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Public questionnaire for the 2019 Evaluation of the Research & Development and Specialisation Block Exemption Regulations

ETNO position paper

1. Horizontal Guidelines ("HGL") - general

The Horizontal Guidelines ("HGL") provide valuable guidance with regards to self-assessment of horizontal co-operation agreements. However, in order to remain effective for the telecommunications sector, it is necessary to update them to cover new market situations related to digitalisation, increase investments and to encourage technical developments and innovation.

In particular:

- The HGL need to be updated to match the current market developments and to provide a legal certainty to the telecommunications industry while taking into account the dynamics of the digital economy.
- The HGL must also be aligned with the European Electronic Communications Code ("EECC") and existing industry practice. By doing so, the different forms of co-operation promoted under the EECC, like co-investment and various forms of cooperation, will be supported by a clear analytical competition law framework.
- The HGL shall also provide more flexibility with regards to cooperation agreements between operators seeking to create solutions based on standards and interoperability, as the current processes are burdensome and not efficient.
- Moreover, the operators shall have more flexibility and legal security with regards to industry-wide initiatives, which aim to create new solutions (sometimes also an alternative to existing solutions proposed by global digital actors) and cannot be achieved alone by one company.
- As data is key in the digital economy, the HGL need to be updated to facilitate horizontal agreements in areas where interoperability is needed such as AI, IoT or data-related projects. Guidance on data pooling and data sharing agreements, in particular, would be welcome to provide legal certainty for European companies to perform the self-assessment.
- Cooperation models require a certain degree of information exchange and data sharing between companies. However, companies are currently lacking clear guidance on the boundaries of allowed data/information exchange related to such cooperation agreements.

The current rules on information exchange create more uncertainty in the Digital Economy and need to be adapted. This is particularly relevant when companies are not sure what kind of information they would be able to exchange in the context of these new cooperation models.

An update of the HGL is needed to provide telecom companies sufficient guidance to carry out their self-assessment. However, due the fast developments in the digital economy, it would be also crucial to see European Commission's ("EC") openness for an individual assessment of envisaged forms of co-operation or exchanges not (fully) covered by the HGL.

a. Global competition on dynamic digital markets

Horizontal agreements need to be assessed in their economic context. Digital markets are developing fast and are global. Telecommunications companies compete on these markets and need to have the adequate conditions to increasingly work together on industry-wide initiatives with a proper scale.

These forms of cooperation are in general pro-competitive as they allow to achieve the necessary scale to be competitive in the context of global actors, and to create new digital solutions for consumers and industry (applications, algorithms, ecosystems, platforms, etc.). They may also result in emergence of alternatives to the ecosystems created by global digital actors and reduce the dependence of the market actors on such ecosystems (often non-European) thus bringing more competition to the digital markets.

Moreover, the telecommunications industry is part of the digital economy ecosystem and it is increasingly facing competition from large global digital players (mainly outside the European Union). Therefore, the competition constraint exercised by these actors needs to be taken into account when assessing industry-wide horizontal agreements, also with regards to their impact on competition.

Under the current framework, the processes to respect in order not to be exposed to legal risk are very burdensome, time-consuming and at the end do not provide the necessary legal certainty. Therefore, many common industry-wide initiatives that would result in creation of new products and solutions have been unfortunately abandoned.

ETNO thus believes an update of the HGL is needed. The update should consider, under certain conditions (as defined above), those initiatives seeking to create innovative and interoperable products and services to support EU competitiveness globally being pro-competitive and not restricting competition. These agreements can be included in already identified types of horizontal co-operation agreements or they can be newly defined.

The counterfactual of the envisaged cooperation should also be considered in the analysis. For instance, when the counterfactual of an industry-wide cooperation agreement is the coexistence of proprietary systems controlled by super-dominant players, the cooperation should be considered pro-competitive unless very serious competitive concerns arise.

In light of a possible new block exemption regulation, another important general aspect to be considered when assessing these horizontal cooperation agreements in the telecommunications sector, is that the approach based on market share, normally used to define the scope of block exemption regulations ("BERs"), is not appropriate in the context of the digital world.

In fact, especially in the telecommunications industry, such agreements need scale to be significant at the global level. Therefore, ETNO believes that a new block exemption for infrastructure cooperation that covers both network sharing agreements and data sharing/data pooling agreements is needed. This will not only be instrumental to achieve the European industry digitalization, but it will also allow cooperation projects to take into consideration the dimension of the broader digital markets and the predominant presence of global players (vs. national large operators).

b. Digital infrastructure agreements

In a market, where there is a high pressure for high quality connectivity, Europe needs to strengthen its strategic digital infrastructures to allow the spread of innovative technologies and services at the benefit of its citizens and businesses.

Generally, the HGL on production agreements might be used in order to assess digital infrastructure sharing initiatives. However, ETNO believes that more specific insights would be necessary as such cooperation agreements have many specificities.

More specifically, digital infrastructures should be the object of a new block exemption regulation provided they respect predefined conditions. They are indeed a source of substantial efficiencies and benefits for consumers, while usually not implying anti-competitive effects in the market, also considering the global competitive dynamics in digital markets (see point a.).

Digital infrastructure should be considered in the broader sense of all assets required to create a European digital market, being for instance networks (i.e. deployment of Very High Capacity Networks, including 5G) and data sharing platforms.

Two relevant examples of digital infrastructures agreements would be: i) the network sharing agreements, which have become a usual and effective way for telecom operators to deploy networks across Europe, and that will be particularly relevant in the deployment of 5G going forward; and ii) data sharing and pooling agreements: data being the basis of the digital economy, it will become a very common type of cooperation, facilitating innovative digital services in Europe.

i. **Network sharing agreements**

For ETNO members, network sharing agreements are probably the most important form of cooperation that should be covered in the HGL or under the new proposed block exemption regulation.

Network sharing agreements have become widespread in Europe as a means to decrease costs, increase coverage, reduce timing of network roll-out, deploy efficiently and rapidly new technologies and reduce the perception of environmental impact of antennas.

Today, there is a danger of a gap between competition and regulatory authority positions on network sharing arrangements. The regulatory authorities encourage or impose network agreements under regulatory framework, while the position of competition authorities varies from country to country and is not clear.

Already in 2011, in a report on infrastructure and spectrum sharing in mobile networks, the Body of European Regulators for Electronic Communications (BEREC)[1] found passive sharing agreements to be spread in all European Member States. Those kinds of agreements are today commonplace and do not raise competition concerns.

The sharing of active network components is also becoming more and more common in the form of RAN sharing. RAN sharing does not imply competitive risks, as it does not affect the differentiation of technological features or service parameters, which nowadays are determined by the core network, service platform or cloud level.

RAN sharing has also been widely considered by the EC as a counterfactual to evaluate merger operations. It has often been used also to deny the efficiency gain attached to a merger considering that similar results could be achieved with less restrictive effect on competition (through RAN sharing).

As far as efficiencies are concerned, 5G networks have two additional elements to support sharing initiatives: on one hand, they involve very high costs with important margins of optimization and, on the other hand, they allow further guarantees of differentiation and flexibility of the offers (e.g. through network virtualization). This has also been acknowledged by the European Parliament recommendation to "*Promote infrastructure sharing for 5G: Policy for 5G networks*"[2]

Hence, when the commonality of costs among the participants keeps a reasonable level, the capacity to differentiate offers is guaranteed (for example through the possibility of individual deployments), information sharing is kept to what is necessary

[1] BEREC-RSPG report on infrastructure and spectrum sharing in mobile/wireless networks, BoR (11) 26 https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/224-berecrspgreport-on-infrastructure-and-spectrum-sharing-in-mobilewireless-networks

[2] "5G Deployment State of Play in Europe, USA and Asia", available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/631060/IPOL_IDA(2019)631060_EN.pdf

and there are no likely foreclosure effects, those agreements should be considered exempted from the application of article 101.

ii. **Data sharing and pooling agreements**

As already mentioned, data being the key input in the Digital Economy, this type of cooperation among competitors is essential to offer innovative digital services in strategic areas including IoT, AI and other data-related initiatives.

Facilitating such kind of horizontal agreements among European competitors under certain requirements, will allow stakeholders to compete with non-European players within the current geopolitical ecosystem. It will also allow to resolve current issues arisen in digital markets such as barriers to enter, bottlenecks, quasi-monopolies, conglomerate effects etc.

Against the background of greater need for data sharing, the exchange of competitively sensitive information in this context shall be controlled as per applicable competition rules and waterproof industry practices, which could be clarified and updated in regard to the value of data in the digital economy.

c. Information exchange

The information exchange framework set out in the HGL needs to be clarified in order to provide more legal certainty and to give response to the challenges emerged in the Digital Economy. In this sense, information exchange should be analysed in a case-by-case basis examining the competitive effects exerted in the market when competitors exchange information.

ETNO is of the view that the current framework obliges companies to adopt an extremely conservative approach, even when the impact of information exchange between competitors is neutral for competition or even pro-competitive (and not foresee to collude). For example, in the case of joint bidding, it could be clarified under which circumstances information exchange relating to buying-market could be considered as potentially anti-competitive.

Finally, there is a specific concern faced by telecommunications companies related to a provision of the new EECC. Article 22, combined with article 20, requires telecommunications companies to provide detailed information on network deployments, including forecasts on the reach of networks. As regulatory authorities may request for this information, there is a need to clarify the position of telecommunications providers providing the requested information especially as regarding the risk of a potential sensitive information exchange.

The current HGL (see under 22) stress that if public authorities encourage a horizontal co-operation this does not mean that the exchange is permissible under Article 101. Only if anti-competitive conduct is required of companies by national legislation, or if the latter creates a legal framework which precludes all scope for competitive activity on their part, Article 101 does not apply (see under 22).

Telecoms companies cannot take the risk that, after providing detailed strategic roll-out information to the public authorities, such data, even when unintended, will be released by public authorities to third parties, including competitors as a result of which an infringement of Article 101 may occur.

d. Standardisation agreement

The adoption of standardization agreements is nowadays essential in a context of globalisation and digitalisation of the markets. Technical standards and specifications are increasingly required in a digitalised world. Moreover, data economy will require additional standards in order to share data, to access third party data as well as to ease the path for new technologies and businesses such as the IoT, the AI, etc.

In that sense, ETNO considers that the current framework set out in the HGL does not provide enough flexibility when analysing whether a standardization agreement falls under Article 101.1 TFEU or if it complies with the requirements of Article 101.3 TFUE.

The existing rules should be reviewed in order to have an updated and future-proof framework, which will respond to all the challenges related to the increase in standard setting activities.

Based on telecom operators' own experiences, these are the changes ETNO would like to propose:

- **Unrestricted participation**. Paragraph 281 of the HGL considers that, for the cooperation to not restrict competition, an unrestricted participation in the standard-setting process should be guaranteed.

  ETNO believes that the current regime is very complex and difficult to follow. In practice, the process applied is unworkable when trying to go through a standardisation process in which many competitors participate from the beginning. Telecom operators' experience has shown that many times initiatives fail due to difficulties to achieve a common understanding among all stakeholders at a very early stage. Telecom operators have also suffered from the misuse of such antitrust rules by third companies with the aim to bring a standardization process to halt, because it was not aligned with their own interests, even when the standard was beneficial for the industry and consumers.

  For this reason, ETNO would like to propose to allow more flexibility in the standard-setting process. While paragraph 295 accepts that some restrictions could be adopted when it is necessary and only "ensuring that stakeholders are kept informed and

consulted on the work in progress", this exception is not sufficiently clear. This rule should be further developed in order to better explain when and to what extent restricted participation is allowed and to provide more flexibility for such restricted participation. For example, in its initial phase the standardisation process could be launched only by a few operators having an interest and scale to work together on the project.

A mechanism to allow the participation of those interested, when the process is more advanced, should be put in place while ensuring that the process is not blocked. This mechanism could be, for instance, a listing of major milestones in which all operators should have the likelihood to vote to continue the discussion but with clear limits.

This measure would ensure that operators will not try to block the standard-setting process at the last step without participating the previous ones. Non-participating operators shall be given the opportunity to submit their observations which shall be duly taken into consideration. In no case, the access to the final result shall be restricted.

It should also be clarified which transparency rules should be respected while taking into consideration the importance for the standard to be developed in due time.

- **Competitors in multi-sectorial processes.** Digitalisation makes cross-sectorial standardisation agreements crucial for European stakeholders to compete in the digital economy, especially in areas where interoperability is needed, such as digital services and data-related cooperation projects. APIs for data sharing and algorithmic models will require standardization processes going forward. In all those projects, where multiple sectors and industries are involved, a smoother scrutiny could be set up considering that players from different sectors are not competitors (more flexibility on unrestricted participation for example).

- **Counterfactual for standardization.** The clear procompetitive nature of standardization agreements should also be considered. In this sense, it would be relevant to take into account in the analysis that in some cases the counterfactual of the considered standardization is not a different standardization, but proprietary systems imposed by global companies. In those cases, there must be a presumption of pro-competitiveness, ideally in the form of a new block exemption, for those standardization cooperation initiatives.

  If not considered, ETNO proposes to include at least such strong presumption in points 7.3 and 7.4 of the HGL when a case-by-case analysis is made.

- **Setting vs implementation**. A clear distinction in the HGL between the setting of the standards and its implementation is needed, with the aim to clarify that the HGL related to standardization agreements should only be applied to the standards setting but not to its implementation.

- **Effects in various markets**. In the case-by-case analysis of a standardization agreement, the effects over the products and services markets, the technology and the standards markets should be considered when analysing the procompetitive effects of the agreement, or it risks being banned under Article 101.1 TFUE instead.

  In this sense, there could be the case that the outcome of such analysis is different depending on the market. Therefore, clear rules on how to balance the effects affecting the different markets would be needed in the HGL. Global context should also be taken into consideration, including competition constraint exercised by global actors.

- **Beyond standardization**. Often, standardization projects entail other components which are not purely related to standardization. Further guidance in the HGL on how to treat those mixed cooperations would be highly useful.

- **Global nature**. Finally, cooperation among competition authorities at an international level is absolutely needed given that standards are usually set at a global level and by global organizations. Therefore, a uniform application of competition law to this kind of cooperation would be very much welcome.

2. Procedural aspects

a. Increase in Legal Certainty

In order to foster horizontal cooperation, which is very much needed for European competitiveness in the changing geopolitical environment, the legal certainty for companies needs to be increased to reduce the cost associated with the legal uncertainties. Currently, as described above, neither the HGL nor BERs provide sufficient guidance for self-assessment and there is very little case law for orientation.

Besides giving clearer guidance in the HGL and the BERs, the EC should also examine how to best provide some informal guidance on a case-by-case basis. The set-up of recurring meetings with the EC, aimed at discussing the interpretation of concrete questions in connection with a specific horizontal cooperation project, is one example of a possible tool in this context.

Additionally, the EC should be able to give inputs and feedback at an earlier stage. Another potentially helpful tool in this context are guidance letters in accordance with the EC Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (2004/C 101/06).

b. Further fast-track EC guidance

ETNO believes a new quicker way to ask the EC for further guidance is needed in those cases in which the self-assessment of the parties does not provide sufficient legal security as to the compliance of the cooperation with Art. 101 conditions and if the cooperation is of a certain

magnitude and complexity. These cases would require a rapid response from the EC, as any ex post review may have major consequences.

In order for such a guidance process to be effective and make it manageable from a European Commission perspective, the process should be voluntary, limited in information provided and the time taken for the issuance of the guidance aimed at not to delay projects disproportionally. It is not desirable to create a burdensome lengthy process, especially in fast-moving markets. Therefore, it would be necessary to define a minimum amount of information that needs to be provided for a decision and have a limited period of time for the decision.

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