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Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings

here: Position Paper of VATM e.V. Germany (does not include business and trade secrets)

We hereby submit the views of VATM and our member companies with regard to the *Guidelines on exclusionary abuses of dominance* (referred in the following as the *Draft Guidelines*) published for open consultation by the European Commission (in the following, the Commission) on 1 August 2024.

VATM welcomes the public consultation and takes the opportunity to provide comments on the proposals made in the Draft Guidelines on the Application of Art. 102 of the Treaty on the Functioning of the European Union (in the following, TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings.

VATM considers the initiative of the Commission to provide precise guidance to both the dominant undertakings with special responsibility not to abuse their dominance and to the challenger undertakings which could suffer exclusionary abuses as a timely and necessary measure. These guidelines would also be highly relevant for national competition authorities and national courts that are dealing with cases of exclusionary conduct and are tasked with a quick and efficient enforcement of the law. In addition, the Draft Guidelines would provide for a coherent and predictable conduct on the side of the Commission in the cases of exclusionary abuse of dominance.

VATM emphasizes the particular importance of the Draft Guidelines for the telecommunications sector - a market field where the abuse of dominance would have a direct adverse effect on the competition dynamics and on the overall market development.

VATM takes note of the approach taken by the Commission and welcomes the suggestions of the Guidelines, in particular:

Enhancing Legal Certainty

VATM views the Draft Guidelines as a significant step towards a practical, impact-oriented approach to Art. 102 TFEU, which is essential for their effective enforcement. Even though not legally binding for the national competition authorities, these guidelines have the potential to enhance legal certainty and encourage consistent enforcement of Art. 102 TFEU, particularly in cases involving exclusionary conduct by dominant undertakings. In our view, as regulatory authorities also bear responsibility for the control of abusive anticompetitive behaviour the guidelines should also address the national institutions that are responsible for sector specific regulatory oversight over the competition dynamics in a certain sector of economic activity, such as telecommunications.

According to the Draft Guidelines, **the exclusionary conduct under Art. 102 TFEU encompasses various types of behaviour that undermine effective competition, harming the public interest, other market participants, and consumers.**

The Draft Guidelines provide that **the abusive anticompetitive behaviour could manifest exclusionary abuses with both exclusionary and exploitative effects.** VATM welcomes this explicit expansion of the meaning of exclusionary abuse and urges the Commission to further clarify it.

Furthermore, **the Draft Guidelines include provisions on collective dominance in addition to single dominance.** VATM welcomes the structured approach of the Commission on this matter, which would provide guidance on exclusionary abuses by collectively dominant undertakings. Such cases might occur in the field of telecommunications in the form of, including but not limited to, recurring price signalling, which has immediate effect on both consumers and competitors. Therefore, an explicit guidance on the matter is needed, as the Commission fairly recognised in the Draft Guidelines.

In addition, **the Draft Guidelines introduce a structured assessment methodology on the relevant categories of exclusionary conduct and their assessment. The assessment contains two main steps, which aim to systematically establish i) whether the conduct departs from competition on the merits, and, then ii) whether the conduct bears the risk of causing exclusionary effects.** VATM welcomes the clear guidance provided on each step, including definitions, assessment methodology and elements that are relevant for the assessment if a conduct would cause exclusionary effects, as well as possible steps against these particular exclusionary conducts. VATM appreciates the streamlined approach of the Commission towards codification of the available case law and supports a systematically structured guidance for a unified interpretation on the relevant categories of exclusionary conduct.

Finally, **VATM emphasizes the importance of the practical guidance the Draft Guidelines provide on the different categories of conducts that may be exclusionary within the meaning of Art. 102 of TFEU** and in direct connection to the available EU case law. These include **specifications**, particularly relevant for the telecommunications sector, **on the margin squeeze test as well as clarification**

regarding the cases in which the use of a price-cost test is not appropriate. In addition, there is an elaborated clarification on the possibility that even a less efficient competitor may exert a genuine constraint on a dominant undertaking.

VATM welcomes all these new instruments and the guidance on their methodological application and considers it to be a timely and universal measure providing for the harmonisation of the practice of the national competition and regulatory authorities.

In this sense, we would like to emphasize that the Draft Guidelines (Section 3.1) underline that in the application of the provided tools there is **no need to prove an intension for conducting the abuse of dominance** – the objective proof of an abusive conduct is what matters. This means that an intervention is justified if there is an objective proof of an abusive conduct, or the manifested behaviour of the dominant undertaking might lead to such conduct. **This represents a welcome and needed addition to the rest of the practical guidance, which is extremely relevant in the context of the German telecommunications market as it translates into the practical applicability of the Draft Guidelines also in the highly publicised cases of strategic overbuild¹ conducted by Deutsche Telekom.** By extension, the abusive conduct could also mean a combination of passive and active behaviour, a further conduct that corresponds to this would then be the selective copper switch-off approach of Deutsche Telekom. As these cases have still not been properly addressed² by the National Regulatory Authority (in the following, NRA) the Draft Guidelines give room for the application of the broad competition law.

In this context, as we observe that the instruments listed above are, to a large extent, also part of the toolbox of the sector specific regulation such as the telecommunications regulation, the ongoing revision provides an opportunity for a unified approach, which is much needed and would be welcome by the industry. Therefore, we urge the Commission to establish a clear link between the Draft Guidelines and the activities conducted by the National Regulatory Authorities, in order to ensure a common approach across different sectors and regulatory bodies along with the prevention of cases, which might lead to exclusionary abuse by the dominant undertaking.

Negative Effects - Burden of Proof and Causation

The VATM further observes that the exclusionary impact of specific behaviour can be demonstrated through a range of qualitative and quantitative tools, depending on the behaviour and context involved. In this regard, the VATM supports the Draft Guidelines' interpretation, as informed by EU case law,

¹ HANDELSBLATT (17.03.2023): *TELEKOMMUNIKATION: Deutschlands Glasfasermarkt läuft heiß.* (handelsblatt.com) (<https://www.handelsblatt.com/technik/it-internet/telekommunikation-deutschlands-glasfasermarkt-laeuft-heiss/29000526.html>, last accessed 30.10.2024).

² TAGESSPIEGEL BACKGROUND; SCHNEIDER, K. (26.09.2024): *Digitalisierung & KI: Wie das BMDV die Telekom beim Doppelausbau geschützt hat.* (background.tagesspiegel.de) ([Wie das BMDV die Telekom beim Doppelausbau geschützt hat - Tagesspiegel Background](https://www.tagesspiegel.de/technik/digitalisierung-und-ki/wie-das-bmdv-die-telekom-beim-doppelausbau-geschuetzt-hat-tagesspiegel-background), last accessed 31.10.2024).

regarding the use of legal presumptions for certain types of behaviour that inherently carry a high potential to produce exclusionary effects or are likely to do so by their nature.

Dem VATM gehören die größten deutschen Telekommunikationsunternehmen an, insgesamt rund 180 auch regional anbietende Netzbetreiber, Diensteanbieter aber auch Zulieferunternehmen. Zudem steht der Verband für wichtige Investoren, die den Glasfaserausbau in Deutschland deutlich voranbringen werden. Die VATM-Mitgliedsunternehmen versorgen 80 Prozent aller Festnetzkunden und nahezu alle Mobilfunkkunden außerhalb der Telekom. Seit der Marktöffnung im Jahr 1998 haben die Wettbewerber im Festnetz- und Mobilfunkbereich Investitionen in Höhe von rund 100 Milliarden Euro vorgenommen. Sie investieren auch am stärksten in den zukunftssicheren Glasfaserausbau direkt bis in die Häuser. 90 Prozent der angeschlossenen Kunden nutzen die gigabitfähigen Netze der Wettbewerber.