Telefónica's response to DG COMP's consultation on the draft revised Implementing Regulation and Notice on the Simplified Procedure EU Merger Control Review: procedural aspects

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Telefónica welcomes the European Commission (EC)'s efforts to streamline the procedural aspects of the EU Merger Control by proposing several changes in the draft revised proposals on the Implementing Regulation on the control of concentrations between undertakings (hereinafter, the Implementing Regulation), alongside the draft revised Form CO, Short Form CO, RS and RM Annexes, as well as the draft revised Notice on the Simplified Procedure.

We appreciate the improvements made by the EC in the draft revised texts, especially in the simplified procedure, that will reduce merging parties' costs and time in the notification procedure. By contrast, the changes gathered in the non-simplified procedure continue to be insufficient and there is still toom to further streamline the procedure in both notification regimes. Telefónica's comments aim to share with the EC its views on how the legislative texts should be best shaped to achieve the EC's goal to ease merger notification.

SIMPLIFIED PROCEDURE

- We welcome the EC's effort to streamline the simplified procedure, by enlarging the scope with the inclusion of two new categories under Art. 5 of the draft revised Notice on Simplified Procedures and the flexibility clause under which, under certain conditions, the EC might consider reviewing transactions that, in principle, would follow the non-simplified procedure. In addition, we welcome the clarification and further guidance provided in the Notice with regard to the safeguards and exclusions whereby the EC sets out examples of concentrations that may be excluded from the simplified procedure due to the characteristics of the given transaction.

- We welcome that extra-territorial JVs and all cases where there are no horizontal overlaps or non-horizontal relationships between the merging' parties' activities (including pipeline products), may be reviewed under a further streamlined "super-simplified procedure". Even though we requested that the review of extra-territorial transactions with no local nexus within the EEA should be excluded from the scope of EU merger control, we believe this super-simplified procedure is a good improvement, as the merging parties will only have to fill in Section 7 of the Short Form Co, whilst Sections 8-11 are exempt from completion . Moreover, the merging parties are entitled to notify the EC about these transactions directly without pre-notification contacts.

- Even though the changes proposed in the draft revised texts of the Notice on the Simplified Procedure and the Short Form CO are positive and suppose a good improvement for the streamlining of the simplified procedure, we believe there is still room for the reduction in the burden imposed on notifying parties under such procedures.

- The EC should seek to focus on the most relevant markets only, without requiring data input on all plausible markets, as referred to in Points 5(d), 8 and Point 14 of the draft revised Notice on the Simplified Procedure, as well as Sections 7-10 of the Short Form CO. Providing such details can be very burdensome when the notifying parties only have a negligible presence in a certain market, while eventually being irrelevant to the broader competitive assessment. Therefore, the merging parties should be entitled to provide information to all plausible markets only when the information is relevant for the competition assessment.

- With regards to the safeguards and exclusions pursuant to which the EC might decide to revert a transaction that, in principle, would meet the simplified procedure to the non-simplified, normal process, we believe that several examples should be excluded from this section:

    (i) To require a normal review process in the case of a change from joint control to sole control when the acquisition of joint control was previously not reviewed by either the EC or a NCA (point 20 of the draft revised Notice on the Simplified Procedure) continues to be excessive (as it is already foreseen in the current Notice). The lack of a previous review does not speak to the impact that such transaction may have on competition. This exception should therefore be removed or at least be considered only on an exceptional basis, such that simplified procedures remain applicable for these types of transactions as provided for in Point 5(e).

    (ii) The example under which the EC will revert to a normal review procedure because third parties have expressed concerns (Para. 22 of the Notice) would need to be clarified, such that only those concerns that are plausible and may result in potential competition law concerns should cause the EC to require a full Form CO notification.

- There should be no need to provide competitor contact details in cases where there are no reportable markets or where it is obvious from the facts that there is no impact on competition in Sections 8-10 of the draft revised Short Form CO. From our point of view, it is time consuming to derive the correct information (so as not to be subject to the potential liability of incorrect / misleading information) as it is not always known for the in house-lawyers, and we are forced to ask for external support. It is our view that, given all third parties will have a chance to submit information to the EC –normally also requested by the EC itself, it doesn't make sense that this is a ploy for the EC not to engage with competitors.

- A measure that would considerably streamline the simplified procedure would be to set stricter time limits in all cases, especially in two situations:

    i. in the communications between the Commission and the NCAs related to the eventual referrals of the case to/from NCAs; and

    ii. in the deadline for the EC to decide to ask the parties for an ordinary Form CO. There is not set out a time limit under which the EC can revert a simplified case to a normal procedure. From our experience, it would desirable not to wait till the 25 working days the EC has to decide about the transaction to ask the notifying parties to deep dive into a non-simplified procedure. This would help avoid the risk of having to switch from a simplified procedure to an ordinary procedure at the very end of the simplified procedure and so penalising the companies for a delayed analysis by the EC.

    iii. In the deadline for the EC to ask third parties for observations regarding the transaction, once the notification has been submitted.

NON-SIMPLIFIED CASES

- The concern over the Form CO template is mainly not about the format, but instead the content or the amount of information requested for drafting a merger notification, that often appears too broad and disproportionate to the case in hand. By virtue of the amount of information requested, the Form CO process is a very complex process and requires the merging parties to instruct forensic experts to help manage the information gathering process and complete the template. This not only implies a huge workload, but also increases the costs that the companies should assume upfront to get the approval from the EC. [Whilst we accept that it is for the notifying parties to provide sufficient evidence to satisfy the EC that the proposed transaction will not significantly impede effective competition in the common market or in a substantial part of it, the burden should be proportionality applied so as not to have a chilling effect and ensure that the cost of compliance is commensurate with the complexity of the proposed transaction]

- Unfortunately, the EC's proposal for changes in the Implementing Regulation and the Form Co are very limited compared to those made in the Notice relating to the Simplified Procedure. We believe there is a lot of room to also streamline the merging parties process in the notification of non-simplified cases:

- The draft revised Form CO sets out that in point 3 that, according to Art. 4 (2) of the Implementing Regulation, the notifying parties may request the EC to dispense with the obligation to provide the relevant information, in particular for Sub-Sections 3.4, 3.5, 3.6, and 3.7 and Section 10 of this Form CO; or with any other requirement in the Form CO related to this information. This proposal is unclear because it seems it reduces the current scope of the notifying parties to ask the EC to dispense with the obligation to provide information in any sections or subsections of the Form CO, as it is set out in the

existing Form CO. We regret this change of approach and encourage the EC to make more flexible this obligation by allowing the notifying parties to request the EC to skip the obligation to dispense relevant information in any of the sections with the proper grounds, whilst leaving at the EC's discretion to accept such request. Conversely, it is also unclear the link of this disposition with the waiver requests set out in point 3 of the draft revised Form CO, pursuant notifying parties can ask the EC to skip certain Sections or sub-Sections of the Form CO during the pre-notification phase. Further clarification on the difference between the waiver requests (Point 4 PRE-NOTIFICATION CONTACTS AND WAIVER REQUESTS) and the possibility to skip information of different sections under Art. 4 (2) of the draft revised Implementing Regulation (Point 3 INFORMATION THAT IS NOT NECESSARY FOR THE COMMISSION'S EXAMINATION OF THE CASE) would be welcome. In addition, we do not understand the coherence of allowing the notifying parties to request waivers of different sections throughout the questionnaire and narrow down the scope for the parties to request the EC to dispense with the obligation to provide the relevant information only for certain sections (if this what it is meant). This should be revised and adapted in a way that the parties can request for the skip of information in any of the sections throughout the Form CO.

- More specifically to waiver requests, we are of the view it is reasonable that the EC can request that the notifying parties provide the information that was previously waivered if, after an initial analysis, the EC decides the completion of the waived sections are key to conduct the assessment. Nevertheless, we believe that, in such circumstances, the EC should be under an obligation to set out the rationale for reversing e its decision, in order to provide full transparency to the notifying parties, as well as to justify the unexpected burden.

- The streamline of Sections 6, 7 & 8 with the introduction of tables, as explained in the explanatory note, could be useful for the EC and the case teams in their analysis of the concentration, but it remains very burdensome for the notifying parties to fill the sections and provide all the information requested. The amount of information requested in these sections should be further streamlined, focusing on the information that is relevant to conduct the competitive assessment. For instance, notifying parties should be exempted to provide data input on all plausible markets, as referred in the different sections 6-9 of the Form CO. Providing such details can be very burdensome when the notifying parties only have a negligible presence in a certain market, while eventually being irrelevant to the broader competitive assessment. Therefore, the merging parties should be entitled to provide information to all plausible markets only when the information is relevant for the competition assessment.

- We welcome the streamline of Section 8 with the removal of certain information requirements[1]. Nevertheless, we are of the view that the current sub-sections in Section 8 (that in the draft revised Form CO are set out in Sections 9 and 10) could be susceptible to

[1] In particular "Cooperative Agreements", "Trade between Member States and imports from outside the EEA", and "Trade associations" from the current Form CO still in force.

be ear-marked as potential opt-out sub-sections, as each of the sub-sections may not be relevant to the competitive analysis, depending on the transaction at stake (for instance 10.8. on R&D). Therefore, it would be preferable that the sub-sections in Sections 9 & 10 are configured with an opt-in mechanism in accordance to the relevance of each sub-section for the issue tackled; that could be triggered at the request of the merging parties in the pre-notification phase or the EC. This mechanism would reduce drastically the administrative burden for the merging parties in the information gathering requested to fill out the template, only leaving those sections that are key for a proper competitive analysis by the EC.

- Lastly, there should be no need to provide competitor contact details in case there are no reportable markets or where it is obvious from the facts that there is no impact on competition in Sections 7 of the draft revised Form CO. From our point of view, it is time consuming to derive the correct information (so as not to be subject to the potential liability of incorrect / misleading information) as it is not always known for the in house-lawyers, and we are forced to ask for external support. It is our view that, given all third parties will have a chance to submit information to the EC –normally also requested by the EC itself, it doesn't make sense that this is a ploy for the EC not to engage with competitors.

Requests for Information (RFIs)

- With respect to RFIs, there is a need to formulate them in a reasonable and proportionate way in respect of the scale, scope and potential impact of the proposed transaction. In many cases, the scope is too broad in terms of time frame and issues addressed (leading to a very burdensome procedure to gather the information requested). This is especially burdensome for industries such as the telecoms. In many cases, the number of documents requested by the EC through RFIs is excessive (exceeding 500.000 documents in several cases). This necessitates the instruction of forensic experts to help the merging parties manage the gathering procedure (increasing workload and procedural economic costs). In addition, sometimes not all information requested is relevant for the review and exceeds the object of the investigation (e.g. (i) information which does not add necessary data that contributes to the EC making a thorough analysis of the transaction; (ii) some documents required can contain highly sensitive and/or confidential information, and sometimes do not contribute to the investigation). Conversely, the EC should be amenable to working proactively with the merging parties to streamline/bespoke the RFIs and compile relevant search terms etc that prevent unintended overreach if more generic RFI questions are posed.

- RFIs should follow an adequate and proportionate analysis that justify the need to ask for such information. This entails the need to focus on the key areas/markets that are critical for the review of the transaction instead of gathering information on all markets involved in the given transaction. Especially in Phase II, we are of the view that the analysis should

be progressive, i.e. by refining the analysis and limiting the theories of harm to identify the competitive concern prior to launching a RFI when the Commission opens a phase II investigation. Therefore, the information requested should be focusing on smaller areas of analysis rather than leaving a broad scope of information envisaged for analysis.

- With regard to the time period of information requested under RFIs, sometimes it is too long (up to 5 years). Especially with respect to fast-moving, constantly evolving markets, such data is rendered out of date, meaningless relatively quickly and does not reflect the reality of the merging parties. It would be preferable to limit with forensic investigations just to the year prior to the transaction. If this point is not taken by the EC, we believe the EC should consider making it possible for the notifying parties to seek a derogation to limit the timeframe covered by the RFI should they be able to demonstrate the irrelevance of the information presented.

- Sometimes the merging parties find it difficult to provide the information with the extent, format, splitting, and methodology, among others, required by the EC in the Form CO. In some cases, the company does not have the information in its systems in the format requested by the EC, and the time and efforts consumed for turning the information into the formatting needed are costly, time-consuming and disproportionate when weighed against the benefit to the EC. For this reason, we believe that in many cases, the EC would obtain better conclusions about the information requested if it is maintained in its original format.

- Lastly, it is also key the EC gives the enough time to the notifying parties to respond to the RFIs. Most of the times, the notifying parties struggle with very tight time periods that sometimes can be far too onerous or insufficient in cases where external advice is requested. We encourage the EC to take this point into consideration, giving reasonable time periods that are manageable according to the information requested.

FORM RS

- We note the EC has not made significant changes to streamline the referral requests under the draft revised RS Form, and we believe the burden of the notifying parties remains sizeable when managing referral requests.

- The Form RS submission becomes into a third phase which enlarge even more the procedure. Therefore, we think it should be streamlined as much as possible, as the Form RS is burdensome on the merging parties by requiring the provision of a large amount of information that is often not relevant to analyse the issue of jurisdiction. Moreover, the time limits for the communications between the Commission and the NCAs should be reduced in a way that they do not turn into a disincentive to submit a Form RS.

- Furthermore, the information requirements should also be reduced in the RS so as not to deter notifying parties' willingness to make a referral. Establishing the appropriate authority that would review the case, should not require a lengthy submission that almost

amounts to a substantive merger control filing. In this sense, the most challenging section is section 5.1.3, as it requires the parties acknowledging the impact on competition of the transaction to be able to ask for the referral. Given that there is a section (Section 4) to deal with the impact of competition, this section 5.1.3 should also be avoided.

- Lastly, as recommended for the ordinary Form CO before, we would support that the EC could waive the parties from fulfilling some sections or even from providing information about all plausible markets focusing only on the main ones.

SUBSTANTIVE APPROACH IN THE APPRAISAL OF HORIZONTAL MERGERS

Telefónica strongly believes that apart from the review of the procedural aspects of the EU Merger Control, the EC should re-think the substantive approach taken so far in the appraisal of horizontal mergers so as to acknowledge the current challenges (both economically and geo-politically) and ensure European sovereignty and resiliency. It is vital that the EC replace the economic theory of perfect competition (the more competitors, the better) with the concept of a sustainable competition. In doing so, we believe that EC should follow a different approach in the application of the Guidelines on Horizontal Mergers[2] in the following aspects:

- The EC needs to demonstrate a "strong probability" when applying the Significant Impediment of an Effective Competition (SIEC) test, instead of demonstrating the "most likely, outcome".
- The analysis of the competitive pressure that the merging parties exert on each other to determine the degree of substitutability of the products or services offered (closeness of competition), as well as the elimination of the undertaking that brings down the prices and ensures the market remains competitive (the Important Competitive Force (ICF)) should be conducted in a way that is closer to market reality and supported by substantial probative material. This is particularly important in more concentrated markets, such as the telecoms.
- In the analysis of the effects foreseen as a result of the transaction, apart from the short-term consideration of price effects, other non-quantitative factors should be considered in a long-term analysis, such as innovation, quality, long-term cycles, investment capacity etc.
- In line with the above, the EC should consider the competitive effects of a merger over a number of years in order to capture its anticipated impact on e.g., investment that may not occur in the immediate short term. So far, the EC does not look at a long enough timeline when considering efficiencies that will arise from a merger. This will be particularly important in strategic markets that will be essential to European sovereignty and security, such as telecoms. Therefore, a broader consideration of long-term dynamic efficiencies and a realistic standard to demonstrate efficiencies is key.

[2] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)

- The methodology used to determine price effects after-merger (GUPPI) is static and disregards changes brought about by the merger that would significantly temper the incentives to raise prices, including in the very short term. Besides, the credibility conferred to such tool is unwarranted by empirical analysis and unbalanced with the standard of proof required from the merging parties to stablish the existence of efficiencies.
- The creation of artificial and asymmetric competition by forcing the merging parties to commit to remedies aimed at forcing new market entrants in already very competitive markets is putting at odds the sustainability of European markets. This is especially exacerbated in sectors such as Telecoms, where the existing ex-ante regulation has ensured and facilitated market entries.
- Lastly, the EC should consider the industrial policy in the general market analysis, as a factual parameter. When applying each and every policy, EU institutions should promote and protect the sustainability of the industry