



ETNO's additional views on aspects not covered by the questionnaire

ETNO would like to add further thoughts on **networks sharing agreements** and **procedural aspects**.

1. Network sharing

The necessity and positive aspects of RAN sharing nowadays has been widely recognised, promoted by regulatory authorities, the Telecom Code and best practices promoted by the European Commission. In fact, mobile network sharing is procompetitive in multiple ways: it allows for efficient investments, enables faster deployment, improved capacity and service quality, environmental benefits and intensified competition at the retail level by unlocking important resources for innovation.

There is a danger of a gap between competition and regulatory authority positions on network sharing arrangements. The regulatory authorities encourage or impose network agreements under regulatory framework, while the position of competition authorities is not consistent. On competition law side, RAN sharing has been widely considered by the EC as a counterfactual to evaluate merger operations, but also has been subject to antitrust investigations. Hence, there is no clarity for self-assessment under the current framework.

We understand that the analysis of network sharing should be done on a case-by-case basis and will always need to look at case and country specific circumstances. Nevertheless, we believe that there are some general points that could be clarified to facilitate self-assessment and encourage investments in high quality networks. The guidelines on joint-production do not provide the guidance that is needed.

For instance, where DG Comp gives some indication on criteria for joint production agreements and considers them valid also for RAN sharing, these seem ill-fitted to the specificities of for network sharing agreements. If looking at market share for instance, as it is suggested for joint production agreements in the Section 4 of the Horizontal Guidelines, this does not fit for an investment-heavy industry, where you will naturally have high joint market shares. Similarly, geographic scope is not a valid criterion for competition law assessment either. For one, the urban/rural distinction which is used in reference to the backward looking BEREC guidelines goes against actual technical constraints and economic rational, in particular with regard to 5G and reduces also the benefits of RAN sharing. Beyond that, telecom operators are under heavy roll-out obligations which ensures broad coverage anyhow.

Therefore, we believe that for the assessment of network sharing agreements it would be more adequate to look at criteria related to differentiation ability, degree of autonomy, innovation and customers' access to improved services. Such criteria would be whether technical and commercial differentiations are still guaranteed and possible, for example via unilateral roll-out of capabilities - in particular as operators evolve towards IP-based networks and network virtualization, and the competition parameters and infrastructure innovation move beyond RAN equipment (as the



definition of services tends to occur at the software layer); and whether parties remain independent as to commercial decisions related to retail and wholesale markets.

Another criterion that is important to evaluate in the case-by-case analysis is the effects of external competition from rival operators. An additional relevant criteria would be to look at whether safeguards are implemented regarding any exchange of competitively sensitive information (clean teams, blackboxes, JV, etc.).

To this end, these criteria should be emphasized as relevant in Section 4 of the HGLs. Network sharing could also be introduced under the Examples under Section 4.5 to provide more legal certainty to operators entering into network sharing agreements and enable consistency in the different competition authority positions.

2. Procedural aspects

In order to foster more horizontal cooperation, which is very much needed for European competitiveness in the changing geopolitical environment, the legal certainty for companies needs to be increased, also to reduce the cost associated with the legal uncertainties. The increased certainty should provide the companies with more flexibility to enter into procompetitive horizontal cooperations,

Currently, the HGL and BERs do not 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 European Commission should also look into how to best provide some informal guidance on a case-by-case basis. The setup of recurring meetings with the European Commission, aimed at discussing the interpretation of concrete questions in connection with a certain horizontal cooperation project, is an example of a possible tool in this sense.

Additionally, the European Commission should be able to give inputs and feedbacks at an earlier stage.

Another tool that you could be helpful in this context are guidance letters in accordance with the Commission 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).

Further fast-track EC guidance.

ETNO also believes a new quicker way to ask the EC for further guidance is needed in those cases in which the self-assessment of the parties does not provide sufficient legal security as to the compliance of the cooperation with Art. 101 conditions and if the cooperation is of a certain magnitude and complexity. These cases would require a rapid response from the EC, as any ex post review may have major consequences.

In order for such a guidance process to be effective and make it manageable from a European Commission perspective, the process should be voluntary, limited in information provided and the time taken for the issuance of the guidance aimed at not to delay projects disproportionately. It is not



desirable to create a burdensome lengthy process, 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.