Joint statement by the European Competition Network (ECN) on the European Commission's initiative to adopt Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

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The ECN welcomes the European Commission's initiative to adopt guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (the "Guidelines").

The ECN has actively contributed to the development of the draft Guidelines. The ECN considers the draft Guidelines as an important step in the direction of a workable effects-based approach to Article 102 TFEU, which is key to ensuring meaningful and effective enforcement. While not legally binding on National Competition Authorities, the draft Guidelines have the potential to enhance legal certainty and foster coherent enforcement of Article 102 TFEU in the area of exclusionary conduct by dominant undertakings.

In line with the draft Guidelines, the ECN considers that the concept of exclusionary abuse under Article 102 TFEU encompasses several types of behaviour that distort effective competition to the detriment of the public interest, other market players and consumers. The ECN also considers that a given conduct's capability to produce exclusionary effects can be demonstrated by means of a variety of qualitative and quantitative tools, depending on the specific behaviour and circumstances at hand, in line with EU Courts' case law. In this regard, the ECN stresses that in order to ensure effective and deterrent enforcement of Article 102 TFEU, the evidentiary burden associated with the

demonstration of exclusionary effects needs to be proportionate to the likelihood that conduct will produce harm. The ECN therefore agrees with the draft Guidelines' interpretation of the EU Courts' case law as regards the existence of legal presumptions in relation to certain types of conduct, that have a high potential to produce exclusionary effects or are by their very nature capable of doing so.