12 February 2020

Response of Orange to the consultation on block exemption regulations and guidelines on horizontal cooperation agreements

Answer to public questionnaire for the 2019 Evaluation

Orange welcomes the European Commission's initiative to review the Horizontal Block Exemption Regulations (R&D and Specialization) (**BER**) and the Guidelines on horizontal cooperation agreements (**HGL**). So far, the BER and HGL have provided useful guidance to assess the legality of different types of horizontal cooperation agreements with regards to Article 101(1) TFEU but they need to evolve to be adapted to the changes imposed by the digitalisation of the economy.

Orange believes that electronic communication network and service providers (**operators**) have a central role to play for achieving a stronger digital Europe by investing in high quality and innovative networks, technologies and services at the benefit of European consumers and businesses.

To seize the full potential of the digital era and to stay competitive in the context of a global digital market, a fluid, legally secured, and efficient cooperation between operators will be crucial for upcoming years which will allow to:

(i) deploy rapidly new technologies and infrastructures,

(ii) gain the necessary scale to contribute to the emergence of European digital innovative products and services and to reduce the dependence on global digital actors (often non-European), and

(iii) promote wide interoperability.

To achieve an efficient cooperation between operators, a flexible and clearer legal framework with regards to horizontal cooperation agreements is indispensable. Such framework should provide a sufficient legal certainty and security for self-assessment and, when necessary, a possibility to request a guidance from the Commission within a reasonable timeline without imposing burdensome and time-consuming processes.

Furthermore, the European framework on horizontal cooperation has to be adapted to the dynamics of the digital economy to avoid any strong asymmetry with regards to the "rules of the game" between the European and global digital actors. We need the EU actors to be able to cooperate and develop innovation at the same pace as other parts of the world, for the benefit of European citizens and European digital economy as a whole.

(1) Basic principles for the assessment under Article 101 of the TFEU

Under the current framework, the market shares of the parties play a central role when analysing the effects of different horizontal cooperation agreements on competition.

As per paragraph 44 of the HGL, if the parties have a low combined market share, the horizontal cooperation agreement is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1) TFEU and, normally, no further analysis will be required.

Moreover, to fall under block exemption regulation or safe harbour in regards to certain types of horizontal cooperation agreements, the market shares of the parties shall not exceed the defined thresholds.

Orange believes that in the rapidly evolving environment of digital markets, traditional definitions of markets and market power are not always adapted as the analysis is static and based on isolated product markets and parties' turnover. To fit to the challenges of the digital era, a more dynamic and forward-looking approach is necessary taking into consideration the interdependence of different markets and the specificities of digital markets.

This is especially true when new market players are not subject to regulatory constraints similar to those impacting historical market players because such regulatory constraints are not defined for new markets or because the historical constraints are not suppressed or at least adapted to rapidly evolving markets.

Therefore, a broader assessment of horizontal cooperation agreements related to digital markets is necessary with less emphasis on market definitions and market power and more on potential effects on competition in dynamic markets. The possible competition constraint exercised by global digital actors on the parties to the horizontal cooperation agreement should as well be integrated in the assessment.

Moreover, greater account should be taken of pro-competitive effects produced by the envisaged cooperation (for example reaching a necessary scale to invest in new technologies and innovation or achieving a level playing field with global actors of digital economy) and sufficient importance should be given to the overall impact that the cooperation may have on the competitiveness of the EU digital economy and on delivering a digital single market.

(2) Different types of horizontal cooperation agreements

Orange believes that for the electronic communications sector the review of the HGL shall focus on the types of horizontal cooperation agreements described below.

(a) Deployment of new technologies and infrastructures: definition of a block exemption for RAN sharing agreements

To achieve digital single market in Europe, it is critical for digital infrastructures to develop at the same pace as the digital economy. To keep up with digital era realities and challenges, the applicable legal and regulatory framework should encourage infrastructure investment including through cooperation between operators Moreover, digital infrastructures should be given a broad sense and shall include not only mobile and fixed networks but also any kind of digital infrastructure (for example platforms).

The guidance provided in the HGL regarding production agreements can be helpful for the self-assessment of network sharing and any other type of digital infrastructure mutualisation agreements, but they are not adapted to the specificities of these forms of cooperation and thus cannot provide a sufficient legal security to the parties entering into such cooperation agreements.

In addition, any negative decision of the European Commission (or national competition authority) intervening several years after the implementation of a network or any other type of digital infrastructure mutualisation (taking into consideration antitrust proceeding timeline), may raise important risks not only for the parties that have invested considerable efforts and resources in such mutualisation agreements but also for concerned customers.

Orange believes that the European Commission shall have a more favourable stance on cooperation agreements between operators seeking infrastructure investments and innovation. For such initiatives, there shall be a presumption as to their compatibility with Article 101 TFEU taking into account the important impact that such agreements may have for fast and robust growth of the European digital economy.

More specifically, there should be a particular focus on network sharing agreements. With the explosion of data use and in the context of a never-ending demand for a better connectivity, there are high expectations from operators with regards to investments in new generation networks (FttH, 5G and future technologies).

The investment pressure on operators is increasing with ambitious expectations from consumers and public authorities regarding the roll-out of state-of-the-art networks. This is the case notably for mobile networks, with expectations on the improvement of the mobile coverage, both indoor and in the rural and non-profitable areas, while at the same time taking into account the growing reluctance regarding the implementation of new sites, in particular because of environmental concerns.

Meanwhile, with each new technology generation, the innovation cycles are getting shorter and the operators have less and less time not only for network roll-out but also for return on investments.

Indeed, GSM technology was operated during 15 years before 3G frequencies were allocated, 3G technology was operated for 10 years before 4G frequencies were allocated, and now only 6 years after effective launch of 4G networks, 5G frequency assignment process has started and first 5G services have already been launched in Europe in 2019.

New technologies, such as 5G, require heavy investments and an accelerated deployment plan that remain challenging for all operators.

To optimize network deployment (cost, environment impact, speed of deployment, etc.) while providing high quality services and improved coverage, mobile network sharing agreements between mobile operators have become widespread in Europe under various schemes:

- passive sharing (hosting), and
- active sharing (MORAN / MOCN).

Today, there is a gap between competition and regulatory authority positions in regards to network sharing agreements. While the regulatory authorities encourage and, in certain cases, even impose network sharing, the positions of competition authorities are not always consistent throughout EU.

Indeed, for fixed networks, with the roll-out of VHC networks (and especially FttH), innovative cooperative agreements have been included in the scope of the regulatory framework or developed by the market, as shown by the mutualisation and co-investment/co-financing arrangements respectively taking place in France and Spain. The benefits have been confirmed in the new European Electronic Communications Code that aims at incentivising such type of cooperation.

As to mobile networks, historically, the established principle was competition by infrastructure as differentiation by coverage was considered to be key for an effective competition between mobile operators.

However, the context has changed since most of the European operators have (or should have shortly) a national mobile coverage (covering 98-99% of the territory) including for new technologies (5G) due to

regulatory obligations. Thus, differentiation today is more about core network elements, quality, innovative services, rather than coverage.

In addition, in many countries, the regulatory framework imposes mobile network sharing for white and sometimes wider zones (for example New Deal in France[1]) on top of existing numerous mutualisation arrangements based on commercial agreements.

Thus, depending on the evolution of the context, namely related to network deployment in the country and regulatory obligations, a RAN sharing agreement that could have been problematic in the past may no longer raise competition issues.

In this context, the position of the European Commission regarding RAN sharing agreements needs to be clarified.

Indeed, when assessing efficiency gains attached to mergers in mobile markets, the European Commission constantly refuses to accept any network efficiency claiming that such efficiencies could be achieved through other arrangements, i.e. RAN sharing agreements. According to the European Commission, such agreements have a less restrictive effect on competition than a merger can have. For example, in the recent merger case Hutchison 3G Italy / Wind / JV in Italy, the Commission considered that "*network sharing agreements … are relevant for the assessment of the Transaction, as they could constitute less anti-competitive alternatives to achieve similar efficiencies. In this respect, the fact that the Parties have entered into the Transaction in itself does not exclude that network sharing is a realistic and attainable alternative to the proposed transaction for achieving the claimed efficiencies*". Further, the Commission stated that "*network sharing agreements are widespread in markets for mobile telecommunications services within the European Union and do not involve particularly insurmountable obstacle*"[2].

However, in 2016, the European Commission opened an antitrust investigation into a network sharing agreement signed in 2011 between two Czech operators of mobile telephony, O2 CZ / CETIN and T-Mobile CZ and sent a statement of objections in summer 2019[3].

This investigation, launched after several years of the implementation of the RAN sharing agreement, confirms the urgent need to give for the future a better legal certainty to the sector on what is acceptable with regards to RAN sharing agreements.

Taking into consideration the above as well as the fact that RAN sharing agreements are generally a source of substantial efficiencies and benefits for operators and consumers (cost reduction, faster deployment of new technologies, more extended coverage, less environmental impact, etc.), **Orange considers that RAN sharing agreements should be block exempted as they can be regarded as normally satisfying the conditions laid down in Article 101(3) TFEU.**

[1] https://en.arcep.fr/news/press-releases/p/n/new-deal-for-mobile-2.html.
[2] Case No COMP/M.7758 - *H3G / Wind*, §1508-1509.
[3] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5110.

Block exemption shall be provided if the RAN sharing agreement fulfils the following cumulative conditions:

- ✓ **Guarantees in terms of capacity for commercial differentiation:**
  - No spectrum sharing except for a transitional period of time or in limited areas, or because of regulatory constraints (obligations or limitation of spectrum). For larger spectrum sharing, a case-by-case assessment shall be necessary,
  - All participants have their own independent core network (possibly based on backhaul/fibre sharing).
- ✓ The **exchange of competitively sensitive information between competitors is restricted and controlled** as per applicable competition rules (black box, clean teams, etc.). This could be achieved through a JV but not necessarily.
- ✓ **Geographical perimeter** (takes into account that geographical obligations are largely addressed by the regulatory framework which imposes national coverage obligation for almost the entire territory (licenses, white zone coverage, etc.))**:**
  - In urban zones, all network operators have already a network (based on coverage obligations) (in this case any mutualisation in urban zones will not have a foreclosure effect),
  - The operator(s) not being part of the cooperation has (have) a sufficient coverage over the territory.

For RAN sharing agreements falling outside the block exemption and for mutualisation agreements concerning digital infrastructures in a broader sense, a comprehensive and secure legal framework for self-assessment should be defined.

(b) Industry-wide initiatives for innovative products and services

Interoperability is essential for the delivery of a European digital single market. Today, however, only global digital actors, due to the structure of their offers, their global size and limited regulatory and competition law constraints, can offer this unique approach on the European soil. Yet, their solutions are very often proprietary and potentially create vertical lock-in for the clients.

Meanwhile, European operators limit their cooperation to basic services, such as voice and SMS. In the context of digitalisation, European operators should have the possibility to evolve towards services that are interoperable with the latest technologies in order to promote the universality of services (voice over LTE, RCS, video over LTE and other new / future technologies). By doing so, Europe would in fact give itself a leading role on digital issues and allow European citizens and industry to be more independent from non-European global actors.

Indeed, being part of the digital economy, the electronic communications sector is, on one side, facing competition from global digital players (mainly based outside the European Union) and, on the other side, is largely dependent on these actors to access to different ecosystems.

In the context of digitalisation and global competitive dynamics, it is important for operators to have more flexibility and security when working together on industry-wide initiatives (not only R&D) seeking to develop innovative products and services to compete at global scale.

Encouraging such initiatives could accelerate the creation of interoperable products and services in Europe, help European operators not to be held back compared to global digital actors and allow Europe to stay competitive in the digital era.

For such discussions, operators should have the flexibility to work in small committees between peers having a common interest for the project as well as the necessary innovation capacity. This would allow working efficiently and in a timely manner on digital projects requiring a scale and reactivity.

In case of a successful outcome and if appropriate, the results could afterwards be proposed to the rest of the industry to achieve a wide interoperability. Moreover, in the event the developed result would need to become a standard, which is not always the case, then it would be presented to standard-setting organisations.

Promoting such initiatives could for example result in the creation of a European application store (for example, in China, several application stores are proposed notably by Huawei, Xiaomi and Alibaba).

Under the current framework, for any project of horizontal cooperation with the involvement of several operators there is a strong presumption of restriction of competition under Article 101(1) TFEU. The process to respect in order not to be exposed to legal risk is very burdensome, time-consuming and does not give sufficient legal comfort. Thus the operators censor themselves when it comes to cooperation and many common initiatives which could result in the creation of new innovative and competitive products and solutions are, unfortunately, abandoned half way or never initiated in the European Union.

For example, the E5 initiative (launched in 2011) had the purpose of discussing several topics of general interest for the telecommunications industry such as RCS, NFC, security and a sustainable model for Internet. The cooperating parties had been transparent vis-à-vis the European Commission from the beginning of the cooperation (EC Commissioners were updated after each meeting) with a strong competition monitoring to avoid any exchange of competitively sensitive information (notably external competition counsel attending the meetings and strict internal process for any document exchange).

Yet, the European Commission opened an antitrust investigation[4]. Thus a decision was taken to stop at once those works and some of the topics were moved under the umbrella of multiple normalisation organisations (GSMA, ETNO, ETSI, i3, etc.). While the decision to stop the E5 initiative triggered the closing of the file by the Commission, it also led to delays in terms of delivery to the markets. For instance, the RCS standard is still, in 2020, under discussion within GSMA while one of its initial aims was to compete against services such as WhatsApp or other solutions which have also been launched meanwhile.

In the context of a global digital economy, such a restrictive approach, when only discussions under the umbrella of standard-setting organisations are considered waterproof, is problematic. If not modified, the current framework will not only discontinue serving its principal objectives which are to ensure fairness for all industry actors and avoid any discrimination and foreclosure but will also become counterproductive.

[4] Case No 39943 - *E5 - Cooperation among large telecom operators*.

In addition, this approach seems to defer from other parts of the world where industry actors seem to have more flexibility when cooperating in a context of a common project.

Moreover, the restrictive interpretation of the European antitrust rules is sometimes used by some global digital actors to block any initiative which could potentially be in competition with their own projects, very often based on proprietary solutions. Such proprietary solutions are afterwards either used in a completely closed ecosystem or become *de facto* mandatory for the rest of the industry due to the size and footprint of such global actors.

By entering the market in a quicker way (contrary to European operators, global digital actors do not need to cooperate with their peers to reach the necessary scale), those actors benefit from the *winner-takes-all* effect, which means it becomes almost unrealistic to compete with alternative solutions. For other players, the debate generally ends up in negotiating access conditions to these solutions.

To support EU competitiveness globally, deliver a digital single market and eliminate asymmetry between European operators and global digital actors, Orange believes that the reviewed HGL should establish a clear and secure framework for self-assessment of industry-wide initiatives undertaken between small groups of operators which seek to develop innovative and competitive products and services.

These forms of cooperation are pro-competitive as they allow the cooperating parties to achieve the necessary scale to be competitive in the context of global actors. They allow to create new digital products and solutions (application, ecosystem, platform, algorithms, etc.) for consumers and industry and to increase EU competitiveness in the digital economy. They may also result in the emergence of European alternatives to the ecosystems created by ultra-powerful digital actors, thereby reducing EU dependency on such global actors and bringing more competition to digital markets.

Therefore, for such industry-wide cooperation agreements, there should not be a presumption of restriction of competition, but, on the contrary, if predefined conditions are fulfilled, such initiatives should be considered complying with Article 101 TFEU (either because they do not infringe Article 101 (1) TFEU or because they fulfil the criteria for exemption under Article 101 (3)).

Such conditions could concern the following pro-competitive parameters (without limitation):

- The objectives pursued by the cooperation (developing innovative and interoperable products and services, achieving a necessary scale, emergence of European alternatives to existing ecosystems, emergence of pan-European interoperable solutions, importance of the reactivity for the success of the project);

- The appropriate safeguards vis-à-vis competition law which will govern the initiative (, absence of any restriction of competition by object, control of the exchange of competitively sensitive information as per applicable competition rules and waterproof industry practices, etc.);

- The effect that the initiative could have on the competitiveness of the global digital industry and in particular of the European digital sector (reducing EU dependency on global actors, increasing EU competitiveness in digital sector, delivering a digital single market, creating a European ecosystem, etc.).

(c) Standardisation agreements

(i) Process

In the context of digitalisation, standardisation is key to achieve wide interoperability.

The HGL provide a valuable guidance for the self-assessment of horizontal cooperation agreements regarding standardisation. However, the provided rules are not fit to the specificities of the digital economy which is dynamic and fast moving while existing rules are sometimes burdensome and time-consuming.

Namely, as per paragraph 281 of the HGL, for the standardisation agreements to fall outside the scope of Article 101(1) TFEU, the involvement of all parties affected by the standard in the process leading to definition of the standard is necessary (*unrestricted participation*).

However, in practice, guaranteeing an unrestricted participation may be complex, inefficient and time-consuming and may result in failure if all the parties do not have the same motivation or interest. Moreover, the experience shows that sometimes some participants benefit from the constraints imposed by the current legal framework to block certain initiatives that could compete with their own proprietary solutions.

It is true that the paragraph 295 of the HGL raises the possibility of departing from the principle of unrestricted participation. As per stated paragraph, if in the absence of a limitation on the number of participants, it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition under Article 101(1) TFEU. The footnote explains that 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) TFEU.

However, this possibility is not sufficiently clear and the burden of proof is heavy when interpreting it in light of paragraph 316 of the HGL *("participation in standard-setting should normally be open to all competitors in the market or markets affected by the standard unless the parties demonstrate significant inefficiencies of such participation or recognised procedures are foreseen for the collective representation of interests"*).

Considering the above mentioned provisions as well as past experiences which did not succeed due to alleged antitrust risks upfront, the operators are now very reluctant to embark into any discussion regarding standardisation and interoperability outside of established standard-setting organisations – which can lead to delay in terms of market delivery and thus to lack of competitiveness.

Indeed, in a digital world where innovation cycles are short, the success of the standardisation process largely depends on its timely definition and implementation. If the process is too lengthy and resource consuming and does not produce required results in due time, the "momentum" is missed. Meanwhile, other actors having a global scale will indeed propose an alternative proprietary solution developed outside of the defined standard-setting organisation (thus without any constraints with regards to antitrust rules). Such solution will eventually be imposed to all the other industry actors due to its wide reach, potentially creating a lock-in and thus excluding any further innovative solution.

Furthermore, these companies (often non-European) having the capability to deploy proprietary solutions competing with future standards still under definition push the standard-setting organisations to adopt their proprietary technology as a standard and, ultimately, under the pressure to adopt a standard and, in the absence of a viable alternative, the standard organisations merely become a rubberstamp for proprietary solutions delivered by such companies.

Therefore, Orange believes that the HGL should be reviewed with regards to standardisation agreements and more flexible solutions should be introduced to current paragraphs 280-286 and 295 of the HGL.

Namely, the paragraph 295 of the HGL needs to be further developed in order to better explain when and to what extent restricted participation is allowed as well as to enlarge the scope of the cases which could fall under this "exception". The criteria for the "exception" to apply should be clear and not imply a heavy burden of proof.

For example, the "exception" to the unrestricted participation principle could be applied in regards to global and sophisticated projects for which the timing is key. The existence of alternative proprietary solutions (or ongoing initiatives in the market) and the possibility to create one should be taken into account for the application of the "exception".

In such cases, the industry actors having a common interest and the necessary scale should be allowed in the beginning of the standardisation process to work in a small committee in order to progress quickly.

The participation should be opened to industry actors not initially involved in the standardisation process once the project is more advanced. At that time, non-participating industry actors should be given the opportunity to submit their observations which shall be duly taken into consideration.

This also calls for reviewing the rules regarding industry consultation and transparency defined in the HGL in order to protect the interests of non-participating industry actors without harming the progress and success of the process. An important factor to take into consideration is the willingness of different industry actors to contribute to the common work by investing sufficient resources and energy. The unrestricted participation principle should not be relied on with the sole objective either to block the initiative or to benefit from the early results without having to invest in costly R&D and focus the resources on implementing the draft standard so as to be the first to reach the market. In this respect, participation should be understood as active participation with real and valuable contributions to achieve the common goal.

The "exception" to unrestricted participation principle should apply in the absence of any restriction of competition by object and provided that the access to the final result is not limited as the objective of such type of horizontal cooperation shall remain to ensure a wide interoperability between industry actors.

(ii) Intellectual Property Rights (IPR)

The pro-competitive benefits of IPR in standards development may be undermined by patent "hold-out" or "reverse hold-up" which refer to the strategic infringements practiced by users / implementers to not negotiate in good faith the licence of a Standard-Essential Patent (**SEP**) holder.

These delaying tactics cost additional time and resources to the patent owners / standards contributors to enforce their rights which ultimately reduce their incentive and ability to invest in R&D as well as in their participation to standards development whose primary goal is to promote competition.

The Court of Justice of the European Union (**CJEU**) acknowledged the problem of "hold-out" in the Huawei v ZTE case[5] in 2015. It clarified that alleged infringers should behave in good faith and not use "delaying

[5] Case C-170/13 Huawei Technologies Co. Limited v. ZTE Corp. (Fifth Chamber, 16 July 2015) http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30ddec4f949241db44d296cc9739f41099c5.e34

tactics." By doing so, the CJEU made it clear that the fair, reasonable and non-discriminatory terms (**FRAND**) are a two-way commitment. Orange believes this should now be reflected in Section 7 of the HGL by adding the following text below paragraph 269, which aims at following the language of the CJEU decision:

> *Equally, the pro-competitive benefits of IPR in standards development may be undermined by users of a standard "holding-out" from accepting the terms offered by a holder of IPR essential to the standard, which provide effective access to that standard, as set out in paragraphs 283 to 285. In such cases, an IPR holder who prevents access, for example through a court injunction, generally cannot violate EU competition law when a user of the standard is unwilling to negotiate or does not act in good faith with the aim of concluding a licence to such IPR, such as by using delaying tactics to avoid taking a licence. Hold-out can be anti-competitive, deterring innovation and participation in pro-competitive standards development. Since competition law focuses on the competitive process as a whole, equal treatment and weight should be applied to the licensing conduct of both IPR holders and users of the standard who may benefit from the FRAND Commitment.*

In addition, the HGL have created legal uncertainty on the market by inserting the wording "to all third parties" in paragraph 285. Indeed, some actors which aim at undermining the value of standardised technologies have developed fallacious arguments that a licence must be granted to any third party requesting one, depriving the IPR holder of the right to choose the level of the supply chain where it grants its license. By doing so, these actors argue in favour of a mandatory component licensing system[6].

This is contrary to the fundamental licensing rule of patent exhaustion as well as recognised and well-established commercial practices. SEP holders commit to offer licences to end-product manufacturers on FRAND terms including "have made" provisions for the benefit of all upstream suppliers. These licences provide end-product manufacturers with an effective access to the standards and intermediary producers with an appropriate protection through the inclusion of a "have made" licence. For these reasons, the wording "to all third parties" disrupts the market by creating legal uncertainty and should be clarified.

(3) Guidance letters

Commission Notice on informal guidance relating to novel questions concerning articles 81 and 82 of the EC Treaty provides a possibility to seize the European Commission of a request for a guidance letter.

Unfortunately, the conditions imposed for the guidance letter to be issued are very restrictive and, in practice, this tool has never been used[7]. This could be explained by the cumulative conditions to be fulfilled to be entitled to formulate a request which appear to set the bar very high to qualify for the informal guidance.

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[6] This was not foreseen during either the initial public consultation evaluating the impact of the HGL 2001; nor following publication of the draft HGL, May 2010, where the word "all" was added for the first time. Its inclusion was not necessary; the cornerstone of the HGL is "effective access" (see paras 264, 268, 280, 283, 284, 286, 287, 294 and 298).

[7] On 12 February 2020, the Commission's website still indicated: "*The Notice sets out the conditions under which the Commission may issue informal guidance letters. So far, no guidance letters have been issued by the Commission. Should the Commission issue a guidance letter in future, it will be made public in accordance with the Notice*", https://ec.europa.eu/competition/antitrust/legislation/guidance.html.

Orange believes that even if, with an efficient review of the HGL, in the vast majority of the cases, it will be possible to have a sufficient guidance for the self-assessment of the legality of different horizontal cooperation agreements, there is still a need for introducing a flexible, efficient and quick guidance process.

Several factors prove the importance of putting in place a less restrictive and more efficient guidance process:

- the complexity of certain projects and the major consequences that any *ex post* assessment by the European Commission could have on the parties and on the market,

- in a fast moving digital markets, it is difficult to provide a legal framework which covers all possible cases and cooperation,

- increased cost associated with the legal uncertainty.

Therefore, Orange proposes to review the notice on informal guidance by providing the parties the possibility to solicit the European Commission when they need a legal certainty with regards to the assessment of their horizontal cooperation agreement and existing tools do not provide sufficient legal security.

For the guidance to be efficient, the guidance letters should be issued within a reasonable timeline (for example 1 month but depending on the complexity of the submitted file an extension of another 1 month could be envisaged) without burdensome processes regarding information requests. The issued guidance should be taken into account if a formal antitrust investigation is opened with regards to the concerned project at a later stage, provided that the companies have complied with the provided guidance.