DEUTSCHE TELEKOM RESPONSE TO COMMISSION´S PUBLIC CONSULTATION ON THE

DRAFT REVISED PROPOSAL ON GUIDELINES FOR HORIZONTAL COOPERATION AGREEMENTS

APRIL 26, 2022

Deutsche Telekom welcomes the opportunity to comment on the consultation of the draft revised proposal on the Guidelines for Horizontal Cooperation Agreements (Horizontal Guidelines) and again would like to underline the importance of cooperation for the European industry in the changing geopolitical environment. With the digital evolution markets continue to become increasingly globalized and the competitive landscape will transform dramatically. European companies, especially telecoms operators, are faced with a balancing act between operating in relatively small fragmented markets in the EU and growing competitive pressure coming from global players. This is a crucial point in time to ensure the Horizontal Guidelines are future proof, since cooperation will be one on the key pillars for the European industry to contribute to the digital transformation of our society and enable the green transition.

It has become a necessity for companies to enter into horizontal co-operation agreements to remain innovative and competitive. In order to achieve the needed countervailing power to compete in global markets it is crucial for the companies to be able to reach scale. Providing a framework that gives legal certainty and enables cooperation will allow European companies to meet the challenges of digitalization and globalization, while remaining at the forefront of innovation to the benefit of the European citizens.

Therefore, it is important that this review of the Horizontal Guidelines and BERs is taken as opportunity to make competition policy more forward looking and fit for the changing global environment. Overall, the aim should be to:

- enable cooperation to reach necessary scale to be competitive on global markets, and
- increase legal certainty with further clarifications in the Horizontal Guidelines for self-assessment.

1. Introduction

DT welcomes the clarifications in para. 13 of the draft of the Horizontal Guidelines that Art. 101 (1) TFEU does not apply to agreements and concerted practices between parent companies and jointly controlled subsidiaries, as they should be considered as one economic unit. Nevertheless, we are not sure why agreements between the parents to alter the scope of the joint venture should not be covered by this rule. Therefore, we suggest to change the wording in this para. 13 by eliminating "- *between the parents to alter the scope of the joint venture;*".

The concept of ancillary restrictions in para. 39 introduces an unduly strict threshold and is not in line with the Notice on Ancillary Restraints, which establishes in it´s para. 13 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*". Therefore, to provide more clarity and ensure consistency the standard set out in the draft of the Horizontal Guidelines should be adjusted to reflect the standard that is applied in the Notice for Ancillary Restraints.

2. R&D

DT believes that Section 2 of the Horizontal Guidelines and the R&D BER should provide clearer encouragement of R&D cooperation and reduce the complexity for their self-assessment. The view on R&D cooperation needs to be more balanced weighing the pro-competitive against the restrictive effects for innovation as such, rather than focusing on foreclosure and competition in innovation markets. More specifically following points should be removed:

- The requirement for the *existence of three or more competing R&D efforts* for an exemption of a R&D cooperation is likely to slow down or even reduce innovation in Europe since it is unduly exigent and unworkable in practice. Even if three competing R&D efforts would exist, it would be overburdensome if not impossible for the parties to identify these R&D efforts and establish that they are comparable. Therefore, this specific condition should be removed.

- The condition to give *full access to the final results* has a chilling effect on the willingness of companies to engage in joint R&D in the first place. Beyond that, these access requirements contribute to the legal uncertainty, especially, the extent and timing of such access conditions would need a clearer and more limited delineation.

3. Production Agreements

Competition policy should facilitate cooperation efforts in Europe by reducing barriers that companies faced in the past, such as opposition against horizontal cooperation in innovation technologies. The pro-competitive aspects of such production cooperations need to be more strongly accounted for. Otherwise, key elements of a future proof digital ecosystem, such as cloud, AI and IoT, could experience serious holdbacks, preventing Europe to catch up in the global race for digital leadership. To this end it is necessary that competition policy enables such cooperation and, in particular, fosters collaboration between European companies with regard to innovation technologies and digital infrastructure.

Against this background it is also important, that efficiencies of joint production agreements are recognized and carefully balanced against any restrictive effect. At the same time, it must be attentively considered where joint production agreements may per se have a pro-competitive effect, not only in the case where it gives rise to a new market, e.g., para. 227, but also where cooperating parties want to compete in a new market that they otherwise would not be able to compete in.

Therefore, we would suggest the following adaptions to the Section 3.3 of the Horizontal Guidelines:

> *227. Production agreements between undertakings which compete on markets on which the cooperation occurs are not likely to have restrictive effects on competition if the production agreement gives rise to a new market* ***or enables the parties compete in a market****, in which they have not been active before, that is to say, if the agreement enables the parties to launch a new product, which, on the basis of objective factors, the parties would otherwise not have been able to do (for example, due to the parties' technical capabilities);....*

4. Mobile Infrastructure Sharing

DT welcomes the recognition of the importance of the connectivity networks for the digital economy and the related roll-out benefits arising from mobile network sharing agreements. Nonetheless, we believe it is crucial that any guidance for network sharing is future proof, in particular, given the constant technical evolution of mobile networks. The Horizontal Guidelines should provide guidance for the decade ahead of us, enabling the most efficient roll-out and allowing to reap all the benefits of innovation without being restrained by outdated technical concepts. To this end we propose some adaptions in the current wording of the draft of the Horizontal Guidelines:

- The benefits of mobile infrastructure sharing extend beyond cost reductions and quality improvements. In particular, the efficiencies of network sharing extend to the decrease of environmental impact, such as lower emissions for site and servicing as well as less production and waste.

- The distinctions under para. 302 between passive, active RAN and spectrum sharing are retrospective, as BEREC already states in 2019 in their Common Position on Infrastructure Sharing. Therefore, it is important to leave flexibility to take into consideration changes, such as the evolution of the RAN technology: With the increasing virtualisation of the networks in future features and functionalities will be more driven by software elements, whereas the hardware elements of the RAN will become more commoditised.

- Furthermore, the evolution of ORAN and related reference designs as well as the developments in existing standardisation bodies (e.g. 3GPP) will lead to the RAN becoming much more standardised than today. These highly standardised RAN solutions will reduce/eliminate infrastructure competition in relation to hardware and pushes the competition towards the software elements. This evolution is clearly seen by the rise of xAPPs and rAPPs which will enable innovation that will help operators create differentiated network experiences by offering performance adapted to particular service types, user groups, or locations. Beyond that, the RAN will develop into a cloudified system which consists of commercial of the shelf servers (COTS), generic cloud software and RAN specific applications. Regarding spectrum sharing we will also see important evolutions, which will lead to spectrum sharing being a necessary step to improve network efficiencies. In particular, in the context of 6G it will be crucial to provide innovative services.

- Regarding the assessment of the effects of a network sharing agreement not all of the factors listed under para. 303 are relevant in the context of network sharing or appropriate going forward:

    - Geographic scope and coverage no longer play the same role as they did in the early days of mobile networks. Over the last years, also driven by regulatory coverage obligations, network coverage is not any more the decisive factor for differentiation. Beyond that coverage is determined by passive sites, the sharing of which is seen as uncritical or even mandated. In addition, the distinction between urban and rural no longer holds up in 5G, where sharing in urban areas can become even more necessary given the characteristics of 5G antennas. Furthermore, network sharing is becoming more and more important in urban areas where traffic volumes are exploding without the possibility for the MNO to increase revenues considering unlimited tariffs.

- Market structure also is an inappropriate factor since the mobile telecommunications sector necessarily is more concentrated given the large investment needs. In such investment heavy industries, you will naturally end up with high market shares. In fact, taking a look at the existing landscape of mobile network sharing the majority of these agreements will have a joint market share that exceeds 50%. Similarly, the amount of spectrum held by the parties should not be a decisive factor for the assessment of the restrictive effects access infrastructure sharing agreements.

Therefore, we would caution the Commission to carefully adapt the envisaged draft guidance on mobile infrastructure sharing to a more forward-looking approach. This would facilitate an efficient competitive roll-out of future technologies, while at the same time avoiding redundant investments in commoditized elements of the access network. In order to achieve this, it is also necessary that the authorities take a more favorable stance on network sharing agreements acknowledging the benefits under Art. 101 (3) TFEU analysis, as they can generally be considered as source of substantial efficiencies and consumer welfare, beyond mere price effects.

In light of the above, we would suggest the following adaptions to the Section 3.6 of the Horizontal Guidelines:

298. While The Commission recognizes potential benefits from mobile infrastructure sharing agreements arising from cost reductions or quality improvements. Cost reductions, for example related to rollout and maintenance, may benefit consumers in terms of lower prices. Better quality of services or a wider variety of products and services can stem, for example, from faster roll-out of new networks and technologies, wider coverage or denser network grids. Mobile infrastructure sharing may also allow the emergence of competition that would not otherwise exist. ***Beyond that, network sharing enables environmental benefits, such as lower emissions for site and servicing as well as less production and waste….***

302. While the competitive assessment under Article 101 must always be conducted on a case-by-case basis, ***in the past*** *broad principles* ***have*** *given a guidance to conduct such an assessment for the different types of mobile infrastructure sharing agreements,* ***though these may no longer be relevant in the future considering the constant technical evolution towards software driven networks:***

a. …

303. *In conducting the assessment of whether a mobile infrastructure sharing agreement may have restrictive effects on competition, a variety of factors are relevant, including:*

a. *the type and depth of sharing (including the degree of independence retained by the network operators);*

b. *the scope of shared services and shared technologies, the duration and the structure put in place by the agreements;*

~~*c. the geographic scope and the market coverage of the mobile infrastructure sharing agreement (for example, the population coverage and whether the agreement concerns densely populated areas);*~~

d. *the market structure and characteristics (~~market shares of the parties, amount of spectrum held by the parties,~~ closeness of competition between the parties, number of-operators outside the agreement and extent of competitive pressure exerted by them, barriers to entry, etc.).*

5. Joint Purchasing

While DT appreciates the efforts to increase the legal certainty for joint purchasing, there still is room clarification on what would amount to a prohibitive restriction.

- In para. 313 the draft Horizontal Guidelines describe the creation of buying power vis-à-vis large suppliers as the usual aim of joint purchasing arrangements. While creating or increasing buying power may often be a significant motivation joint purchasing arrangements often not only aim at mere buying power but also at economies of scale. In particular, in the telecomumications sector where individual specifications of network equipment play an important role the harmonization of such specifications by network operators in context of a joint purchasing may lead to higher quantities of the harmonized products. The ability to produce higher quantities of a product with harmonized specification leads in turn to lower production costs to the benefit of the supplier which can be passed on to the purchasers.

- Under para. 317 the draft Horizontal Guidelines distinguish between buyer cartels and (legitimate) joint purchasing arrangements. While agreements leading to a coordination of purchasing activities of undertakings dealing individually with suppliers are considered as buyer cartel the joint and open negotiation of bundled volumes are considered as (legitimate) joint purchasing. In this context, a further

clarification on how to differentiate both forms of conduct would be necessary. This applies all the more as in the following the Horizontal Guidelines indicate that a (legitimate) joint purchasing does not require to disclose the exact identity of its members and that an arrangement where the members are not obliged to purchase all or most of their requirements through the arrangement are considered as less restrictive. While in the first case a purchasing arrangement leaves room for individual purchasing activities of the members which – for the supplier not transparent – might be influenced by the purchasing cooperation and the associated information exchange, the second case raises the question of how individual independent purchasing should be possible despite knowledge of the common purchasing terms and conditions without exposing the undertaking concerned to the risk that the individual purchasing activity is the result of a coordinated market behavior, i.e. a buyer cartel. Therefore, we suggest not to maintain the artificial distinction between buyer cartels and legitimate purchasing cooperations or add more clarification. Alternatively, each form of coordination of purchasing behavior could be examined as to whether it is a restriction of competition by object or effect and whether the conditions for exemption are met, e.g., because the cooperation leads to economies of scale.

- In para. 329 of the draft of the Horizontal Guidelines the unchanged threshold of 15% for the combined market share of the parties on the purchasing markets is too low. This applies in particular in cases where the supplier markets are highly concentrated and the suppliers themselves have significantly higher market shares. At least in cases where 3 or fewer suppliers have joint market shares of more than 50%, the threshold should be raised to 30%.

- When assessing the effects of a purchasing cooperation on the downstream sales market in para. 335, it should also be taken into account whether the jointly purchased products constitute a significant input for the activities on the sales markets. If this is not the case and the cooperation does not contribute to an appreciable increase in commonality of costs, this is a strong indication against negative effects on the downstream sales market even if the participating companies have higher market shares on these markets.

- In para. 343 it should be clarified that the threat to stop supplying a specific product can be abusive and prohibited, at least for market-dominant companies.

- As mentioned above under para. 344 the efficiency gains of a purchasing group also include economies of scale through the increase in quantities as a result of a harmonization of the product specifications demanded.

- According to para. 346 of the draft Horizontal Guidelines, consumer benefits are limited to a pass-on of price reductions by the purchaser. This view is too narrow in that consumer benefits can also arise from additional investment in a broader or improved product offering. If the members of a purchasing cooperation invest the reduced purchasing costs in an improved product quality or portfolio, this should be taken into account as a consumer benefit in the same way as lower prices.

6. Information Exchange

DT welcomes that the chapter on information exchange now takes note of the importance of data in the digital economy. In this context it is of particular importance to clarify the distinction between information and data. In the digital economy data is one of the key inputs in order to be able to offer innovative products and services, for example with regard to AI and IoT, which will also play an increasing role in the traditional industries. Against this background and given the fragmentation of the European markets there will be a much greater need for data sharing in the future to maximize the benefits of big data for industries and consumers. Facilitating horizontal cooperation with regard to the commercial exchange of data among competitors, will allow stakeholders to compete within the current geopolitical ecosystem and to resolve current digital markets issues such as barriers to enter, the existence of gatekeepers and their conglomerate effects. Facilitating horizontal cooperation on data sharing would also be consistent with the European Commission's Data Strategy and the recently presented proposal for a Data Act by the European Commission. With the Data Act, the Commission aims to enhance fair access to and use of data, e.g., by enabling users to share their data with third parties including between actual or potential competitors.

Therefore, it is crucial that the guidelines are further updated in order to provide more legal certainty and in particular to respond to the challenges of data sharing in the digital economy. Criteria such as frequency of exchange or age of data cannot be considered a viable criterion in the digital economy where the permanent exchange of real-time data is what makes the data sharing produce the optimum benefit for the industry and the consumers.

- The broad classification of certain *information exchanges as by object* infringements under para. 424 seems overly cautions, especially against the need to maximize the benefits of big data for industries and consumers. For instance, if you look at the category of *future product characteristics:* a classification of this information as by object infringement would make it nearly prohibitive to enter into meaningful joint production or standardisation agreements. In general, the analysis of information

exchange should rather be based on the merits of each case, carefully balancing the restrictive and the pro-competitive effects.

- The classification of certain *unilateral disclosures*, such as posts on websites, chat messages, emails, phone calls, input in shared algorithmic tools, meetings etc., as concerted practice under para. 432 in combination with the presumption under para. 433 that this information has been taking account of is concerning. Not only that the authorities do not need to proof that the third party has actually taken account of the information, but also the third party now needs to proof that they distanced themselves of this receipt of information, which they actually may not even be aware of.

- The condition on information exchange in the context of M&A in para. 410 on what information is "directly related to and necessary" in the context of M&A activity does not provide sufficient clarity. For instance, what is "necessary" may change depending on the stage the M&A activity is at. Furthermore, there is the danger of overly restrictive interpretation of this condition. The reality of M&A transactions and the related risks make it necessary that much more expansive data on the target is exchanged than in other contexts such as cooperation's, which normally have a much more limited scope. Beyond that, the information is necessary for the parties to ensure the terms of their transaction adequately capture and allocate the related risks.

- The draft of the Horizontal Guidelines recognize *data sharing and data pooling* as a form of information exchange, but nevertheless only provide little guidance on these types of cooperation. In fact, submitting the data sharing agreements to the information exchange framework, including notions such as age of data and frequencies of exchange, may restrain companies reaping the full benefit of data in the digital economy. DT considers that, given the importance of this type of cooperation agreement for the digital economy, more specific and dedicated guidance is necessary, including on the use of data marketplaces and intermediaries. Having an overly restrictive or unclear regime on what may be prohibitively sensitive or strategic in the context of data sharing or forcing non-discriminatory access for all market players may impede effective competition with closed platform ecosystems which can benefit of a vast amount of different data. Moreover, any approach taken should be consistent with the European Commissions' approach on data spaces and data governance.

- In light of the crucial role of data in the digital economy and the significant benefits sharing can bring to competition and consumers DT would welcome a broader guidance and emphasis on the pro-competitive effects of data pooling and the assessment of the pass-on, also beyond the consumers in the relevant market.

Especially, more clarity on the situations when in competition with closed platform ecosystems the sharing of data among the other market participants without having to open the access to these closed ecosystems enables a level playing field.

In addition to the broader general adaptions that need to be made in this section on information exchange especially in the context of the digital economy, we would suggest to following wording for para. 433:

> *433. When an undertaking receives commercially sensitive information from a competitor (be it in a meeting, by phone, electronically or as input in an algorithmic tool),* ***and*** *it ~~will be presumed to~~ takes account of such information and adapt its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such information or reports it to the administrative authorities.* ****....****

7. Standardization

Cooperation is also increasingly necessary for interoperability and standardization to achieve the goals of the digital single market and environmental targets. It is vital for the autonomy and competitiveness of the European Digital Single Market to facilitate cooperation, in particular, in case of standard-setting and innovation efforts regarding critical layers of the digital ecosystem. Hereby, it is crucial to ensure that not only cooperative efforts concerning the development of standards is exempted but also cooperation aiming at the implementation of standards. Otherwise, newly developed standards and related innovations run into danger of not materializing and not unfolding their respective economic and social benefits.

More particular on the revised draft of the standardization section of draft of the Horizontal Guidelines we believe that it is important to carefully distinguish between (a) standard setting and (b) standard development as well as access and licensing. Beyond that, could be emphasized that the provision of access to the standard on fair, reasonable and non-discriminatory (FRAND) terms apply to all undertakings asking for such a license no matter on which level of sales/production these undertakings conduct their business, e.g., paras. 477, 480 and 481.

Regarding the assumption that the comparison can be made in a consistent and reliable manner throughout paras. 486 et seqq. it is our experience that information regarding license fees asked by IPR holders in relation to a specific standard are not available. Ex-ante declaration of royalties has been discussed extensively in standard setting organizations such as ETSI, but usually there is no majority vote available to implement such declaration

obligations. Some IPR holders have publicly announced a royalty cap for what they will charge, e.g., for 5G implementers, but this information is scarce and does not give a complete picture for an implementer before actually adopting a standard or offering products based on the standard in question (lock-in).

On the *participation in the development of the standard* we welcome the newly added guidance in paras. 496 and 507 regarding situations when restricting participation may not have restrictive effects on competition under Art.101 (1) TFEU. Although we would welcome more clarification on the examples such as the meaning of the phrase "limited in time" or the meaning of "major milestones".

Therefore, we would suggest the following adaptions to the Section 7 of the Horizontal Guidelines:

> *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)....*

8. Sustainability

DT welcomes the inclusion of guidance for the assessment of sustainability agreements in the draft of the Horizontal Guidelines. However, in our opinion the scope is too narrow given that the section seems to focus sustainability standardisation agreements, rather than looking at the different types of cooperation agreements that may pursue sustainability objectives.

Beyond that, we believe that the Horizontal Guidelines need to contain more clarification for the assessment of sustainability efficiencies under Art. 101 (3) TFEU. Other types of cooperation agreements could produce substantial sustainability efficiencies helping to meet the Green Deal objectives, which should be recognised by this section. There should be more clarification on how such sustainability benefits are balanced with potential restrictive effects of cooperations, which may have a different centre of gravity than sustainability.

Therefore, as a minimum requirement sustainability objective must be included in the section on efficiencies in para. 41 of the Horizontal Guidelines:

> *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)….*

9. Procedural Aspects

In addition to the revision of the Guidelines for Horizontal Cooperation Agreements and BERs some procedural revisions may be useful to foster horizontal cooperation, which is very much needed for European competitiveness in the changing geopolitical environment. The legal certainty for companies may also be increased by individual guidance on a case-by-case basis, which would further help to reduce the cost associated with the remaining legal uncertainties, especially in novel cooperation models:

- Currently, as described above, neither the Horizontal Guidelines nor BERs provide sufficient guidance for self-assessment and there is very little case law for orientation. Besides giving clearer guidance, the EC should also examine how to best provide some informal guidance on a case-by-case basis.

- Beyond that, a voluntary fast-track notification procedure should be allowed for cooperations that have certain magnitude and involve high stakes, putting the cooperating companies at high risk. For such cases a voluntary notification procedure should be introduced, similar to the voluntary procedure that has been suggested by the German Commission 'Competition Law 4.0' with regard to innovation cooperation: "*recommends the introduction of a voluntary notification procedure at the European level for novel forms of cooperation in the digital economy with a right to receive a decision within a short period of time. It also recommends that the Directorate-General for Competition hire additional personnel for this purpose.*" In order for such a voluntary notification procedure to be effective and make it manageable from an EC and parties' perspective the procedure should be limited in information provided and time. It is not desirable to create a burdensome lengthy procedure, 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, e.g., 3 months.