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New Guidance on Network Sharing Agreements: More Questions Than Answers?

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On 1 June 2023, the European Commission published its new Horizontal Cooperation Guidelines (HCG) with a view to providing improved guidance for competitors wishing to cooperate, including in areas not previously covered in the 2012 HCG. One such new area is specific to the telecommunications sector and covers network sharing agreements (NSAs). This analysis sets out the key elements of the new guidance and its implications for the telecommunications industry.

Types of cooperation covered by the new guidance

Cooperation between competitors is an important feature of the telecommunications industry, as operators need to rely on each other to ensure seamless connectivity between networks, and often collaborate to expand their network coverage and improve service quality. NSAs are among the most common forms of cooperation in the mobile telecommunications sector. They broadly involve the joint deployment and sharing of mobile network infrastructure, and occasionally, frequency bands between mobile network operators (MNOs).

NSAs take a range of different forms from the more basic types of cooperation, which includes the sharing of passive network infrastructure (masts, cabinets, antennas, or power supplies), to more advanced forms of cooperation involving the sharing of Radio Access Network (RAN) equipment at the sites (active sharing) and spectrum pooling. NSAs may cover the whole country or be limited to certain areas. All these various forms of NSAs are covered by the new HCG, which, contrary to the draft version, now also explicitly covers NSAs involving geographic segmentation, ie arrangements where network operators divide their responsibilities for installing and operating the infrastructure in specific territories (HCG, para 258).

The HCG specifically states that the guidance does not apply to wholesale access agreements, such as wholesale access agreements concluded by MNOs with Mobile Virtual Network Operators (MVNOs) or national roaming arrangements entered into between MNOs (as these do not involve the sharing of network infrastructure, as per para 258). Other common types of cooperation between operators such as interconnection agreements, joint deployment fixed networks, provision of wholesale leased lines or dark fibre also fall outside the scope of the HCG guidance.

Substantive assessment of NSAs

NSAs have recently been subject to significant regulatory scrutiny, with both the Commission and national regulators launching investigations into network sharing in several EU countries (e.g. Case AT.40305 Network sharing- Czech Republic, Case M.9674 Vodafone Italia/TIM/Inwit JV, Belgian Competition Authority 22-PK-40-AUD Telenet/Proximus/Orange or Finnish Competition Authority decision on the proposed network sharing between DNA and Sonera).

In many of these cases, the parties were forced to modify the cooperation to address the concerns raised by the regulators. Providing clearer guidance on the assessment of NSAs in the HCG was seen as an important step to creating more legal certainty by assisting operators in structuring their cooperation to avoid competition concerns.

The HCG confirms that NSAs generally do not restrict competition by object (unless they serve as a cover up for a cartel, see HCG para 262) and are often pro-competitive, as they allow operators to share operations costs, as well the cost of subsequent network upgrades and maintenance. Indeed, joint investments in infrastructure can produce benefits for consumers in terms of lower prices, better quality of service and faster rollout of new networks. In some cases, NSAs are even mandated by national regulators (e.g. in geographic areas where there are insurmountable economic or physical barriers to the replication of mobile network infrastructure, HCG para 260). The Commission also specifically acknowledges that NSAs could be a solution to ensure timely access to 5G radio spectrum and facilitate the roll-out of 5G networks, which the Commission considers a priority. [1]

That said, the HCG also notes that NSAs may, in certain situations, restrict competition, including due to their potentially negative effects on infrastructure competition and competition on innovation (HCG paras 262-263).

The draft HCG published last year appeared to put a lot of importance on the nature of the cooperation. The first element of the analysis was whether the cooperation involved passive or active sharing. Passive sharing was blessed as being normally not problematic, while active sharing and spectrum pooling, which generally involve more extensive cooperation that leads to closer alignment between the parties in terms of network quality and coverage (HCG, paras 266(b) and (c), was labelled as potentially more problematic. This was criticised by the industry, as the differentiation between active and passive sharing is expected to become less relevant in the future network design. Although the passive/active categorisation is still relevant to the assessment of NSAs (HCG, para 266), the importance of this element appears to have been de-emphasised in the final version of the HCG. Instead, the focus is on several broad factors relevant to the assessment of NSAs, including:

- The type and depth of sharing (including the degree of independence retained by the MNOs in terms of their investment decisions and network rollout);
- The scope of the shared services and shared technologies (which, presumably, refers to the passive vs. active division again), the purpose of the (spectrum) sharing, the duration and structure of the cooperation put in place by the agreements;
- The geographic scope and the market coverage of the NSA (in past decisions, the Commission had asked the parties to carve out densely populated urban areas from cooperation, while it was generally more open to cooperation in rural areas where there are lower incentives for MNOs to invest) [2];

- The characteristics and structure of the relevant market (market shares of the parties, amount of spectrum held by the parties, closeness of competition between the parties, number of operators outside the agreement and extent of the competitive pressure exerted by them, barriers to entry, agreements with third-party owners of components of network infrastructure or third-party service providers, for instance, providers of tower services) [3];
- The number of NSAs in the relevant market and the number and identity of participating network operators (HCG, para 264).

The HCG also sets out a list of minimal requirements for an NSA not to be considered, at first blush, as likely to have restrictive effects, including that the participating MNOs must control their core networks and maintain independent retail/wholesale operations and strategy, and not exchange commercially sensitive information.

The parties must also be able to implement, unilaterally, any infrastructure deployments and maintain the ability to follow independent spectrum strategies (including in relation to independent acquisitions of spectrum; independent decisions on how to use such spectrum and which spectrum bands, and whether or not to share the spectrum once acquired) (HCG, para 265).

Indeed, the HCG specifically states that, while spectrum pooling could be allowed in certain circumstances, such agreements “*require a more careful Article 101 assessment*” than other forms of NSAs (HCG, para 266). The latter suggests that an agreement involving spectrum pooling would need to be very carefully crafted to avoid the presumption that it creates restrictive effects.

Implications for the industry

HCG is helpful in that it summarises the existing case law and factors that have been generally considered by regulators in the assessment of NSAs, but it will not change how telecoms operators negotiate or organise their infrastructure.

The HCG establishes no safe harbours for network sharing arrangements that are unlikely to create any material concerns. While the HCG acknowledges that passive network sharing is clearly less problematic, this may become of less relevance for the industry, as the significance of passive infrastructure and hardware in future network design is expected to decrease as software becomes the main driver of quality differentiation. It also does little to improve legal certainty for operators wishing to engage in more advanced forms of cooperation (such as active sharing and spectrum pooling), for example in terms of assessing the potential restrictive effects based on the relevant factors listed in the HCG and how they should be weighed against the efficiencies that network sharing agreements generate. Thus, advanced network sharing arrangements may continue facing a high degree of regulatory scrutiny and potentially lengthy investigations, which may slow down the roll-out of 5G networks in Europe.

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[1] The HCG also notes that network sharing agreements may bring all these benefits "*without the need for consolidation through mergers*" (see HCG, para 260). This reflects the fact that in a number of mobile merger cases, the Commission rejected efficiencies related to the merger as not being merger-specific because a network sharing agreement would have been an alternative to the merger. This, however, appears to be more of a side note that does not change the substantive assessment of NSAs under the HCG. See, *e.g.*, Case M.7018 – Telefónica Deutschland/ E-PLUS, paras 912 and following.

[2] See European Commission, Case AT.40305 Network sharing – Czech Republic, 22 November 2022, in which the parties committed to exclude the two largest metropolitan areas in Czechia from the scope of the cooperation. See also the Commission's press release relating to case M.9674, *Vodafone Italia / TIM / Inwit* JV (2020) in which the Commission explains that, as a result of the preliminary consultations with the Commission, the parties decided *to "scale down their active sharing, leaving out the most densely and highly populated cities and centres of economic importance, corresponding to over 30% of the Italian population"*. By contrast, the Belgian Competition Authority ("the BCA") recently approved active sharing between the two main MNOs without any significant commitments. Belgian Competition Authority, 22-PK-40-AUD, Telenet / Proximus / Orange, 23 December 2022.

[3] All these factors were relevant to the Commission's assessment of both the Czech and the Italian network sharing cases referenced above.

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