GSMA Response to the EU Commission Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control

ADDITIONAL STATEMENT

In general, the GSMA still sees some room for further simplification with regard to the pre-notification phase, Requests For Information and document production in order to reduce the burden of merger control notifications on companies, especially in unproblematic cases.

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

Improvements could be made on 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 excessive voluminous data requests.

In this light also the questions in an RFI should 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 during which data 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 form 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 be more closely aligned with the notifying parties to define which data is absolutely necessary and in which format certain data is readily available.

Receiving RFIs as third party to an EU merger control review can be just as burdensome as being a notifying party, but more of a challenge since in general the company will not have a team of employees devoted to the project. In order to reduce the burden, information requests could be more limited in scope, but also more flexible with the format and methodology of the information that the Commission requires.

Finally, the GSMA welcomes the current consultation, which shows that the changing realities of the digital ecosystem are testing the current rules and approaches, and require adjustments to ensure the EC Merge Regulation remain an effective tool to promote open, competitive markets, especially in the digital ecosystem.

In parallel to this consultation, the GSMA would like to encourage the European Commission to consider an in-depth review of its approach to assessing mergers and, in particular, mergers in the mobile sector.

While the fundamental principles of merger control are sound, and each case is unique, accepted practices in relation to mergers need to evolve to embrace new market realities. Because of the GSMA's focus, we feel compelled to point out that the European Commission's current approach to mobile mergers focuses mainly on expected price effects, while efficiency gains or the impact on investment do not receive the same attention.

When assessing mobile mergers, policymakers should consider the full range of static and dynamic benefits (including wider societal benefits) that can arise from mergers, including price effects, innovation, the use of spectrum and investments over both the short and longer term. The EC should also consider placing greater emphasis on how mergers may change an operator's ability to invest. Growing demand for data services requiring ever increasing bandwidth means constant investment in new capacity and technology is needed. The current (blanket) short-term approach, focusing on the expected effects of mergers over a 2-3 years period is not suitable for sectors and industries where investments have longer-term periods of amortization, such as the mobile industries (where the cycles are more in the order of 5 to 10 years).

Mergers can accelerate the transition between technology cycles in the mobile industry (technology cycles are responsible for significant reductions in unit prices), leading to improvements in quality and driving service innovation.

Adjustment to the current approach could include using different techniques, including quantitative ones, to measure dynamic efficiencies, as well as setting out explicit public interest tests alongside the existing competition tests to allow mergers that can generate significant societal benefits to go through. Examples of alternative approaches have been recently reviewed in the GSMA's study "Resetting Competition Policy Frameworks", produced for the GSMA by the economic advisory experts CEG. The report is publicly available and can be found here.

When it comes to comparing the performance of different market structures, there's no robust and consistent evidence to show that markets with more operators outperform markets with a more concentrated structure. On the other hand, emerging evidence shows that 4 to 3 mergers can have a positive impact on investments, which in turn is a determinant of the quality of the service and network performance.

It is very important, therefore, that any assessment takes into account the dynamic benefits on investments and quality of service when reviewing proposed mobile mergers.