TEF'S CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE HORIZONTAL GUIDELINES AND THE HBERS

Telefónica welcomes the European Commission's (EC) decision to initiate a new public consultation to seek stakeholder input on the draft revised texts of the draft revised block exemption regulations on research and development agreements ('R&D BER') and specialisation agreements ('Specialisation BER'), and the accompanying Guidelines on horizontal cooperation agreements ('Horizontal Guidelines'), which will expire on 31 December 2022. Overall, we are happy to see that the EC well heard the industry's claims done throughout the subsequent public consultations and workshops taken place in the last years. The draft revised proposals make a significant improvement compared to the current ones, providing further guidance and examples in the reaching of the different types of cooperation agreements, clarifying certain aspects, and adapting the current tools to the challenges emerged by the Digital Economy and the Green transition.

However, Telefónica is of the view that there are still relevant items that require to be revisited by the EC, either because they are not adapted to new market realities or further clarification is needed. This contribution aims to touch upon those topics that, in Telefónica's point of view, should be urgently addressed by the EC, in order to ensure that the legislative tools are future proof, provide full legal certainty, and address properly current and future market challenges.

Introductory Chapter

- **Liability of joint ventures and parent companies**

We welcome the clarification made in paragraph 13 of the draft revised Horizontal Guidelines, setting out that agreements and concerted practices between the parent(s) undertakings and their jointly controlled subsidiaries (JV) will not meet Art. 101 (1) TFEU, as they are considered a single economic unit and thus, a single undertaking under Competition Law rules. This clarification is key to ensure legal certainty for undertakings in their relationship with their JVs, and it is aligned with recent case Law, that establishes that when it is demonstrated that parent companies exercise decisive influence over their JV, they should not be considered competitors, even if they are both active on the same relevant product and geographic markets.

However, in the scenarios listed in paragraph 13 under which Art. 101 (1) will still apply, the scenario applied to, *inter alia*, agreements "*between the parents to alter the scope of the joint venture*" is unclear. We also note that the EC takes a negative bias in the identification of this type of agreements. Further guidance on this point will be welcomed to ensure full legal certainty to undertakings in the relationship with their JV.

- **Need to further adapt the Horizontal Guidelines to digitalisation**

We regret the draft Guidelines are not sufficiently adapted to the Digital Economy and the challenges emerged by digitalization. The draft Guidelines do not sufficiently address the new types of cooperation that are emerging. These cooperation models require a certain degree of information exchange and data sharing between the participating companies. Clear guidance on this new cooperation models is needed, as companies are currently lacking clear guidance with regard to the boundaries of permitted information exchange in such cooperations.

❖ **Potential competitors**

The guidance provided on the notion of potential competitors in paragraph 17 of the draft Guidelines remains unclear, creating substantial legal uncertainty for undertakings. Telefónica is of the view that undertakings can hardly assess whether or not another company has the "*firm intention and inherent ability"* to enter the market in a timeframe of three years. Whether the undertaking's intention to enter the market is not still available in the public domain, any exchange on future strategy plans would certainly be an exchange of competitively sensitive information. Likewise, the same applies to the other criteria included in the draft Guidelines such as whether or not a company has taken "*sufficient preparatory steps*" or "*the real and concrete possibilities of an undertaking*" to enter the market. Therefore, the draft Guidelines should clarify the term "competitor", by only including actual competitors, or it should provide clear guidance that allows companies to assess whether or not a company is a potential competitor in practice.

❖ **Ancillary restrictions**

Paragraph 39 of the draft Guidelines sets out the notion on ancillary restrictions, where it establishes a too strict threshold under which the ancillary restraints of a given cooperation agreement would be analysed. We are of the view this threshold is much higher than the threshold foreseen in the Commission Notice on Ancillary Restraints[1]. The Notice on Ancillary Restraints establishes that an ancillary restraint to a concentration is legitimate if the concentration *"could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty"* (paragraph 13). This threshold is economically sensible.

Conversely, the draft Guidelines establishes: "*The fact that the operation or the activity at stake is simply more difficult to implement, or less profitable without the restriction concerned, does not make that restriction 'objectively necessary' and thus ancillary"*. This threshold is difficult to assess by the parties that need legal certainty and a benchmark that is economically foreseeable to measure. **Therefore, the threshold set out in the draft Guidelines should be adjusted to reflect the threshold applied in the Notice for Ancillary restraints.**

Mobile infrastructure sharing agreements – Chapter 3.6

Telefónica welcomes the guidance provided by the EC on mobile infrastructure sharing agreements, explicitly stating that network sharing agreements should be analyzed on a case-by-case basis, based on the specificities of the national market and the agreement as such.

In this sense, we welcome the EC's recognition of the importance of connectivity networks as an essential output for the digitalization and the Digital Economy, in the way that quality, coverage, innovation and faster network roll-out can be achieved, among others, through the sharing of the networks.

However, we note that the draft revised Guidelines set out principles and factors that do not reflect neither the technical evolution of the current and future technologies nor attend to the market realities in the assessment of mobile infrastructure sharing agreements. We therefore propose some adaptations to the current wording, with the aim to ensure that the provided guidance is future-proof and fit for purpose:

[1] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03)

- We believe that **the distinction under paragraph 302 between passive, active RAN and spectrum pooling agreements is coherent in the short-term**, as it gives response to the current tangibles ways network sharing is nowadays being reached. However, we want to flag two points:
    - This differentiation takes a **negative bias on the sharing of active RAN and spectrum pooling, making a presumption that these types of sharing are more likely for the parties to collude** (especially negative for the spectrum pooling). **This presumption should be removed.** Today mobile network can deliver a single bearer service or "network slice". All customers get the same service. With the deployment of 5G Stand Alone will come the ability to deliver multiple bearer services on a single radio network, these bearer services can be differentiated in terms of quality and other performance attributes. Even if there is the deepest level of sharing, as long as the core is separate, the different network slices of the operators could be differentiated. Consequently, it will very often be the case that active sharing and spectrum pooling do not run an increased risk of reducing service differentiation.

      In addition, there could be network sharing agreements in which the parties share active or spectrum to reach areas where it is not worth to cover or to attend specific coverage circumstances. It cannot be presumed that a given agreement, just because the parties share active or spectrum infrastructure, is more likely to restrict competition.

    - **The draft revised Guidelines is necessarily backward looking and does not consider future developments in technology, where new sharing modalities might arise**. For instance, now with 5G and 6G, the virtualisation of networks makes this current differentiation unworkable.

      With the deployment of 5G and the virtualisation of the networks, some of the main drivers of differentiation in terms of quality and other performance attributes are software driven. As a result of these new network architectures, active sharing and, to a certain degree spectrum sharing, given other capacity drivers like MIMO, are less relevant for service differentiation. A softer wording is hence recommended.

      In addition, hardware will become more of a commodity, especially with the emergence of Open-RAN. With Open-RAN, MNOs will no longer distinguish on the standardised hardware elements. Therefore, in the future, the main elements of capacity and differentiation will be on the software level, so softer wording is recommended when it comes to competition concerns described by the EC in the draft Horizontal Guidelines regarding active sharing (deployment of capacity) or spectrum sharing (differentiation) so as not to pre-empt future technical developments.

      This differentiation could even further evolve in the future according to the new technologies developed, where it is all about software. Therefore, **a flexible approach should be taken by the EC in the appraisal of future network sharing agreements.**

- The benefits of mobile infrastructure sharing go beyond cost reductions and quality improvements. Network sharing enables faster roll-out, it allows operators to join efforts in the deployment of new technologies in areas where investment return is less profitable and exert environmental benefits, such as lower emissions and reduction of the ecological footprint. In this sense, **specific guidance under which basis a given mobile network sharing agreement would meet the conditions under Art. 101 (3) TFEU would be welcome**. Thus, RAN Sharing agreements exerting the following pro-competitive effects should be excluded from the presumption that it falls under Art. 101 (1) TFEU by principle, or even to be considered under a Block Exemption Regulation for mobile network sharing agreements. These efficiencies are: efficient investments, faster deployment, roll-out of new technologies, improved capacity and service quality, environmental benefits as well as intensified competition at the retail level by unlocking important resources for innovation.

- Regarding the assessment of the effects of a network sharing agreement, not all the relevant factors listed under paragraph 303 are appropriate going forward:

    - **Geographic scope and coverage are no longer applicable** as they were in the past. Over the last years, also driven by coverage obligations, network coverage has no longer played a role in competitive distinction. Moreover, network operators have reached the site limit, there is a maximum network extension, so this parameter is no longer relevant. Beyond that coverage is determined by passive sites, the sharing of which is seen as uncritical or even mandated.

      Furthermore, the distinction between urban and rural no longer holds up in 5G, where sharing in urban areas is key, due to the marginal space to introduce new equipment and the characteristics of 5G antennas. For instance, small cells may be deployed for densification of mobile networks. Urban environments can present challenges to deploy a large number of sites (ref. Inwit and H3G/Orange in Austria – planning restrictions). These restrictions will limit the capacity of mobile networks especially if small cells can only be deployed by individual operators. Looking forward there may be many positive reasons why incremental capacity at the margin (as opposed to the overall capacity of the network) would be more efficiently deployed on a shared basis. After all, this is the business model for many Wireless Infrastructure Providers, so cannot be per se problematic.

    - **Market structure is also an inappropriate factor** for an investment-heavy industry such as the mobile telecommunications sector, where you naturally will end up with high market shares. In fact, when you look at existing mobile network sharing agreements, the majority of them will have a joint market share that exceeds 50%. We nevertheless agree with the EC that in the appraisal of mobile infrastructure sharing agreements, it is key to take into consideration the number of competitors outside the market and the competitive pressure exerted by them. **It is also key for the EC to prevent foreclosure effects that the given agreement might exert**, making sure that all parties that are technical capable and can add value to the given agreement, are allowed to join it.

- Paragraph 304 sets out minimum conditions that a network sharing agreement should meet to determine its unlikelihood to be restrictive on competition. In this sense, we are of the view that the **condition on the need to follow differentiate spectrum**

strategies should be removed. It is incorrect to assert that *per se* spectrum pooling is likely to be more problematic, but it is necessary to pay attention to the specific circumstances as well as the amount of spectrum pooled. For instance, where spectrum at the margin (e.g. mmWave spectrum for hotspots) is pooled, jointly used or jointly deployed, it will not impose on the operators' ability to deploy and acquire spectrum for wide area coverage.

Information exchange – Chapter 6

- **Data sharing and data pooling agreements** (paragraph 407 and related footnote) are considered a specific type of information exchange within the draft Guidelines. The consideration of data sharing and data pooling agreements as information exchange would lead to consider that any information shared within this kind of agreements might be considered commercially sensitive and therefore subject to a strict approach because of the fear of breaching antitrust rules. Moreover, considering that this type of cooperation will become even more common than before within the Digital Economy, ad-hoc guidance on data sharing and data pooling agreements would be extremely helpful to provide legal certainty for undertakings in their assessment under the meaning of Article 101 TFEU.

- **Information exchange in M&A transactions**. The draft Guidelines set out in paragraph 410 that an information exchange may be part of an acquisition process and that, in this scenario, the exchange may be subject to the rules of the EU Merger Regulation and that any conduct restricting competition that is not directly related to and necessary for the implementation of the acquisition, remains subject to Article 101 (1) TFEU. We are of the view that this paragraph fails to reflect the realities of the M&A process. More specifically, what information is "directly related to and necessary" for M&A activity may be much more expansive than would be the case in many other contexts given the commercial risks inherent in such a project, and the need for parties to ensure the terms of their transaction adequately capture and allocate those risks. Similarly, what is "directly related to and necessary" may change through the course of an M&A transaction as, first, the likelihood of a deal being reached (and therefore risks being realised) increases, and second, completion (and therefore smooth implementation) nears. Therefore, this paragraph should be removed.

- **Upfront identification of commercially sensitive information (CSI)** (paragraphs 423-424). We welcome the provided list of examples on information exchange that would be considered CSI for the assessment under 101(1) TFUE, as it will help undertakings for the self-assessment of information exchange. However, Telefónica is of the view that the guidance provided should be narrow down to avoid a broad interpretation. In this sense, several changes should be done in these paragraphs to provide legal certainty:

  In paragraph 423: need to fine tune the wording on what is considered CSI in order to avoid broad interpretation, by removing: … "~~it often~~ concerns information that is important for an undertaking to protect in order to maintain…".

  In paragraph 424: "The exchange with competitors of future product characteristics which are relevant for consumers". This provision is too general and uncertain, and it could lead to unjustified strict provisions on information exchange/data *sharing which would limit undertaking' ability to conclude such agreements.*

Relatedly, paragraph 424 identified as an CSI, *"The exchange with competitors of information concerning positions on the market and strategies at auctions for financial products".* This example should be limited, as the exchange of market shares that are public and in the public domain, would not have any anticompetitive concern. Therefore, we propose to fine-tune the wording, by including the following addition: *"The exchange with competitors of information concerning positions on the market* **(as long as such positions are not public)** *and strategies at auctions for financial products"*

- In "**Access to information and data collected"** section (paragraphs 441-442), it is stated that in situations where the information exchanged is strategic for competition and covers a significant part of the relevant market, the exchange of such strategic information may be permissible only if the information is made accessible in a non-discriminatory manner to all undertakings active in the relevant market. **This provision is excessively restrictive and should be deleted**, as it puts at odds the incentives for the undertakings to enter into data sharing agreements, whilst interfere with the commercial freedom of the parties.

- The guidance provided over **'Genuinely public' information** (paragraph 425) is too vague and more precise guidance would be welcomed to provide full certainty on the nature of "genuinely public information". In particular, more clarity on whether information available at a (potentially considerable) costs to all undertaking in the market and is bought as a matter by all undertakings in the market, constitutes genuinely public information. Likewise, the Guidelines should make clear that information being "equally accessible" to all competitors and customers does not require that the information is in fact equally accessed. In addition, the apparent suggestion in paragraph 426 that information might not be considered genuinely public only because another participant has not taken the time to gather it, should not prevent that information from being classified as public.

- **Restriction of competition by object** (paragraph 448): the proposed wording seems to extend the meaning under which an information exchange will be considered a restriction by object. The current Guidelines establish that information exchange is considered to be a restriction by object where it has "*the objective of restricting competition on the market*". However, in the new proposal, it sets out that it will be the case "*when the information is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market"*. This new proposal provides a broad definition that exerts great legal uncertainty for undertakings.

- **Unilateral disclosures** (paragraph 432): the draft Guidelines foresee unilateral disclosures of commercially sensitive information carried out by an undertaking to its competitor(s) through posts on websites which, as stated in this paragraph, could lead the entire sector to enter into an infringement under 101 (1) basis if its competitors do not respond making a clear statement that they do not accept such information. We do not understand the rationale behind this provision, especially because the EC is shifting the burden of proof onto the competitors to demonstrate they have put distance themselves from the information (which it may not even be aware it exists, given the ambiguity over what is intended by "who accepts it" in relation to posts on websites). On the contrary, we are of the view that the burden of proof should be onto the EC to

show that the exchange had the object or the effect to restrict competition. More clarity on what is required to have "accepted" a unilateral disclosure from competitors is needed. Likewise, paragraph 434 should be clear that the unilateral announcement of genuinely public information will not constitute a concerted practice within the meaning of Article 101 (1) and therefore not require a proactive statement by the receiver that it does not want to receive such information.

Standardization agreements – Chapter 8

- **Need to ensure balance of interests in the standardization process**

Paragraph 466 of the draft revised Horizontal Guidelines addresses possible restrictive effects on competition in standardization processes. As the Guidelines establish, cooperation in standard-setting organizations may give rise to restrictions in price competition and limitations or control of production, innovation and technical development. Among the channels of exclusion mentioned in the Draft*, exclusion of, or discrimination against, certain undertakings by prevention of effective access to the standard* is of particular importance to ensure access to innovation and a fair play among industry members in the market. However, access to standards is as relevant as ensuring that within the standardization process all parties are heard in equally terms. Balance of interests in standardization processes is essential to ensure that standard setters are not allowed to create and leverage unbalanced processes to adopt favourable self-regulation that constitute a competitive advantage for the incumbent participants, to the detriment of consumer choice. This implies that no single interest category constitutes a majority of the membership of a consensus body. For this reason, we believe that Point 466 of the Guidelines must be complemented by an additional channel: ***exclusion of, or discrimination against, certain industry players by prevention of effective balance of interests to the standardization process.***

> *466. Participants in standardisation are not necessarily competitors. Standard development can, however, in specific circumstances where competitors are involved, also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. As further explained below, this can occur through three main channels, namely (i) reduction in price competition, (ii) foreclosure of innovative technologies and (iii) exclusion of, or discrimination against, certain undertakings by prevention of effective access to the standard,* ***(iv) exclusion of, or discrimination against, certain industry players by prevention of effective balance of interests to the standardization process.***

Likewise, balance of interests within the standardization process should be granted for the reasons above mentioned, in the way that all participants are heard in equally terms to ensure there is no restriction in the participation. Therefore, we believe this notion should be included in paragraph 478 of the draft revised Horizontal Guidelines whereby it establishes the conditions under which unrestricted participation should be granted to ensure the standardization process does not exert restrictive effects, as following:

> *478. In particular, to ensure unrestricted participation the rules of the standard-development organisation would need to provide that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard development organisations would also need* ***to ensure effective balance of interests of all industry sectors involved in***

the standardization process *and to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard.*

- **Effects based assessment in the participation in the development of the standard**

The draft revised Horizontal Guidelines includes in paragraph 496 a new example of situations where restricting participation might not have restrictive effects on competition within the meaning of Article 101 (1), in particular, the restriction of participants limited in time and with a view to progressing quickly (such as the start of the standardisation effort), and as long as all competitors take part in the milestone decisions to continue the development of the standard. We celebrate this introduction as it would help erase the complexities of the standardization process. In addition, we believe there should be a mechanism to guarantee the right to participate, while avoiding at the same time that companies which refused to invest time and effort in the process are able to participate at the latest stage only with the objective of blocking the process. Mechanisms to avoid those problems should be found as, for instance, imposing the obligation to set milestones in the process where all companies can participate, but acquiring also those companies a duty to participate in order to be able to block the process in the following milestones.

Sustainability agreements- Chapter 9 and Introductory chapter

- **Horizontal cooperation agreements that exert pro-competitive effects in sustainability goals**

The draft revised Horizontal Guidelines include a new chapter on sustainability agreements (Chapter 9), where it provides guidance on the assessment of agreements between competitors that pursue one or more sustainability goals, with a special focus on sustainability standardisation agreements which, in the EC's point of view, are the most common type of cooperation that will pursue sustainability objectives. We believe that the EC's proposed scope for sustainability agreements is very narrow and further clarification on when section 9 would apply would be welcomed.

Moreover, the assessment of sustainability goals is so narrow that the EC only considers "sustainability agreements" as such to any type of cooperation agreements that primarily pursue one or more sustainability objectives, leaving out of the scope of assessment under Art. 101 (3) TFUE basis, other type of cooperation agreements which, although their main goal is not the pursuing of sustainability objectives, they might exert sustainability benefits. This possibility has been completely missed in the whole Chapter.

We therefore ask the EC to include in the draft revised Horizontal Guidelines, the consideration of the sustainability benefits as an effect to be analysed in the overall appraisal of a horizontal cooperation agreement under the meaning of Article 101 (3) TFEU. We are of the view that the Green Deal objectives should be met in all horizontal cooperation agreements if possible, and that undertaking's efforts to contribute to such objectives should be considered as a pro-competitive effect in the general appraisal of a horizontal cooperation agreement. Horizontal cooperation agreements can meet Green Deal objectives if they contribute to reducing the ecological footprint (carbon emissions, recyclability and recycling, reduction of plastics and composting projects), to gain efficiencies and to share infrastructure and costs, as well as agree

certain standards to reduce the environmental impact and/or to increase the commercial viability of environmental projects, should be considered procompetitive.

In this sense, we believe that within the cumulative conditions for the evaluation of horizontal cooperation agreements under Article 101 (3) (paragraph 41 of the revised Horizontal Guidelines), the sustainability effects should be included in the analysis of the economic progress effects the agreement might meet under the first accumulative criteria.

In addition, we ask the EC to include in every chapter of the Horizontal Guidelines addressing the different types of horizontal cooperation agreements, a specific mention on the consideration of sustainability efficiencies in the assessment of the given cooperation agreement under Article 101 (3) TFUE, in such a way that sustainability efficiencies (if any) are considered in the overall assessment of the pro-competitive effects exerted by the agreement to determine its compatibility with the internal market. Thus, it is ensured that any type of cooperation agreement (regardless of being standardisation agreement, R&D agreement or specialisation agreements etc.) is entitled to benefit from the pro-competitive effects that not only standardization agreements but the whole Industry, should pursue to meet EC's policy goals.