DEUTSCHE TELEKOM REPLY TO THE CONSULTATION ON THE HORIZONTAL COOPERATION GUIDELINES AND R&D AND SPECIALISATION BLOCK EXEMPTION REGULATION

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1. Introduction

Deutsche Telekom welcomes this opportunity to comment on the review of the horizontal cooperation guidelines and BERs and would like to underline the importance of co-operation for the European industry in the changing geopolitical environment. With the digital evolution markets are becoming increasingly globalized dramatically changing the competitive landscape. European companies are faced with the balancing act between operating in relatively small fragmented markets in the EU (despite ongoing market integration) and growing competitive pressure coming from global players. In some cases, the latter even benefit from protective measures in their home countries, distorting the competitive process and thereby putting European players at a systematic competitive disadvantage.[1]

Against this background, it is indispensable for companies to enter into horizontal co-operations to remain competitive. In order to achieve the necessary countervailing power to compete in the global markets the companies need to be able to reach the essential scale. Enabling cooperation will allow European players to meet the challenges of digitalization and remain at the forefront of innovation to the benefit of the European citizens.

To this end it is necessary that competition policy facilitates such cooperation and, in particular, fosters collaboration between European companies with regard to innovation technologies and digital infrastructure. Beyond that, cooperation is increasingly necessary for interoperability and standardization to achieve the goals of the digital single market and environmental targets. Therefor is crucial that this review of the horizontal cooperation guidelines and BERs is taken as opportunity to make competition policy future-proof and fit for the changing global environment. This means:

- increasing freedom to cooperate to reach necessary scale to be competitive on global markets, and
- providing more legal certainty, by clarifying the guidelines and BERs, but at the same time giving guidance on individual questions.

Unfortunately, the current guidelines and practice have provided neither the necessary flexibility nor the legal certainty, but rather stifled incentives for horizontal cooperation in our industry, discouraging innovations and standardization efforts, as the following two examples demonstrate:

[1] **Competing at scale, Competition policy fit for the global stage, ERT 2019:** https://ert.eu/pdf-information/2019-10-07-competing-at-scale-2/

- "E5" standardization cooperation from 2010:
    - 5 largest European Operators (DT, Orange, TIM, VF, TEF) for the development of standards for RCS, mobile payment, mobile advertising and secure IT transport.
    - The aim was to establish a secure and attractive counterweight to the proprietary services of Google and Apple, by allowing the cooperation to achieve sufficient scale.
    - DG Competition had launched investigations wihich ultimately failed in 2013, but the lack of transparency, lengthiness and legal uncertainty of the procedure have decisively discouraged the cooperation in the industry. As a consequence, the development of these digital services was set back for years or completely prevented, which has caused lasting damage to the competitive situation of European Telcos.
- The ongoing investigations of the GSMA's eSIM standardization:
    - Led by the DoJ, while being passively supported by DG COMP, and as a direct result of excessive complaints from a few players (particularly Apple and Google), the eSIM investigations have substantially slowed down the eSIM standardization by more than 1 year. Due to the lack of transparency by the DoJ and DG COMP, the GSMA was left widely unclear on the exact theories of harm the investigations were based on, which fueled uncertainty and discouragement in the entire industry.

2. Horizontal Guidelines

- General

The horizontal guidelines need to be updated to the geopolitical challenges in order to provide valuable guidance with regard to self-assessment of horizontal co-operation agreements. In particular, for the telecommunications sector it is necessary to update them in order to meet the challenges regarding digitalisation, increased investment needs and to encourage technical developments and innovation. As the telecommunications industry is part of the digital economy ecosystem and it is increasingly facing competition from large global digital players the competition constraint exercised by these actors needs to be taken into account when assessing industry-wide horizontal agreements, also with regard to their impact on competition. Hence, the consideration of the counterfactual of the envisaged cooperation should play an important role in the analysis.

Telecoms operators need more flexibility and legal certainty regarding industry-wide initiatives, which aim to create innovative solutions, which could not be achieved standalone by one company. This should be reflected in updated guidelines to provide telecom operators with sufficient guidance to carry out their self-assessment. At the same time, due the fast developments in the digital economy, a procedure for an assessment on an indivudual case basis of envisaged forms of co-operation of a certain magnitude is necessary.

In general, more emphasis needs to be put on benefits and efficiencies of co-operations, balancing the pro-competitive elements against potential anticompetitive effects on an equal basis. In fact, for horizontal agreements that generally are considered to produce procompetitive effects the analysis of such effects should not just occur under Art. 101 (3), but already be considered under Art. 101 (1). Beyond that, it would be useful to consider and include non-price factors. When considering the potential pro-competitive effects and/or benefits for customers of a certain cooperation, the guidelines should explicitly acknowledge that factors such as improvements in quality, infrastructure, standards, innovation and sustainability are at least equally important as price.

- Information exchange agreements and data sharing

In the digital economy data is one of the key inputs in order to offer innovative digital services with regard to IoT, AI and other data-related initiatives. Against this background and given the fragmentation of the European market there will be a much greater need for data sharing in future. Facilitating horizontal cooperation with regard to the commercial exchange of data among European competitors, will allow these stakeholders to compete within the challenging current geopolitical ecosystem and to resolve the present obstacles of the digital markets such as barriers to entry, bottlenecks, quasi-monopolies, conglomerate effects etc.

The dated information exchange rules in the guidelines are not fit with regard to the role of data in the digital economy. In fact, they must be updated from scratch in order to meet the needs for data sharing/pooling in future. Criteria such as frequency or age of data can not be considered a viable criterion in the digital economy where the permanent exchange of real-time data is what makes the sharing produce the optimum benefit for the industry and the consumers.

The information exchange framework set out in the guidelines needs to be updated in order to provide more legal certainty and in particular to respond to the challenges of data sharing of the digital economy. This means on the one hand, the critical information exchange should not determined by the nature of the data, but should be analysed in a case-by-case basis examining the competitive effects exerted in the market when competitors exchange information. On the other hand, facilitate more commercial data sharing to unlook the full value of the data by creating a BER for certain data types.

- Purchasing agreements

The current guidelines chapter for purchasing agreements does not provide sufficient clarity for self-assessment. In order to achieve sufficient scale to counter the market power of proprietary platforms/ecosystems, the telecommunication industry may want to jointly purchase and implement certain technologies to develop open and interoperable platforms. With a view surrounding the discussion regarding the definition of relevant markets on multi-sided platform markets, the current guidelines fail to provide sufficient clarity regarding joint purchasing and/or selection of vendors for self-assessment which led to chilling effect to the detriment of competition and innovation. Given the clash of business models as

well as the regional telecommunication operations vs. global reach of certain proprietary platforms, joint purchasing/development of open and interoperable platforms may even constitute a market based remedy to potentially abusive behavior in digital markets.

- Agreements on commercialisation

In practice we experience an increased demand for sales cooperations with (potential) competitors. Under the current legal framework, no general exemption but only exemptions for very specific cases such as research & development and specializations exist. In fact, the requirements of the block exemptions are in practice seldomly met. Hence, companies wishing to enter a sales cooperation need to deal with the legal uncertainty even if, from an antitrust perspective certain sales cooperations, such as the ones described in the following, should be exempted as they are unproblematic or at least the advantages outweigh the disadvantages:

> *Company A, a small manufacturer/producer of an innovative product with a small market share and limited sales force, is in need of support in its sales activities in order to be able to penetrate the market with its innovative product. Company B has a large sales force but no or only small market share in the relevant product market.*
>
> *Alternative 1: Company B, a sales partner of company A, refines the innovative product of Company A and sells the refined product to the end customer.*
>
> *Alternative 2: Company B resells the innovative product of Company A but at the same time offers complementary services to the end customer.*

In both alternatives Companies A and B remain competitors towards the end customer. However, in order to sell Company A's product Company B needs Company A's support in its sales activities.

Under the current legal framework companies seeking legal certainty and to jointly market a product would have the option to create a sales joint venture. The creation of a sales joint venture would most likely be unproblematic from an antitrust perspective as the joint market share remains low. However, this is not a viable option in many cases as the creation of a JV is expensive and time-consuming. In order to avoid legal uncertainty and to enable companies to penetrate the market with an innovative product quicker, joint sales activities as foreseen in the block exemptions for specialization and R&D agreements, should generally be exempted if the combined market share of the cooperating companies is below 15 %. In such cases there are usually no or only limited negative effects on competition or at the very least the advantages of a joint sales approach outweigh the disadvantages. Such an exemption already exists for purchasing cooperations. This exemption should be extended to sales cooperations such as the ones described above.

- Standardisation agreements

Standardization agreements are critical in the context of globalisation and digitalisation of the markets. Technical standards and specifications are increasingly required to be able to compete in a digitalised world. Moreover, the data economy will require additional standards in order to share data, to access third party data as well as to ease the path for new technologies and businesses such as in the flied of IoT, AI, cloud etc.

Currently the guidelines do not provide enough clarity and emphasis when analysing the pro-competitive against the anticompetitive effects of a standardization agreement. The existing guidelines should be adapted in order to have an updated and future-proof framework, which will facilitate the needs with regard to increased standard setting in the digital environment.

In particular, in fast-moving digital markets it is difficult to move forward with standardisation, if an unrestricted participation in the standard-setting process should be guaranteed. In practice, the process is too complex when trying to achieve a common denominator among all stakeholders at a very early stage. Such a process is also open to misuse with the aim to bring a standardization process to halt, because it was not aligned with their own interests, even when the standard was beneficial for the industry and consumers. Therfore, the guidelines should allow more flexibility in the standard-setting process by for instance introducing a mechanism to allow the participation of those interested, when the process is more advanced, while ensuring that the process is not blocked.

Beyond that, the guidelines should ensure that not only cooperative efforts concerning the development of standards are exempted, but also cooperation aiming at the implementation of standards. Otherwise, newly developed standards and related innovations run into danger of not materializing and unfolding their respective economic and social benefits.

- Digital infrastructure agreements

It is vital for the autonomy and competitiveness of the European Digital Single Market to facilitate cooperation, in particular, in case of standard-setting and innovation efforts regarding critical layers of the digital ecosystem. Competition law should facilitate cooperation efforts in Europe by reducing barriers that EU companies faced in the past, such as opposition against horizontal cooperation in innovation technologies. The pro-competitive aspects of such cooperation need to be more strongly accounted for. Otherwise, key elements of a future-proof digital ecosystem, such as 5G, AI, and IoT, could experience serious hold-backs, preventing Europe to catch up in the global race for digital leadership. As stated above hereby, it is crucial to ensure that cooperation aiming at the implementation of standards is exempted, in order to ensure that newly developed standards and related innovations can unfold their respective economic and social benefits.

- Network sharing agreements

One particular example for a cooperation for an infrastructure layer that is critical for the Digital Single market are network sharing agreements. Network sharing is a widespread form of cooperation between telecommunications operators that benefits both consumers and the European economy as a whole, including swifter and enhanced deployment of innovative technologies, broader coverage, improved service quality and lower environmental impact. It leads to significant cost savings for network deployment by freeing up resources for other investments in innovation which ultimately translates into lower tariffs, increased quality, and improved product propositions.

Network sharing enables efficient investments avoiding redundant infrastructure and reducing the overall number of antenna sites and equipment, also resulting in environmental and public health benefits. With network sharing, mobile network operators can invest more in innovative products and new service functionalities, which intensifies competition at the retail level. RAN sharing preserves the independence of - and differentiation between – operators at retail level. Under RAN sharing, individual operators continue to separately operate their own core networks and IP platforms and may always pursue unilateral build-outs and launch new service functionalities, which are primarily dependent on other network layers.

With the evolution towards 5G and the need for further densification of networks also in urban areas, network sharing will be even more necessary. The European Parliament on 5G recommends to "*Promote infrastructure sharing for 5G: Policy for 5G networks should be based on encouraging infrastructure sharing with separation of infrastructure and services. This could be fundamental to the financing model for 5G networks to provide widespread coverage for the Digital Single Market*".[2]

Therefore, the new guidelines should acknowledge the positive effects of network sharing and should give clearer guidance on the permissibility of such co-operation. Given the general pro-competitive nature of such co-operations they should be regarded as permissible when the commonality of costs among the participants is kept at a relative low level, the capacity to differentiate on services is guaranteed (e.g. by unilateral deployments), information sharing is kept to what is necessary and there are non-exclusive.

2 "5G Deployment State of Play in Europe, USA and Asia", available at : https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/631060/IPOL_IDA(2019)631060_EN.pdf

3. Research & Development and Specialisation BER

- R&D

On joint R&D agreements there is a need to emphasise that they can generally be presumed pro-competitive and therefore a simplified approach should apply here. The current complexity of the R&D BER creates great uncertainty for companies as to whether or not their joint R&D agreement is compliant with EU competition rules or not. This is particularly true in cases where the joint R&D agreement does not comply with all the strict requirements of the R&D BER. The R&D BER and the guidelines need an update which should emphasize more strongly the generally pro-competitive nature of joint R&D cooperation, have less strict criteria in the BER and provide clearer guidance to ensure that companies have sufficient comfort entering into a pro-competitive R&D cooperation. In general, the complexity of the R&D BER should be reduced making it easier to get the desired legal certainty with a simplified self-assessment.

- Specialisation

The use of the Specialisation BER should be broadened in order to maximise the efficiencies that can be gained from specialisation. The current, very restrictive threshold of 20% combined market share often prevents larger companies to benefit from the efficiencies generated by a specialisation cooperation. In particular, in a geopolitical environment where European companies lack the scale of other players, specialisation enable the competitiveness of European players. Therefore, the threshold should be increase to at least 30%.

4. Procedural aspects

- Increase in legal certainty

In order to foster horizontal cooperation, which is very much needed for European competitiveness in the changing geopolitical environment, the legal certainty for companies needs to be increased to reduce the cost associated with the legal uncertainties. Currently, as described above, neither the HGL nor BERs provide sufficient guidance for self-assessment and there is very little case law for orientation.

Besides giving clearer guidance in the HGL and the BERs, the EC should also examine how to best provide some informal guidance on a case-by-case basis. The set-up of recurring meetings with the EC, aimed at discussing the interpretation of concrete questions in connection with a specific horizontal cooperation project, is one example of a possible tool in this context.

- Informal guidance letters

Additionally, the EC should be able to give inputs and feedback at an earlier stage. Another potentially helpful tool in this context are guidance letters in accordance with the EC Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (2004/C 101/06). Given the limited use of this tool so far, it may be necessary to reassess the interpretation for the criteria which should be enlarged to include more cases for application of this tool.

- Voluntary fast-track notification procedure

Voluntary fast-track notification procedure should be allowed for cooperations that have certain magnitude and involve high stakes, putting the cooperating companies at high risk. For such (exceptional) cases a voluntary notification procedure should be introduced, similar to the voluntary procedure that has been suggested by the German Commission 'Competition Law 4.0' with regard to innovation cooperation: "*recommends the introduction of a voluntary notification procedure at the European level for novel forms of cooperation in the digital economy with a right to receive a decision within a short period of time. It also recommends that the Directorate-General for Competition hire additional personnel for this purpose.*"[3]

In order for such a voluntary notification procedure to be effective and make it manageable from a European Commission perspective the procedure should be limited in information provided and time. It is not desirable to create a burdensome lengthy procedure, especially in fast-moving markets. Therefore, it would be necessary to define a minimum amount of information that needs to be provided for a decision and have a limited period of time for the decision, eg. 3 months.

Both the higher use of informal guidance letters as well as a voluntary fast-track notification procedure will also contribute to creating more case law which will then in turn facilitate the self-assessment of the companies.

[3] A new competition framework for the digital economy, BMWI 2019: https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3