

ETNO additional comments to the consultation of the European Commission on “Evaluation of procedural and jurisdictional aspects of EU merger control”

In addition to the responses provided in the questionnaire, ETNO would like to submit the following comments on merger control.

1) Procedural issues

In general, we still see room for further simplification with regard to the pre-notification phase, RFIs and document production in order to reduce the burden on companies, especially in non-problematic cases.

a) Pre-notification

The pre-notification process can be helpful to structure the EU merger review process more efficiently in very complex cases, especially given the tight time limits in Phase 1 of the process. Nonetheless, the duration of the process and the amount of information requested could be better focused.

Improvements could be made with regard to the duration of the pre-notification process to make sure that it is not abused to effectively double the time limits imposed by the EU merger control regime. This can be done in particular by focusing on the critical issues/markets and avoiding overly voluminous data requests.

b) RFIs

As notifying parties: some RFIs could be considered disproportionate in scope, timing and/or extension. In particular:

- Some RFIs ask for a huge amount of documents requiring even the instruction, by the parties, of forensic experts helping to manage the collection procedure. It could be illustrative to mention that, in some cases, the first search of internal documents required by the Commission (a usual RFI at the beginning of the cases) has reached more than 500.000 documents. This could be considered disproportionate.

- The time period for some RFIs is so long –asking for information of even 5 years before – that the data obtained are not meaningful. Sometimes it is not possible, or very difficult and costly, to provide a complete reply.
- Not all the information required is relevant for the merger review as it goes beyond the object of the investigation. Some documents required also contain information not related to the object of the investigation which is sometimes highly sensitive and confidential.

As third parties: When a company is asked as third party, the company does not have a team of employees devoted to the project; instead, colleagues from different units normally need to leave their day-to-day work to deal with the request. The deadlines are sometimes very short and the extension of the questions very long. If a company has to check with colleagues from different countries it is even more difficult and time-consuming because it then needs to consolidate a group answer.

Moreover, there are questionnaires not closely related to a company's activity. In such case, one needs to conduct a previous investigation about the operation, markets affected, etc. in order to understand all possible implications for the company. Sometimes these implications are not really obvious and it usually happens that the less obvious the implications are, the more work is to be developed. Sometimes, there are questions which do not really correspond to the company to answer.

Therefore, we would appreciate that the Commission would follow a more flexible approach, asking the companies only to answer questions on which they have knowledge, or which they are genuinely concerned with and/or they can really contribute to the Commission analysis. This approach would provide more meaningful contributions for the Commission and its analysis.

Sometimes it is difficult to provide the information within the format, methodology, splitting, extension that the Commission requires. Sometimes this is so because the company has the information in its systems under other format, splitting, etc. The time and efforts required for turning the information into the formatting requested by the Commission are really disproportionate compared to the result. In many occasions we are convinced that the Commission could obtain better conclusions with the data provided by the company in their original format.

Under the same perspective, RFIs should also be limited to the critical points and avoid excessive data requests on each and every market potentially involved. There should be prior engagement with the notifying parties to ensure the availability of data in general and the format, amount and timeframe within which information can be delivered.

The time limits for answering RFIs set by the Commission in general are very challenging and hard to meet without extraordinary effort from the business side. Even though the Commission will be willing to give short extension in most of the cases, this will not really alleviate the burden. It would be helpful if the Commission could more closely align with the notifying parties to define which data is absolutely necessary and in which format certain data is readily available.

c) Timing of different phases

The split of time among the different parts of the procedure, in complex Phase 2 cases, does not make much sense. The time between the notification and the remedies negotiations is very long while the time between the remedies negotiations and the end of the procedure is very short.

Therefore, the time devoted to analyse the remedies is too short and no meaningful economic analysis can be developed. It is quite astounding that, in such long cases, there is a long time devoted to analyse the concerns and more specifically the scenario of the merger without remedies (from an economic and legal point of view: notification, 6.1.c) decision, SO, etc.), while there is a very short period of time to analyse the scenario of the transaction with the remedies.

Indeed, we think there is not enough time to develop a proper economic analysis of the scenario of the merger to proceed with the proposed remedies. It would be really useful to have time for a proper analysis of this last scenario, which in complex cases is the most likely outcome; it would also avoid overly political decisions.

Therefore, we propose a more equilibrated split of times between these two parts; if necessary, the 6.1.c) decision in cases where clear concerns are raised could be eliminated and substituted directly by the SO, leaving then more time for the discussion about remedies and for the economic analysis of the scenario of the merger with remedies.

In the same spirit, a clear split in time between the reply to the SO and the remedies offer would be preferable; having to argue against the SO's concerns at the same time that remedies to solve such concerns are being offered does not seem to make sense.

Finally, regarding the timing of procedures, the duration of a complete clearance procedure is excessive if we consider that the companies involved are meanwhile in an uncertain situation (more than one year in complex cases), which makes them lose momentum, thereby harming the effective competition in the markets.

d) Case-team organization

The internal organization of DG COMP's case teams sometimes does not help to have an efficient procedure. Case teams in complex Phase 2 cases are very big, with 20 people or more, and sometimes there is not a clear leadership establishing priorities and assessing the relevance of each issue.

This impairs the good development of the procedure because each member of the case team is devoted to find the concerns related to the part of the transaction assigned to him/her (for example, a member dealing only with impact on retailers). During the meetings each member of the case team has his/her slot of time to explain that small part, so several conversations develop one after the other without a proper prioritization of concerns. We consider that a stronger role of the case-handler, being the speaker/interlocutor of the Commission, prioritizing concerns and leading meaningful conversations/negotiations would really improve the procedure.

e) Chief Economist Team Role

The role of the Chief Economist Team further increases the mentioned effects because it tends to become a second case team which tries to also find more economic concerns instead of developing an objective analysis on the economic (negative but also positive) effects of the transaction.

f) Case team background and approach

The Commission should be more oriented towards how companies work, how they are organized, etc. Sometimes the approach is extremely theoretical, without taking into consideration the nature and reality of companies' incentives and purposes.

2) Substantive issues

Following ETNO members' experience in the last merger cases they have been involved –mainly complex Phase 2 cases – there are several aspects of the substantive assessment which could be improved, as follows:

- The Commission's analysis is just focused on price effects, but other non-price factors should be considered. For instance, investments, which are very relevant in many industries such as telecoms; or quality, privacy, data-related aspects, which have a significant impact in the digital environment.
- The Commission's analysis is excessively short-term when dealing with industries where investment cycles are long-term. The Commission usually considers scenarios in 2-3 year time when analysing transaction's effects. When dealing with investment cycles of 5-10 years it is difficult that investments play a role in Commission's analysis, which then remains incomplete.
- The so-called "gap cases" – those cases where no dominant position is created but a SLC is identified - are increasing due to an excessively broad application by the Commission. In particular, the concepts of "Important Competitive Force" and "close competitor" have been used by the Commission in a too generous manner:
 - o An ICF cannot be considered if it is not sustainable in the market, and if it is not a viable competitor due to its long-lasting losses. Some feasibility should be added to the concept. Therefore, we propose that a higher standard of proof should be required to the Commission to appreciate the existence of an ICF.
 - o As for the "close competitors", it is frustrating to see how the methodology to demonstrate that the parties in the transaction are close competitors change from one case to another for the Commission to be able to reach the same conclusion every-time.

- The efficiencies have become a theoretical figure not to be applied in reality due to the excessively high standard of proof required by the Commission to appreciate its existence. When analyzing efficiencies, the Commission should take a more pragmatic approach. Moreover, dynamic efficiencies should also be considered.
- The coordination between DG COMP and other DGs should also be improved as the Commission, when solving merger cases, should also take into consideration general principles of the Treaty and other EU policies. A more effective inter-services consultation process, where other DGs are able to really participate and give comments, appears necessary to that end.

About ETNO

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.