Expert Paper on EU Merger Control

Reform and Renewal in the Post-Pandemic World

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Introduction

The Working Group on Competition Policy of the European Round Table for Industry ("**ERT**"), representing many of Europe's leading businesses, welcomes the EC's consultation on revisions to certain procedural aspects of EU merger control. As a leading competition authority, the European Commission ("**EC**") is an important global role model, and it is positive that steps are being proposed to reduce the burden that the EC's merger control processes create.

However, there are multiple aspects of EU merger control rules and procedures not covered in the consultation that nevertheless urgently need reform. EU merger control policy will need to evolve to help support European recovery from Covid-19 and competitiveness more broadly – acting as a key tool to create a global level playing field at a time of unprecedented change.

In this paper, ERT examines EU merger control policy more broadly to highlight the most significant current issues and to suggest reforms. Many of the points made here build upon previous Expert Papers and reports submitted to the EC by ERT.[1]

1. Executive Summary

1.1 Overall, EU merger control policy and enforcement serves Europe well and has evolved through the years to deliver strong and fair competition within a changing internal market. However, there are some key areas where EU merger control is no longer fit for purpose, and needs reform to meet modern challenges. This need for reform is particularly acute due to the leading role the EC has amongst competition agencies worldwide. Any established EC practice may eventually be adopted by other authorities, and so extra care must be taken to ensure EC processes are fit for purpose.

[1] These papers include the following: "*European Round Table's comments on the Fletcher/Lyons study published by DG COMP on the definition of geographic market (the "Study")*" (2016); "*ERT position paper on the EU and non-EU merger control regimes*" (2017); "*ERT companies' experiences in China: Lack of level playing field*" (2018); "*Comments on DG COMP's Best Practice on requests for internal documents under EUMR*" (2018); "*ERT Position: European Champions will be key to Europe's future relevance and prosperity. How can the EUMR be applied to avoid preventing their success?*" (2019); "*Competing at Scale: EU Competition Policy fit for the Global Stage*" (2019); "*ERT Response to the Market Definition Notice review*" (2020); and "*ERT Response to the Consultation on the New Competition Tool*" (2020). The ERT Expert Papers are available on: https://ert.eu/focus-areas/competition-policy/.

1.2 The key reforms that ERT proposes are as follows:

(A) **Reforms to streamline the simplified and non-simplified merger review processes**

(i) *Ensure that information requests to notifying parties are proportionate*. Current internal document requests in particular are often excessive and disproportionately burdensome on companies. The EC should focus more on what is essential. Parties must be able to exclude both privileged materials and information not relevant to the deal from documents provided to the EC. Documents should then be reviewed in context, without single phrases being taken out of context, and evaluated in the round.

(ii) *Ensure quicker and more predictable timetables*. The EC must endeavour to speed up review processes (formal and informal), which are often too long, particularly in simple cases. Key reforms would include agreeing on target timetables with the parties at the outset of pre-notification to ensure that it is used productively, avoiding unjustifiably extended pre-notification and stop-the-clocks, and ensuring merger review can continue over holiday periods.

(iii) *Take a more flexible approach to market testing*. The EC's current approach to market testing is burdensome and inefficient for third party respondents and may result in misleading impressions of the market. A key reform would be to move, where desirable for third parties, to a model of setting up calls with third parties during market testing, and asking relevant parties to sign-off on call notes. The calls would then replace written questionnaires. Third parties should anyway be free not to answer (parts of) questionnaires where views are neutral (other than targeted data requests that the EC deems necessary for its review). "Leading" questions should also be avoided.

(B) **Reforms to improve administrative processes**

(i) *Empower case teams to take a flexible, pragmatic approach to the investigation*. Case teams should be encouraged and empowered by the hierarchy to waive aspects of the EC process in appropriate cases – in particular where no competition concerns arise and there are no third-party complaints.

(ii) *Rolling access to file for merging parties.* The EC should allow merging parties to review evidence from the market on a rolling basis to avoid misunderstandings and increase efficiency, rather than waiting until later in the process for this.

(iii) *In complex cases introduce new checks and balances to ensure a fair decision process*. Whilst encouraging flexibility, the EC should also introduce greater controls on case teams when it comes to taking merger control decisions. One way this could be achieved is by introducing in

complex cases internal review in front of a decision-maker and allowing the merging parties to make submissions to that decision-maker, before a decision is taken. Currently, the checks and controls are not transparent and accessible for merging parties.

(iv) *Improve Case Search on Europa.eu*. The EC's online case resources are greatly appreciated by merging parties, but they can also be improved. A simple improvement would be to introduce a "key word search" function on Case Search.

(C) **Reforms to the substantive assessment**

(i) *Update the approach to market definition so it is fit for the modern world*. The EC should take a more dynamic approach to market definition, and recognise that markets are increasingly global, or at least regional (i.e. beyond Member State borders).

(ii) *Ensure the competitive assessment is a realistic, forward-looking process.* The EC needs to update its approach to the competitive assessment to ensure that merger review is sufficiently forward-looking. Counterfactuals must consider how the market will evolve taking into account the relevant factors, rather than assuming that factors will remain as they have been in the past. For instance, in today's digital age, digital platforms frequently enter into traditional markets, changing how these markets operate in the process. This is similarly important post-Covid when it will be essential for the EC to reflect on how the pandemic has permanently changed the competitive landscape in many industries. The EC should also re-consider the time periods over which it is willing to factor in potential entry – it is typically far too short and fails to reflect market realities.

(iii) *Adopt a new approach to efficiencies*. The EC needs to revise its approach to price and non-price related efficiencies. The EC should accurately capture innovation and significant non-price consumer benefits (including sustainability aspects) arising from mergers. Where it is not satisfied that an efficiency is real, the EC should explain in detail why a particular efficiency has been dismissed. The EC should also be more pragmatic and realistic about counterfactuals, rather than appearing to search for supposed alternative deals or deal structures that could theoretically deliver similar efficiencies, thereby enabling them to dismiss efficiencies on the basis that they are not merger specific.

(iv) *Consider whether behavioural changes would fix competition concerns*. The EC should not assume that divestments are the only suitable remedy to competition concerns.

(v) *Adjust approach to the SIEC test.* ERT urges the EC to apply the reasoning of the General Court in *CK Telecoms UK Investments Ltd v European Commission* when applying the SIEC test.

(D) **Reforms to jurisdiction**

(i) *Clarify the new Article 22 policy.* ERT notes that the EC did not consult on the recent change it made to the application of Article 22. It is imperative that the EC pause and consult with the market on this change before it is implemented further, as the new policy, as it currently stands, would remove a key strength of the EUMR, i.e. the legal certainty created by the jurisdictional turnover tests. Failing that, the EC should confine its new merger policy on reviewing acquisitions even when they fall below both EU and Member State merger control thresholds to exceptional cases such as digital gatekeepers. This should be specified in guidance, which should be adopted only after full market consultation.

(ii) *Exempt mergers with no EEA nexus from review*. The EC is one of the few regulators in the world that reviews the formation of joint ventures with no domestic (EEA) nexus. This results in unnecessary reviews of and delays to such mergers. The formation of such joint ventures should be exempt from EU merger control, or at the least should be subject to a more rapid "super-simplified" review and clearance process.

1.3 ERT would like to emphasise their appreciation of the EC's commitment to dialogue with merging parties and the wider market. ERT members appreciate the willingness of EC teams to accommodate calls on live merger control matters, and in general, find the willingness of the EC to engage with the parties to be a major advantage of the EC merger control process. The typical willingness of the EC to consult with the market on proposed reforms is also to be applauded. In the spirit of that open dialogue, detail on the issues and proposed reforms to EU merger control identified by ERT are set out in the following paragraphs.

PART A: REFORMS TO STREAMLINE THE MERGER CONTROL PROCESS

2. Internal document requests

2.1 Companies often invest disproportionate amounts of time and resources in responding to internal document requests from the EC during merger reviews. The nature of the requests vary, but the burden of responding can rapidly become extremely onerous - for example, the preparation of organisational charts, document retention policies and similar materials for a large company is hugely resource-intensive and time-consuming. Many materials requested by the EC are not relevant to the merger, rendering this burdensome exercise excessive and disproportionate. Indeed, many materials will have such low relevance that they are not reviewed by the EC.

2.2 ERT members have had concerning experiences with the EC gathering a disproportionate amount of irrelevant data during document review processes. The EC has on occasion then resisted privilege claims where the subject matter is not related to the investigation at hand, and more generally refused the merging parties conducting a relevancy review before submitting materials to the EC. There is no justification for requesting information that is not even connected with the subject matter of the merger, or materials that are in draft (which cannot, by definition, be said to represent settled company policy). As a matter of good administration it should be uncontroversial that

both irrelevant and/or privileged materials should always be excluded from the review. ERT members urge the EC to recognise the disproportionate burden that internal document requests can create for merging parties.

2.3 Furthermore, ERT members are particularly concerned where – as a result of the document review – single phrases are taken out of context from within an internal document to support a point being made by the EC. When considering the weight to give to statements in internal documents, the EC should pay attention to the nature, purpose and source of a given document, and check this understanding with the parties. It is also crucial that the EC evaluates all the evidence (both inculpatory and exculpatory) and comes to a conclusion on the balance of evidence, rather than reaching a conclusion and then cherry-picking the inculpatory evidence that supports it.

2.4 Issues also arise when it comes to the data types the EC requests. Typically the EC requires merging parties to not only hand over data, but also to change its format and analyse it for the EC. This has given rise to a burdensome and costly private industry of IT forensic specialists and economists who amend the data of the parties to put it into the format requested by the EC. As well as being disproportionately burdensome, this approach risks the EC drawing conclusions that do not reflect the reality of the underlying data. ERT urges the EC to move away from this practice, and instead examine data in the format it is produced by the merging parties. Only in truly exceptional cases should the EC ask merging parties to produce entirely new data, or to present data in a new format.

2.5 ERT members emphasise that, from the perspective of merging parties, the EC's approach can sometimes represent the "worst of all worlds" where it issues an excessively burdensome internal document request in addition to the lengthy and detailed written submissions containing substantive analysis and advocacy in the Form CO. This contrasts with other merger control regimes like the US, which might require many internal documents but do not also require lengthy substantive submissions. This contributes to EC merger control increasingly being seen as the most burdensome of the international merger control processes.

2.6 Several key reforms would address these concerns:

(A) The EC should rationalise and adjust the goals of the document request exercise, acknowledging the (potentially limited) relevance of internal documents and avoiding requesting them when that is the case or limiting the scope of such requests. While internal documents may at times provide useful evidence, other more robust sources are likely to be available (and oftentimes more easily accessible). The EC's default position should move away from large scale document requests and become more targeted.

(B) Where internal documents are requested, the parties should be able to focus on what is essential concerning whether or not materials are relevant to the merger. They must be able to exclude information not relevant to the merger. The EC should not rely on indiscriminate forensic "imaging" of staff documents. Overly broad requests slow down the process and can confuse the issue by overwhelming the case team with information.

(C) Merging parties should not be required to provide privileged materials to the EC, including where the privileged material does not relate to the merger in question. The EC should be more flexible in understanding that privileged material extends to in-house counsel communications, communications with economists, common interest privilege materials and materials produced by legal counsel based outside of the EEA.

(D) The EC should take account of the following factors when giving weight to comments within an internal document:

(i) The role, seniority, and decision making power in the company's name held by the author;

(ii) The date of the document and the market context and commercial strategy at that time;

(iii) The purpose for which the document was created (for example whether the author is advocating for a particular outcome within the company or whether a strategy was adopted by a decision-making body);

(iv) The fact that statements in emails and draft documents that have not yet been approved or finalised could be personal employee reflections rather than the views of the relevant company;

(v) Whether the document is consistent with other internal documents produced by and evidence relating to the merging party (and then weight the document accordingly); and

(vi) The merging parties' view of the document.

2.7 Where the EC has doubts over whether all relevant materials have been provided, it should consider options aside from requesting more documents.

2.8 These reforms would reduce the currently excessive and disproportionate burden that internal document requests create for merging parties and reduce the risk of misunderstandings over the meaning of documents.

3. Review timetables

3.1 At present, despite the statutory timings within the EU Merger Regulation,[2] the EU merger control process can be excessively long and involve unnecessary time delays to the closing of transactions. One of the key causes of these delays can be excessive use of "stop the clock" RFIs. In addition, in certain cases there can be delays where the pre-notification period is unnecessarily long or resulting from consultation with other DGs – such delays should be unheard of with better coordination and forward planning between and within DGs.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004, available here.

3.2 ERT members feel that the finalisation of the EU merger control process is, in the majority of cases, the determining factor for the timeline between signing and closing of transactions, delaying the consummation of transactions with all the negative economic effects that entails for the businesses concerned. Some ERT members are finding that this is a real competitive disadvantage for large European players when competing in M&A transactions.

The pre-notification phase

3.3 Pre-notification is a positive aspect of the EC's merger control procedure, particularly for complex cases. It can usefully flush out substantive issues early on, giving both the parties and the EC the time they need to consider and address those issues.

3.4 However, in several cases, particularly the more straightforward ones, pre-notification can introduce needless uncertainty and delays into the overall merger review timeline. While three or four-month pre-notification periods can be necessary and helpful in complex cases, several ERT members are concerned that pre-notification phases of such length are also common in cases where the period is unnecessary (e.g. Phase 1 non-remedy cases). Several ERT members are particularly concerned by the use of pre-notification to make information requests or to have discussions that could be adequately addressed in the formal review process. Pre-notification can be particularly excessive under the Simplified Procedure; by shifting the burden of completing a Short Form CO to the EC's satisfaction to the pre-notification stage, many of the procedural efficiencies that the Simplified Procedure is intended to give are reduced.[3]

3.5 The following key reforms would address these concerns:

(A) For straightforward cases, the EC case team should engage with the notifying parties at the start of pre-notification to set a non-binding timeline for pre-notification that the EC aims to sticks to, and agree on the scope of pre-notification. To their credit, many case teams already adopt this practice, and ERT hopes that this practice can become universal. For the simplified procedure cases, it should be considered to have no pre-notification period.

(B) Pre-notification should be used to discuss areas that are of real interest to the EC from a substantive competition perspective, and data the parties can provide on such areas to address real issues early. That does not mean that the EC should delay its formal review until it has exhaustively considered every possible market or sub-market, where it is evident that these are unlikely to give rise to substantive competition concerns.

(C) The EC should better utilise pre-notification to reach out to the market and get views from third parties early on. Whilst some cases teams are willing to adopt this practice, this should be standard for all but the very simplest of pre-

[3] In addition, the ERT notes that the time and effort required to prepare a Short Form CO is often equivalent to the time taken to prepare a full Form CO as merging parties are required to provide data on all plausible affected markets

notification periods so that pre-notification does enable the EC to give merging parties clear guidance on the direction of travel of the case.

Excessive use of "stop the clock" RFIs

3.6 ERT members feel in some cases that the EC is too willing to unnecessarily "stop the clock" whilst burdensome RFIs are responded to, further lengthening timelines. The EC should take time to consider the most efficient way of gathering the information it requires, only resorting to burdensome RFIs that "stop the clock" where it has exhausted less time-consuming routes to gather information.

3.7 One reform that would materially reduce the time lost to "stop the clock" RFIs would be to make meetings and calls with the merging parties the norm, rather than a demand for narrative responses. The EC could then follow up with notes of the call for the parties to comment on. Some case teams are already relatively open to meetings and calls and this is very much appreciated by ERT members, who would like to see it become a universally adopted practice.

EC "blackout" during holiday periods

3.8 Some ERT members are concerned over the impact on deal timetables of the EC's practices around summer holiday periods. Whilst it is recognised that activities within Europe slow around the holiday periods, some ERT members' experiences are that it is common for the EC to pressure parties not to make merger filings during summer holiday periods (July and August) and Christmas (December).

3.9 This approach negatively impacts the reputation of the EC and European Union more generally. The EC's justification for these delays is often that there is a lack of responsiveness from third parties to EC questionnaires over the holiday periods. However, for the summer period this assumption is unfounded – it is no longer the case that businesses effectively shut down over the summer holidays.

3.10 Accordingly, the EC's general approach should be to allow normal commercial activity to continue within Europe during July and August by continuing to accept merger filings and run market investigations.

4. Market testing & third party outreach[4]

4.1 ERT members are concerned that the EC's approach to market testing is excessively burdensome. Third-party questionnaires are too lengthy and jargon-heavy, and quite often up to 200 questions are included in questionnaires. Whilst ERT recognises the EC's willingness to be flexible with timelines for third party responses, there is still a strong feeling that the questionnaires can be far too onerous and insufficient time is offered to third party respondents given the lack of a dedicated deal team within third parties to work on the response. The EC also has a habit of taking a "scattergun" approach within questionnaires rather than focusing on core issues relevant to the third party. ERT

[4] This section focuses on third party market testing in merger control, but ERT members would also urge the EC to adopt the reforms suggested here for market testing in Sector Inquiries.

members also have concerns over the EC's approach of addressing questions to different parts of the business rather than addressing questions to a logical single contact point (such as the legal team) – though this issue has improved significantly since the EC adopted its contacts register.

4.2 As well as being burdensome due to the length of questionnaires, the EC often requests that materials be provided to it in a fashion that may not reflect how those materials are stored. The time and effort consumed whilst reformatting materials into the format requested can be costly and disproportionate. There are also concerns about the lack of coordination within the EC on third party questionnaires – ERT members have experienced receiving three separate questionnaires within a five-day period, with overlapping and at times contradictory requests.

4.3 As well as being burdensome, ERT members are concerned that the EC's approach may result in a misleading impression of the market. Questionnaires often contain "leading" questions that may elicit unrepresentative answers, and there is a feeling amongst some ERT members that the EC uses statements by third parties out of context in a way that may lose the intended meaning. ERT would therefore encourage the EC to take advice from professional survey companies on how to prepare surveys and then adopt their best practices when framing their market questionnaires, and when interpreting the results of those surveys in terms of the use of statistical evidence.

4.4 More fundamentally, ERT would encourage the EC to limit the use of the clunky e-questionnaires and replace them with meetings and calls, which are more targeted and efficient. The EC could then follow up with notes of the meeting or call for third parties to comment on it. ERT members have been encouraged by the increasing trend at the EC to ask for calls with the relevant business teams before sending a questionnaire, and urge the EC to fully embrace calls as a replacement for questionnaires where desirable for third parties.

4.5 ERT also appreciates where the EC share agendas ahead of these calls, as these ensure targeted discussion and allow for preparation by third parties. ERT, therefore, suggests that the EC make it standard practice to share an agenda with attendees sufficiently in advance of third party market test calls.

4.6 If the EC is, in some instances, unable to rely on a call with third parties, and a written questionnaire is necessary, the following reforms should be undertaken at a minimum:

(A) Written questionnaires should only contain questions relating to the third party's core business area. Questions should be clear and short, using straightforward language. Third parties should be free not to answer questionnaires where their views are neutral. ERT members appreciate when the EC follows up on a call with a questionnaire that reflects the information discussed and would encourage the EC to make this practice universal.

(B) Longer deadlines to respond to questionnaires should be given as a matter of routine.

(C) Leading questions should be avoided and comments should not be taken out of context by the EC in subsequent EC documents, to accurately identify and reflect

market dynamics. The EC should give the merging parties the opportunity to comment on questionnaires before they are sent to third parties, to avoid the current situation where questions may not be as clear and concise as they would be if they were coming from industry participants.

(D) Where data or other types of document are requested, the EC should allow them to be submitted in their original format.

4.7 In addition, third party market testing should begin during pre-notification (as suggested in paragraph 3 above). The EC should also ensure that questions are consistently addressed to the same team within third-party respondents (e.g. the legal team) rather than addressing different questionnaires to different teams – though this issue has improved since the EC adopted its contacts register.

PART B: REFORMS TO IMPROVE ADMINISTRATIVE PROCESSES

5. Earlier, rolling access to file

5.1 The EC often rely on third-party market comments when making decisions, and it is well known that reactions from the market have a large impact on whether or not the EC has a favourable view of a merger. As well as allowing the merging parties to comment on proposed questions to the market before they are shared, there is no reason to delay providing the parties to the transaction with visibility of market comments until late in the Phase 1 process.

5.2 Earlier access on a rolling basis from the start of Phase 1 to relevant parts of the EC's file would create significant efficiencies, allowing notifying parties to address material concerns earlier, as well as address any factual misunderstandings that market testing may give rise to. The EC should therefore shift to providing the same access to file to the parties, but on a rolling basis, keeping the merging parties up to date with market testing progress as well as any emerging issues.

6. Empowering case teams to investigate cases flexibly

6.1 ERT members are encouraged to see that some EC case teams are willing to waive unnecessary requirements during the merger review process and avoid a formalistic or mechanical approach to merger control review. This pragmatic approach is to be applauded, and ERT is keen for the EC to encourage this type of behaviour by case teams.

6.2 Key areas in which case teams should be encouraged to adopt a more flexible approach include:

(A) Making use of waivers for data and other requirements in the Form CO where appropriate (for example, waiving the requirement to particularise markets where concerns do not arise) – or even waiving sections of the Form CO entirely where appropriate; and

(B) Recommending a more streamlined Phase 1 decision where there have been no relevant or material third party complaints or interest in the merger.

6.3 ERT encourages the hierarchy to empower case teams to take this pragmatic attitude to cases and to be clear that case teams are expected to be bold in the execution of their function rather than sticking to formalistic processes when they are not required.

7. Checks and balances over decisions

7.1 ERT members are concerned that there are insufficient checks and balances applied during the decision-making process in complex merger control cases. Unlike many jurisdictions where merger control investigators must prove their case to an independent decision-maker, the line between the investigative and the decision making roles are blurred within EU merger control. Long timelines at the European courts also limit the scope for judicial resolution of any concerns that merging parties may have over an EC merger decision.

7.2 The net effect of these points is that each EC case team has an immense amount of power relative to case teams in other territories when taking merger control decisions. The checks and balances that this power is subject to are not transparent to merging parties – indeed, it is not clear that checks and balances exist in a meaningful way. Whilst ERT is keen for case teams to have sufficient operational flexibility to run the investigation, it is also important that proper, impartial oversight is applied to the decision making process, and that merging parties allowed to present their views to that decision-maker.

7.3 Some ERT members consider that merging parties would feel significantly more comfortable if there was a meaningful opportunity for an unbiased and independent review of merger decisions within the EC's process for complex merger control cases, where a senior EC decision-maker that has not been involved in the investigation can take a final view on the quality of the EC's case. This would give the notifying parties an effective means of challenging the positions taken by the case team by allowing them to bring their arguments before a fresh pair of eyes.

8. Improve Case Search on Europa.eu

8.1 ERT appreciates the open and transparent way in which the EC ordinarily conducts itself. This approach is exemplified by the EC's voluminous online publications, including its repository of case law on Case Search. Whilst ERT appreciates access to EC cases, how these are displayed and categorised would be greatly improved by the introduction of a simple "key word search" function. The EC should therefore engage IT consultants to introduce this functionality.

PART C: REFORMS TO THE SUBSTANTIVE ASSESSMENT

9. Market definition

9.1 ERT supports market definition as a foundational aspect of competition law enforcement, and is generally supportive of the EC's use of market definition to anchor competition law analysis. However, ERT also believes that the EC should take a more dynamic and forward-looking approach to market definition, as the current approach is unduly static. Market definitions (both product and geographic) are fact-based, and facts are changing rapidly in the current geopolitical and geo-economic environment. The EC must avoid over-reliance on precedent given this rapid change, and must ensure that market

definitions are assessed by reference to current, robust and reliable data where they are relied on. The EC should not feel overly reliant on internal resources to conduct this exercise – private sector economic specialists may sometimes be an appropriate tool for the EC to use to ensure rapid identification of accurate market definitions.

9.2 Product market definitions in particular are changing in many industries as a result of the fast-paced evolution in technology and the ability of digital platforms to leverage strength in one market to enter seemingly unrelated markets. The EC needs to ensure it takes a more forward-looking view on these changes to market definition, ensuring that the product market definition captures and takes account of new entrants and the evolution of supply and demand-side structures.

9.3 ERT has previously shared certain observations on the EC's approach to geographic market definition.[5] As articulated in those previous papers, traditionally the EC's analysis of geographic markets focused on local, national and EU/EEA level, depending on the sector in question. This narrow approach may have been appropriate in the past, but now needs to be adjusted to the realities of the competitive pressure of global markets in many sectors of the economy. The key points that ERT has made previously to the EC are as follows:

(A) The EC should not overly rely on precedent to find national markets: the EC's decisions on geographic market definition ("**GMD**") tend to be made based on historical data, its previous findings and regulatory market definitions, which often results in defining markets nationally. However, it is clear that globalisation, single market integration initiatives and the development of online marketplaces have encouraged convergence across the EEA and worldwide, suggesting GMD should be wider than in the past. The EC should collect information on and take into account current and forward-looking developments, including non-price factors, to assess the competitive constraints exerted on relevant players.

(B) Insufficient weight is given to non-EEA imports and other potential entrants: in assessing GMD, the EC too frequently fails to appreciate competitive constraints arising from imports from non-EEA countries, such as China and the US, for a variety of reasons (e.g., (perceived) lower quality, longer lead times, limited product range, regulatory constraints and unfavourable payment conditions, etc.). This approach is outdated given the importance of non-EEA imports within the EEA. The EC should carry out a thorough analysis of the perceived barriers to entry for imports to determine the competitive effect they exercise on the market. The EC should also be forward-looking in assessing the GMD and take into account any likely entry within a period of up to at least five years (depending on the market).

(C) The digital economy creates wider than national markets: the EC should recognise the extent to which online platforms operate across borders and act as

[5] See, for example, "*European Round Table's comments on the Fletcher/Lyons study published by DG COMP on the definition of geographic market (the "Study")*" (2016), responding to Amelia Fletcher and Bruce Lyons, "Geographic Market Definition in European Merger Control", available at http://ec.europa.eu/competition/publications/reports/study_gmd.pdf.

a competitive restraint to traditional bricks-and-mortar operations. Consumers' online activity should be given greater weight in GMD.

9.4 Finally, ERT would emphasise that a conclusion on market definition in an Article 101 or Article 102 TFEU context will not always be relevant in an EU merger control context and *vice versa*. The EC should keep a dynamic and open mind to market definition during merger control review.

10. Ensure the competitive assessment is an accurate, forward-looking process

10.1 The EC's backwards-looking approach to the competitive assessment and the evidence that underpins it can result in unrealistic conclusions. There are two key areas where this causes concern:

(A) Counterfactual analysis often assumes conditions would be as they have been in the past absent a merger, but this is not always the case. A more forward-looking and realistic approach to counterfactuals is required that takes account of how markets might evolve, in particular, to take account of the disruptive and fast-paced impact of technology.

(B) The EC typically considers whether new entrants will enter a market within the next two to three years. However, for many markets, the investment cycle is longer than that, meaning that limiting the review period to two-three years misses out on important competitive constraints.

10.2 Accordingly, ERT urges the EC to avoid "backwards-looking" counterfactuals based on past events and to adopt an approach that considers both present competition and the likely trend in future competition absent a merger. Subject to the nature of the specific case and market, the general timeframe the EC considers for potential entries to relevant markets should also be extended. The EC should reflect the market as it is and would likely become, as well as wider geopolitical and geo-economic changes.

10.3 These concerns are particularly in focus due to the Covid-19 pandemic. The long term impact of Covid-19 may not yet be known in precise detail, but what is clear is that it has changed competitive dynamics in a variety of markets in a permanent way. When the pandemic is over, markets will not return to the structures they had in 2019. The EC will need to reflect these changes in its merger assessments.

11. Efficiencies

11.1 The EC typically applies an unduly high standard of proof to establish efficiencies; higher, in particular, than the standard of proof the EC applies to evidence of anti-competitive effects. This is not logical as the EC should look to balance the positive and negative effects of a merger, nor is this analytical structure set out in the EUMR (unlike Article 101). The EC is often candid about the obstacles parties face, indicating openly that the hurdle the parties face to establish efficiencies is insurmountable. As a result, important innovation and other non-price efficiencies including investments, sustainability, environmental, living standards, human rights, child labour, and nutritional aspects are neglected by the EC when conducting the competitive assessment on a merger.

11.2 This position is no longer tenable, particularly given the findings of the General Court that the EC must take account of efficiencies as a part of the competitive assessment relating to price.[6] As well as taking into account efficiencies when considering the impact of a merger on price, the EC should reverse the burden of proof and take into account non-price efficiencies and the benefits they bring as part of the competitive assessment. In other words, it should not be a burden on the parties to prove these non-price efficiencies; they should form part of the EC's assessment, alongside the price. Once the EC has investigated the presence of efficiencies but has nonetheless concluded that there remain competitive concerns, it would then be for the parties to further establish efficiencies as part of an efficiencies defence (if appropriate).

11.3 Furthermore, at present, the EC does not look at a long enough timeline when considering efficiencies that will arise from a merger. As a result, the EC does not accurately capture innovation and significant non-price consumer benefits (including investments, sustainability and other non-price aspects) arising from mergers that may take time. In light of the proposed "Green Deal" for Europe, the efficiencies defence may take increasing salience going forward as mergers result in more environmentally sustainable businesses in the long run. Efficiencies will also be increasingly important for driving the energy transition, investment in high-performance networks, and the recovery and EU competitiveness in a post-Pandemic world.

11.4 To address these concerns, the EC should:

(A) ensure that sufficient importance is given to efficiencies in the merger control analysis and simplify, clarify and lower the requirements for a successful efficiencies defence;

(B) make more explicit recognition of sustainability benefits as being able to offset other (eg price) related harms;

(C) adopt a more flexible approach to the question of in- and out-of-market benefits. From an economic standpoint, both should be relevant to the overall question of the competitive harm caused by the merger. This will be particularly important in the consideration of sustainability benefits given the potential timeframes in question in such cases;

(D) regard efficiency arguments neutrally, and not perceive them as an admission that the transaction gives rise to competition concerns;

(E) ensure the standard of proof the EC applies is the same lower standard adopted for identifying potential anti-competitive effects;

(F) shoulder the burden of proof for both price and non-price efficiencies by integrating consideration of both price and non-price efficiencies into the normal competitive assessment, rather than solely relying on parties to raise these as a defence;

[6] *CK Telecoms UK Investments Ltd v European Commission* (2020), paras 277 – 279 - available at the following link.

(G) adopt a longer timeline when considering what efficiencies might emerge, as efficiencies could feasibly manifest over a longer period of time;

(H) adopt realistic approaches to counterfactuals, rather than appearing to search for supposed alternative deals or deal structures that could theoretically deliver similar efficiencies, thereby enabling the EC to dismiss efficiencies on the basis that they are not merger specific; and

(I) where efficiencies are rejected, clearly set out the reasoning for this, and allow the parties to respond on these reasons before taking a final decision.

12. Behavioural remedies

12.1 It is well known that the EC has a strong preference for structural remedies as a solution to competition concerns arising from mergers. However, divestments come with many negatives that ERT is concerned the EC does not give appropriate weight to – for example they may undermine or eliminate the very efficiencies that the merger created.

12.2 ERT members are of the view that behavioural remedies can be appropriate and sometimes more effective at resolving competition concerns than divestments and encourage the EC to adopt them more often. Behavioural remedies are more flexible than structural remedies, do not involve unnecessary transaction costs and give the EC a flexible balance between over and under-enforcement. If rigorously imposed upon companies, behavioural remedies make it possible to carry out mergers without harming competition whilst also respecting the rights of merging parties. The Monitoring Trustee system works well in providing oversight of remedies without the EC having to re-direct excessive resources from merger cases.

12.3 Behavioural remedies are popular worldwide, and the EC would be well placed to move to a more positive (or at least neutral) position on behavioural remedies. ERT is encouraged by recent examples of behavioural or hybrid remedies being approved by the EC, such as in *Google/Fitbit*,[7] and hopes this trend will continue. Notably, behavioural remedies are regularly applied in other major competition law hubs (such as China), and it is expected that the application of behavioural over structural remedies would help support European businesses in successfully competing globally in the aftermath of the Covid-19 pandemic.

13. Adjust application of the SIEC Test

13.1 One of the most powerful tools available to the EC is the power to prohibit mergers. It is important that the EC exercise this power only in the most serious circumstances where there is no doubt that significant anticompetitive effects will arise.

13.2 Accordingly, the EC should follow the guidance set out by the General Court in *CK Telecoms UK Investments Ltd v European Commission* (2020),[8] before finding that a

[7] M.9660 *Google/Fitbit* (2020), available at the following link.
[8] *CK Telecoms UK Investments Ltd v European Commission* (2020), available at the following link.

merger would result in a significant impediment of effective competition ("**SIEC**") capable of being prohibited. In particular, as the General Court sets out, the EC should:

(A) First establish that any competitive constraint represents an 'important competitive force' having a greater influence on the market than suggested by its market share, **and** should stand out in some way from other competitors in terms of its impact on competition, before finding that such removal would result in a SIEC;

(B) Ensure that competition between parties is accurately measured to establish that merging parties are close competitors, including taking account of efficiencies arising from a merger when conducting any quantitative analysis on upward pricing pressure;

(C) Establish that any non-coordinated effects will themselves result in a SIEC before relying on such non-coordinated effects to prohibit a merger;

(D) Take account of efficiencies as part of the competitive assessment, rather than only seeing efficiencies as a defence for the merging parties to prove; and

(E) Ensure that the standard of proof met for alleged anticompetitive effects is that there is a "strong probability" of such effects.

13.3 Finally, ERT encourages the EC to apply a consistent approach to the theories of harm it deploys, and avoid contradictory theories of harm. For example, where a theory of harm concerns non-coordinated price effects, this should necessarily preclude the EC also asserting theories of harm based on coordinated price effects.

PART D: REFORMS TO JURISDICTION

14. Article 22 referrals

14.1 The EC has unilaterally changed its approach to Article 22 referrals; now accepting – and even encouraging – such referrals from the Member States without jurisdiction to review the transaction themselves. ERT understands that this expansion in the application of Article 22 is prompted by concerns that "killer acquisitions" of promising startups – especially by large digital and pharma companies – have previously escaped merger review in the EEA due to targets having no or little turnover.

14.2 ERT acknowledges the concern about killer acquisitions but has significant concerns over the damage the EC's new policy does to legal certainty. A particular strength of the EC merger control procedure has always been the clear jurisdictional thresholds, which give legal certainty as to whether a merger filing is required. It has now become unpredictable whether EU merger rules will apply to a given deal or not, as the previously clear jurisdictional thresholds at the EU and national level are now not the only criteria for the deal to be subject to merger control. ERT notes that, whilst EC guidance mentions the digital and pharma sectors, in particular, it does not limit the policy change to these sectors, let alone particular operators in these sectors. The new Article 22 policy may therefore apply in practice to all sectors. Practically, in the absence of certainty, merging parties can only attempt to quantify EU merger control exposure by briefing all 27 EU

Member States in an attempt to manage the risk of a referral occurring after deal closing. This is an extreme and excessive requirement, which the EC has nonetheless suggested is appropriate. The key benefit of EU merger control – the one-stop-shop within the EU – is likely to be undermined by this move.

14.3 Practically, this means that it will no longer be possible to accurately capture the risk of review by the EC because the EC can review transactions after they have closed even where they did not meet any merger control threshold within the EEA. Capturing this risk in deal documentation with appropriate risk allocation, conditions precedent and long-stop dates is essentially impossible, and as a result, the feasibility of mergers within the EU will increasingly be called into question. For such a policy to be unilaterally introduced without consultation in the market is of serious concern and runs counter to the fundamental EU legal principle of proportionality.

14.4 It is also important to recognise the role of the EC as a global role model within competition law. The behaviour of the EC is seen as best practice within the competition law world, and EC practices are often imitated by other regulators. ERT is therefore concerned that this change in policy by DG COMP could undermine the principle that merger control jurisdictional thresholds should be certain, as well as the idea that private sector stakeholders should be given a prior warning (and be consulted with) before major changes are made to the merger control rules they are subject to. Through its actions in relation to Article 22, the EC has set an unfortunate precedent for global competition enforcement.

14.5 In the first instance, ERT strongly suggests that the EC reverse this new Article 22 policy pending consultation with the market on the impact and implications of the change. Absent that move, in the interests of legal certainty, the EC should at the least confine Article 22 referral reviews that fall below the relevant thresholds under EU law or the law of Member States to exceptional cases, such as digital gatekeepers. If the new policy is retained, ERT calls upon the EC to create rigorous guidance on when this new policy will be applied, as current guidance is not sufficiently clear and creates significant legal uncertainty. Key provisions that guidance would need to include are:

(A) A stricter time-limit on interventions of no more than one month after a transaction becomes public, rather than the current six;

(B) Further guidance on what steps constitute a transaction being “made known” to the EC and the Member States; and

(C) Clearly defined transaction thresholds to avoid legal uncertainty and to reduce the hurdle to deal-making that the new Article 22 policy presents. These transaction thresholds could, for example, be linked to a set multiple of the turnover of the target that might indicate a so-called “killer acquisition”. Alternatively, thresholds could be linked to a range of criteria that might indicate a so-called “killer acquisition” (for example if the transaction concerns a digital gatekeeper).

It would also be necessary for the EC to publicly consult on this guidance so that the potential risks of the new policy and proposed guidelines are properly understood and taken into account.

15. Exempt mergers with no EEA economics effect

15.1 As described in ERT's response to the EC's consultation, EU merger control is the most prominent of the competition regimes worldwide that claim jurisdiction over the formation of joint ventures with no local nexus, based on the turnover of JV parents within the EEA. This has the effect of catching JV transactions that have no relevance to the EEA, often between merging parties that are not competitors within the EEA. The delay that this can create for transactions that have no EEA nexus is disproportionate and should be avoided. The burden of making a filing for each of these transactions is needlessly time-consuming for both the merging parties and the EC.

15.2 A local nexus requirement should be introduced to provide that, where a joint venture has no local nexus in the EEA, it is either not subject to merger control or is subject to a super-simplified procedure. A super-simplified procedure would provide some safeguards – for example, the EC could require that such transactions fill out an ultra-short form notification containing a tick-box form listing the parties, the JV and its lack of presence within the EEA.

Recovery, European competitiveness and an international level playing field

As Europe recovers from the Covid-19 Pandemic and faces new challenges in the digital era, the EC must recognise the role that merger control, efficiencies and wider competition policy can take in supporting digital developments and the wider recovery. The reforms suggested here will help renew European merger control so that it is fit for purpose for the challenges facing Europe in the coming years.

Wider competition law issues exist aside from merger control. Recovery from the pandemic, the European Green Deal, continuous market digitisation, and other measures to support the European economy will increase the need for pro-competitive cooperation between companies, both through merger and through other forms of agreement. The EC should be considering broadening the scope of permissible horizontal agreements that are pro-competitive and needed to meet EU policy goals. It should also be considering broadening the scope for vertical agreements that require an integrated approach to meet the demands of consumers.

European competitiveness needs to be supported, partly to ensure a level playing field internationally but also to drive efficiencies. Industries face unprecedented challenges due to changing global landscapes and increasingly global markets. There is a real risk that American and Chinese behemoths will be able to leverage their strengths in stable home markets to gain share in Europe and out-compete European players globally. Innovation, investment, scale and efficiency are key to meeting this challenge, and the EC should undertake the reforms described in this paper to tackle issues raised by the 21st century's digital and globalised economy and the energy transition and to support European competitiveness on these points.

The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. The companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.

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