



Liberty Global response to draft revised Guidelines on Horizontal Agreements

Liberty Global welcomes the opportunity to give feedback on the draft revised Guidelines on Horizontal Agreements (the Guidelines), the draft revised Research & Development Block Exemption Regulation (R&D BER) and the draft revised Specialisation Block Exemption Regulation (Specialisation BER). The regime governing horizontal agreements has worked well and we welcome the continuation of much of this regime. The additional clarity provided in the Guidelines is welcome, as it gives greater legal certainty, particularly for markets undergoing rapid innovation and change. We urge that the regime governing horizontal agreements continues to protect infrastructure competition as this in turn provides best outcomes in terms of innovation and consumer welfare.

Legal certainty

The existing Guidelines on Horizontal Agreements have largely functioned well. Underpinned by the principles of proportionality and appropriateness, they have created a stable legal framework that is well understood across industries. Liberty Global supports the continuation of much of the existing framework in the draft revised Guidelines, while welcoming the majority of the clarifications and changes present. The incorporation of concepts developed through the decisions of the European Court of Justice is a welcome addition – placing these concepts in the context of how they should be applied increases legal certainty.

It is vital that the application of these Guidelines prevents the distortion of competition. Although horizontal agreements can lead to certain efficiencies, as identified in the Guidelines, these must be carefully balanced against restrictions of competition.

As identified in the previous rounds of consultation, the ability to define the relevant market for assessment of market shares can be challenging, particularly when dealing with emerging technologies that may not fit into existing markets. Liberty Global recognises that the Commission is undertaking a revision of the Market Definition Notice. Liberty Global believes this Notice has been helpful. However, we are concerned that the Notice and the Horizontal Guidelines are not reviewed in full parallel and hence we cannot assess the impact of the revision of one on the other. We would welcome further information on how the revised Market Definition Notice should be used in conjunction with the revised Horizontal Guidelines.

Liberty Global welcomes the effort to provide further clarification on how to assess market shares for products which do not fit into established markets in the R&D BER. However, the condition that the R&D agreement should leave at least three additional active R&D projects comparable to the R&D agreement under examination is difficult to enforce in practice. Undertakings engaging in R&D agreements will likely not be aware of activities of other actors in the area of research, or only in a late stage. Due to the imposition of limitations on information sharing, in addition to commercial sensitivity, these projects are often confidential. It is likely impossible for an undertaking to be certain that at least three other projects carrying out similar research exist; this acts as a strong deterrent for relying on the R&D BER, which in turn could have a chilling effect on research, development and innovation.

Principles of proportionality and appropriateness at the core of regulatory assessment

Liberty Global strongly supports the finding that the Guidelines should not be treated as a regulatory checklist – instead, each case must be assessed on its own facts. The Guidelines should be applied on a case-by-case basis – this ensures that decisions made are proportionate and appropriate. It allows for changing market conditions to be taken into account and ensures the Guidelines are more future-proof.

The Guidelines recognise that horizontal agreements rarely fall neatly into one category of agreement, but often contain elements of multiple types of agreement. The Guidelines continue the approach laid out in the previous Guidelines of requiring that the agreement be assessed on the basis of its so-called “centre of gravity”. Liberty Global welcomes the further explanation of how the assessment of the centre of gravity should be carried out, in particular the examples delineating how the various aspects of the agreement may relate to each other. However, we urge a reiteration that the assessment of the centre of gravity should also be carried out on a case-by-case basis. This is important to ensure that a cookie-cutter approach to assessment is not adopted, which could have a negative impact on how the subsequent assessment of the agreement is carried out.

Liberty Global supports the continuation of the De Minimis notice in assessment of horizontal agreements. However, we note that in dynamic, developing markets, undertakings can gain market share very quickly. The application of the De Minimis notice to agreements should be monitored to ensure it continues to apply in markets where undertakings gain market share quickly to ensure the thresholds have not been tripped.

Production Agreements

Liberty Global welcomes the additional guidance and clarity provided by the update to the guidelines on production agreements. Production and specialisation agreements can have a significant impact on competition and the consistent application of these guidelines is vital to ensure that these do not unduly restrict competition.

The change to the definition of unilateral specialisation agreement from an “agreement between two parties” to “agreement between two or more parties” – and the corresponding change in the Specialisation BER – provide welcome clarity and better reflects the reality of how these agreements are formed. Given that specialisation agreements benefit from the Specialisation BER, the further guidance given on different types of specialisation agreements is key for legal certainty.

The identification of the relevant markets affected by production agreements is essential for an effective assessment of the distortion of competition. We welcome the recognition that production and specialisation agreements can cause significant distortions of competition in upstream, downstream and neighbouring markets. We note that the definition of these markets is conducted under the Market Definition Notice, which is under review. We urge the Commission to ensure that the revisions made to



this Notice adequately capture the impacts that can occur on spill-over markets. This is particularly important given that increased digitisation and technological advancement has changed how markets may interact, and emerging markets may cause spill-over effects which have not been foreseen.

The operation of the Specialisation BER is central to regime relating to production agreements. We support the continuity provided by the draft revised Specialisation BER, which safeguards legal certainty. The operation of the existing Specialisation BER has been largely satisfactory and it has been applied in an appropriate and proportionate manner. The market share thresholds lie at the core of the operation of the Specialisation BER. Liberty Global welcomes the further clarification on market share thresholds on downstream markets, which recognises the importance of assessing effects on spill-over markets and clears up the ambiguity which existed on this point under the previous Specialisation BER.

Mobile Infrastructure Sharing Agreements

Operators are building new networks and upgrading existing ones. This can be viewed within the wider context of digital transformation. The fourth industrial revolution will build upon previous waves of digital disruption. New applications serve only to increase the demand for gigabit-capable broadband networks – allowing for the continued functioning of the internet ecosystem as an engine of innovation. It is investment in networks which underpins applications, business models and innovation that, in turn, drives growth in every other part of the economy and directly benefits consumers. As Europe embraces the possibilities of the digital transition, with ambitious 2025 and 2030 strategic objectives, it is vital that the right environment is created for broadband rollout.

In this respect we welcome the specific guidance given on the operation of mobile infrastructure sharing agreements. Creating the right environment for investment in infrastructure upgrade and rollout is essential to ensure that the EU continues to benefit from digitalisation. Infrastructure competition is key to ensure networks continue to become quicker, more efficient and more resilient. Avoiding distortion of competition caused by mobile network infrastructure agreements is a key to creating the right environment for infrastructure competition.

As noted in the draft revised Guidelines, mobile network infrastructure agreements can result in some efficiencies. However, these agreements can also reduce infrastructure competition, causing increased prices and reduction in quality of service on downstream markets. Depending on the nature of the agreement, it may also have a long-term foreclosure effect on the market, as undertaking not party to the agreement may be unable to effectively compete. This has a negative impact on downstream markets.

We agree with the principle that each mobile network infrastructure agreement must be assessed on a case-by-case basis. The four criteria laid out in Paragraph 303 must be looked at in full during this assessment. However, the guidelines provide little guidance on how the case-by-case assessment should be performed and in particular on how the different factors in paragraph 303 should be weighed. A safe harbor or rebuttable presumptions could be considered to improve clarity and legal certainty. We disagree with the statement that passive sharing is unlikely to give rise to restrictive effects on competition – as noted in the Guidelines, this is dependent on the level of independence the parties



maintain. The Commission should make this provision clearer, to avoid the impression of a “free pass” on passive sharing.

We note that mobile infrastructure sharing agreements may result in increased information exchange. We welcome the recognition in the draft revised Guidelines that this may go beyond what is necessary for the operation of the agreement. It is important that this exchange of information be properly considered during the assessment of the agreement, as it may result in collusive behaviour. It should be taken into account that third parties often lack critical information on how the information exchange is set up and therefore are unable to assist the competition authorities in their assessment.

We note that network infrastructure sharing agreements are identified as a possible tool to encourage investment in areas with lower population densities that may be less commercially viable. This is consistent with the position found in the European Electronic Communications Code (the Code) and the BEREC Common Position on Mobile Infrastructure Sharing. However, there are other regulatory tools which may encourage rollout in less densely populated areas, such as provisions under the Code and the Broadband Cost Reduction Directive, which may have a less distortive effect on competition than allowing mobile network infrastructure sharing in the long-term. Insofar as mobile network sharing agreements may encourage rollout in less densely populated areas, it is vital that the scope of these agreements is limited to these areas. Allowing mobile network sharing agreements in densely populated areas, and/or across the entire territory of the Member State, limits infrastructure competition and distorts the market. In the long-run, this reduces innovation and has a negative effect on consumers.

Sustainability Agreements

Liberty Global strongly supports the Commission’s goals of reducing emissions and achieving and Green and Digital Transition for the economy. We welcome the inclusion of sustainability-focused agreements in the draft revised Guidelines, which provides much needed legal certainty on an increasingly important area.

We welcome the recognition of the broad scope of sustainability-related topics. Reducing emissions, human rights protection and reduction of resource extraction and waste are all essential for sustainable development. Sustainability should not be viewed through a narrow lens.

There are many forms of agreements which may contribute to the furtherance of sustainability goals, however, we agree with the Commission’s view that standardisation agreements are likely to be particularly relevant. We posit that the safe harbour created for standardisation agreements for the purpose of sustainability is quite soft. In particular, further clarity would be useful on what constitutes a significant price increase – although this may vary depending on market conditions, some guidance would be useful to provide further legal certainty for undertakings seeking to rely on these provisions. Liberty Global believes that the Commission should recognise that consumer benefit should not be solely judged on price – other factors such as quality of service, reliability and social benefit are of increasing importance to consumers.



About Liberty Global

Liberty Global (NASDAQ: LBTYA, LBTYB and LBTYK) is a world leader in converged broadband, video and mobile communications services. We deliver next-generation products through advanced fibre and 5G networks that connect over 85 million subscribers across Europe and the United Kingdom. Our businesses operate under some of the best-known consumer brands, including Virgin Media-O2 in the UK, VodafoneZiggo in the Netherlands, Telenet in Belgium, Sunrise UPC in Switzerland, Virgin Media in Ireland and UPC in Eastern Europe. Through our substantial scale and commitment to innovation, we are building Tomorrow's Connections Today, investing in the infrastructure and platforms that empower our customers to make the most of the digital revolution, while deploying the advanced technologies that nations and economies need to thrive. Our consolidated businesses generate annual revenue of more than \$7.5 billion, while the VodafoneZiggo JV and the VMO2 JV generate combined annual revenue of more than \$19 billion.* Liberty Global Ventures, our global investment arm, has a portfolio of more than 75 companies and funds across content, technology and infrastructure, including strategic stakes in companies like ITV, Univision, Plume, Lionsgate and the Formula E racing series.

*Revenue figures above are provided based on full year 2021 Liberty Global consolidated results (excluding revenue from the UK JV Entities) and the combined as reported full year 2021 results for the VodafoneZiggo JV and estimated US GAAP full year 2021 results for the VMO2 JV. For more information, please visit www.libertyglobal.com.