ETNO response to the public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines

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ETNO response

Introduction

The European Telecommunication Network Operators' Association (ETNO) welcomes the European Commission (EC) opportunity to provide feedback to the draft revised Horizontal Guidelines (HGL).

More specifically, our response will focus on these sections of the Horizontal Guidelines:

- Mobile infrastructure sharing agreements – Chapter 3.6
- Bidding consortia – Chapter 5.4
- Information Exchange – Chapter 6
- Considerations on liability of joint ventures and parent companies – Introductory Chapter
- Ancillary restrictions – Introductory Chapter
- Standardisation Agreements – Chapter 7
- Sustainability Agreements – Chapter 9

ETNO takes also the chance to provide with amendments on selected paragraphs indicated in the text boxes. Text additions or changes are marked in **bold**. Deletions are marked with ~~strikethrough~~.

Mobile infrastructure sharing agreements – Chapter 3.6

We appreciate that the EC heard the call for action made by the telecom industry, and that it is willing to provide some guidance to give more legal certainty for telecoms operators to reach horizontal agreements for network deployment.

We welcome this positive development, which we think will allow a new step forward in encouraging investments and innovation in Europe for the benefit of European citizens and businesses.

More concretely, we welcome that in the draft HGL the EC has recognised the importance of the connectivity networks as foundation for the digital economy, as well as the related benefits of mobile network sharing agreements.

Given that the guidelines should provide guidance for the decade ahead of us, we believe that it is crucial that they provide orientations which remain future proof. To this end, we propose some adaptations in the current wording of the proposed guidance:

- The benefits of mobile infrastructure sharing extend beyond cost reductions and quality improvements. In particular, network sharing enables a wider and faster roll-out as it allows operators to join efforts in the deployment of new technologies. Furthermore, network sharing has environmental benefits, such as lower emissions and less production/waste. We believe that such important benefits should be integrated in paragraphs 296 and 298 of the draft HGL.

In light of the above, specific guidance under which a given mobile network sharing agreement would meet the conditions under Art. 101 (3) TFEU would be welcomed.
Also, it should be clear that RAN sharing agreements exerting the following pro-competitive effects should be excluded from the presumption that it falls under Art. 101 (1) TFEU by principle: efficient investments, faster 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.

- We understand that the distinction under paragraph 302 between passive, active RAN and spectrum may have had some interest in the past. However, we note that this differentiation will become less relevant, even not suitable, especially in light of the newest and future network generations, such as 5G and 6G, where the virtualisation of networks makes this current differentiation unworkable.

  With the deployment of 5G and the virtualisation of the networks, some of the main drivers of differentiation in terms of quality and other performance attributes are software driven.
  As a result of these new network architectures, active sharing and, to a certain degree spectrum sharing, given other capacity drivers like MIMO, are less relevant for service differentiation. A softer wording is hence recommended.

  In addition, hardware will become more of a commodity, especially with the emergence of Open-RAN. With Open-RAN, MNOs will less and less distinguish on the standardised hardware elements. This differentiation could even further evolve in the future according to the new technologies developed, where it is all about software.

  In this context, it is worth mentioning that the evolution towards IP-based networks and network virtualisation and the fact that service definition tends to occur at the software layer pushes the parameters of competition and infrastructure innovation beyond RAN equipment and, for this reason, RAN sharing should not be seen as limiting per se technical and commercial differentiations.

  In other words, in the future, the main elements of capacity and differentiation will be on the software level, hence a softer wording is recommended when it comes to competition concerns described by the EC in the draft HGL regarding active sharing (deployment of capacity) or spectrum sharing (differentiation) so as not to pre-empt future technical developments.

- While we welcome the EC initiative to provide some criteria for the self-assessment of RAN sharing agreements, the objective being to achieve a legal certainty, such criteria should remain as exhaustive and as clear as possible. In this context, regarding the assessment of the effects of a network sharing agreement, not all the factors listed under paragraph 303 seem to be relevant especially when going forward:

  - Geographic scope and coverage (sub c) no longer play the same role as they may have played in the early days of mobile networks. Over the last years, arising from rights of use

of spectrum frequencies imposed by national regulators, the network coverage no longer plays a role in competitive distinction as all mobile operators have an extensive national coverage. Moreover, coverage is determined by passive sites anyway, the sharing of which is seen as uncritical or even mandated.

Furthermore, the distinction between urban and rural parameter to assess of the impact of the sharing arrangement on competition no longer holds up, especially in 5G, where sharing in urban areas can become even more necessary given the characteristics of 5G antennas, given the need for densification and at the same time the higher statical requirements for 5G antennas. As the HGL aims at providing a self-assessment tool to operators for coming 10 years, we believe the current approach to the geographical scope to no longer be valid and thus it should be removed as an assessment criteria.

The focus on market shares when considering the Market structure (sub d) does not seem to be an appropriate criteria and should not be overestimated. For an investment-heavy industry such as the mobile telecommunications sector, there are naturally limited number of actors, and, if one looks at RAN sharing agreements, the majority of such agreements result in a joint market share that exceeds 50%, without this having any relevance for the assessment. However, we agree with the EC that in the appraisal of the network sharing agreement, the competitors outside the agreement and the competitive pressure exerted by them, are factors that should be taken into account.

Furthermore, RAN sharing is not merging the parties to cooperation and does not impact retail and wholesale strategies of cooperating parties. In this context, it is not clear how the closeness of competition could play a role in defining the effects of RAN sharing on competition.

As to spectrum holdings, it could play a role only in RAN sharing arrangements involving spectrum sharing.

- Paragraph 304 sets out a minimum conditions that a network sharing agreement should meet to determine its unlikelihood to be restrictive on competition, which obviously contributes to more transparency. We believe, however, that the condition on the need to follow differentiate spectrum strategies should be reviewed in order not to eliminate per se any spectrum pooling. Indeed, 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 will not impose restrictions on the operators' ability to deploy and acquire spectrum for wide area coverage.

- 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 therefore propose to clearly state that such criteria are not the minimum to respect, but they are the main criteria in the assessment of mobile network sharing agreements.

In light of the above, we would urge the EC to carefully consider the proposed modifications in the current draft guidance on network sharing in order for such guidance to be a more forward-looking approach.
This should facilitate an efficient competitive roll-out of future technologies, support the connectivity goals of the EU while at the same time avoiding redundant investment in commoditised elements of the access network.

Below our suggested amendments:

302. While the competitive assessment under Article 101 must always be conducted on a case-by-case basis[170], broad principles ~~can be~~ **have** given ~~as~~ guidance to conduct such an assessment for the different types of mobile infrastructure sharing agreements **in the past, though these may be less relevant in the future in light of the constant technical developments towards software driven networks**:

(a) Passive sharing is unlikely to give rise to restrictive effects on competition, as long as the network operators maintain a significant degree of independence and flexibility in defining their business strategy, the characteristics of their services and network investments;

(b) Active RAN sharing agreements may **in certain circumstances** be more likely to give rise to restrictive effects on competition. This is because, compared to passive sharing, active RAN sharing likely involves more extensive cooperation on network elements that are likely to affect not only coverage but also independent deployment of capacity;

(c) Spectrum sharing agreements (also referred to as 'spectrum pooling') are a more far-reaching cooperation and may restrict the parties' ability to differentiate their retail and/or wholesale offers even further and directly limit competition between them[171]. While competent authorities shall not prevent thesharing of radio spectrum in the conditions attached to the rights of use for radio spectrum,[172] these agreements must be examined cautiously under Article101[173].

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);[174]

(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);[175]~~

(d) the market ~~structure and~~ characteristics (~~market shares of the parties~~, ~~amount ofspectrum 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.).

304. Whilst not automatically meaning compliance with Article 101, in order for a mobile infrastructure sharing agreement to be considered, *prima facie*, as being unlikely to have restrictive effects under Article 101, it would have to comply, ~~as a minimum~~ **in general**, with the following:

(a) Operators control and operate their own core network and no technical, contractual, financial or other disincentives exist preventing the operators to individually/unilaterally deploy their infrastructure, upgrade and innovate should they wish to do so;

(b) Operators maintain independent retail and wholesale operations (technical, commercial and other decision making independence). This includes the freedom of operators to set prices for their services, to determine the product/bundle parameters, to follow independent spectrum strategies and to differentiate their services based on quality and other parameters;

(c) Operators do not exchange more information than is strictly necessary for the mobile infrastructure sharing to operate and necessary barriers to information exchange have been put in place.

305. Non-compliance of the mobile infrastructure sharing agreement with these minimum conditions gives an indication that the mobile infrastructure sharing agreement is **more** likely to have restrictive effects under Article 101 **than compliance with these general conditions.**

Bidding consortia - Chapter 5.4

- Among the novelties of this draft, the newly introduced paragraph on the "bidding consortia" (par. 5.4, pages 85-87) stands out in the Chapter on Commercialisation agreements. The paragraph concerns the assessment of some aspect of consortia agreements in the context of public and private tenders.
- The consortia agreement among tender participants, especially in public tenders, in general should be assessed case by case. The definition of strict antitrust rules for consortia agreements in view of tenders, especially public tenders, unduly affects contractual freedom and hinders the opportunities for companies to submit joint bidding and, consequently, to participate in major projects.
- Adding additional constraints to already very disciplined contracts, such as that of tenders, entails the inevitable consequence to further plaster up/hold back this sector. Moreover, as to joint public bids and subcontracts, what has already been provided for by the Commission in a recent Communication (no. 2021/C 91/01 dated 18th March 2021) should suffice, since it also places the task of carefully assessing these features on the contracting authority. The new draft guidelines add too many elements and constraints on public bids, also on top of the ones provided by the above-mentioned Communication, extending them to private bits too.
- Public and private tenders have different characteristics and address different needs, involve different (public-law and private-law) rights and interests and, therefore, they cannot be effectively treated on the basis of the same rules.

- Furthermore, the notion of "potential competitor" in the tenders seems strict and restrictive. The identification of this concept should be carried out in a very cautious way and on a case-by-case basis, as it is not possible here to consider all the variables involved. Indeed, the provision on the hypotheses where the subjects could participate individually in a part of the tender (one or more lots, par. 393), and the one on the hypotheses in which a higher number of subjects participate in the joint bidding than strictly necessary (par. 394), seem too restrictive and should be deleted.
- We propose, therefore, to maintain in the text of the guidelines the general principle of the lack of danger for competition of the bidding consortia among non-competitors, adding the efficiencies which could be considered in case of joint bidding among potential competitors and without giving a specific notion of "impossibility to participate individually" to a tender as provided in paragraph 393 (possibility to participate in a lot) and paragraph 394 (there are more parties to a consortium agreement than necessary).
- Should it be confirmed in its wording, the paragraph on the definition of potential competitors must not find extensive application on other kinds of agreements, other than those of commercialisation in bidding consortia. All this, however, reaffirming the principle of lack of risk for competition of consortia among non-competitors.
- Moreover, in the current text of the guidelines, such agreements are referred more generically as participation in consortia to realise "projects" and not limited to "bidding" only, as in the new draft of the guidelines. We propose to maintain this approach of current guidelines.
- Furthermore, the criterion which attaches much weight to the fact that "*other relevant competitors take part in the bidding procedure*", deemed as interconnected with the finding of the related benefit for consumers, forces the company to undergo the assessment of a data not always known in advance, with the consequence that the company is unable to anticipate the compliance of its choices with the antitrust legislation (choices on how to participate in a tender, i.e. if to participate in a lot on its own or to the whole tender with others, *etc.*).
- Summing up, it is not easy for antitrust law to enter with detailed provisions in such a delicate matter as the joint bidding in tenders, dealing with public and private tenders in one single step and without considering properly beforehand in the review – as normal – all the needs and variables of the case. Antitrust law should provide a framework without unduly affecting private contractual autonomy (but also, indirectly, the public contracting body) to avoid therefore the overlap with business assessments, forcing companies to operate in a minefield (already) full of antitrust risks and bounded as to potential business choices by dense sector regulations.

"Information Exchange" – Chapter 6

- The draft revision of the horizontal guidelines modifies the chapter on Information Exchange agreements (Chapter 6), that concerns agreements in which information exchange in itself forms the main objective of the cooperation. Among the novelties of this chapter, there are specific provisions on some types of data sharing, which are basically considered sub-groups within the wider category of information exchange.
- Data sharing, in general, has a positive effect on competition and it is precisely for this purpose that the Commission is strongly pushing for the opening of the data market.

- Therefore, ETNO welcomes that the draft guidelines acknowledge data sharing efficiencies and benefits, having become essential to inform decision-making through the use of big data analytics and machine learning techniques.
- However, the draft of Chapter 6 includes some unjustified provisions which would unduly limit market players' ability to conclude data sharing and pooling agreements.
- Data sharing and data pooling agreements are considered a specific type of information exchange within the draft Guidelines (paragraph 407 and related footnote).
- This approach would lead to consider that any information shared within this kind of agreements might be commercially sensitive and therefore subject to a strict approach under antitrust rules. Taking into account the fact that data sharing/pooling cooperation will become even more common than before within the Digital Economy, ad-hoc guidance on data sharing and data pooling agreements (separate from information exchange) would be extremely helpful to provide legal certainty for undertakings in their assessment under the meaning of Article 101 TFEU.
- Furthermore, in section "*Access to information and data collected*" (§441-442), 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 and unduly restrictive and should be deleted.
  As Art. 101 does not provide a basis for assessing the need or the obligation to give access to certain data, this question should rather be addressed under Art 102 or through specific regulation imposing access obligations on certain market players.
  Subsidiarily, if the EC does not share this understanding, ETNO considers that as a second best solution would be necessary to limit the "duty" to give access only to cases of exceptional danger to competition. Such cases might occur when agreements are made by digital gatekeepers, whose size and market power has become paramount (under the definition of the Digital Markets Act).
  In the absence of the above-mentioned modification, the measure would be completely disproportionate and this paragraph would represent a heavy and undue interference with the commercial freedom of the parties taking into account the time, costs and efforts involved in acquiring those data and the unjustified advantage that other undertakings would have/obtain. Also, it will have a chill-out effect on any data sharing/pooling initiative which could be pro-competitive.
- Regarding the provision on information exchange that may stem from regulatory initiatives (§411), the EC should ensure compatibility between competition law and regulation, avoiding companies incurring in excessive compliance costs and risks of infringements due to a regulatory obligation.

  In the regulated telecommunications sector, companies may be obliged to share information on the basis of regulation, like the obligation to provide detailed fiber roll-out plans to regulators (art. 22 of the EECC).

  There is indeed a specific concern faced by telecommunications companies related to a provision of the EECC. Article 22, combined with Article 20, requires telecommunications companies to provide detailed information on network deployments, including forecasts on the reach of the

networks. As regulatory authorities may request for this information, there is a need to clarify the position of telecommunications operators providing the requested information especially as regards the risk of a potential sensitive information exchange. ETNO considers that the guidance provided in paragraph 411 in this respect is not sufficient.

Given these obligations, we request to clarify paragraph 441 so that operators are sufficiently protected when fulfilling regulatory information obligations that force them to provide commercially sensitive information.

- The upfront identification of commercially sensitive information (§423-424) for the assessment under 101(1) TFEU could be useful for the undertakings, provided that the black-list introduced in Chapter 6 will not be interpreted extensively, considering the possible specific needs of particular cases. However, the list item related to "the exchange with competitors of future product characteristics which are relevant for consumers" seems too vague and should, therefore, be further specified to narrow down the scope. Relatedly, paragraph 424 identified as an CSI, "*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*".
- Information exchange in M&A transactions (para. 410): we are of the view that the guidance provided in the Guidelines fails to reflect the realities of the M&A process. Particularly, 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.
- Unilateral disclosures. The Guidelines foresee in §432, 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 a infringement under 101 (1) basis if the 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 put distance 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 is needed on what is required to have "accepted" a unilateral disclosure from competitors. Likewise, §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) and therefore not require a proactive statement by the receiver that it does not want to receive such information.

Liability of joint ventures and parent companies

We welcome the clarification made in paragraph 13 of the draft revised Horizontal Guidelines, setting out that agreements and concerted practices between the parent(s) undertakings and their jointly controlled subsidiaries (JV) will not meet Art. 101 (1) TFEU, as they are considered a single economic unit and thus, a single undertaking under Competition Law rules.

This clarification is key to ensure legal certainty for undertakings at global scale when manage operations through both the jointly and the solely controlled subsidiaries, and it is aligned with the recent case Law of the Court of Justice. This clarification is without prejudice to the exchanges of information made by competitors through the jointly controlled company, which should still fall under Article 101 (1).

However, in the scenarios listed in paragraph 13 under which Art. 101 (1) will still apply, the scenario applied to agreements "*between the parents to alter the scope of the joint venture*" is unclear and there is a negative bias in the setting out of this scenario. We do not understand the coherence behind this provision and further guidance on this point will be welcomed to ensure full legal certainty to undertakings in the relationship with their JV.

Ancillary Restraints

The draft Guidelines sets 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. We are of the view that this threshold is much higher than the threshold foreseen in the Commission Notice on Ancillary Restraints, which establishes in paragraph 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*" (paragraph 13). This threshold is economically measurable. Conversely, the draft Guidelines establishes 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*". 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 Guidelines should be adjusted to reflect the threshold applied in the Notice for Ancillary restraints.

Standardisation Agreements (Chapter 7)

- **Effective access to the standardisation process**

Paragraph 466 of the draft revised Horizontal Guidelines addresses possible restrictive effects on competition in standardization processes. As the Guidelines establish, cooperation in standard-setting organizations may give rise to restrictions in price competition and limitations or control of production, innovation and technical development. Among the channels of exclusion mentioned in the Draft*, exclusion of, or discrimination against, certain undertakings by prevention of effective access to the standard* is of particular importance to ensure access to innovation and a fair play among industry members in the market.

- **Effects based assessment in the participation in the development of the standard**

The draft revised Horizontal Guidelines includes in paragraph 496 a new example of situations where restricting participation might not have restrictive effects on competition within the meaning of Article 101 (1) TFUE.

In particular, the restriction of participants limited in time and with a view to progressing quickly (such as the start of the standardisation effort), as long as all competitors take part in the milestone decisions to continue the development of the standard, is not considered to have restrictive effects on competition. We celebrate this introduction as it would help erase the complexities of the standardization process.

In addition, we believe that the guidelines should specify that the principles of unrestricted and effective access and transparency should not prevent the standard development organisation to implement mechanisms to avoid that companies, which have not invested the time and efforts required along the standardisation process, are able to participate at the latest stage only to block the process. Especially if those companies were provided with the opportunity to participate in due time.

Furthermore, 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) and which cases efficiencies yet have to be proven under Article 101 (3). We believe that some clarifications are to be introduced to separate both cases.

For example, in the cases described under paragraph 496, the restrictive participation should be considered non-problematic and for all other cases of restrictive participations, the parties would 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.

Horizontal cooperation agreements that exert pro-competitive effects in sustainability goals (Chapter 9)

The draft revised Horizontal Guidelines include a new chapter on sustainability agreements (Chapter 9), which provides guidance on the assessment of agreements between competitors that pursue one or more sustainability goals, with a special focus on sustainability standardisation agreements. We believe that the EC's proposed scope for sustainability agreements is very narrow and further clarification on when section 9 would apply would be welcomed.

Moreover, the draft revised Horizontal Guidelines do not consider the sustainability effects to be considered in the analysis of a horizontal cooperation agreement under the meaning of Article 101 (3) TFEU. We are of the view that the Green Deal objectives should be met in all horizontal cooperation agreements if possible, and that the undertaking's efforts to contribute to such objectives should be considered as a pro-competitive effect in the general appraisal of horizontal cooperation agreements. Horizontal cooperation agreements can meet Green Deal 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 certain standards to reduce the environmental impact and/or to increase the commercial viability of environmental projects etc.

Therefore, we propose to include under the four cumulative conditions for the evaluation of horizontal cooperation agreements under Article 101 (3) (§41 of the revised Horizontal Guidelines), the

sustainability effects as one of the efficiencies the cooperation agreement might meet, particularly within the first criteria.

Based on the above, we propose the following modifications:

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 competition in respect of a substantial part of the products in question.

Subsidiarily, we ask the EC to include in every chapter of the Horizontal Guidelines 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) TFUE. This inclusion should be performed 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 standardization agreements but the whole Industry, should pursue to meet EC's policy goals.

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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