April 2022

Inputs to the EC consultation on the review of the Guidelines on Horizontal Cooperation Agreements

Orange welcomes the European Commission's (EC) willingness to review the guidelines on horizontal cooperation agreements (HGL) to ensure a full alignment with various EU policies and new market developments.

Orange namely appreciates that the EC has heard the call of operators to provide guidance on mobile network sharing agreements which would facilitate the self-assessment of telecom operators when contemplating such cooperation. Orange is convinced that this positive development will allow a new step forward in encouraging investments and innovation in Europe for the benefit of European citizens and businesses.

Orange hereby submits its observations regarding certain proposals of the EC with the view to render the upcoming legal framework regarding horizontal cooperation agreements more secure, robust and future looking which would contribute to the growth of the European digital economy.

I. Mobile infrastructure sharing agreements (Section 3.5 of the draft HGL)

1. Orange welcomes the EC's acknowledgment of the utmost importance of connectivity networks and of potential benefits of mobile infrastructure sharing agreements. However, Orange believes that it is quite restrictive to present the objectives of RAN sharing agreements only from cost-saving perspective. Indeed, mobile infrastructure sharing agreements allow in particular a more rationalized network deployment and thus result in a faster and wider deployment. This rationalization also contributes to limiting environmental impact while maintaining high quality services and extended coverage.

Furthermore, Orange does not think that it is relevant in the HGL to compare the efficiencies generated through RAN sharing with mergers. The purpose of the HGL is to provide a guidance to operators entering into RAN sharing arrangements and any reference to a merger assessment could be confusing. We therefore propose to keep the assessment of RAN sharing agreements separate from merger assessments.

Based on the above, Orange proposes the following modifications to the paragraphs 296 and 298 of the draft HGL.

§296: Mobile network operators often cooperate to increase the cost-effectiveness of their network roll- out **and to optimize such roll-out from coverage, deployment calendar and environmental** impact **perspective.**

§298: The Commission recognises potential benefits from mobile infrastructure sharing agreements arising from cost reductions ~~or~~ **and** quality improvements. Cost reductions, for example related to rollout and maintenance, may benefit consumers in terms of lower prices **or more investments in infrastructures.** 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 can also have environmental benefits (for example less energy consumption for same traffic, less production/waste) and provide a better societal acceptability for network roll-out (for example due to the reduction of the number of antennas).** Mobile infrastructure sharing may also allow the emergence of competition that would not otherwise exist. ~~The Commission has also generally found that mobile network operators can benefit from large efficient networks by entering into mobile infrastructure sharing agreements without the need for consolidation through mergers.~~

2. Orange considers that the HGL should assess competition at the infrastructure level taking into consideration recent developments in mobile infrastructure markets. Indeed, over recent years TowerCo companies have taken over passive mobile infrastructures in Europe. Today, in many European countries, such as France, Spain, Italy, Poland, etc. telecom operators are not anymore the owners of mobile towers and thus they do not compete in the market of passive infrastructures. Furthermore, there are no more any barriers to access passive infrastructures as the TowerCo companies' business case is to achieve an increased level of tenancy ratio on their towers.

Based on the above, Orange proposes the following modifications to the paragraph 300 of the draft HGL.

§300: Reduced infrastructure competition may in turn limit competition at wholesale as well as at retail level. This is because more limited competition at the infrastructure level may affect parameters such as the number and location of sites, timing of the sites' rollout, as well as the amount of capacity installed at each site which, in turn, can affect quality of service and prices. **In the markets where passive infrastructure access market is competitive (regulatory obligations, commercial arrangements, existence of alternative solutions, etc.), the risk of limiting competition at infrastructure level is less likely.**

3. It is generally accepted that in the context of cooperation for mobile infrastructure sharing the involved parties may need to exchange certain commercially sensitive information. However, such exchange should be limited to what is absolutely needed for the purposes of the project. Orange therefore agrees with the EC that if the exchange of sensitive information goes beyond what is necessary, such exchange would be problematic from competition standpoint. However, Orange is not sure to understand certain formulations in the HGL which may create legal uncertainty.

Orange proposes the following modifications to the paragraph 301 of the draft HGL.

§301: Information exchanges between the parties may also be problematic from a competition perspective, ~~especially~~ when they exceed what is strictly necessary for the mobile infrastructure sharing agreement to function.

4. Today passive sharing is widely used by telecommunications operators contributing to the optimization of the use of mobile sites. Passive sharing is also encouraged and sometimes even imposed by different telecom regulators in Europe.

Wide use of passive sharing becomes even more true with the development of a separate Towerco market for mobile passive infrastructure.

In this context, it is surprising to see that in certain cases the EC may consider passive sharing as problematic and resulting in limitation of parties' independence.

As to active RAN sharing agreements, while it is true that a case-by-case assessment is necessary, it is also true that not all active RAN sharing agreements may raise competition concerns.

Based on the above, Orange proposes the following modifications to the paragraph 302 of the draft HGL:

§302

a) Passive sharing ~~is unlikely to~~ **does not** 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 **in certain limited cases** may 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 **unless they respect a certain number of criteria** (as defined in paragraphs 303 and 304).

5. Orange welcomes the EC initiative to provide some criteria of self-assessment for RAN sharing agreements. This assessment grid, if clearly defined, will be of an important help when negotiating RAN sharing agreements. To guarantee a greater legal certainty, such criteria should remain as exhaustive as possible. To achieve the above purpose, Orange has the following comments regarding the criteria proposed in the paragraphs 303 – 305 of the HGL.

Scope and structure: As to the duration of RAN sharing agreements, such agreements are usually entered into for a relatively long period as they involve important investments and are strategic agreements for telecommunications operators. In any case, once implemented, RAN sharing should be maintained at least for the whole innovation cycle (until the change of a technology), as undoing an already existing RAN sharing would impact not only the operators but also the quality and the continuity of the services provided to customers. Furthermore, the parties to RAN sharing agreement look for legal certainly also because such agreements engage parties for long term in terms of investment. Therefore, it seems surprising to consider duration as an assessment criteria for RAN sharing agreements.

As to involved technologies, it should be noted that the main objective of RAN sharing agreements is to optimize the roll-out which results in faster and wider deployment. RAN sharing makes much more sense when it covers a new technology to deploy rather than for already existing technologies. Furthermore, it is usually not possible to implement a RAN sharing for one technology while keeping network deployment separate for another. This is even more true in a context where today all equipment is multi-technology compatible.

For the above reasons, Orange proposes to modify the point b of the paragraph 303 of the draft HGL as follows:

(b) the scope of shared services ~~shared technologies~~, ~~the duration~~ and the structure put in place by the agreements;

Geographic scope: Mentioning the geographical scope (and especially the inclusion of dense zones)

as a criteria of assessment does not seem to take into consideration different recent developments in the telecommunications markets.

Indeed, European telecommunications markets have become more mature - most European operators have (or should have shortly) a national mobile coverage (99% population and more than 95% of the territory for all technologies, including 4G). Furthermore, in most of the European countries even N°3 and N°4 MNOs cover nearly the same geographical perimeter than the most advanced MNOs. This is namely due to regulatory obligations which are more and more important in terms of coverage. As to 5G, the new European Digital decade objectives foresee 5G everywhere by 2030.

This leads to a conclusion that the differentiation today is more about core network elements, quality and innovative services rather than coverage and this will be even more true moving forward.

As the main objective for HGL is to provide a self-assessment tool to operators for several years ahead, Orange believes that it is important to adopt a more future-proofed approach when it comes to the geographical scope by removing it from the list of assessment criteria.

However, if the geographic scope cannot be removed, at the least the EC should provide a more substile definition of this criteria by explaining why and when the geographical scope could be taken into consideration. Orange considers that competition problems may raise only in cases where there are barriers to reach a large coverage individually or through partnerships.

Based on the above, Orange proposes the following modifications to the criteria on the geographic scope:

(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). **The geographic scope would be relevant only in markets where there are high barriers to reach a large coverage individually or through partnerships.**

Market structure and characteristics: Combined market shares cannot be a criteria of assessment in a market with limited actors.

Furthermore, RAN sharing is not merging the parties to cooperation and does not impact retail and wholesale strategies of cooperating parties. Indeed, RAN sharing parties normally are supposed to remain commercially independent in the market. 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.

Based on the above, Orange proposes the following modifications to the market structure criteria:

(c) 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.)

In the paragraph 304, while the defined criteria provide a clear guidance on the elements which are important for the competition assessment of RAN sharing agreements and correspond to what the industry was looking for since many years, certain statements go too far and thus create an ambiguity as to the value of such assessment criteria.

Therefore, Orange proposes the following modifications to the paragraphs 304 and 305 of the draft HGL:

§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~~ with the following…

§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 **(but not automatically)** to have restrictive effects under Article 101.

II. Purchasing agreements (Section 4 of the draft HGL)

Orange is surprised by the reference to Licensing Negotiation Groups (LNG) in paragraph 312 of the draft HGL, as in our experience we are not aware of any Licensing Negotiation Group. The first time we saw this concept appear was in the report of the Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group published in January 2021. We are therefore very concerned about the reference to such a theoretical concept by the EC in the draft HGL as the guidelines are meant to provide practical guidance with regard to existing market behaviours.

Moreover, Orange considers that this reference to LNGs in paragraphs 312 and the combination with paragraph 313 could have an adverse impact on the sector of Standard Essential Patents licensing. By considering LNGs as Joint Purchasing Agreement that could benefit from a "safe harbour" (in case its stakeholders' combined market shares do not exceed 15 % on both the purchasing and the selling markets), the EC would off balance the SEP licensing ecosystem in favour of SEP implementers without any proof of pro-competitive effects of such LNGs.

By jointly negotiating SEP licenses, the "buyer power" of the said licensees strongly increases and hence would off balance the negotiation processes with SEP holders: we would witness an exponential growth of hold-out strategies, jeopardizing the pro-competitive effects of the open standards system. Indeed, behaviours such as "hold out" practices when carried out by joint licensees would have a greater impact on SEP holders by making licensing of their SEPs harder or in many cases nearly impossible thereby threatening the existence and viability of the virtuous cycle of innovation in open standards. The anti-competitive impact of LNG would be even greater considering the burden of FRAND obligations on SEP holders.

Finally, LNG initiatives are likely to favour the sharing of sensitive information relating to potential licensees' marketing and commercial performance, projections and strategy. The sharing of such information combined with detailed commercial licensing negotiations, when shared among economic actors who are either competing on the same markets or could be potential competitors in that market, will ultimately lead to concerted commercial practices and are likely to qualify as restriction of competition by object.

Based on the above, Orange proposes the following modifications to the paragraphs 312 of the draft HGL.

§312: Depending on the sector, the purchaser may consume the products or use them as inputs for their own activities, for example energy or fertilisers. ~~Groups of potential licensees can also jointly negotiate licencing agreements for standard essential patents with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups).~~

III. Information exchange (Section 6 of the draft HGL)

While Orange agrees with most of the modifications of this chapter which generally integrate different case law on this matter, Orange does not think that the approach of applying the same rules to data and information sharing is always justified.

Indeed, data is a separate category of information and is a crucial input in digital economy. Data sharing does not necessarily pursue the same objectives as information sharing. Data is also a key input for machine learning and artificial intelligence which is the basis for future smart technologies and services.

In this context, Orange does not think that the same constraints should apply both for information and data sharing. Furthermore, imposing a large number of constraints on data sharing would have a chill-out effect while the objective should be to encourage data sharing/pooling for the benefit of the development of the digital and data economy. Recent various European initiatives aim precisely at incentivizing data sharing in the EU, such as the calls to create data spaces, the recently adopted Digital Governance Act, or the proposed Data Act.

Based on the above, Orange considers that more adapted, flexible and future looking guidance should be provided for data sharing/pooling cooperation.

At the very least, Orange considers that the paragraphs 421 and 442 should be modified to reflect the idea that cooperating parties may pull together data without being obliged to open such data sharing initiative to all other market actors with the exception of cases when data sharing / pooling may create a foreclosure risk (e.g. data sharing/pooling between large digital actors already individually controlling an important amount of data).

IV. Standardisation agreements (Section 7 of the draft HGL)

1. Participation rules

Orange welcomes the EC's willingness to introduce more flexible solutions when it comes to the development of certain standards where the timing is important or where such development would not be possible if open participation principle were to be respected. Indeed, such a flexible approach is key in a digital world where innovation cycles are short and where the success of the standardisation process largely depends on its timely definition without non-efficient and resource consuming processes. Furthermore, working in small groups allows to test different solutions quickly before presenting them to a larger forum. The guidelines should not forbid this approach as they could be beneficial for the whole industry.

Orange overall agrees with the proposed modifications which integrate well above constraints. In addition, Orange believes 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, Orange considers that the articulation between Article 101 (1) and 101 (3) is not always clear.

Indeed, the paragraph 496 of the draft HGL provides that in certain situations, restricting participation

may not have restrictive effects on competition within the meaning of Article 101(1), while at the same time in the footnote 294 of the same paragraph it is stated that "the initial restriction could be outweighed by efficiencies to be considered under Article 101(3)". It is thus not clear whether in the cases provided in the paragraph 496 the restrictive participation is not problematic under Article 101 (1) or whether efficiencies yet have to be proven under Article 101 (3).

The same, in the paragraph 507 concerning efficiencies gains and in the footnote 302 of this paragraph it is not clear when restrictive participation has to be justified by efficiency gains and when such restriction does not raise any competition issue under Article 101 (1).

Based on the above, Orange proposes the following modifications to the paragraphs 496 and 507 of the draft HGL and the footnotes 294 and 302.

§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.

2. IPR and FRAND

Orange would like to point out that the draft HGL deal with how SDOs develop standards and ensure effective access to those standards on a fair, reasonable and non-discriminatory (FRAND) basis. The HGL are intended to provide safe harbour guidance to SDOs under Article 101, but they are not dealing with and should not deal with bilateral licensing negotiations. Only Article 102 has any direct applicability to such negotiations. Therefore, the HGL should not define whether or how an IPR holder is to license its IPR, subject to the licensing commitment it has voluntarily chosen to contribute its technology for a SDO's standard.

Orange welcomes the reference to "hold out" in paragraph 470 of the draft HGL. However, reference to "hold up" (i.e. refusal to grant license by SEP holder) in the same paragraph seems erroneous since there has been no proof of such behaviours by SEP holders. Indeed, the FRAND commitments do provide a certain frame to prevent abusive behaviours from SEP holders and courts cannot grant an injunction in the absence of a FRAND offer or a duly proven unwillingness to take a licence of SEPs.

The HGL should be made only in response to clear economic evidence of material harm, therefore Orange would recommend deleting the reference to "hold up".

However there exists no frame to prevent abusive behaviours from SEP implementers: this asymmetrical regime of SEP holders (who are subject to FRAND commitments) and SEP implementers clearly dilutes any asserted market power that could be associated with the detention of SEPs.

Based on the above, Orange proposes the following modifications to the paragraph 470 of the draft HGL.

§470: When the standard constitutes a barrier to entry, the undertaking could thereby control the product or service market to which the standard relates. This in turn could allow undertakings to behave in anti-competitive ways~~, for example by refusing to license the necessary IPR or by extracting excess rents by way of discriminatory or excessive royalty fees thereby preventing effective access to the standard ("hold up").~~ The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a FRAND royalty fee or using dilatory strategies ("hold-out").

Paragraph 468 of the draft HGL seems to suggest that standards foreclose the market and have the effect of inhibiting the development of other technologies and/or standards. Orange considers that this is a flawed statement because SDOs are merely forums that develop and propose a standardized technology to the market. The market actors will decide whether or not to adopt the standard, but no SDO as such has the possibility to impose its own standard on the market by way of anticompetitive behaviors. The sole case where a standard has been imposed on the market is by way of intervention of the regulator to make said standard mandatory (e.g. CEN-CENELEC standards).

Orange also wishes to underline that standards are not frozen, indeed they are evolving throughout their lifetime, and these evolutions may incorporate additional technologies to best fit the needs of the market.

Based on the above, Orange proposes the following modifications to the paragraphs 468 of the draft HGL.

§468: ~~In addition, standards requiring that a particular technology is used exclusively for a standard can have the effect of hindering the development and diffusion of other technologies. Prevent the development of other technologies by obliging the members of the standard development organisation to exclusively use a particular standard, may lead to the same effect.~~ The risk of limitation of innovation is increased if one or more undertakings are unjustifiably excluded from the standard development process.

Regarding paragraph 482 of the draft HGL, Orange thinks that the words *"to all third parties"*, are in contradiction with decades of industry practice acknowledged by court decisions[1] confirming that licensing should take place at the point in the value chain where the value of connectivity is realised. Moreover, the words *"to all third parties*", do not fit with the rest of the HGL, which focuses on ensuring

[1] In **Nokia v Daimler**, the Court indicated that "the patent holder must, in principle, 'be given a share' in the 'economic benefits of the technology to the saleable end product at the final stage of the value chain'." (Regional Court (Landgericht) of Mannheim 18 August 2020 - Case No. 2 O 34/19) https://caselaw.4ipcouncil.com/german-court-decisions/lg-mannheim/nokia-v-daimler.

In **Sharp v Daimler**, the Court pointed out that "EU competition law does not establish an obligation to license SEPs at all levels of the value chain" and that patent holders are in principle, free to choose the level of the value chain for licensing. (Regional Court (Landgericht) of Munich on 10 September 2020 (Case No. 7 O 8818/19) https://caselaw.4ipcouncil.com/german-court-decisions/lg-munich-district-court/sharp-v-daimler

access for those wanting to use standardised technology covered by essential IPR, which is also at the heart of access-based IPR policies of SDOs like ETSI. Finally, the words *"to all third parties*" in the original paragraph 285 have recently been wilfully misinterpreted by certain implementers and their industry associations as imposing a "license to all" rather than an "access to all" requirement, to clarify this point and avoid disputes Orange proposes the following modifications to paragraph 482 of the draft HGL:

§482 In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR ~~to all third parties~~ on fair, reasonable and non-discriminatory terms ('FRAND commitment')278. That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard development process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller. It should be noted that FRAND can also cover royalty-free licensing.

Paragraph 483 of the draft HGL, deals with disclosure requirements at SDOs in the context of a safe harbour. The existing HGL safe harbour provisions include scope for the use of blanket declarations followed up by specific disclosure as the standard develops. Orange thinks that the proposed amendments on this topic misunderstands the purpose of declarations and in particular the purpose of blanket declarations. In fact, blanket declarations constitute the tool to enable the industry to make an informed choice of technology, because they ensure access to all work contributed to the standardisation effort, therefore mitigating patent ambush. For these reasons Orange believes that the changes to this paragraph are inappropriate, therefore the original text of paragraph 286 of the existing HGL should not be modified and should replace the language proposed in paragraph 483 of the draft HGL.

§483 **Moreover, the IPR policy would need to require good faith disclosure, by participants, of their IPR that might be essential for the implementation of the standard under development. This would enable the industry to make an informed choice of technology and thereby assist in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavours to identify IPR reading on the potential standard (115). It is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology (without identifying specific IPR claims or applications for IPR). Since the risks with regard to effective access are not the same in the case of a standard-setting organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.** ~~**Moreover, the IPR policy would need to require good faith disclosure, by participants, of their IPR that might be essential for the implementation of the standard under development. This would enable the industry to make an informed choice of technology and thereby assist in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavours to identify IPR reading on the potential standard (115). It is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology (without identifying specific IPR claims or applications for IPR). Since the risks with regard to effective access are not the same in the case of a standard-setting organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.**~~

In paragraph 486 of the draft HGL Orange is also worried about the intention of EC to set up a royalty rate on IPR based on "*the economic value of the IPR (…) irrespective of the market success of the products which is unrelated to the patented technology*". This assertion in contradiction with decades of industry practice would constitute the end of any incentive for EU companies to participate in the elaboration of standards.

A German case has already paved the way by recognizing that focusing on the value of the protected technology for the end-product is reasonable[2], as the connectivity permits to secure the value of the end product. The notion of "value added of the covered IPR (…) irrespective of the market success of the products" would completely fail to encompass income generated from additional services offered to clients based on the SEP (for example connectivity), costs saving and optimising R&D expenses by SEP implementer.

Based on the above, Orange proposes the following modifications to the paragraphs 486 of the draft HGL.

§486: In case of a dispute, the assessment of whether fees charged for access to IPR in the Standard development context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR. ~~**The economic value of the IPR could be based on the present value added of the covered IPR and should be irrespective of the market success of the products which is unrelated to the patented technology.**~~

For the reasons explained above in comment to paragraph 482 of the draft HGL, Orange proposes the following modification to the paragraph 491 of the draft HGL:

§491 The assessment whether the agreement restricts competition will also focus on access to the standard. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible for ~~**all**~~ members or third parties (that is to say, non-members of the relevant standard development organisation) this may foreclose or segment markets and is thereby likely to restrict competition. Competition is likewise likely to be restricted where the result of a standard is only accessible on discriminatory or excessive terms for members or third parties. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.

V. Other points

In the paragraph 20 of the draft HGL, it is not clear why the undertakings should remain subject to Article 101 if the engaged conduct was encouraged by public authorities. Such an approach is not justified and creates an important legal uncertainty for undertakings knowing that in many situations the undertakings will not have a choice but to respect the requirements/encouragements of public authorities even if they are not formulated through national legislation.

Based on the above, Orange proposes to modify the paragraph 20 as follows:

§ 20: Article 101 does not apply where the anti-competitive conduct of undertakings is required

[2] In **Nokia v Daimler**, the Court indicated that "the patent holder must, in principle, 'be given a share' in the 'economic benefits of the technology to the saleable end product at the final stage of the value chain'." (Regional Court (Landgericht) of Mannheim 18 August 2020 - Case No. 2 O 34/19) https://caselaw.4ipcouncil.com/german-court-decisions/lg-mannheim/nokia-v-daimler.

either by national legislation, or by a national legal framework which precludes all scope for competitive activity for the undertakings involved. In such situations, undertakings are precluded from engaging in autonomous conduct which might prevent, restrict or distort competition. ~~The fact that public authorities encourage a horizontal cooperation agreement does not mean that it is permissible under Article 101. Undertakings remain subject to Article 101 if a national law merely encourages or makes it easier for them to engage in autonomous anti-competitive conduct.~~ In certain cases, undertakings are encouraged by public authorities to enter into horizontal cooperation agreements in order **for example** to attain a public policy objective by way of self-regulation. **In such case Article 101 does not apply if the conduct encouraged by public authorities results in restriction or distortion of competition unless the undertakings have the choice not to enter into the horizontal cooperation agreement encouraged by the public authorities.**