ETNO Response to the Consultation on the Draft revised Merger Implementing Regulation ('Implementing Regulation') and the Notice on Simplified Procedure

June 2022

ETNO welcomes the chance to comment on the Draft revised Merger Implementing Regulation ('Implementing Regulation') and the Notice on Simplified Procedure. ETNO values the efforts of the EC to streamline the procedural aspects of EU Merger Control, but considers it necessary to further streamline the notification process, taking into account the following aspects:

Draft Revised Form CO

- The information requirements requested in connection with the Form CO with regard to non-simplified cases are too broad. In fact, 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 with regard to personal and financial resources on the parties, but it also will have an adverse effect on the notification and therefore the timing of the transaction.

- In order to streamline non-simplified cases by focusing on the key areas/markets that are critical with regard to a certain transaction the threshold for the identification of affected markets should be raised. Collecting information in a format that is often different from what the companies reporting system provides for is very burdensome for the part of the organization that already is under constraints in a merger situation. Zooming in on the issues that really matter at an early stage (especially when the Commission opens a Phase II investigation), would not only reduce the burden, but also may help to speed up the process. In addition, the time period requested in the information gathering for the RFI should be limited to the last year prior to the transaction. ETNO is of the view that the current time period foreseen is too long (up to 5 years) and the data gathered in such a long time turns frequently outdated and not meaningful for the purpose of the analysis. In the past we have seen that merger processes are becoming longer, because of excessive pre-notification phases, which are used to look in-depth into multiple markets. Resources on both sides would be used much more efficiently, if the process would be aimed at narrowing the scope to the key markets.

- The draft revised Form CO sets out 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. ETNO believes this paragraph **is unclear and seems to narrow down the current disposition of the existing Form CO pursuant the notifying parties can ask the EC to dispense with the obligation to provide information in any sections or subsections of the Form CO.** We 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.

- In relation to the previous paragraph, **it is also unclear the link of this disposition with the waiver requests set out in point 4 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 and the possibility to skip information of different sections would be welcome.** In addition, the same scope of application should apply in both points 3 and 4 of the draft revised Form CO, whereby the notifying parties can request a waiver or to be dispensed of providing certain information in any of the sections throughout the Form CO.

- With regards to **waiver requests**, 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.

- ETNO welcomes the streamline of Section 8 with the removal of certain information requirements[1]. **Nevertheless, we are of the view the current sub-sections in Section 8 (that in the draft revised Form CO are distributed in Sections 9 and 10) 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 to the relevance of each sub-section for the issue tackled; that could be triggered at the request of the merging parties or the EC in the pre-notification phase. 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.

- The streamline of Sections 6, 7 & 8 with the introduction of tables could be useful for 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 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. The handling of templates can be improved, since it can be a challenge as it is not necessarily geared towards the specificities of the business or the transaction. Often the information

[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.

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 on key markets. Moreover, the merging parties find frequently tricky to provide information with the scope, format and breakdown required by the EC in the RFIs.

- In addition, too broad scopes information required in a specific format, such as extended time horizons or different alternative subsegments of the market, increases the burden on companies in terms of timing and related costs without having a clear connection with the analysis of the EC.

- The merging parties often find it difficult to provide information regarding the scope, format and breakdown required by the EC in the RFIs, leading to additional costs and time consuming efforts for the merging parties. We therefore believe that, in many cases, the Commission would obtain better conclusions about the information requested if it maintained its original format. Furthermore, there is a need to limit the power of the attorney request once in order to streamline the procedure.

- 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.

Draft Revised Short Form CO

- ETNO welcomes 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 that we requested for leaving outside of scope of the simplified procedure the review of extra-territorial transactions with no local nexus within the EEA, we believe this super-simplified procedure is a good improvement.

- 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 notifying parties shall be entitled to provide information to all plausible markets only when the information is relevant for the competition assessment. The EC should 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.

- Regarding 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, ETNO believes several examples should be removed:

    i. Para. 22 of the draft revised Notice on the Simplified procedure sets out that EC might evert to a normal review procedure because third parties have expressed concerns. This scenario should be further developed, as these concerns should be permitted only when they are plausible and may result in a potential distortion of competition that forces the EC to require the notifying parties to enter into a non-simplified procedure.

    ii. 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) is excessive. The lack of a previous review does not speak to the impact that such transaction may have on competition. Therefore, this exception should be removed or at least be considered only under very exceptional basis, taking into account that simplified procedures remain applicable for this kind of transactions pursuant Point 5 (e) of the Short Form CO.

- 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; 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.

Substantive approach in the appraisal of horizontal mergers

ETNO is of the view 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 the EC should follow a different approach in the application of the Guidelines on Horizontal Mergers[2] in the following aspects:

- 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. Conversely, the application of the SIEC test should demonstrate a "strong probability", rather than demonstrating the "most likely outcome".

- 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.

- 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 remedy assessment should evolve to reflect market changes and protect European investments and sovereignty. Looking at replacing the merging actor after each consolidation is putting at odds the sustainability of European markets and the capacity of European actors to invest and innovate. This is especially exacerbated in sectors such as Telecoms, where on one side, the market is facing major transformation as telecom operators progressively separate from their physical infrastructures while financial institutions take over them and on the other side, the remedies imposed in the context of previous consolidations have proven to be inefficient as remedy takers instead of capitalising on acquired assets to further invest, within few years divest the remedies to another market player or investor.

- 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.

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

Additional information

Jurisdictional consultation

- ETNO Members note that it would be opportune to also streamline process and timing in cases where a jurisdictional consultation is activated by the Parties to seek clarity on whether a certain transaction would fall under the EUMR (e.g. to assess the full functionality of joint ventures or the existence of a change of control). Since such consultations regard the "nature" of the transaction and are preliminary to any discussion on the merit and on potential competitive effects they should not require extensive RFIs nor a timeframe comparable to that of a pre-notification. Instead, these procedures might take several months (even 4 months) without a real justification and therefore delaying the closing of the transactions (especially in the cases where a notification is then required). For the sake of legal certainty, ETNO believes that the Commission should set a deadline or at least give the Parties an indicative timeline for this kind of consultations (whose completion shouldn't take more than one month).

RFIs

- First, RFIs for third parties are extremely burdensome for relevant companies (especially for companies such as ETNO's members that are pan-European operators), as they are targeted for RFIs even though they are not intrinsically connected with the revised merger or they have to respond to questions that are not directly related to the company's activity, creating a huge burden for the targeted company in the analysis to understand first what markets are affected, possible concerns etc. Therefore, ETNO believes that a more flexible approach taken by the Commission is needed in the RFIs for third parties, allowing the targeted companies to answer only those questions about which the company has knowledge, or the company is concerned and capable to contribute to the Commission's analysis. Secondly, as mentioned before, in some cases, the company does not have the information in its systems in the format requested by the Commission, and the time and efforts consumed for turning the information into the formatting needed are costly and disproportionate if we consider the conclusions obtained. For this reason, ETNO is of the view that the Commission would obtain better conclusions about the information requested if it is maintained in its original format.

For questions and clarifications regarding this paper, please contact **Maarit Palovirta**, Senior Director of Regulatory Affairs (palovirta@etno.eu).