



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY THE
EUROPEAN COMMISSION
ON THE**

**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**

30 OCTOBER 2024

1. Introductory remarks

1. **ecta**, the **European competitive telecommunications association**,¹ welcomes the opportunity to provide feedback on the European Commission's consultation on the 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 (hereinafter "The Proposed Guidelines" or "Draft Guidelines").
2. **ecta** represents those alternative electronic communications networks and services operators who, relying on the pro-competitive EU legal framework that has created a free market for electronic communications, have helped overcome national monopolies to give EU citizens, businesses and public administrations quality and choice at affordable prices. **ecta** represents at large those operators who are driving the development of an accessible Gigabit society, who represent significant investments in fixed, mobile and fixed wireless access networks that qualify as Very High Capacity Networks (hereinafter "VHCN") and who demonstrate unique innovation capabilities.
3. **ecta** warmly welcomes the Commission's initiative to issue the guidance on exclusionary abuses by dominant undertakings. The time is ripe to provide more structured and explicit guidance to the dominant undertakings that have the special responsibility not to abuse their dominance, to the challenger undertakings that can suffer exclusionary abuses in electronic communications sector. Guidance is also highly relevant for national competition authorities and national courts that are dealing with exclusionary conduct cases and have the task of providing timely and effective public enforcement of the law. Predictability on the Commission's approach is also highly valuable.
4. **ecta** underlines the direct and significant positive impact that the Proposed Guidelines, once adopted, will have on the telecommunications sector in terms of ensuring coherent enforcement of competition law.
5. **ecta** considers the public consultation timely, necessary and appropriate for the reasons exposed in the following paragraphs.
6. The telecommunications sector in Europe, thanks to the applicable EU Regulatory Framework², has been characterised by good progress in terms of competition over the past twenty plus years, even though problems clearly remain. With respect to other comparable areas of the world, such as the United States, offers are characterized by innovative services and bundles and competitive prices³.

¹ <https://www.ectaportal.com/about-ecta>

² [Directive \(EU\) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code \(Recast\)Text with EEA relevance. \(europa.eu\)](#)

³ See for instance the "Study on mobile and fixed broadband prices in Europe 2022", available at: [Mobile and Fixed Broadband Prices in Europe 2022 | Shaping Europe's digital future \(europa.eu\)](#)

This is a very important asset that Europe has built over time for European consumers and businesses, taking into account the strategic importance of telecommunications in enabling the digitalization of other sectors and creating a spill over effect.

7. However, **the telecoms sector**, due to its market structure characterised by network effects and entry barriers in terms of extremely high network deployment costs, especially in certain non urban areas, could be **liable to the exclusionary abuses by dominant undertakings, in the fixed electronic communications network and services markets. This may happen, where a new entrant Mobile Network Operator (MNO) still has to build much of its network or in market structures with 3 MNOs and limited presence of Mobile Virtual Network Operators (MVNOs)**⁴. It may also happen with regard to fixed broadband and very-high capacity networks also in geographic areas smaller than national markets.
8. In this context, It goes without saying that it is crucial that competition is preserved and enabled to further unfold its beneficial effects in European telecommunications markets. So, the guidance that the Commission intends to provide will be a key factor in ensuring the analytical certainty and predictability regarding certain behaviour that can be adopted either by the dominant operator or by the operators that can enjoy joint dominance. Moreover, the Draft Guidelines and the approach they seem to propose could also have an important “signalling” role by preventing the abuses that the dominant operators could have the incentive to undertake.
9. **ecta** provides its key considerations in section 2. From paragraph 10 to 25 **ecta** puts forward its considerations on the general approach of the Proposed Guidelines by commenting on the specific sections following the order of the topics in the Proposed Guidelines. Paragraphs 26 to 29 constitute **ecta** conclusions.

2. Key ecta considerations

2.1. General approach of the Proposed Guidelines and novelties proposed with respect to the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings⁵

10. The Proposed Guidelines seem to adopt a strategy aimed at providing market players with greater certainty and predictability when it comes to the situations that can imply an abuse of dominant position by way of an exclusionary conduct. They do so by providing clear interpretation of the European Courts’ case-law

⁴ While the finding of abuse of dominance by a single dominant firm is quite common (see for instance, the [Telia Sonera Case](#) referred in the Draft Guidelines) the cases of abuse of collective dominance are quite rare in European case-law as they are difficult to assess but this does not mean that they are not effectively occurring.

⁵ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) (2009/C 45/02), available [here](#).

regarding exclusionary abuse cases. In such manner, they aim at finding a more structured and agile method in pursuing (and not lifting or undermining) the effect based analysis.

11. ecta appreciates and endorses this approach because, if adopted, it will enhance legal certainty for dominant undertakings when they self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU and also will provide a clearer guidance for challenger undertakings in their relevant market(s) that could be subject to the exclusionary abuses, for national competition authorities, national courts and for the Commission itself in expediting cases.

2.1.1 Recognition of the fact that the exclusionary abuses could have both exclusionary and exploitative effects

12. While the Proposed Guidelines' scope concerns exclusionary abuses, ecta notes the references provided by the Draft Guidelines to exploitative abuses, namely: *"the same conduct by a dominant undertaking may have both exclusionary and exploitative effects"*⁶ and *"the principles relevant to the assessment of dominance (section 2) and the justifications based on objective necessity and efficiencies (section 5) are also relevant for the assessment of other forms of abusive conduct, such as exploitative abuses" (paragraph 11 of the Draft Guidelines)*. ecta considers this reference, reflecting case-law, most useful for potential cases in the future, and therefore respectfully invites the Commission to confirm this wording in the text of the Guidelines.

2.1.2 Inclusion of collective dominance in addition to single dominance

13. ecta welcomes the Commission's proposal to include guidance on exclusionary abuses by collectively dominant undertakings, to provide more structured and explicit guidance on those specific cases. Certain telecommunications market constellations, could have problematic characteristics, including recurring price signalling, systematic annual retail price increases, etc. Concerns about the operation of mobile telecommunications markets are also an important reference, in support of the Commission's considerations at section 2.3.
14. As known, the mobile telecoms markets are characterized by the presence of few players (3 MNOs) and limited presence of MVNOs, where the early entrants are generally the operators with strong market share, spectrum portfolio, capillary infrastructure and the electromagnetic emission spaces, while the late entrants (i.e. 3rd and 4th MNO) by the way of their late entrance time don't benefit of the same strong market position. those types of markets, may be more subject to collective dominance, which can take the form of an explicit or a tacit coordination between undertakings. Similar market structure and similar risks may be faced in fixed broadband and very-high capacity networks and services markets. In case of a tacit coordination the factors that should be present to assess a collective dominance are the following: competitors can easily arrive at a common perception of how the coordination should work, and, of the parameters that can be used as coordination point between the parts of the implicit coordination; the

⁶ See the footnote 17 of the Draft Guidelines.

ability to coordinate their behaviour on the market by simply observing and reacting to each other's behaviour; the ability to monitor adherence to terms of coordination and to identify the deviations to react (punish) to them quickly and with intensity.

15. In fact, ecta fully agrees with the proposed Guidelines statement on the basis of clear indications provided by the case-law: *"..., the existence of an agreement or structural links between undertakings is not indispensable to establish collective dominance⁸¹. Collective dominance may also be established based on other connecting factors, or on an economic assessment of the structure of the market in question⁸² and the way in which the undertakings in question interact on the market. Where the characteristics of the market facilitate the adoption of a common policy by the undertakings concerned, collective dominance can also be established without there being an agreement or structural links⁸³".*
16. Finally, the proposed Guidelines, on the basis of the EU case-law, state that *"Collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated, that the undertakings concerned adopt identical conduct on the market in all respects or that the abuse involves all the undertakings concerned⁷⁵. It is sufficient that the action amounting to an abuse can be identified as one of the manifestations of such a joint dominant position⁷⁶. (ecta emphasis added)* ecta deems this a key point for the assessment of the cases of joint dominance and for ensuring **an effective deterrence capacity** for the Proposed Guidelines. As clearly specified by the Proposed Guidelines: *"Pursuant to the Union Courts' case law⁸, Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers⁹, including practices that may harm consumers by undermining an effective structure of competition¹⁰."* (ecta emphasis added)

2.1.3 Guidance on the relevant categories of exclusionary conduct and their assessment

17. The proposed Guidelines, in analysing the conduct that could be exclusionary, introduce a structured assessment methodology by defining first a two-step assessment to establish the abuse, by asking: i) does the conduct depart from competition on the merits? and ii) is the conduct capable of having exclusionary effects? ecta appreciates the clear guidance provided on each step, including definitions, assessment methodology and elements that are relevant to the assessment of a conduct's capability to lead to exclusionary effects and possible defenses.
18. The Proposed Guidelines clarify that article 102 TFEU does not preclude the departure from the market or marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers (for instance in terms of, price, choice, quality or innovation).

19. At the same time, to assess if there is any departure from competition on the merits, the Proposed Guidelines differentiate between three types of exclusionary abuses, entirely based on EU case-law, and link each of the categories to a diversified burden of proof level. The Proposed Guidelines specify that the strongest category, “the naked restrictions”, defined as the “*..conduct that holds no economic interest for a dominant undertaking, except that of restricting competition*” do fall outside the scope of competition on the merits. The conducts that are included in this category are, for instance, payments by the dominant undertaking to customers that are conditional on those customers postponing or cancelling the launch of products based on inputs offered by the dominant undertaking’s competitors, actively dismantling infrastructure used by a competitor, and agreeing with distributors to replace a competing product with its own under the threat of withdrawing rebates benefiting the distributors. In cases falling under this category, the dominant undertaking, even though it has the right and the burden of proof of demonstrating that the conduct constitutes competition based on merits, the Proposed Guidelines specify that “*it is highly unlikely that such behaviour can be justified in this way*”.
20. The second category is also based clearly on EU case-law: “*The case law of the Union Courts has developed specific analytical frameworks to establish whether certain types of conduct by dominant undertakings infringe Article 102 TFEU (hereinafter referred to as “specific legal tests”)*¹⁰². Those specific legal tests are an expression of the application of the general principles discussed in this section to the specific conduct in question. Therefore, when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects”. The Proposed Guidelines recognize that the Union Courts have not always made explicit use of the term “presumption” for each one of these practices, but at the same time, the Proposed Guidelines consider that: “*...the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as “presumptions”*”. Therefore, they “*...make use of the expression “presumption” (or “presumed”) for allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts*”. In cases falling under this category, the dominant undertaking has the burden of proof of demonstrating that the conduct constitutes competition based on merits.
21. The third category covers the conducts for which the Commission will have to demonstrate a capability of producing exclusionary effects. In this case, the burden of proof is on the Commission. While the effects in question must not be merely hypothetical, this demonstration does not require proof that the conduct has produced actual exclusionary effects. On the contrary, the fact that a conduct has failed to produce actual exclusionary effects does not in itself disprove its capability to produce such effects.
22. ecta fully agrees with this approach which clearly specifies the cases in which the conduct is presumed by definition to be exclusionary. The Commission’s proposals rightly reflect the reality (recognised by the Courts as punctually specified in the Proposed Guidelines) that there are conducts and contractual

restrictions which, on the basis of historical empirical evidence, have been shown to be consistently abusive and anticompetitive, and therefore do not require EU competition authorities to prove their effects in specific cases.

23. This approach will ensure greater efficiency for the Commission in the handling of the cases, and will provide a clear and desirable signal to the dominant firms to not undertake some forms of conduct, as the burden of proof in showing that such conduct is not exclusionary would be on them. This approach will also render the whole process of assessment more timely with respect to the current state of art of the assessment phase, which suffers very lengthy durations and this has a relevant (negative) impact on public enforcement. As correctly stated by a recent paper by H. Schweitzer-De Ridder⁷: *“The duration of adversarial Art. 102 proceedings before the Commission has significantly increased in recent years, such that an effective deterrence and protection competition is no longer ensured”*. In fact, one of the most important downsides of the ex-post competition intervention approach is the length of the assessment phase and the (unavoidable) uncertainty that a general application of effects based approach, indistinctive from the type of alleged exclusionary conducts, brings into the assessment process. The Schweitzer-DeRidder paper, after analysing the last 31 years of EU case-law, finds that after 2004 (the introduction of commitment mechanism option into the law) the major part of the proceedings consisted in cooperative enforcement and had shorter duration vis-a-vis the adversarial proceedings. However, the fact that the inclusion of those cooperative proceedings decisions only decreases by four months after 2004 is remarkable. It is even the more striking, from the Schweitzer-DeRidder analysis, that the length of the last decisions in adversarial proceedings Google Search (AdSense) and Qualcomm (predation), extended respectively 111 months (or 9.3 years) and 122 months (or 10.2 years) until a final decision! It goes without saying that a proceeding that endures 6, 8 or 10 years, irrespective of the quality of the decision (i.e. maybe based on a highly sophisticated economic effect based assessment) will fail to remedy the harm to the competitive structure deriving from the exclusionary abuse. Consequently, the enforcement will not be able to act as a deterrent by increasing the risk that dominant undertakings do overlook the consequences of their behaviour should they undertake a conduct which can be deemed as borderline in terms of potential exclusionary effect.
24. ecta believes that the **Proposed Guidelines do not aim at excluding or downsizing the application of the effect based approach, they rather aim at clarifying on the basis of the precise and uncontroversial reading of the EU case-law, the relevant categories that should be considered exclusionary by their own nature**. The clarification provided is a fundamental part of the Proposed Guidelines. It provides a workable effect-based analysis for all relevant stakeholders involved in the Art. 102 assessment procedures. In addition, it conveys a clear signal to the dominant undertakings. ecta expects that, if adopted, the clarification will have a beneficial effect on the market to prevent important exclusionary conducts. Therefore, ecta considers this proposal of categorisation with the proposed exclusionary conduct treatment and the burden of proof

⁷ See “How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission’s Future Guidelines on Exclusionary Abuses”, by Heike Schweitzer, Simon de Ridder, June 2024, available [here](#)

allocation very useful for the consistent, timely and effective assessment of the Art.102 cases, and asks the Commission that it is confirmed in the final text of the Guidelines. In case the stakeholders defending incumbent operators push for its removal that should only strengthen the Commission's resolve to maintain the text.

2.1.4 Practical guidance on the different conducts that can be liable to be exclusionary within the meaning of Art. 102 of TFEU in light of the EU case-law

25. ecta appreciates the clear guidance provided on the various conducts liable to be exclusionary, which have been encountered in the telecoms sector. This includes, inter alia:

- i) in the section regarding the conducts with specific legal test (4.2), the specification on the margin squeeze which clarifies: *"For a margin squeeze to be abusive, it is not necessary to establish that the upstream prices for the input are in themselves excessive or that the downstream prices are in themselves predatory"*²⁹⁰ and underlines: *"it is also not necessary to demonstrate that the dominant undertaking is capable of recouping any losses it may suffer to squeeze the margins of its competitors"*²⁹¹. (ecta emphasis added). To such purpose, ecta would like to highlight that the Court of Justice in the Telia Sonera preliminary ruling⁸ stated that: *"...the absence of any regulatory obligation to supply the ADSL input services on the wholesale market has no effect on the question of whether the pricing practice at issue in the main proceedings is abusive"*.
- ii) in the section regarding the conducts with no specific legal test (4.3) clarification regarding the cases in which the use of a price-cost test is not appropriate, and the clarification on the possibility that even a less efficient competitor may nonetheless exert a genuine constraint on the dominant undertaking: *"The use of a price-cost test may not be appropriate in cases where: (i) the inducements offered by the dominant undertaking are not monetary and cannot easily be converted into a quantified monetary amount"*³¹⁴; or *(ii) the emergence of an as-efficient competitor would be practically impossible, for instance, because of the dominant undertaking's very large market share or the presence of significant barriers to entry or expansion in the market, or the existence of regulatory constraints"*³¹⁵. *In these circumstances, even a less efficient competitor may also exert a genuine constraint on the dominant undertaking"*³¹⁶. *In these cases, the assessment of whether the conduct departs from competition on the merits will be carried out on the basis of the general principles set out in section 3.2.* (ecta emphasis added)

3. ecta conclusions

26. As known, the EU Treaty in Art. 3 specifies clearly, among the founding principles of the EU internal market, the sustainable development of: *"...Europe based on*

⁸ See [JUDGMENT OF THE COURT \(First Chamber\) 17 February 2011](#), paragraph 59.

balanced economic growth and price stability, a highly competitive social market economy,...". The effective, timely and consistent enforcement of Art.102 TFEU is one of the key factors that substantially contributes to such aim. In this sense, and pursuing for all alleged cases of exclusionary abuse, an effect based approach, by putting the burden of proof on the enforcers, by looking at the past cases, if not amended as proposed by the Draft Guidelines, will impede the effective enforcement by further increasing the burden of proof on the enforcers, prolonging the length of the proceedings, be they cooperative or adversarial, and most concerningly, it will diminish substantially the probability that the enforcer undertakes a case of alleged exclusionary abuse due to the high level of complexity of the cases that today can occur on the telecommunications markets. This is also in consideration of the fact that each decision by the enforcers, be it the European enforcer or a national member state enforcer, are subject to judicial appeals.

27. The recent ECJ decision C-377/20, Servizio Elettrico Nazionale, in response to the request for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy) to the second question: *"whether Article 102 TFEU must be interpreted as meaning that, in order to establish whether a practice constitutes abuse of a dominant position, it is sufficient for a competition authority to prove that that practice is capable of adversely affecting an effective competition structure on the relevant market or whether it must be proved further, or in the alternative, that that practice is capable of affecting the well-being of consumers"* has undoubtedly clarified that: *"the purpose of Article 102 TFEU more specifically is, according to settled case-law, to prevent conduct of an undertaking in a dominant position that has the effect, to the detriment of consumers, of hindering, through recourse to means or resources different from those governing normal competition, maintenance of the degree of competition existing in the market or the growth of that competition (see, to that effect, judgments of 13 February 1979, Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 91; of 27 March 2012, Post Danmark, C 209/10, EU:C:2012:172, paragraph 24; and of 30 January 2020, Generics (UK) and Others, C 307/18, EU:C:2020:52, paragraph 148 and the case-law cited). To that effect, as the Court has held, that provision seeks to sanction not only practices likely to cause direct harm to consumers but also those which cause them harm indirectly by undermining an effective structure of competition (see, to that effect, inter alia, judgments of 15 March 2007, British Airways v Commission, C 95/04 P, EU:C:2007:166, paragraphs 106 and 107, and of 17 February 2011, TeliaSonera, C 52/09, EU:C:2011:83, paragraph 24).* (ecta emphasis added)
28. Indeed ECJ Decision C-377/20, affirmed such broader interpretation quite clearly: *"The vital nature of the FEU Treaty provisions on competition is also apparent from the Protocol (No 27) on the internal market and competition, which forms an integral part of the Treaties in accordance with Article 51 TEU and states that the internal market includes a system ensuring that competition is not distorted (judgment of 17 November 2011, Commission v Italy, C 496/09, EU:C:2011:740, paragraph 60).*
29. ecta fully agrees with the proposed Guidelines, their general approach and novelties introduced, in the terms underlined in the section 2 above, namely:

- a. Inclusion of the reference to the exploitative abuses.
- b. Inclusion of the collective dominance concept and relative guidance.
- c. Guidance on the relevant categories of conduct that can be liable to be exclusionary within the meaning of Art. 102 of TFEU in light of the EU case-law issued, by allocating the burden of proof respectively to the enforcers or to the dominant undertakings involved in the alleged exclusionary conduct.
- d. Practical guidance on the different conducts that can be liable to be exclusionary within the meaning of Art. 102 of TFEU in light of the EU case-law that are particularly relevant for the telecommunications markets.

ecta respectfully requests the Commission to confirm those elements in the final text of the Guidelines.

In case of questions or requests for clarification regarding this contribution, The Commission is welcome to contact Mr Luc Hindryckx, ecta Director General or Mrs Pinar Serdengeçti ecta Regulation and Competition Affairs Director.