April 2022

GSMA Response to DG Competition consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines

The GSMA welcomes the opportunity to submit views on the recently published drafts of the revised R&D and Specialisation Block Exemption Regulations (together 'HBERs') and Horizontal Guidelines (HGLs). We acknowledge DG Competition's efforts to update the HBERs and HGLs to the challenges brought by the digitisation and the additional guidance provided for network sharing and sustainability agreements. We also welcome Executive Vice-President Vestager's announcement of the review of Regulation 1/2003 which we understand will explore suggestions that the GSMA has previously made in the context of the horizontal agreements' framework review, such as the need for more informal guidance.

In this response, we would like to focus on the main points that we believe need additional guidance or clarification in the HGLs.

General points

The GSMA welcomes the European Commission's (EC) added guidance on how to assess the **'centre of gravity'** of an agreement. However, further guidance is required on the implications of concluding which part of the cooperation constitutes the centre of gravity and which parts are subordinate. Stakeholders should be able to readily understand when and why it is necessary or beneficial to deviate from the general rule that "*all the chapters pertaining to the different parts of the cooperation will be relevant*". Is for example its relevance limited to determining whether the cooperation constitutes a by object restriction (see for example the reference in paragraph 6 to the centre of gravity relating to "*the assessment of whether certain conduct will normally be considered a restriction of competition by object or by effect*"). More guidance is also required on how to weigh up different factors relevant to an effects analysis that are discussed in multiple chapters relevant to the cooperation.

The GSMA welcomes the clarification made by the EC in paragraph 13 of the HGLs, whereby agreements and concerted practices between the **parent(s) undertakings and their jointly controlled subsidiaries** (JV) will not fall under the restriction in Art. 101 (1) TFEU, following the case law on the single economic unit. However, the use of the word 'typically' is confusing. If the list of scenarios in paragraph 13 under which Art. 101 (1) TFEU will still apply is not comprehensive, it should be expanded upon or more general principles should be added to assist self-assessment. In addition, the specific scenario related to the agreements "*between the parents to alter the scope of the joint venture*", is confusing and leads to a negative bias. Further clarification on this point would be helpful to ensure full legal certainty for undertakings in their relationship with their JV.

Last, the draft HGLs set out in paragraph 39 the notion on **ancillary restrictions**, where it establishes a too strict threshold under which the ancillary restraints of a given cooperation agreement would be analysed. The GSMA is of the view that this threshold is much higher than the threshold foreseen in the Commission Notice on Ancillary Restraints, which establishes that an ancillary restraint to a concentration is legitimate if the concentration "*could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty*" (paragraph 13). This threshold is economically measurable. Conversely, the HGLs establish that: "*The fact that the operation or the activity at stake is simply more difficult to implement, or less profitable without the restriction concerned, does not make that restriction 'objectively necessary' and thus ancillary*" (paragraph 39). This threshold is difficult to assess by the parties that need legal certainty and a benchmark that is economically foreseeable to measure. Therefore, the threshold set out in the draft HGLs should be adjusted to reflect the threshold applied in the Notice for Ancillary restraints.

Relationship with other guidance and legislation

Paragraph 51 rightly maintains the EC's position that the HGLs do not apply to operations constituting a concentration. At the same time, the HGLs have benefitted from the EC's inclusion of references to recent antitrust cases which would improve understanding of the Guidance. Given that in the same period there have been significant merger cases which have enhanced understanding of concepts relevant to both areas of competition law (for example the EC's and the Court's approach to "potential competition" and "anticompetitive foreclosure"), the GSMA would ask that, where appropriate, the EC takes the opportunity to reference the implications of cases in the HGLs.

Production agreements and mobile infrastructure sharing agreements

The GSMA welcomes the recognition of the benefits of mobile network sharing agreements. At the same time, we believe that the HGLs need to be adapted to give valuable orientation for the decade ahead of us, in particular with regard to technical developments. To this end, we propose some adaptions in the current wording:

- **Network cooperation has several benefits**. The objectives of mobile infrastructure sharing go beyond cost saving. Generating synergies to allow faster and wider rollout (in particular new technologies such as 5G and, in the future, 6G including in areas where investment return is less profitable) is one of the main reasons. The synergies can also allow network operators to invest more to e.g. improve customer experience and enable new services more quickly. Sharing also generates significant environmental benefits, such as lower energy consumption emissions, production and waste. Such benefits should be recognised in the HGLs. Furthermore, specific guidance under which basis a given mobile network sharing agreement would meet the conditions under Art. 101 (3) TFEU would be welcomed. Thus, RAN Sharing agreements exerting the following pro-competitive effects should be excluded from the presumption that they fall under Art. 101 (1) TFEU by principle: efficient investments, faster and wider deployment, roll-out of new technologies, improved capacity and service quality, environmental benefits as well as intensified competition at the retail level by unlocking important resources for innovation.

- The **distinction under paragraph 302 between passive, active RAN and spectrum pooling agreements** gives response to tangibles ways network sharing has being reached. However, the draft revised HGLs need to be more flexible to be future-proofed, where technical developments and new sharing modalities might arise with the virtualisation of networks in the roll-out of 5G and 6G.

  In addition, the emergence of Open-RAN will create a new potential layer of competition, hence a softer wording is recommended when it comes to potential competition concerns described by the EC in the draft HGLs so as not to pre-empt future technical developments.

- **Need to acknowledge potential future technological** developments. The revised HGL should expressly note that it may be necessary to adapt the approach to network sharing agreements in future as a result of future technological developments. For example, if hardware was to become more commoditised in future such that software became the main driver of differentiation.

- Regarding the **assessment of the effects of a network sharing agreement:**

  - **The relevance from an antitrust perspective of geographic scope and coverage has evolved**, which needs to be factored in to the revised HGLs. While case-by-case

analysis might still be required, technology has evolved in a way which makes it more likely that active sharing in important urban areas and their surrounds will generate material pro-competitive benefits (in addition to the significant benefits generated in rural and some suburban areas).

- **Market structure should not be, per ser, problematic** nor should prejudge the compatibility of a given agreement with the internal market in an investment-heavy industry such as the mobile telecommunications sector. Here you naturally will end up with high market shares. In fact, when you look at existing mobile network sharing agreements, the majority of these will have a joint market share that exceeds 50%. In addition, we agree with the EC that in **the appraisal of the network sharing agreement, should follow a case-by-case assessment** and the competitors outside the agreement and the competitive pressure exerted by them, are factors that should be taken into account.

- The condition on the need to follow **differentiate spectrum strategies should be revised under paragraph 304**. It is necessary to pay attention to the specific circumstances as well as the amount of spectrum pooled. For instance, where spectrum at the margin (e.g. mmWave spectrum for hotspots) is pooled and jointly deployed, it is unlikely to impose on the operators' ability to deploy and acquire spectrum for wide area coverage.

In this light, and for the guidance to be future proof, **we recommend the Commission to carefully adapt the current guidance on network sharing to a more forward-looking approach**. This should facilitate an efficient competitive roll-out of future technologies.

Finally, while the objective of the criteria defined in paragraph 304 is to provide a clear guidance on the issues which are important for the competition assessment of RAN sharing agreements, certain statements seem to go too far and thus create an ambiguity as to the value of such assessment criteria. We propose to clearly state that such criteria are not the minimum to respect but are the main criteria in the assessment of mobile network sharing agreements.

Information Exchange

The draft HGLs chapter on information exchange agreements – that concerns agreements in which information exchange in itself is the main objective of the cooperation – contains new specific provisions on some types of data sharing, which are basically considered sub-groups within the category of information exchange.

The GSMA believes that **data sharing and data pooling agreements should not be treated as information exchange and specific guidance on this kind of agreements is paramount**. The consideration of data sharing and data pooling agreements as information exchange would lead to consider that any information shared within this kind of agreements might be considered commercially sensitive and therefore subject to a strict approach because of the fear of breaching antitrust rules. Moreover, taking into account that this type of cooperation is very common within the Digital Economy, ad-hoc guidance would provide legal certainty for undertakings in the appraisal of this kind of agreements under Article 101 TFEU.

In general, data sharing agreements have a positive effect on competition. Indeed, for this purpose, the Commission is strongly pushing for the opening of the data market. Several initiatives can be mentioned in this regard: the Data Strategy, the Open Data Directive, the Data Governance Act, the Data Act. The GSMA, therefore, welcomes that the draft HGLs acknowledge data sharing efficiencies and benefits, and that data sharing is also encouraged in the European Strategy for Data.

Nevertheless, the draft of Chapter 6 contains some unjustified strict provisions on information and data exchange which would limit market players' ability to conclude such agreements:

- One of these is in paragraphs "**Access to information and data collected**" (paras. 441-442), where it is stated that, in situations where the information exchanged is strategic for competition and covers a significant part of the relevant market, the exchange of such strategic information may be permissible only if the information is made accessible in a non-discriminatory manner to all undertakings active in the relevant market. This provision is excessively restrictive and should be deleted. As a second best, it would be necessary to limit the "duty" to give access to cases of exceptional danger to competition. Such cases might occur when agreements are made by digital players of gatekeepers' size and market power. If the provision will not be deleted or modified restricting the scope of application to those very exceptional cases, this paragraph will represent a heavy interference with the commercial freedom of the parties and, itself, a breach in the freedom of competition, taking into account the time, costs and efforts involved in acquiring that data and the unjustified advantage that other undertakings would have.

- GSMA thinks that the upfront **identification of commercially sensitive information** (paras. 423-424) for the assessment under 101(1) TFEU could be useful for undertakings, as long as the list introduced in Chapter 6 will not be interpreted extensively. However, the following changes should be done to provide legal certainty to undertakings and avoid a broad interpretation over what is considered as commercially sensitive information that could blur the goal of the guidance provided:

    - Paragraph 423 needs to be fine-tuned to narrow down the wording on what is considered commercially sensitive information to avoid broad interpretation, by removing: … "*it ~~often~~ concerns information that is important for an undertaking to protect in order to maintain…*".

    - Paragraph 424 lists particularly commercially sensitive information. One of the items of the list concerns "*The exchange with competitors of future product characteristics which are relevant for consumers*". This provision is too general and indeterminate, and it could lead to unjustified strict provisions on information exchange which would limit an undertaking's capability to reach such agreements, so it should be further specified to restrict the scope. For example, a range of possible future product characteristics may need to be considered in the context of standard-setting.

    - Relatedly, paragraph 424 identified as a commercially sensitive information, "*The exchange with competitors of information concerning positions on the market and strategies at auctions for financial products*". This example should be limited, as the exchange of market shares that are public and in the public domain, would not have any anticompetitive concern. Therefore, we propose to fine-tune the wording, by including the following addition: "*The exchange with competitors of information concerning positions on the market **(as long as such positions are not public)** and strategies at auctions for financial products*"

- In addition, while the GSMA appreciates that the Commission is reluctant to define what constitutes a 'significant part' of the market (for example in para 421), guidance on e.g. the type of market characteristics or information being shared that impact upon the level of market coverage that is deemed 'significant' would be helpful.

- In paragraph 425 with regard to the guidance on what is considered **'genuinely public' information** is too vague and more precise guidance would be welcomed to provide full certainty on the nature of "genuinely public information".

- On the theme of **information exchange that may stem from regulatory initiatives** (para. 411), the Commission should ensure that everything possible is done to achieve coordination between competition law and regulation, avoiding companies incurring in excessive compliance costs and risks of infringements due to a regulatory obligation. In addition, in the example provided at paragraph 411, reference is made to the problematic sharing of technical information (as separate from commercially sensitive information). If this distinction is intentional, further guidance on why/when sharing of technical information that is not commercially sensitive raises competition concerns would be helpful.

- On **unilateral disclosures** (para. 432): the HGLs foresee unilateral disclosures of commercially sensitive information carried out by an undertaking to its competitor(s) through posts on websites which, as stated in this paragraph, could lead the entire sector to enter into an infringement under 101 (1) TFEU basis if its competitors do not respond making a clear statement that they do not accept such information. We do not understand the rationale behind this provision, especially because the EC is shifting the burden of proof onto the competitors to demonstrate they have distanced themselves from the information (which it may not even be aware it exists, given the ambiguity over what is intended by "who accepts it" in relation to posts on websites). On the contrary, we are of the view that the burden of proof should be onto the EC to show that the exchange had the object or the effect to restrict competition. More clarity on what is required to have "accepted" a unilateral disclosure from competitors is needed. Likewise, paragraph 434 should be clear that the unilateral announcement of genuinely public information will not constitute a concerted practice within the meaning of Article 101 (1) TFEU and therefore not require a proactive statement by the receiver that it does not want to receive such information.
- On the guidance provided on **information exchange in Merger & Acquisition transactions** (para. 410), the GSMA believes that this paragraph fails to reflect the realities of the M&A process. In particular, what information is "directly related to and necessary" for M&A activity may be much more expansive than would be the case in many other contexts given the commercial risks inherent in such a project, and the need for parties to ensure the terms of their transaction adequately capture and allocate those risks. Similarly, what is "directly related to and necessary" may change through the course of an M&A transaction as, first, the likelihood of a deal being reached (and therefore risks being realized) increases, and second, completion (and therefore smooth implementation) nears. Therefore, this paragraph should be removed.

Standardisation agreements

The GSMA welcomes the acknowledgement that **participants in standardisation agreements are not necessarily competitors** (para. 466), however, the HGLs fall short of giving guidance as to when agreements with such broad participation wouldn't raise competition concerns. We would therefore reiterate our previously submitted request that cross-sectorial standardisation agreements should benefit from a relaxed application of competition rules to the extent that the companies entering into these agreements are not competitors and given that interoperability is key to develop many products and services.

The principles set out in paragraphs 477 to 480 remain fit for purpose and provide standard-setting organisations with the necessary guidance to design a competition-risk-free standard-setting process. However, it would be appropriate to include guidance and/or examples with respect to the **transparency principle**. For instance, would the simple publication of the upcoming/ongoing/finalised standardisation efforts on the standard-setting organisation's website meet the transparency requirement in para. 479.

As regards the Section 7.3.3.2. ("**Effects based assessment for standardisation agreements**"), the GSMA would appreciate further clarification of the following points:

- '**Voluntary nature of the standard'**: confirmation that paragraph 490 is solely concerned with non-voluntary standards in the sense of standards exclusivity (e.g., a contractual requirement for members only to sell products/services in compliance with the standard in question).

- **'Participation in the development of the standard':** The GSMA finds useful the newly added guidance (particularly on paras. 496 and 507) on the situations when **restricting participation** may not have restrictive effects on competition. However, the GSMA also recommends the following:

    - Clarification of the meaning of the phrase "limited in time" in para 496 (ii) ("*if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to be involved in order to continue the development of the standard*") - does "limited in time" simply mean that the restriction is finite (i.e. at a certain point the process will be opened up to scrutiny / voting by interested stakeholders)? Clarification of the meaning of "major milestones" would also assist in this regard.

    - In addition, we believe it would be appropriate to clarify on paragraph 496 that not only competitors but all industry affected by the standard would be able to have visibility in order to determine when and how to participate in these major milestones. We would propose the following change in this regard: "*as long as at major milestones all ~~competitors~~* ***companies being affected by the standard*** *have* ***~~an~~ sufficient visibility to assess when and how*** *~~opportunity~~ to be involved* ***in the development of the standard****….*".

      It would also be appropriate to build on footnote 294 to clarify whether, for example, standard-development organisations are allowed to include participation restrictions that protect the right to participate whilst at the same time seeking to drive efficiency by preventing companies that refused to invest time and effort in the process participating in the later stages of the process only with the objective of blocking the process.

    - When reading paragraphs 496 and 507, including footnotes 294 and 302, it is not always clear in which cases the restrictive participation is not problematic under Article 101 (1) TFEU and which cases efficiencies yet have to be proven under Article 101 (3) TFEU. We believe that some clarifications are to be introduced to separate both cases.

      For example, in the cases provided in paragraph 496, the restrictive participation should be considered non-problematic and for all other cases of restrictive participations, the parties will need to prove efficiency gains. Based on the above, we propose the following modifications:

496. *However, in certain situations, restricting participation may not have restrictive effects on competition within the meaning of Article 101(1), for instance: (i) if there is competition between several standards and standard development organisations, (ii) if in the absence of a restriction on the participants[293] it would not have been possible to adopt the standard, or such adoption would have been unlikely* ***as it would have been heavily delayed by an inefficient process****[294] or (iii) if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to be involved in ~~order to continue~~ the development of the standard.*

~~Footnote 294: *Or if the adoption of the standard would have been heavily delayed by an inefficient process, any initial restriction could be outweighed by efficiencies to be considered under Article 101(3).*~~

507. *Participation in standard development should normally be open to all competitors in the market or markets affected by the standard unless ~~the parties demonstrate~~ there are significant inefficiencies ~~of~~ **for** such participation **as provided in paragraph 496**[301]. Alternatively, any restrictive effects of restricted participation should be otherwise removed or lessened **for the** ~~.~~*[302] *~~In addition, a~~ restriction on the participants ~~could~~ **to** be outweighed by efficiencies under Article 101(3) ~~if the adoption of the standard would have been heavily delayed by a process open to all competitors~~.*

Footnote 302: *~~See paragraph 477 above on~~ **for example** ensuring that stakeholders are kept informed and consulted on the work in progress if participation is restricted.*

Last, we believe it would be appropriate to add an example of such restriction at the end of Chapter 7.

The additional guidance on IPR disclosures, FRAND and royalties throughout Chapter 7 is welcomed.

In our view, more emphasis and guidance should be given in relation to **certification and testing agreements**. In particular, it would be useful to clarify whether these should qualify as a standardisation agreement, as it might appear to be the case in paragraph 510 and therefore follow rules set out in this Chapter, or if, to the contrary, the standard-setting body would have, once the standard is adopted, the possibility to set out objective certification and/or testing criteria to evaluate compliance with the standard by itself or by a designated body. It is important to note here that exclusivity for testing/certification to a particular body might sometimes be given because having multiple bodies is not technically feasible or, while feasible, extremely confusing and unproductive. This should be acknowledged in paragraph 510 as another justification for restricting compliance on top of the one mentioned about time limitation. Additionally, when exclusivity is necessary, the HGLs should clarify whether the agreement can include additional safeguards to mitigate possible risks to competition on top of the mentioned certification fee that should be reasonable and proportionate to the compliance testing cost. Examples of additional safeguards would be for the certification or testing body to only be able to decline certification/testing based on objective reasons to avoid exclusionary practices by such body. Also here, we believe that it would be useful to add examples about certification/testing agreements at the end of Chapter 7.

There is also a lack of guidance on the ability of those involved in the standardisation process to **self-certify products' compliance** with standards and to share these test results in the interests of efficiency (and e.g. reduce reliance on centralised certification bodies). If the Commission would consider this type of co-operation to fall outside of Article 101(1) TFEU, it would be helpful for this to be stated in the HGLs.

Additionally, given the global nature of standardisation agreements, authorities should cooperate to ensure that where standards are set at a global level and by global organisations and, a coherent application of competition rules regarding standardisation agreements exists.

Research and Development agreements

As a general comment, the GSMA notes that there is a lack of guidance in relation to collaborations looking to combine insight gained along the value chain. This could include for example joint performance testing (collating of results) with a view to providing input and insight to enable upstream suppliers to identify efficiencies in the development of their upstream product. A worked example would

be helpful, demonstrating how such collaborations could fit within the R&D block exemption and if not, how it falls to be assessed under Article 101 TFEU more generally.

Sustainability agreements

The GSMA welcomes the inclusion in Chapter 9 of the HGLs of guidance for the assessment of sustainability agreements, defined as a type of cooperation between competitors that pursue one or more sustainability goals. However, the guidance provided only covers sustainability standardisation agreements which, in the EC's point of view, are the most common type of cooperation that will pursue sustainability objectives. The GSMA believes that the proposed scope is very narrow and further clarification, including examples, on when section 9 would apply to sustainability agreements that do not entail standardisation would be welcomed.

In terms of scope, we believe that the EC is leaving out of guidance under Art. 101 (3) TFEU basis other sort of cooperation agreements which, although their main goal is not the pursuit of sustainability objectives, they might exert sustainability benefits instead. This possibility has been completely missed in the whole Chapter.

The GSMA believes that the HGLs should **include the assessment of sustainability benefits** as an effect to be analysed in the overall evaluation of a horizontal cooperation agreement under the meaning of Article 101 (3) TFEU. Horizontal cooperation agreements can meet the Green Deal's objectives if they contribute to reducing the ecological footprint (carbon emissions, recyclability and recycling, reduction of plastics and composting projects), to gain efficiencies and to share infrastructure and costs, as well as agree certain standards to reduce the environmental impact and/or to increase the commercial viability of environmental projects, should be considered procompetitive. Therefore, cooperation agreements that exert sustainability efficiencies should be considered as a pro-competitive effect in the general assessment of a horizontal cooperation agreement

In this sense, the GSMA proposes to **include** under the **four cumulative conditions** for the evaluation of horizontal cooperation agreements under Article 101 (3) TFEU, the **sustainability effects** as one of the efficiencies the undertakings entering the agreement might meet, within the first cumulative criteria:

41. The application of the exception rule of Article 101(3) is subject to four cumulative conditions, two positive and two negative:

– the agreement must contribute to improving the production or distribution of products or contribute to promoting technical, or economic progress, ***or contribute to sustainability objectives****, that is to say, lead to efficiency gains;*

– the restrictions must be indispensable to the attainment of those objectives, that is to say, the efficiency gains;

– consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement. Hence, efficiencies only accruing to the parties to the agreement will not suffice. For the purposes of these Guidelines, the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement44; and

– the agreement must not afford the parties the possibility of eliminating

Subsidiarily, we ask the EC to include in every chapter of the HGLs addressing the different types of horizontal cooperation agreements, a specific mention on the consideration of sustainability efficiencies in the assessment of the given cooperation agreement under Article 101 (3) TFEU, in such a way that sustainability efficiencies (if any) are considered in the overall assessment of the pro-competitive effects exerted by the agreement to determine its compatibility with the internal market. Thus, it is ensured that

any type of cooperation agreement (regardless of being standardisation agreement, R&D agreement or specialisation agreements etc.) is entitled to benefit from the pro-competitive effects that not only standardisation agreements but the whole industry, should pursue to meet EC's policy goals.

About the GSMA

The GSMA is a global organisation unifying the mobile ecosystem to discover, develop and deliver innovation foundational to positive business environments and societal change. Our vision is to unlock the full power of connectivity so that people, industry, and society thrive. Representing mobile operators and organisations across the mobile ecosystem and adjacent industries, the GSMA delivers for its members across three broad pillars: Connectivity for Good, Industry Services and Solutions, and Outreach. This activity includes advancing policy, tackling today's biggest societal challenges, underpinning the technology and interoperability that make mobile work, and providing the world's largest platform to convene the mobile ecosystem at the Mobile World Congress (MWC) and Mobile 360 series[1] of events.

We invite you to find out more at gsma.com.

[1] See https://www.mobile360series.com/.