

# FEEDBACK TO A PUBLIC CONSULTATION

## **Draft new Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings**

ALLRAIL, the Alliance of Passenger Rail New Entrants, is the EU-recognised association representing independent passenger railway companies in Europe. ALLRAIL advocates for faster market opening in passenger rail transport in order to accelerate the modal shift to rail.

We welcome the opportunity to contribute to the European Commission's draft new guidelines on the application of article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings.

We appreciate the European Commission's vigilance in monitoring competition rules to ensure a fair and open EU market. The European passenger rail sector, with its high barriers to entry, urgently needs a proactive approach from the Commission to prevent exclusionary practices that limit competition.

Effective enforcement of Article 102 TFEU is essential for fostering a passenger rail market where new entrants can thrive, spurring innovation and providing better and more affordable choices for consumers. We see these draft Guidelines as a critical step forward in creating a more dynamic, inclusive passenger rail market, aligned with the EU's sustainability and modal shift goals.

Our members have experienced a list of barriers to expansion and entry, to their detriment and, ultimately, to the detriment of competition and the market. We would particularly like to bring the Commission's attention to point 30 listing the various factors conducive to barriers to expansion and entry.

An additional critical barrier to entry that is quasi-ubiquitous in the European passenger rail market is the influence of state ownership or control over dominant railway undertakings. Such state-linked dominance not only amplifies competitive

imbalances but also introduces further obstacles against new entrants, as these state-owned undertakings may enjoy regulatory advantages, legacy assets from the monopoly period (especially well-established brand recognition and reputation), significant equity injections, implicit/de facto financial backing, priority in strategic decisions, privileged access to infrastructure resources (such as maintenance facilities and train paths), privileged information (the two last points are especially in the context of vertically integrated undertakings comprised of the infrastructure manager – but also in case of officially unbundled undertakings due to their legacy position and links to the state).

To strengthen the guidelines, we propose adding to the list of “*other barriers to expansion and entry that derive from certain advantages that have been identified in the past*” in point 30, a ninth element: “*ix) state-controlled enterprises as dominant undertaking*”, referring also to case-law that highlights competitive risks posed by state-backed advantages, for example:

1. *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova*, Case C-18/93,
2. *Deutsche Telekom AG v. European Commission*, Case C-280/08 P,
3. *SNCM v. European Commission*, Case T-454/13,
4. *France v. European Commission*, Case T-366/13,
5. *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, Case C-41/90
6. *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, **Case C-280/00**