June 2022

GSMA Response to DG Competition consultation on Merger control in the EU – further simplification of procedures

The GSMA welcomes the opportunity to submit views on the recently published drafts of the revised Implementing Regulation on the control of concentrations between undertakings (hereinafter, the Implementing Regulation) alongside the Annexes, as well as the draft revised Notice on the Simplified Procedure. We acknowledge the Commission's efforts to streamline the procedural aspects of the EU Merger Control, which suppose a good improvement in the case of the simplified procedure. However, given the minimum changes proposed in the non-simplified procedure, we urge the Commission to take additional steps to further streamline the notification procedure in non-simplified cases to reduce the burden for companies and the Commission.

In this response, we would like to focus on the main points where we believe the Commission has still room to further streamline the notification process in both the non-simplified and simplified procedures.

In addition, we have taken this opportunity to raise points that go beyond the procedural aspects of the European Union Merger Regulation (EUMR). The GSMA strongly believes that it is vital that the Commission re-evaluates its substantive approach to merger review in these more challenging times (both economically and geo-politically). This is particularly so in relation to efficiencies and investment incentives.

1. NON-SIMPLIFIED CASES

The concerns over the non-simplified cases remain on the **information requirements, that tend to be disproportionate and too broad**. The amount of information to be provided has massively grown over the last decade, especially regarding internal document requests under section 5.4. We now see cases where over 500.000 internal documents are requested, with a questionable outcome as far as proportionality is concerned, given that of all these documents only a few quotes end up in the decision. Not only does this put an immense burden regarding personnel and financial resources on the parties, but it will also have an adverse effect on timing of the transaction.

Beyond that, **the overall process should be more streamlined by focusing on the key areas/markets that are critical to the transaction rather than collecting information on all the markets involved**. Usually, broad scopes of the information and the format requested increase the burden on companies in terms of timing and associated costs. We therefore suggest streamlining the Form CO by focusing on the key areas/markets that are critical regarding a certain transaction rather than collecting information on all the markets involved. Focusing on key markets will allow for a more efficient use of resources as well as helping to speed up the process. This is especially paramount when the Commission opens a Phase II investigation in which the analysis should be refined and limited to the theories of harm to identify the competitive concerns prior to launching a Request For Information (RFI). Therefore, the information required shall focus on targeted areas of analysis.

More generally, we **recommend that the Commission discusses RFIs with the parties in advance of sending them** in order to ensure that they are targeted and do not include superfluous requests resulting in them becoming unnecessarily burdensome. In addition, it is also key the Commission 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 Commission to take this point into consideration, giving reasonable time periods that are manageable according to the information requested. **The timing period required in terms of information gathering for the RFI should be limited to the last year prior to the transaction**. The current period is too long (up to 5 years) and the

data gathered in such a long time turns frequently outdated and not meaningful for the purpose of the analysis. If this point is not taken by the Commission, the GSMA believes it 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**. While the growingly excessive amount of data collected remains one of the biggest burdens**, filling out the template can be a challenge as it is not geared towards the specificities of the business or the transaction**. Often the information requested is not directly available or collected in a different format, which means that the information is not easily collectable or will need resource-consuming reprocessing. All the more important it becomes under the principle of proportionality to keep a focus key markets. To improve this point, **we would request the Commission to be more flexible and to accept data gathered in different formats**. This would certainly help speed up the data gathering process on the parties' side and it would be earlier in the hands of the Commission.

On the waiver requests and the disposition under Art. 4(2) of the Implementing Regulation, under which the notifying parties may request the Commission to dispense with the obligation to provide the relevant information for certain sections, we want to flag the following concerns:

i. First, the draft revised Form CO, in connection with Art. 4(2) of the Implementing Regulation, establishes that the notifying parties may request the EC to dispense with the obligation to provide the relevant information only for certain sections[1]; or with any other requirement in the Form CO related to this information. The GSMA notes that this change 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 rule still in force. We regret this change of approach and **encourage the Commission to make this obligation more flexible 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**.

ii. Second, **further clarification on the difference between the waiver requests** (Point 4 of the draft revised Form CO) and the **possibility to skip information** of different sections under Art. 4(2) of the draft revised Implementing Regulation (Point 3 of the draft revised Form) is needed.

iii. Third, according to the previous point, it seems that there is an **incongruence to allow 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. 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.

iv. Last, on the waiver requests, the GSMA agrees that the EC can request the notifying parties to provide the information that was previously skipped under the waiver requests if, after a first analysis, the EC decides the filling in of the waived sections are key to conduct the assessment. Nevertheless, we believe this **reversion should be duly justified** by the EC, in order to give fully certainty to the notifying parties, as well as to justify the unexpected burden.

The changes made by the Commission **streamlining Section 8** (now distributed in Sections 9 and 10 of the draft revised Form CO) with the removal of certain information requirements (in particular, "Cooperative Agreements", "Trade between Member States and imports from outside the EEA", and "Trade associations") is welcomed. Nevertheless, we are of the view that **sub-sections could be susceptible to be ear-marked as potential opt-out sub-section**, 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 with the relevance of each sub-section for the issue tackled; that could be triggered at the request of the merging parties or the Commission in the pre-notification phase. This

[1] Sub-Sections 3.4, 3.5, 3.6, and 3.7 and Section 10 of this Form CO

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.

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 still 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 from providing 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**.

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 request 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.

2. SIMPLIFIED PROCEDURE

The **GSMA welcomes that extra-territorial Joint Ventures 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 that we requested for leaving outside of scope of the merger control review extra-territorial Joint Ventures, 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 exempted to be filled. Moreover, the merging parties are entitled to notify the EC 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 that there is still room for the reduction in the burden imposed on notifying parties.

The **EC should seek to focus on the most relevant markets only**, without requiring data input on all plausible markets, as stated in Point 8 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 regard to the safeguards and exclusions whereby the EC might decide to revert a transaction that in principle would meet the simplified procedure to the ordinary one, we believe that several examples should be skipped from this section:

- To **require an ordinary review process in 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 pursuant Point 5 (e) of the Short Form CO

- The example under which the **EC will revert to a normal review procedure because third parties Commission 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 three situations:

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

ii. in the deadline for the EC to decide to ask the parties for an ordinary Form CO, avoiding the risk of having to switch from a simplified procedure to an ordinary procedure at the very end of the simplified procedure and so penalizing the companies for a delayed analysis by the EC. 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 be desirable not to wait till the 25 working days to revert to a non-simplified procedure.

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

3. SUBSTANTIVE ASPECTS OF EU MERGER CONTROL

We strongly believe that, in addition to reviewing the procedural aspects of the EUMR, it is **vital that the Commission re-evaluates its substantive approach to merger review in these more challenging times** (both economically and geo-politically). This is particularly in relation to efficiencies and investment incentives. Europe needs investment more than ever in order to compete globally and protect its sovereignty and security (including physical/military, energy and digital/cyber). More specifically:

- There must be recognition that depending on the precise structure of the markets/industry in question, the effects of consolidation on investment incentives and efficiencies – and therefore consumer welfare - can far outweigh the current focus of the Commission (which has been almost exclusively on short term pricing effects, especially in consumer markets)

- This is particularly true in markets with high fixed costs, where players need to be able to recover their costs from a large enough customer base in order to justify the significant levels of up-front investment required

- The Commission should replace the economic theory of perfect competition (the more competitors, the better), by the concept of a sustainable competition

- The Commission's assessment should therefore:
  - Acknowledge the role of minimum viable scale in markets with high fixed costs on investment incentives. Artificially persisting with sub-optimal market structures is likely to constrain the ability of smaller players to invest and therefore compete effectively against larger players.
  - More generally place less weight on short-term pricing effects and more weight on non-price consumer and efficiency benefits which can be achieved e.g. through increased rivalry in investment (while appreciating that rivalry is not just a factor of total number of players), innovation (high speed and capacity), quality, investment capacity etc.
  - In line with this, 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. In particular, at present the Commission 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 digital, telecommunications and energy. Therefore, broader consideration of long-term dynamic efficiencies and a realistic standard to show efficiencies is key.

About the GSMA

The GSMA is a global organisation unifying the mobile ecosystem to discover, develop and deliver innovation foundational to positive business environments and societal change. Our vision is to unlock the full power of connectivity so that people, industry, and society thrive. Representing mobile operators and organisations across the mobile ecosystem and adjacent industries, the GSMA delivers for its members across three broad pillars: Connectivity for Good, Industry Services and Solutions, and Outreach. This activity includes advancing policy, tackling today's biggest societal challenges, underpinning the technology and interoperability that make mobile work, and providing the world's largest platform to convene the mobile ecosystem at the Mobile World Congress (MWC) and Mobile 360 series[2] of events.

We invite you to find out more at gsma.com.

[2] See https://www.mobile360series.com/.