



## **Accompanying paper to GSMA's reply to the European Commission Public Consultation on EU Competition rules on horizontal agreements between companies<sup>1</sup>**

The GSMA welcomes DG Competition's initiative to evaluate the EU Competition rules on horizontal agreements between companies.

Overall, the GSMA believes that the instruments undergoing revision have been positive for providing legal certainty to companies engaging in horizontal cooperation agreements. However, we believe that existing instruments do not provide enough certainty in today's digital economy and should therefore be adapted to the digital revolution.

Digital transformation refers to two broad phenomena. First, the universal or near-universal availability of digital networks that allows better and more innovative services to be offered to consumers. Second, the increasing digitisation of economic processes, from purchasing, through production to distribution. To date, we have seen incredible advances in the digitisation of distribution processing, which has allowed services and products previously requiring a physical distribution outlets to be offered over the internet. The next big wave of digitisation is expected to revolutionise production processes, via the massive deployment of the Internet of Things. A common feature of digitisation is that digital data is produced at each and every stage allowing real time processing which can be used to improve the production and delivery of products and services. For the next wave of digital transformation to succeed, and spread the benefits across all economic sectors and actors, it is important that the next generation of digital infrastructure, in particular 5G networks, is rolled out efficiently and in a timely fashion. Agreements that could facilitate this should be looked at through a favourable lens, given their ability to generate significant positive spill over effects for consumers and society.

In general, GSMA considers that the current rules do not give enough flexibility to European companies to enter into the pro-competitive agreements that are nowadays key to compete in a digital global world. Furthermore, both the HGL and the BER should be restructured to pursue as main objective that of reducing to the least false positives (i.e. cases where a violation of 101.1 TFEU or failure to meet the criteria in 101.3 TFEU is wrongly assessed) instead of avoiding false negatives (i.e. cases where compliance with 101.1 TFEU or 101.3 TFEU is wrongly assessed). This is particularly important for specialisation/joint production, joint commercialisation and standardisation agreements.

Speed to scale is decisive in new digital, data-driven markets. In this regard, the HGL are not fully in line with the important changes that the digital revolution has brought about in both digital and traditional markets thus leaving too much margin for interpretation. HGL should therefore be revisited in order to: (i) take into account the above-mentioned important changes (e.g. proliferation of multisided markets, growing importance of scale, lower importance of prices, etc.); and (ii) strongly reduce the margin of interpretation. Additionally, market shares are not anymore an adequate indicator of market power in an ecosystem where the majority of the services are provided for free.

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<sup>1</sup> This paper should be read together with GSMA's response to DG Competition's Questionnaire for the 2019 Evaluation of the Research & Development and Specialisation Block Exemption Regulations.



In particular, the current self-assessment mechanism is time consuming and do not provide GSMA and its members with a reasonably high degree of certainty to avoid antitrust investigations. The advent of digital giants is forcing Mobile Network Operators to enter into pro-competitive agreements to survive in the markets where they are already present or to give them the opportunity to enter new markets. The current set of rules does not provide sufficient clarity on whether these agreements could trigger antitrust intervention. For this reason, telecoms operations often abandon or stop at very early stages projects that could imply significant benefits for European consumers.

With regards to data, the GSMA believes that current instruments lack any structured reference to the impact of data as a new factor of production. The HGL and the BERs should therefore address the specific role of data in the digital economy and provide guidance on the assessment of both their pro-competitive and anti-competitive effects.

In relation to the above, the GSMA proposes the Commission to complement existing instruments with:

- A **preliminary screening tool** for particularly relevant and time-sensitive agreements;<sup>2</sup>
- More guidance and update of the rules on Standardisation agreements in the HGL;
- Introducing new BERs for:
  - **Standardisation agreements**, which would mean faster and more predictable standardisation processes (see below);
  - **Data sharing and data pooling**: this type of cooperation among competitors is essential to offer innovative digital services and in key areas such as IoT, AI and data-related projects;
  - **Agreements aimed at reducing the cost for the roll out of important infrastructures of high public interest** (notably network sharing agreements). In particular, passive sharing and RAN sharing should be permitted by default. The advent of full IP-based networks and the related infrastructure innovations have produced a context in which the services differentiation does not come from the characteristics and performance of the RAN networks but from the characteristics of the specific network slices. New technologies like network virtualisation and slicing, in fact, facilitate sharing of active access infrastructure without compromising differentiation. Spectrum sharing and core network sharing should be considered on a case-by-case basis and taking into account the important efficiencies and positive consequences of faster and better 5G roll out; and
  - **Specialisation agreements**: BER should be modified so to facilitate exemption of agreements aiming to create products and services that compete with those offered by digital giants. In these cases, the market share thresholds should be replaced by qualitative criteria related to the absence of incompatible

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<sup>2</sup> This instrument would allow companies to obtain guidelines from the Commission through an instrument more flexible than both the old and existing ones. Before 2003, the blanket notification mechanism, although able to provide sufficient legal clarity, was too burdensome for the limited resources of DG Comp. The existing mechanism, based on the HGL and on Article 10 of Regulation 1/2003, on the contrary, does not ensure sufficient legal clarity. The proposed mechanism would combine the effectiveness of the old one with the flexibility of the existing one. In order not to heavily increase the workload of the Commission, in fact, this mechanism would be only applied to agreements of particular relevance i.e. with a combined market share of the parties bypassing the threshold for direct exemption or regarding particularly important and complex projects.



restrictions or market characteristics. If the Commission decides to keep market shares thresholds, these should be much higher than existing ones and should not be based only on turnover.

- **Expanding the parameters for application beyond market shares** i.e. introducing in all BERs and in the HGL a rebuttable presumption of compliance with article 101 TFEU for horizontal cooperation agreements producing effects on markets where the parties to the agreement are newcomers and/or markets characterised by the presence or imminent entrance of a dominant, conglomerate digital platform;<sup>3</sup>
- The inclusion in the HGL of provisions taking into account the **impact of data** on competition in the relevant markets; and
- The inclusion in the HGL of a section analysing the new categories of agreements aimed at creating scale, scope or skills in the use of data.

On top of the previous comments we would also like to add that, from GSMA point of view, standardisation agreements are key in today's digital economy. We would therefore like to raise the following points:

- **Cross-sectorial standardisation agreements** should benefit from a relaxed application of competition rules to the extent that the companies entering into these agreements are not competitors and given that interoperability is key to develop AI, IoT and data products and services. Additionally, given the global nature of these agreements, authorities should cooperate to ensure: i) that standards are set at a global level and by global organisations and, ii) a coherent application of competition rules;
- **Participation**: the rules around restriction of participation in standard-setting processes in paragraphs 280-281 of the HGL should be clarified in order to provide clearer guidance about when and to what extent participation can be restricted and which transparency rules should be included;
- **Effects analysis**: authorities should carry out case-by-case analysis of the effects of standardisation agreements taking into account the specificities of the markets;
- **Counterfactual**: authorities should analyse whether the alternative to a particular standard would be proprietary systems imposed by dominant companies;
- **Standard implementation**: the HGL should explicitly say that they only apply to standard-setting agreements but not to their implementation; and
- **Mixed cooperation**: agreements might include other cooperation provisions beyond standardisation. In some occasions, it is not clear which part of the agreement would fall under the standardisation guidelines or under other sections of the HGL. HGL should therefore include some guidance as to how to assess these types of cooperation.

More in general, GSMA considers that Paragraph 7.4 of the HGL should contain a rebuttable presumption of compatibility of standardisation agreements with article 101 TFEU when a few conditions are met (e.g. counterfactual is a proprietary, dominant solution; predictable effects are not restrictive; etc.).

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<sup>3</sup> This quite wide range of situations could be captured by substituting the cumulative market share threshold with a description of the market conditions justifying the exemption. In that case, present those conditions all agreements will be exempted. This default exemption would be complemented with: (i) a list of clauses or market conditions that would make the agreement incompatible with Article 101 and (ii) the provision of a stricter and wider fall back clause allowing to withdraw the exemption in presence of unexpected restrictive consequences of the agreement on the market.



## **About the GSMA**

The GSMA represents the interests of mobile operators worldwide, uniting more than 750 operators and nearly 400 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces the industry-leading MWC events held annually in Barcelona, Los Angeles and Shanghai, as well as the Mobile 360 Series of regional conferences.

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