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Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with * are mandatory.

Evaluation of procedural and jurisdictional aspects of EU Merger Control

I. Introduction

Preliminary Remark: The following questionnaire has been drafted by the Services of the Directorate General for Competition in order to collect views on some procedural and jurisdictional aspects of EU merger control. The questionnaire does not necessarily reflect the views of the European Commission and does not prejudge its future decisions, if any, on further action on these aspects.

A. Purpose of the consultation

The purpose of the present consultation is to gather information on particular aspects of the performance of EU merger control. This consultation invites citizens, businesses, associations, public authorities and other stakeholders to provide feedback on their experience/knowledge of issues under scrutiny and what action, if any, should be taken in this regard.

Input from stakeholders will be used in a Staff Working Document to evaluate procedural and jurisdictional aspects of EU merger control. The Commission will carefully analyse the outcome of this consultation and previous consultations as well as the findings of the evaluation as a whole before deciding whether it should take further action.

B. Background

Merger control constitutes one of the instruments of EU competition law. Its main objective is to ensure that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations.

In recent years (particularly in 2009 and from 2013 onwards), the European Commission has taken stock and assessed the functioning of different aspects of EU merger control and identified possible areas for refinement, improvement and simplification.

In particular, the European Commission adopted in 2014 the White Paper "Towards More Effective EU Merger Control (the "White Paper", COM(2014) 449 final). The White Paper confirmed that EU merger control works well and that no fundamental overhaul of the system is needed, but envisaged specific amendments in order to make it more effective.

The key proposals of the White Paper were the following:

1. Introducing a light and tailor-made review of acquisitions of non-controlling minority shareholdings which could harm competition;
2. Making case referrals between Member States and the Commission more business-friendly and effective;
3. Making procedures simpler for certain categories of mergers that normally do not raise competition concerns; and
4. Fostering coherence and convergence between Member States with a view to enhance cooperation and to avoid divergent decisions in parallel merger reviews conducted by the competition authorities of several Member States.

Based on the White Paper, the Commission carried out a public consultation. Respondents mostly agreed that the EU merger control system overall works well but welcomed the White Paper's proposals in relation to the streamlining of the case referral system and simplification.

Recently, a debate has emerged among stakeholders and competition experts on a new topic, namely the effectiveness of the current turnover-based jurisdictional thresholds of EU merger control. These jurisdictional thresholds are set out in Article 1 of the Merger Regulation and determine which transactions have a Union dimension and are reviewed, in principle, by the European Commission.

Some stakeholders have raised the question of whether the turnover-based jurisdictional thresholds allow capturing, under EU merger control rules, all transactions which can potentially have an impact in the internal market. This question may be particularly significant for transactions in the digital economy, but also in other industry sectors, such as pharmaceuticals, where acquisition targets may not have always generated substantial turnover yet, but nevertheless are highly valued and constitute, or are likely to become, an important competitive force in the relevant market(s).

Moreover, recent experience in enforcing the EU merger control rules has shown that certain technical aspects of the procedural and investigative framework for the assessment of mergers may merit further evaluation. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.

Scope of the Evaluation

It therefore appears opportune to build upon the work undertaken so far in the context of the White Paper and prior consultations and complement it by evaluating the following procedural and jurisdictional aspects of EU merger control in more detail:

1. Simplification: the treatment of certain categories of cases that do not generally raise competitive concerns, as set out in the Merger Regulation,[1] the Implementing Regulation,[2] and the Commission Notice on simplified procedure;[3]
2. Functioning of the turnover-based jurisdictional thresholds set out in the Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover;
3. Functioning of the case referral mechanisms set out in the Merger Regulation, the Implementing Regulation and the Commission Notice on case referral;
4. Certain technical aspects of the procedural and investigative framework for the assessment of mergers.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

[2] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004, OJ L 133, 30.04.2004, p. 1, as amended.

[3] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, OJ C 366, 14 December 2013, p.5 and its Corrigendum to the Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 011, 15 January 2014, p 6 (the "Commission Notice on simplified procedure).

II. Practical Guide to fill in the questionnaire

Please respond to all questions that you have knowledge about. Feel free to skip those questions that you cannot answer or are unsure about.

Replying to the questions:

- Questions with a radio-button are "single choice": only one option can be chosen.
- Question with a check-box are "multiple choice": several answers can be chosen.
- Questions showing an empty box are free text questions.
- Depending on your answer to a given question, some additional questions may appear automatically asking you to provide further information. This, for example, is the case when the reply "Other" is chosen.
- Please use only the "Previous" and "Next" buttons to navigate through the questionnaire (do not use the backwards or forward button of the browser).

Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft").
- If you chose "Save as Draft", the system will:

  - show you a message indicating that your draft reply has been saved,
  - give you the link that you will have to use in order to continue replying at a later stage,
  - give you the possibility to send you the link by email (we encourage you to use this option).

- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

Submitting your final reply

- The submission of the final reply can only be done by clicking the "Submit" button that you will find in the last section "Conclusion and Submission".
- Once you submit your reply, the system will show you a message indicating the case identification number of your reply ("Case Id"). Please keep this Case Id. number as it could be necessary in order to identify your reply in case you want to modify it at a later stage.
- You will also be given the opportunity to either print or download your reply for your own records.

III. About you

Please provide your contact details below:

*1. Are you replying as:

- ○ a private individual
- ◉ an organisation or a company
- ○ a public authority or an international organisation

*The name of your organisation/ company/ public authority/ international organisation

Telefonica SA

*Your full name

Carlos Rodriguez Cocina

*Email address

carlos.rcocina@telefonica.com

* Organisation represented

1.1 Please indicate which type of organisation or company it is.

- ○ Academic institution
- ○ Non-governmental organisation
- ◉ Company/SME/micro-enterprise/sole trader
- ○ Think tank
- ○ Media
- ○ Consumer organisation
- ○ Industry association
- ○ Consultancy/law firm
- ○ Trade union

* 1.1.1 Is it a multinational enterprise (groups with establishments in more than one country)?

- ◉ YES
- ○ NO

*1.1.2 How many employees does your company have?

- ○ 1-9
- ○ 10-49
- ○ 50-249
- ○ 250-499
- ◉ 500 or more

*1.2 Please provide a brief description of the activities of your organisation.

Teelcommunications operator

*1.3 Where are you based?

- ○ Austria
- ○ Belgium
- ○ Bulgaria
- ○ Croatia
- ○ Cyprus
- ○ Czech Republic
- ○ Denmark
- ○ Estonia
- ○ Finland
- ○ France
- ○ Germany
- ○ Greece
- ○ Hungary
- ○ Iceland
- ○ Ireland
- ○ Italy
- ○ Latvia
- ○ Liechtenstein
- ○ Lithuania
- ○ Luxemburg
- ○ Malta
- ○ Netherlands
- ○ Norway
- ○ Poland
- ○ Portugal
- ○ Romania
- ○ Slovak Republic
- ○ Slovenia
- ◉ Spain
- ○ Sweden
- ○ United Kingdom
- ○ Other

*Please specify.

Head Quarters in Madrid, representation office in Brussels

2. Transparency Register (Register now)

In the interests of transparency, the Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent by registering in the Transparency Register and subscribing to its Code of Conduct. If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704; Better Regulation guidelines, see SWD(2015)111 final and Communication on ETI Follow-up, see COM (2007) 127).

If you are a registered organisation, please indicate below your Register ID number when replying to the online questionnaire. Your contribution will then be considered as representative of the views of your organisation.

If your organisation is not registered, you have the opportunity to register now, please click on the link in the title. Then you can return to this page, continue replying to the questionnaire and submit your contribution as a registered organisation.

It is important to read the specific privacy statement available on the public consultation website for information on how your personal data and contribution will be used.

For registered organisations: indicate your Register ID number here:

52431421-12

* 3.Please choose from one of the following options on the use of your contribution:

- (●) My/our contribution can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).
- ( ) My/our contribution can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that this is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication. I am aware that I am solely responsible if my answer reveals accidentally my identity.
- ( ) My/our contribution cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

*4. Finally, if required, can the Commission services contact you for further details on the information you have submitted?

- (●) YES
- ( ) NO

IV. Questionnaire

IV.1. Simplification

In December 2013, the Commission adopted a package of measures aimed at simplifying procedures to the fullest extent possible without amending the Merger Regulation itself (the so called "Simplification Package"). In particular, the Simplification Package:

- Widened the scope of application of the so-called simplified procedure for non-problematic cases;
- Streamlined and simplified the forms for notifying mergers to the Commission.

Through the Simplification Package, which entered into force on 1 January 2014, the number of cases dealt with under the simplified procedure has increased by 10 percentage points from an average of 59% over the period 2004-2013 to around 69% of all notified transactions over the period January 2014 to September 2016).

According to the Commission Notice on simplified procedure ("the Notice"), the Commission in principle applies the simplified procedure to each of the following categories of concentrations:

i. Transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see point 5 (a) of the Notice);

ii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (see point 5 (b) of the Notice);

iii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20 %; (ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 % (see point 5 (c) of the Notice);

iv. Transactions where a party is to acquire sole control of an undertaking over which it already has joint control (see point 5 (d) of the Notice)

v. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 (see point 6 of the Notice).

The Notice sets out a number of safeguards and exclusions from the simplified procedure (see notably points 8 to 21). The Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure.

The 2014 White Paper made further-reaching proposals for amendments to the Merger Regulation that would make procedures simpler:

- This could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets;

- Moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses.

These proposals are still being assessed. Your response to the following questions will contribute to that assessment.

1. The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under a simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.

(1 = "did not create much added value"; 7 = "created much added value"):

	1	2	3	4	5	6	7
Your rating	○	○	○	◉	○	○	○

Please explain.

Since the launched of the 2013 Simplification Package, Telefonica has only dealt with few cases which matched the necessary requirements to fall under the Simplified Procedure. Due to this small experience, Telefonica can hardly contribute to identify benefits or disadvantages about the Simplified Procedure.
However, Telefonica believes that making a thorough competitive analysis in non-problematic cases carries an excessive workload for both companies and the European Commission. Extending procedures unnecessarily may impact negatively on the companies and markets, while it also impedes the Commission to focus on other mergers which do require further analysis. Hence, Telefonica celebrates the aim of the Simple Procedure of contributing to remove administrative burdens and reduce costs and resources. In that sense, the one stop shop review at EU level for concentrations falling under the Simplified Procedure can create added value for businesses and consumers.
Moreover, Telefonica believes that any merger should be eligible for being notified under the Simple Procedure if, after pre-notification contacts with the Commission, it can be concluded that the transaction does not raise competitive concerns. This possibility would contribute to remove administrative burdens and to reduce costs in those non-problematic mergers.

Further simplification of the treatment of certain categories of non-problematic cases

2. In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

No comments

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

No comments

(iii) Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

No comments

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

No comments

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase:

- ( ) YES
- (●) NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

No comments

(ii) Post notification:

- ( ) YES
- (●) NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

No comments

4. Have you dealt with or otherwise been involved in any merger cases which fell under the relevant categories of cases listed in question 2 and was thus potentially eligible for notification under the simplified procedure but where, from the outset, the parties decided to follow the normal review procedure?

- ( ) YES
- (●) NO

Please explain under which category of simplified cases it fell and the reasons why the case was notified under the normal procedure.

No comments

5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

Telefónica does not have experiences of a particular type of cases which should fall under the Simplified Procedure, but we consider that a general rule could be inserted in the current regime to gather any merger case which could be subject to Simplified Procedure. This rule could state that any merger should be eligible for being notified under the Simple Procedure if, after pre-notification contacts with the Commission, it can be concluded that the transaction does not raise competitive concerns. In that way, administrative burdens and costs could also be reduced in non-problematic cases not foreseen nowadays.

6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

- ( ) YES
- ( ) NO
- (●) OTHER

Please explain your answer with respect to each of the categories of cases listed in question 2 above.

- Transactions falling under point 5a of the Notice:

- ( ) YES
- (●) NO

Please explain.

Because in these cases no notification should be required. It is not proportionate to have to notify transactions which do not have activities within the EU. It is very doubtful that any harmful effect could arise or that it cannot be tackled by article 101.

- Transactions falling under point 5b of the Notice:

- ○ YES
- ◉ NO

Please explain.

Because in these cases no notification should be required. It is not proportionate to have to notify transactions which do not generate horizontal or vertical effects. A modification could be included to also require that not conglomerate effects are foreseen; it would be enough to include the underlined words in the following sentence: “or in a product market which is upstream or downstream, or a neighbouring market, from a product market in which any other party to the concentration is engaged“. It is very doubtful that any harmful effect could arise or that it cannot be tackle by article 101.

- Transactions falling under point 5c or point 6 of the Notice:

- ◉ YES
- ○ NO

Please explain.

No comments

- Transactions falling under point 5d of the Notice:

- ◉ YES
- ○ NO

Please explain.

No comments

7. To which extent have such costs (in terms of workload and resources spent) been reduced by the 2013 Simplification Package? Please explain.

As exposed above, since the launch of the 2013 Simplification Package Telefonica has only dealt with few cases which matched the necessary requirements to fall under the Simplified Procedure. Due to this small experience, Telefonica can hardly contribute to assess the extent to which the costs have been reduced.

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

- (●) YES
- ( ) NO
- ( ) OTHER

If you replied yes or other, do you consider that there is scope for further simplification by, in particular:

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

- (●) YES
- ( ) NO

Please explain.

At least cases falling under point 5a or 5b should be exempted because, as stated before, their effects over the market would be inexistent or negligible. Moreover, a general clause should be introduced allowing the Commission to exempt any case falling under any of the categories, when it is obvious that no harmful effects on competition are foreseen.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

- (●) YES
- ( ) NO

Please explain.

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If the cases falling under 5a and 5b are not exempted or a general clause to
allow the Commission to exempt non-problematic cases is not included,
introducing at least lighter information requirements could be an advance.
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8.3 Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

- YES
- (●) NO

Please explain.

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Self-assessment systems provide for a lack of legal certainty which is not
desirable.
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8.4 Other

- YES
- (●) NO

Please explain.

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No comments
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When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects. Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.

In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

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No comments
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Further simplification of the treatment of extra-EEA joint ventures

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures") can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

In our experience, the notification of this kind of mergers do not contribute to protecting competition and consumers in Europe because the merger-specific effects take place anywhere outside the EU, but not in the EU. If any particular clause or ancillary agreement which could be part of these transactions could have any effect in the EU, it could be tackled by article 101 (as it has been the case until now even having the obligation to notify these cases).

10. Has this one stop shop review at EU level of extra-EEA joint ventures created added value for businesses and consumers?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

Please see answer to Q9.

11. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying extra-EEA joint ventures are adequate and proportionate in order to ensure an appropriate review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

Please see answer to Q9.

12. To which extent have such costs been reduced by the 2013 Simplification Package? Please explain.

```
As exposed above, since the launch of the 2013 Simplification Package
Telefonica has only dealt with few cases which matched the necessary
requirements to fall under the Simplified Procedure. Due to this small
experience, Telefonica can hardly contribute to assess the extent to which
the costs have been reduced.
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13.On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

- ○ The treatment of extra-EEA joint ventures is sufficiently simplified.
- ◉ There is scope for further simplification.

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

- ◉ YES
- ○ NO

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address / dispel such risks.

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No comments
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(ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?

- ○ YES
- ◉ NO

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

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Only the exemption from notification could be suitable to further simplify.
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(iii) Other.

Please explain.

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No comments
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IV.2. Jurisdictional thresholds

The Merger Regulation only applies to concentrations of a Union dimension, which are those where the undertakings concerned meet the different relevant turnover thresholds set out in Article 1 of the Merger Regulation.

Article 1 of the Merger Regulation

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Union dimension as defined in this Article.

2. A concentration has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

4. […]

5. […]

Recently, a debate has emerged on the effectiveness of these turnover-based jurisdictional thresholds, specifically on whether they allow capturing all transactions which can potentially have an impact on the internal market. This may be particularly significant in the digital economy, where services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues. With significant numbers of users, these services may play a competitive role. Moreover, relevant business models may involve collecting and analysing large inventories of data that do not yet generate significant turnover (at least in an initial period). Therefore, players in the digital economy may have considerable actual or potential market impact that may be reflected in high acquisition values, although they may not yet generate any or only little turnover. Acquisitions of such companies with no substantial turnover are likely not captured under the current turnover-based thresholds triggering a notification under the EU Merger Regulation, even in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has a considerable market potential for other reasons. It has been suggested to complement the existing turnover-based jurisdictional thresholds of the EU Merger Regulation by additional notification requirements based on alternative criteria, such as the transaction value. The perceived legal gap may not only concern the digital industry, but also other industry sectors, such as the pharmaceutical industry. There have been indeed a number of highly valued acquisitions, by major pharmaceutical companies, of small biotechnology companies, which predominantly research and develop new treatments that may have high commercial potential, and do not yet generate any or only little turnover.

Moreover, the question of whether there is a legal gap needs to be assessed in the context of the case referral system in EU merger control. Even in instances where a merger does not have Union dimension based on the turnover of the merging parties, the Commission may obtain jurisdiction through a referral. According to Article 4(5) of the Merger Regulation, the parties to a merger may ask for referral of a case from the level of Member States to the Commission before it is notified, if the case is notifiable under the national merger control laws in at least three Member States and if the additional criteria set out in Article 4 (5) of the Merger Regulation are met. Also, according to Article 22 of the Merger Regulation, national competition authorities may request the referral of a case to the Commission after notification, if the specific conditions of Article 22 of the Merger Regulation are met.

This section of the questionnaire gathers your views on the existence of a possible enforcement gap of EU merger control, and what would be its possible dimension and relevance. Moreover, this section also requests your views on possible policy responses, if such were to be warranted.

14. In your experience, have you encountered competitively significant transactions **in the digital economy in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] A well-known example of these transactions is the acquisition in 2014 of WhatsApp by Facebook, which fell outside the thresholds of Article 1 of the Merger Regulation but was ultimately referred to the Commission pursuant to Article 4(5) thereof. Information on merger cases reviewed by the European Commission is accessible via the search function on DG COMP's website at http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2.

- (●) YES
- ( ) NO
- ( ) OTHER

- **If yes**, please describe the characteristics of such transactions.

Telefonica considers that there have been effectively many transactions by the largest players on Internet which could have had a substantial impact in the some of the global markets within the digital economy and, therefore, also affecting those markets at EU level. Most of them were not analyzed by the Commission for not to falling under the current turnover-based thresholds set out in the Merger Regulation.
Thus, Telefonica notes that biggest Internet players (such as Google, Facebook or Amazon) have been acquiring through the last 15 years many undertakings. Some of them could be small businesses whose acquisition may not cause a worrying market concentration but, with the mass acquisition of similar companies over the years, there could have caused some harming effects. Moreover, by purchasing direct competitors or threatens in neighbouring markets, those companies could have removed competition creating an undesirable pre-emptive effect. This, in turn, could prevent innovation as incentives of start-ups and new companies to innovate could be destroyed.

- **If yes**, please give concrete examples.

Focusing on the three players above mentioned, Google, Facebook and Amazon, they have closed more than 320 transactions in the last 15 years. Most of these acquisitions were direct competitors or companies which started to have a significant position in neighbouring markets.

An overview of these transactions offers the following highlights:

Google

Since 2001 until now, Google, through its parent company Alphabet Inc., has bought more than 200 undertakings all over the world, among them: 22 undertaking related to online advertising market; 15 undertakings which develop Maps and GPS navigation technology to integrate them in Google Maps (for instance, the popular App Waze); 16 undertakings related to social networking services to integrate them in Google +; the purchase of Youtube and other 11 undertakings more to develop the video-sharing platform; 29 undertakings to develop its Android Operating System; 15 undertakings related to web search engine and used mainly to Google Shopping; 10 undertaking which work in the development of artificial intelligence and robotics, among others.

Of the 202 acquisitions made by Google, only 2 of them were subjected of the European Commission' scrutiny: Doubleclick in 2008, which was cleared in Phase II without Statement of Objections; and Motorola Mobility in 2012, cleared in Phase I without any concerns by the EC.

As we can see, through these acquisitions, Google has become a strong player, probably the strongest player in the digital market, with scarce scrutiny by the competition authorities. Considering the preponderant position of Google in some of these markets and the strong interlinks among them, all contributing to reinforce Google's position in data-related markets, there could maybe be room for some further scrutiny.

Facebook
Since its foundation in 2005, Facebook has acquired more than 60 undertakings, several of them to develop and complement the social networking service with certain functionalities but also to remove many of its direct competitors and thus concentrating a higher power in the social media market.

At least 11 of the undertakings acquired were direct competitors of Facebook such as Beluga, a group messaging; WhatsApp, a mobile instant messaging; Instagram, a mobile photo-sharing and social networking service; and Lightbox.com, a photo blogging platform which was fully closed just one month after its purchase by Facebook.

Only WhatsApp's acquisition was reviewed by the European Commission, which was cleared in Phase I without taking into consideration the huge amount of personal data that Facebook was grabbing and the likelihood to share it for advertising purposes. This merger was cleared without raising any concerns nor imposing the correspondent remedies. The sole statements of Facebook that had no plans to introduce targeted advertising on WhatsApp or to integrate both services, as well as the promise not to change WhatsApp's privacy policy (such as it is actually doing just 2 years after the clearance) was enough to get a clearance decision in phase 1. At the moment of the transaction, Facebook had 1.3 bn consumers while WhatsApp counted with around 600 million around the world.

Hence, Facebook has become the largest social networking service, owning an enormous personal data-base whereby obtains a good financial return through advertising and being hardly replicable to its direct competitors (those who have not been bought yet).

Amazon
Since 1998 until nowadays, Amazon has acquired around 60 undertakings, the vast majority were Amazon's direct competitors in the e-commerce market in the different countries which operates. All of them were integrated in Amazon's online store after their acquisition and became Amazon's brand in the country which was already operating. These are the case, for instance, of Bookpages.co.uk in UK, Telebook in Germany, and recently Flipkart in India.

These examples should not provide for a list of specific transactions which should have gone through a notification process but they are rather the evidence that there is an unsolved issue in the digital ecosystem with regards the merger control review. In fact, the business model based on non-priced services and the global scope of most digital companies make current merger control regimes not suitable to tackle the strong concentration evolution and the pre-emptive effects of these markets (exacerbated even more by the intense network effects of these multi-sided businesses). Therefore, Telefonica strongly supports a review of the current EU Merger Control regime to be able to provide an answer to these new challenges of the digital economy.

- **If yes**, please estimate how many of those transactions take place per year.

Just taking into account the transactions of those companies in the last years (2013-today):
- Google has acquired 80 companies, of which 18 were bought in 2013, 34 in 2014, 15 in 2015, and 14 in 2016.
- Facebook has acquired 20 companies, of which 7 were bought in 2013, 7 in 2014; 5 in 2015 and 2 in 2016.
- Amazon has acquired 8 companies, of which 3 were bought in 2013, 3 in 2014 and 1 both in 2015 and 2016.

Altogether make a total of 108 transactions, of which only Facebook/WhatsApp was analyzed by the Commission.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

We do not have enough information to provide for such analysis, but there are some facts to be considered. If we take Facebook/WhatsApp as example, it was scrutinized by the Commission because it exceeded thresholds in the UK, Cyprus and Spain. Nowadays, with the merger control regime in Cyprus under review and the UK under the Brexit process, we can say that it is at least doubtful that in the near future the referral procedures could be a mechanism for the Commission to obtain jurisdiction over digital cases.

15. In your experience, have you encountered competitively significant transactions **in the pharmaceutical industry in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.

- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

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Not applicable. Not in this sector.
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16. In your experience, have you encountered competitively significant transactions **in other industries than the digital and pharmaceutical sectors in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?
    - YES
    - NO
    - OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

17. In your experience and in light of your responses to the previous questions (14 to 16), are the possible shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation (in terms of possibly not capturing all competitively significant transactions having a cross-border effect in the EEA) sufficiently addressed by the current case referral system (including the pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation and the post-notification referral to the Commission under Article 22 of the Merger Regulation)?
    - YES
    - NO
    - OTHER

Please explain.

No. As explained above, nowadays, with the merger control regime in Cyprus under review and the UK under the Brexit process, we can say that it is at least doubtful that in the near future the referral procedures could be a mechanism for the Commission to obtain jurisdiction over digital cases. Moreover, being those cases usually related to global markets it does not make too much sense to obtain jurisdiction through referrals. All the contrary, and not existing a global competition authority to deal with those cases, the Commission should analyse the effects of those mergers over the EU.

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?
    - YES
    - NO
    - OTHER

- **If yes**, please also indicate which are, in your opinion, the complementary jurisdictional criteria whose absence may impair the above-mentioned goal. Please also take into account, in your reply, the Commission's objective of not imposing undue burdens on businesses.

As exposed above, the special features of the digital ecosystem are, among other, the existence of business models based on non-monetary transactions and multi-sided monetization. Therefore, turnover does not capture the competitive significance of some mergers.
During the last years, there have been many discussions about what could be the possible new thresholds to be included in the EU merger regime. There are some options, all of them with advantages and disadvantages.
Probably the most efficient one, in terms of easiness of application and because it can also tackle the “pharmaceutical gap“, is the transaction value. Nevertheless, it must be accepted that the acquisition of small companies (start-ups or companies purchased at a very early stage, when they are still a pipeline) could still not be captured by this new threshold.
Another possibility would be to focus on number of clients/users, which can be easy to apply once a methodology to measure the numbers is chosen. Disadvantages of this threshold would be that it does not serve for pipelines not having clients/users yet.

- **If no or other**, please explain.

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?
    - (●) YES
    - ( ) NO
    - ( ) OTHER

Please explain.

If the new threshold chosen is the value of transaction, and no other new threshold is adopted to avoid the gap explained in digital ecosystem, then we consider that its absence impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level.

20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

We have not gone through a thorough analysis to decide on a particular value, but a good point to initiate the analysis could be the benchmark offered by countries which already had this threshold or are in the process of introducing it, such as US or Germany.

21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

- [x] A general clause stipulating that concentrations which meet the deal size threshold are only notifiable if they are likely to produce a measurable impact within the EEA, complemented by specific explanatory guidance.
- [ ] Industry specific criteria to ensure a local nexus.
- [x] Other

Please explain your response and provide examples where appropriate.

Another solution could be including requirements based on the development of activities in the EU. In this sense, the criteria being introduced under German law, which requires the undertaking to be acquired to be active in Germany to a significant extent, could be an option.

22. If you replied yes to question 19, would you see a need for additional criteria limiting the scope of application of this deal size threshold in order to ensure a smooth and cost-effective system of EU merger control?

- ( ) YES
- ( ) NO
- (•) OTHER

Please explain your answer.

In principle we consider that having additional criteria limiting the scope of application of this deal size threshold could be useful in order to ensure a smooth and cost-effective system of EU Merger Control. However, we have not analysed in depth which of them could be preferable. In any case, the global scope of most of those digital mergers should be taken into consideration by not limiting excessively the scope through criteria based on EU turnover.

IV.3. Referrals

The division of competence between the Commission and the EU Member States is based on the application of the turnover thresholds set out in Article 1 of the Merger Regulation and includes three corrective mechanisms.

The first corrective mechanism is the so-called "two-thirds rule". Pursuant to this rule, notification under the Merger Regulation is not required if each of the parties concerned realises more than two thirds of its EU-wide turnover in one and the same Member State, even if the general thresholds under Articles 1(2) and 1(3) of the Merger Regulation are met. The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) of the Merger Regulation or to the Commission under Article 4(5) if certain conditions are fulfilled. The initiative for requesting such a referral prior to notification lies in the hands of the parties. However, pre-notification referrals are subject to approval by the Member States and the Commission under Article 4(4) and by the Member States under Article 4(5) of the Merger Regulation.

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assess mergers that fall below the thresholds of the Merger Regulation under certain conditions (Article 22 of the Merger Regulation). Conversely, a Member State may, in cases that have been notified under the Merger Regulation, request the transfer of competence to the national competition authorities under certain conditions (Article 9 of the Merger Regulation).

In relation to the current case referral mechanism foreseen by the Merger Regulation, the White Paper proposals aimed at making case referrals between Member States and the Commission more business-friendly and effective.

Those proposals essentially consist of:

1. Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;

2. Specific modifications concerning the post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulation, namely

- an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 of the Merger Regulation (currently the Commission only obtains jurisdiction in those Member States that join the referral request),
- and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request, and

3. The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

- YES
- (●) NO
- OTHER

Please explain.

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Even if the current referral system works reasonably, burden on businesses
could be further reduced as explained bellow.
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24. If you consider that the current system is not optimal, do you consider that the proposals made by the White Paper would contribute to better allocating merger cases to the more appropriate competition authority and/or reducing burden on businesses?

- YES
- NO
- (●) OTHER

Please explain.

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Telefónica considers that these two measures could be convenient in order to
reduce burden on businesses:
-        Abolishing the two steps procedure under Article 4(5) of the Merger
Regulation, and
-        The removal of the requirement under Article 4(4) of the Merger
Regulation pursuant to which parties have to assert that the transaction may
"significantly affect competition in a market" in order for a case to qualify
for a referral.

As for the other measures, we think that its effectiveness would depend on
each case. Therefore, we do not have a clear opinion on that.
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25. Do you consider that there is scope to make the referral system (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) even more business friendly and effective, beyond the White Paper's proposals?

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain.

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Reducing times and administrative burdens is always positive for the business
although we do not have specific proposals.
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IV.4. Technical aspects

The 2014 Commission Staff Working Document (2014 SWD) accompanying the White Paper identified additional technical aspects of the procedural and investigative framework for the assessment of mergers where experience has shown that improvement may be possible. The SWD included the following proposals:

- Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
- Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission’s power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation.
- Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.
- Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.
- Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.
- Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

We consider there is still scope to improve EU merger control system, as we explain in the following questions.
We agree, based in our own experience, with the following measures:
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
As for the others, we do not have a clear position.

27. Based on your experience, are there any other possible shortcomings of a technical nature in the current Merger Regulation? Do you have any suggestions to address the shortcomings you identified?

Based on Telefonica's experience in merger cases, we believe that there are still some proposals, from a procedural/technical perspective, for the improvement of the current regime which Telefónica would like to share with the Commission.

First of all, considering Requests for Information (RFI), we would like to distinguish between the two scenarios, when the company is a notifying party and when it is not.

1. RFIs received as notifying party:
A big part of the administrative burden associated to merger control procedures is related to RFIs, therefore we consider that an analysis of the adequacy and proportionality of them, should be carried out. From our experience, some RFIs could be considered disproportionate. Sometimes the scope is too broad or the considered time period too long. The extension can also be excessive in many RFIs. Telefónica would like to call Commission's attention on the several topics.

In many cases the amount of documents required by the European Commission through RFIs is excessive. Many times, there is a need to instruct forensic experts to help the companies to manage the collection procedure. This implies an enormous burden of work and also increases the costs that the companies assume to get the clearance by the EC. In the last mergers where Telefónica was involved the first petition of internal information required by the EC (an usual RFI at the beginning of the cases) has reached hundreds thousands of documents.

In addition to the massive amount of documents required by the Commission, we have found that sometimes not all information requested is relevant for the merger review and even exceeds the object of the investigation: on the one hand, there is information which does not add additional or specific data that contributes to make a thorough analysis of the operation; on the other hand, some documents required can also contain high sensitive and/or

confidential information for the business's company which is not related to the object of the information.

In relation to the period of time considered in the questionnaires, sometimes it is too long (more than 5 years ago in some requests), and in many cases the data obtained are not meaningful and/or even outdated. Due to the extensive information requested, sometimes it is impossible, or hard and expensive, to gather it.

2. RFIs received as a third party:

With regard these RFIs, the main problem is the relevance for the company. Telefonica founds that there are questionnaires which are not directly related to the company's activity so the company firstly need to understand what are the markets affected, possible concerns etc., and sometimes these implications are not really obvious. Furthermore there are sometimes specific questions which do not really correspond to the company to answer.

Therefore, a more flexible approach taken by the Commission would be welcome, letting the companies only answer questions about which the company has knowledge, or the company is genuinely concerned and/or it can really contribute to the Commission analysis. This approach would provide more meaningful contributions for the Commission.

A second problem would be that sometimes the company finds difficult to provide the information with the extension, format, splitting, and methodology, among others, required by the Commission. 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, Telefonica considers that in many cases, the Commission would obtain better conclusions about the information requested if it is maintained in its original format.

Finally, when Telefónica has been asked as third party, it has found the issue of not being able to assign a specific team of employees to the task of replying. Employees from different departments have to leave their day-to-day business to deal with the request within the period of time required, which sometimes is too short. Moreover, the work becomes harder for multinational companies which has to gather or check information with its subsidiaries based on different countries because it is important to give a consolidate answer of the whole company.

A last issue we would like to raise it is the interlocution with the Commission's case-team. Being these teams so big, there is a need for a more meaningful prioritization of concerns and for a more centralized interlocution between the case-team and the notifying parties. We are convinced that those changes would improve the effectiveness of the whole procedure.

28. One of the proposals contained in the 2014 SWD relates to the possibility of introducing additional flexibility regarding the investigation time limits. In this regard, have you experienced any particularly significant time constraints during a Phase 2 merger investigation, in particular in those cases where a Statement of Objections had been adopted (for example, for remedy discussions following the adoption of the Statement of Objections)?

- (●) YES
- ( ) NO
- ( ) OTHER

Please consider, inter alia, the time needed for the Commission to carry out its investigation and for the notifying parties to make legal and economic submissions, exercise their rights of defence and to propose and discuss commitments.

In Phase 2 merger investigations, from our experience, there are some improvements to be made in the management of time, especially with regards the different milestones across the procedure.

Firstly, it is true that there is usually a squeeze between the timing for answering the Statement of Objections and the discussion on remedies, which makes more complex for parties and the Commission to focus on each of them. Especially for the notifying parties, having to reply to the SO (stating obviously against the existence of the objections) at the same time that proposing remedies to those objections, is quite contradictory.

On the other hand, Telefonica considers that the split of time among different parts of the procedure does not make sense. In particular, Telefonica believes that the time between the remedies negotiations and the end of the procedure is very short, mainly in the period to analyse the remedies, where a meaningful economic analysis becomes impossible to develop due to the scarcity of time. In the long and complex cases in which Telefónica has been involved, there is a long time devoted to analyse the concerns and the supposed scenario of the merger without remedies but there is a very short period of time to analyse the possible scenario with the remedies applied. There is not enough time to develop a proper economic analysis of the eventual scenario of the merger with the proposed remedies.

For all of the above reasons, Telefonica thinks it would be useful to be reconsidered the time applied in the different periods of the procedure, giving more time for a proper analysis of the scenario with the application of the remedies proposed, which in complex cases is the most likely outcome. Thus, Telefonica proposes a more equilibrated split of times between these two parts. If it is necessary, the 6.1.c) decision in cases were clear concerns are identified, could be eliminated and substituted directly by the SO, leaving then more time for the discussion about the remedies and their economic impact. In the same way, it would be preferable a clear split in time between the reply to the SO and the remedies offer. It will also avoid having to argument against the SO’s concerns at the same time that offering the remedies to solve those concerns.

Finally, Telefonica believes that the duration of a complete clearance procedure is excessive if we consider that the companies involved are meanwhile in an uncertain situation, which makes them lose value and harms the effective competition in the markets which the companies operate.

29. In the light of your reply to question 28 above, do you consider that the current distinction between remedies presented before or after working day 55 since the opening of phase II proceedings, on which depends the extension of the procedure by 15 additional working days, is working well in practice?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain.

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Please see answer to Q28.
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V. Submission of additional information

Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. The maximal file size is 1MB. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

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/TELEF_NICA_Position_Paper__attachment_to_questionnaire_reply_final_version.doc

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