DEUTSCHE TELEKOM RESPONSE

TO COMMISSION´S PUBLIC CONSULTATION ON THE

DRAFT REVISED MERGER IMPLEMENTING REGULATION AND THE NOTICE ON SIMPLIFIED PROCEDURE

JUNE, 2022

Deutsche Telekom welcomes the opportunity to comment on the consultation of the draft revised Merger Implementing Regulation ("Implementing Regulation") and Notice on Simplified Procedure. The simplification and streamlining of merger control procedures is very much desirable given that in the past decades we have seen an ever-increasing complexity in merger procedures. This increased complexity has added an immense burden on merging parties, in particular in our industry, with regard to the resources that need to be invested. Beyond that, it has led to longer proceeding making the timing of a transaction more difficult and more cumbersome for the parties ongoing operations.

While Deutsche Telekom appreciates the attempt to simplify and streamline the merger control process, we do not understand why the main focus and adaptions are on the simplified cases. In reality we observe the main burden and increased complexity in the non-simplified cases and therefore see the biggest need for simplification in these instances. Unfortunately, this review of the merger control procedures is not tackling this main problem, which could have substantially reduced the burden for all stakeholders.

In addition, it is important to not only look at the procedural aspects of the merger control process to have less burden and more streamlined cases. It is critical that the Commission also review´s the existing framework and current practice regarding the substantive assessment of a merger transaction.

1. Non-simplified Merger Cases (Implementing Regulation, Form CO)

Overall, the Commission has forgone the chance to simplify and streamline the procedure for non-simplified merger cases in line with the aim of the review to focus resources on the most complex and relevant cases. Not all non-simplified cases fall into this category of mergers that merit a detailed investigation, especially for Phase 1 cases the procedure and Form CO needs to be more streamlined.

Beyond that, even those cases that are deemed the most complex and relevant can be streamlined by focusing more on the key markets and issues that are critical with regard to a certain transaction. To this end the Implementing Regulation and the Commission's practice should be adapted to:

- Raising the threshold for the identification of affected 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.
- Streamlining the information requested in the FormCO on what is critical regarding the key concerns, rather than having a broad sweep all approach and to looking in-depth into multiple markets that may not pose a problem.
- Reconsider the need to identify all plausible alternative product and geographic market definitions.

This would not only reduce the administrative burden on the parties, but also help in speeding up the merger control process.

In general, the aim should be to administer the procedure as efficient and as swift as possible. For one, we have seen that merger processes are becoming longer, because of excessive pre-notification phases. In fact, in recent cases we have experienced pre-notification phases exceeding 6 months, being nearly as long as an actual phase 2 merger. Therefore, to ensure a faster and more predictable timeline following could be introduced to the Implementing Regulation:

- Obligation for an indicative timetable for the pre-notification phase, which should have a maximum time limit of 60 days, which in exceptional cases may be extended by 30 days
- Sharing of investigation concept and jointly agreeing a timeline for the whole procedure at the beginning of the process

Further delays during the process have been created by stop-the-clocks or over extended holiday periods. In order to ensure a fast process, the threshold for stop the clock´s should be raised and

the Implementing Regulation should clarify that they should only be used in very exceptional cases and circumstances.

Another aspect that creates substantial administrative burden on the parties is the collection of documents and information. Over the past years we have seen a massive increase in the information and documents requested from the parties. For instance, on internal document requests in Phase 2 cases we have experienced cases where hundreds of thousands of documents needed to be provided which looks like being more inspired by the US system´s "Second Request". In fact, over time it seems that the EC has blended the burdensome administrative system, with its detailed up-front notification form, frequently running to hundreds of pages and many annexes, with a US adversarial system, relying on US-style disclosure. This puts an immense burden regarding personal and financial resources on the parties, given the high costs of e-discovery and the fact that the checking for privilege still requires a manual review of documents.

Beyond that we see information requested in a format that is often different from what the companies reporting system provides for and the foreseen tables are burdensome to fill out. Also, the long-time horizons going back as far as 5 years for some markets or having to provide data for varying geographical scops put addition strain on the merging parties to provide the full data set. The starting point should be the data from the last 1-2 business years, exceptionally there may be a need to look at the last 3-5 business years. In this context it becomes even more important under the principle of proportionality to keep a focus on the key markets in order to avoid unnecessary administrative burden for the parts of the organization that already are under constraints in a merger situation. Therefore, also here zooming in on the issues that really matter at an early stage during the pre-notification phase would not only reduce the burden by for instance:

- Reducing the amount of internal documents required by focusing on key documents and custodians
- Pre-discuss with parties the appropriate format/ adaption of templates for information and relevant timeframes this information needs to be collected for
- Where e-discovery exercise is necessary this should be clarified prior to notification, or at the very latest in the Phase 1, to allow companies enough time to vet the hundreds of thousands of documents

Deutsche Telekom appreciates the effort to reduce the sections that need to be addressed in the Form CO. In particular, it welcomes the changes made to Section 8 and now the new Sections 9 and 10 of the Form CO. The removal of the information requirements regarding the "Cooperative Agreements", "Trade between Member States and imports from outside the EEA",

and "Trade associations" are a step in the right direction, but also other sub-sections of the old Section 8 and now the new Sections 9 and 10 of the Form CO could be a good candidate for opt-out.

For many transactions one could even argue that section 8 and its sub-sections do not play an important role, since they do substantially contribute to the assessment of the transactions. Therefore, the question is whether from a proportionality and efficiency perspective certain sub-sections should rather be treated as optional with an opt-in mechanism, that could be triggered by the notifying parties or DG Comp.

2. Simplified Merger Cases (Notice, Shorth Form CO)

DT welcomes that the draft notice on the simplified procedure for certain concentrations contains some important simplifications for the undertakings concerned. Nevertheless, DT believes that the proposed amendments do not go far enough and that there is still room for further improvement and for the reduction in the burden imposed on notifying parties.

It is to be welcomed that the establishment of joint ventures having only extraterritorial effects without relevant nexus to the EEA as well as all cases in which neither horizontal overlaps nor non-horizontal relationships exist shall be examined in a "super simplified" procedure. DT also believes that the proposed introduction of new categories of vertical relationships qualifying for a simplified procedure in point 5 as well as the flexibility clauses in point 8 and 9 are a positive improvement of the current rules.

However, in DT's view these proposals do not go far enough. Even based on the proposed amendments, there are still considerable burden on the notifying parties as well as inefficiencies in the process which can be avoided.

The requirements for qualifying for a simplified procedure are still too narrow.

- The relevant standard for a transaction qualifying for a simplified procedure should be whether the transaction is not expected to have any appreciable negative effect on competition. If this is the case, the simplified procedure should be opened for the notifying parties irrespective of specific market share thresholds. In order to enable the Commission to determine whether the preconditions for a simplified procedure are fulfilled it should be up to notifying parties to demonstrate in the pre-notification

discussions why the transaction will not have appreciable negative effects on competition. To the extent that no plausible reasons for a negative appreciable effect on competition are identified in the prenotification phase, the transaction should be treated under the simplified procedure.

- Notwithstanding the above, DT suggests a clarification in point 5c concerning transactions without a horizontal overlap of the parties on the relevant markets or on any market that is upstream or downstream of the relevant product market. It should be clarified that these requirements are also met for founding a joint venture if the joint venture will be active in a product and geographic market in which only one parent company is active or in which there is only a vertical relationship with one parent company, while all other undertakings involved are not active on the same, upstream or downstream market (see case M.10548 – Telekom Deutschland /IFM Investors /JV).

The Commission's proposals for defining cases qualifying for a simplified procedure as well as cases in which a simplified procedure cannot be applied based on the proposed safeguard and exclusion clauses, are largely based on complex criteria which require a comprehensive investigation of the facts (e.g., on the definition of the relevant market or the existence of potential competition). In order to streamline the process and to avoid inefficiencies in the collection and assessment of the relevant facts, it is crucial that the criteria are limited to the core elements being absolutely necessary for a competitive assessment. This means in particular that the requirement for the notifying parties in point 14 to provide information “on all plausible alternative market definitions” and to provide “all the data and information relating to the definition of such markets” goes too far. Here again, the analysis should be limited to the core markets relevant to the transaction in order to avoid unnecessary burdens for the notifying parties.

The goal of streamlining and simplifying the merger control procedure can only be achieved if the necessary assessment of whether a transaction qualifies for the simplified procedure or whether an exclusion provision applies can only be achieved if this assessment can be made within a manageable period of time. The Commission’s notice should therefore define a strict time frame within which the Case Team has to decide whether a transaction may be treated in a simplified procedure. The underlying goal of simplifying and accelerating procedures would not be served if the Case Team would only decide after a burdensome and lengthy process that a transaction does not qualify for a simplified procedure or would even revert to the normal procedure after it already made a positive decision to pursue the simplified procedure.

Against this background, we also consider the flexibility clause and the option of the notifying parties to request a review under the simplified procedure to be a positive, but not yet sufficient proposal. The criteria proposed in point 8 and 9 are a step in the right direction. However, the

flexibility clause can only have a simplifying and accelerating effect on the procedure if a decision upon the parties' request is taken within a certain timeframe.

Moreover, DT considers the automatic reversion to the normal procedure in point 22 if a third party expresses "substantiated competition concerns" to be too far-reaching. A third party, which may be pursuing a considerable self-interest, should not have it in its own hands to force the notifying parties to incur considerable expense and to significantly delay a transaction that does not raise competition concerns. It should therefore be clarified that the Commission will only revert to the normal process if a thorough assessment of the presented competition confirmed the alleged concerns.

The limited applicability of the simplified procedure rules on changes from joint to sole control are not convincing. According to point 20, a closer investigation may be necessary if a former joint venture is integrated into the group of companies of the company exercising sole control in the future and where this "removes a degree of independence" of the joint venture. However, the loss of "independence" and the possible integration of a then consolidated company into the group of the solely controlling shareholder would be inherent to the acquisition of sole control by the shareholder. This exclusion rule should therefore be deleted. The same applies to a reversion to the normal procedure provided for in point 21 if the prior acquisition of joint control has not been examined either by the Commission or by the competent competition authorities of the Member States. In DT's view a lack of competence of the Commission or a national competition authority is no suitable indicator for any negative competitive effect of a transaction.

DT welcomes the simplification of the short form CO, including the switch to a multiple-choice form. However, DT urgently suggests the inclusion of optional input fields for free text and explanations in order to enable a better assessment of open and evaluation-dependent information. We therefore believe that a multiple-choice procedure is not an adequate tool for all possible cases. This applies in particular to the assessment of the full functionality of joint ventures, the required information to apply the flexibility clause as well as the clauses on safeguards and exclusions. At the same time, this does not expose companies to an unnecessary risk of possible incomplete/incorrect information.