



Full fibre for a digital and sustainable Europe

Response to the consultation on the 'Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings'

## Introduction

The FTTH Council Europe appreciates the opportunity to comment 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 Guidelines’.

The FTTH Council is an industry organisation with a mission to accelerate the availability of fibre-based, ultra-high-speed access networks to consumers and businesses. The Council promotes this technology because it will deliver a flow of new services that enhances the quality of life, contributes to a better environment and increased competitiveness. The FTTH Council consists of more than 150 member companies. Its members include leading telecommunications companies and many world leaders in the telecommunications industry (additional information at [www.ftthcouncil.eu](http://www.ftthcouncil.eu)).

The FTTH welcomes the intention of DG Competition to ensure clarity and predictability in the market on the application of Article 102 TFEU. We also welcome that the proposed guidelines aim to put order on the subject based on the consolidated case-law. This is particularly beneficial for the telecommunications sector which was the basis of several important rulings of the Court of Justice regarding Article 102. It should also be acknowledged that we still observe in the market – due to its monopolistic origins – several cases of abuses by dominant players despite the existence of ex-ante regulation. Therefore, we invite DG Competition to closely monitor the evolution of the market ensuring that alternative operators - which emerged after the liberalization of the sector, and which are leading the investments on FTTH networks – would be able to continue to exert a positive competitive pressure on the market. This is particularly important in the context of switching off a monopolistic-copper networks in favour of (often) multiple fibre networks under different ownership.

DG Competition will be aware that there is currently a very strong push for a deregulatory approach to be adopted in Europe. The FTTH Council believes such a position is not justified and that there are already built-in mechanisms in the ex-ante regulatory regime to ensure regulation is withdrawn, where it is appropriate and at the appropriate time. The FTTH Council believe that a reduction of ex-ante regulation would not be helpful in markets with dominant players, such as in Germany where the removal of ex-ante regulation could be very harmful and allow continued market power abuse. However, while the debate about whether to curtail ex-ante regulation will happen elsewhere, the relevant point is that the importance of ex-post competition law is likely to increase over time and play a more decisive role in maintaining competitive telecom markets in Europe. While the presence of ex-ante regulation has in the past been used as ‘cover’ for abusive practices by dominant entities in the telecom sectors<sup>1</sup>, the future prospect of more limited oversight by ex-ante regulation increases the ease and probability of abusive behaviour by dominant firms.

The FTTH Council takes this opportunity to make further submission on the Guidelines proposed.

## Commentary

### Coordination between ex ante regulation and competition law enforcement

The FTTH Council believes there should be greater emphasis on the observation expressed in paragraph 13 *“The fact that the conduct of a dominant undertaking has been found to have infringed other legislation does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for an infringement of Article 102 TFEU for the same conduct”<sup>21</sup>. In addition, the fact that an undertaking’s conduct has been found to comply with other legislation – or even been*

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<sup>2</sup> For instance Case 66/86, Ahmed Saeed Flugreisen et Silver Line Reisebüro GmbH contre Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. Demande de décision préjudicielle: Bundesgerichtshof - Allemagne.

*encouraged by it – does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for infringing Article 102 TFEU through the same conduct<sup>22</sup>.*

In particular, it is worth emphasizing that even if another area of the Commission sets industrial policy goals, or other goals, these do not obviate a firm's (or Member State's) obligations under Competition Law<sup>2</sup>.

Indeed, this is crucial because we are observing the tendency by dominant operators to adopt strategic behaviours, using structures allowed by the sectoral regulatory framework, merely to have access to incentives that limit ex-ante obligations, with the sole objective of undermining the business case of alternative operators.

This will be crucial in case a 'copper-network switch-off' policy establishes a cut-off date for the closure of copper legacy networks as suggested in the recent white paper "*How to master Europe's digital infrastructure needs?*" as well as in the Draghi report. This measure, which is strongly supported by the FTTH Council, should be accompanied by adequate competitive safeguards during its implementation. In this regard, it should be also noted that ex-ante regulation should not be lifted, at least until a mature full-fibre environment is established.

#### *Competition on the Merits*

The FTTH Council supports the principle that markets should be driven by effective competition and that achieving a dominant position through a fair competition should not be seen *per se* negatively. We acknowledge the intention of DG Competition to try to clarify and strengthen the criteria to assess certain abusive conducts which in many of the cases – as confirmed by the case law cited – have the sole objective of impeding competitors active on the market

In particular, section 3.2.2 sets out a series of elements which try to clarify the boundaries of competition on the merits (see paragraphs 53 to 58) allowing companies to do a proper ex-ante assessment before adopting conduct which can be harmful for the market. Despite this intention, the concept of 'competition on the merits' as well as the two-stage approach suggested in the draft, should be further assessed and clarified to avoid unintended consequences and ensuring sufficient predictability for the operators. The FTTH Council would note already that some of the exclusionary practices, elaborated later in the document, are especially prevalent in the telecom sector based on the case law cited (see in particular section 4.2.4 on Predatory Pricing, 4.2.5 on Margin Squeeze, 4.3.4 on Access Restrictions). Therefore, a further clarification of the specific legal tests that should be adopted would be appreciated.

As mentioned above, this will be fundamental in the transition from legacy copper networks to FTTH networks. Indeed, the FTTH Council has seen frequently observed that operators with significant market power – usually the exclusive owners of legacy copper networks – favour the migration of customers only in the markets where they have also deployed fibre. On the contrary, they adopt strategic behaviours to discourage the migration from copper to fibre where that fibre has been deployed by alternative operators. Such an approach is clearly aimed at restricting competition and, particularly, is harming consumers. While no one denies the rights of dominant firms to compete on the merits, there is a large scope for using the mechanisms listed in paragraph 55, in particular, to restrict external competition and to preserve the dominant firm's market position in the above-mentioned cases.

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### *Conclusions.*

The FTTH Council believes this update to the Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings is a valuable update, pointing to relevant recent case law and experience.

The telecom sector is in an extraordinary period of transition, moving from copper to fibre networks, and ensuring a well-functioning, competitive market will determine the outcomes and future dynamics of the sector for a long period.

Clarity on the interpretation is needed in particular to allow companies to have a proper ex-ante assessment of their intention regarding adopting certain conducts on the market. Therefore, some concepts should be further developed and clarified.

However, the success of the EU competition law has always been based on its case-by-case approach and its sophisticated and advanced economic approach. Therefore, it is recommended to take a balanced approach between legal certainty and the capacity to assess the economic decisions of a company in light of the market reality and its possible evolution.

Furthermore, it is important to highlight that the proposed Guidelines are not only relevant for competition authorities. As national regulatory authorities also have to acknowledge the development and safeguarding of competition, and since their regulatory regimes are often based on competition law principles, they also have to take account of these principles in their evaluations and assessments.

The FTTH Council remains available for any further inputs as necessary.