCMO encourage more clarity in the Guidelines on how non-compliance with other legislation should be considered part of the assessment of the concept of "competition on the merits". DPCMO hopes that the EU Commission will take this into consideration when framing the final Guidelines.

1.2 Artificial Intelligence as a New Frontier of Competition Law

Based on DPCMO's reading of the current draft, there is no mention of Artificial Intelligence (AI) in the Guidelines. DPCMO believes that AI will become an increasingly significant part of the future and may serve as a new frontier of competition law enforcement. To DPCMO, it is evident how Big Tech-undertakings are incorporating AI in their current workstreams as well as investing significant resources in further exploring the opportunities this technology. Furthermore, it is evident that there already are undertakings in the AI market, including but not limited to OpenAI, which has rapidly gained significant market power. In addition to the specific regulation such as the AI Act, DPCMO believes that Article 102 TFEU will serve as an important regulatory tool for regulating AI in the future. Therefore, DPCMO's recommends that the EU Commission stays ahead of developments in AI by considering it directly in the Guidelines.

Based on DPCMO's experience, it becomes potentially anti-competitive behaviour when large AI service providers use media content without an agreement with the publishers. As stated in Section 1.1 above, the use of media content by a dominant undertaking without a prior agreement ensuring the consent and fair remuneration of the press publishers, will result in an abnormal competitive situation, and therefore not competition on the merits.

As briefly mentioned above, in October 2024, DPCMO requested mediation with OpenAI by the Danish Ministry of Culture. In the case it is undisputed that OpenAI has included DPCMO repertoire in its training until at least August 2024. It is undisputed that OpenAI does not respect TDM-reservations in terms & conditions of a website. It is undisputed that OpenAI until 'summer 2023' did not enable web publishers to express their preferences about the use of their content in AI. Considering the significant market power of OpenAI, DPCMO considers self-evident that OpenAI's behaviour does not constitute competition on the merits.

To DPCMO, there is no difference between the role that Big Tech-undertakings have played on digital markets such as social media, search engines and app stores, and the role that providers of AI services play and will play in the future. Accordingly, said AI service providers ought to be subject to the same level of competition law scrutiny as has been enforced against Big Tech-undertakings during the past decade by the Vestager Commission.

By way of example, the French Competition Authority addressed the concerns regarding AI in the dispute between Google and French press publishers. This is addressed in more detail in Section 2 below.

DPCMO recommends that the EU Commission consider whether AI should play a role in the Guidelines, as it is likely to have a significant impact on the future competitive landscape.

1.3 Effective Competition Policy

DPCMO appreciates that the EU hosts large, dominant undertakings that contribute to economic growth and enhance the wealth of the EU. It is important for DPCMO to emphasize that they are not opposed to large or even dominant undertakings, as these entities often provide significant benefits and a key driver to innovation. However, DPCMO wishes for these undertakings to engage with SMEs under normal competitive conditions. Therefore, DPCMO hopes that the Guidelines will contribute to creating a more effective competition policy within the EU.

An effective competition policy is also in line with Ursula von der Leyen's mission letter to the anticipated Competition Commissioner, Teresa Riera (the "Mission Letter").⁸

In the Mission Letter, von der Leyen emphasizes that Europe needs a new approach to competition policy. DPCMO hopes that the final version of the Guidelines can be a step in the direction of the new and more effective competition policy. Furthermore, the Mission Letter highlights the need for a competition policy where there is more support for undertakings to scale up in the global market which allows European businesses and consumers to reap the benefits of effective competition. Lastly, the Mission Letter states that competition policy should also reflect the growing importance of resilience in the face of geopolitical and other threats to supply chains and of unfair competition through subsidies.

DPCMO supports this approach. To DPCMO, the purpose of ensuring effective competition policy is closely linked to ensuring the competitiveness of European undertakings against undertakings from third countries, particularly Big Tech-undertakings based outside of the EU. In Denmark the Government has declared that "Big Tech" will be a priority during the current government's Presidency. Digitalisation is dominated by a handful of powerful global tech giants that have a major impact on our society, the well-being of children and young people, democratic discourse, rules of law and our competitiveness in the EU.

An effective competition policy is also in line with Mario Draghi's report "*The future of European competitiveness*" from September 2024. Draghi highlights in the report that the EU has several fundamental prerequisites for being a competitive economy. One of the prerequisites is that the EU has a strong regulatory framework. DPCMO believes that a strong regulatory framework is central to an effective competition policy, especially in dealing with situations involving undertakings from third countries. Therefore, DPCMO hopes that the Guidelines can contribute to a strong regulatory framework, even though the EU Commissions guidelines are considered soft law.

⁸ 17. September 2024, Mission Letter from Ursula von der Leyen, President of the European Commission, to Teresa Riera, Executive Vice-President-designate for a Clean, Just and Competitive Transition

Various policy papers from EU institutions emphasize that their purpose is to support European businesses that contribute to core European values such as democracy, protection of fundamental rights and innovation. The same values DPCMO have; to support democracy and social cohesion through independent journalism. Like independent press publishers in other member states, the members of DPCMO are only able to do so, if the markets are well-functioning and operating on the backbone of a regulatory framework fit for purpose.

2 Inspiration from National Case Law

When the EU Commission drafts the final Guidelines, DPCMO encourages the EU Commission not only to consider EU case law as the foundation for the Guidelines, but to also seek inspiration from case law from the Member States on the application of EU competition law. Since the publication of the latest version of the Enforcement Paper in 2008/2009, the national competition authorities have proved capable of addressing the ever-changing legal landscape and have provided great guidance on how to address challenges on fast-growing digital markets.

In this context, DPCMO wishes to highlight the following case from the French Competition Authority as briefly highlighted above in Section 1. The case concerned a dispute between Google and French press publishers over Google's use of the publishers' work.⁹

The dispute emerged when France implemented the Directive on Copyright in the Digital Single Market into French law in 2019. This included Article 15, which addresses declining revenues in the press sector by tackling the challenges press publishers face in controlling uses of their content by various online platforms.

France was the first Member State to implement Article 15, requiring online services to provide detailed usage information to press publishers. In 2020, French press publishers filed a complaint with the French Competition Authority, accusing Google of anti-competitive practices. The French Competition Authority found that Google was abusing its dominance in the market for internet search services. The French Competition Authority ordered Google to engage in good faith negotiations with the press publishers for the use of their publications. Google faced significant penalties for not adhering to these requirements, including a €500 million fine in 2021 and a €250 million fine in 2024 for failing to meet its commitments.

A key issue in the case also involved Google's use of press content to train its AI service, Gemini, without proper disclosure or opt-out mechanisms for publishers. The French Competition Authority found Google in breach of its commitments, raising concerns about the application of French law and the effectiveness of Google's opt-out mechanisms.

In DPCMO's opinion, the decision should serve as precedent on an EU level, as it established that a dominant undertaking may abuse its dominant position by infringing copyright and neighbouring

⁹ Décision n° 24-D-03 du 15 mars 2024 relative au respect des engagements figurant dans la décision de l'Autorité de la concurrence n° 22-D-13 du 21 juin 2022 relative à des pratiques mises en œuvre par Google dans le secteur de la presse

rights. The case concerned the same exclusive press publishers' right as was implemented under Section 69(a) of the Danish Copyright Act, and which forms the basis of DPCMO's work.

DPCMO believes that the decision can have significant implications for the application of Article 102 TFEU. Big Tech-undertakings are often massive conglomerates offering many different products and services which make them operate across different markets with varying regulations governing them. Therefore, it is crucial that Article 102 TFEU is applicable regardless of the market the dominant undertaking operates in, and in addition to the specific legislations governing it. Where a dominant undertaking does not respect the applicable legislation because the undertaking believes that it can avoid doing so due to its dominant position and thus does not compete on the merits, Article 102 TFEU becomes ever more relevant. DPCMO encourages the EU Commission to reflect the important and innovative decisions of Member States' national competition authorities when drafting the final version of the Guidelines.

3 Briefly on the Scope of Application and the Interplay with the Existing Regulatory Framework

In recent years, the EU has adopted various legislation to regulate the digital markets, including being the Digital Markets Act¹⁰ ("DMA"), the Digital Services Act¹¹ ("DSA"), the Platform-to-business Regulation¹² ("P2B") and the Artificial Intelligence Act ("AI Act")¹³. This regulatory framework relates to different aspects of digital markets but share the common goal of encouraging the ex-ante lawful behaviour of digital undertaking where there is no room for illegal and harmful activities to the harm of consumers and well-functioning markets as such. The regulatory framework serves the strong purpose of ensuring fair competition in the digital sector. Therefore, there is a clear connection between this sector-specific regulation and general competition law, specifically Article 102 TFEU.

The draft Guidelines do not propose a distinction between DMA, DSA, P2B and Article 102 TFEU, nor do they clarify how Article 102 TFEU would apply in conjunction with the other sector-specific regulations. It is crucial for companies to have legal certainty and to be able to navigate in the regulatory landscape. From DPCMO's perspective, the EU Commission has an equal interest in clarifying the scope of application and the regulatory interplay to ensure effective enforcement of all applicable rules. Therefore, DPCMO hopes that the final Guidelines will include guidance on the relationship between Article 102 TFEU and the other regulations, including more guidance on the relevant enforcement authorities.

Inter alia, further guidance could include the concept of a "dominant undertaking" versus a "Gatekeeper" in DMA Article 2, including whether a designated Gatekeeper under Article 3 of DMA always will be a dominant undertaking under Article 102 TFEU.

¹⁰ 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)

¹¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)

¹² Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

¹³ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act)

Furthermore, the guidance could include whether the EU Commission prioritizes to investigate under DMA or competition law (or both) in case of non-compliance of the DMA. In the designation of Gatekeepers pursuant to Article 3 of DMA, there is less need for a comprehensive market definition than under competition law. However, it is stated in the preamble of DMA that DMA aims to *complement* the enforcement of competition law.¹⁴ Further guidance on the interplay between DMA and competition law would therefore be appreciated by business users such as the members of DPCMO.

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DPCMO will of course be available for further consultations as the need may arise and will also be happy to elaborate on the points made or engage in further discussion if needed.

Best regards,

Karen Rønde

CEO, DPCMO

¹⁴ DMA, recital 10