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3 June, 2022

European Commission
For the attention of Ms Julia Brockhoff
EU Merger Regulation Simplification Consultation

Sent by email only to: COMP-SIMPLIFICATION_IMPACT_ASSESSMENT@ec.europa.eu

Dear Ms Brockhoff

Merger control in the EU – further simplification of procedures

We welcome the opportunity to comment on the European Commission's (**Commission**) public consultation on a draft revised Merger Implementing Regulation and a draft revised Notice on Simplified Procedure.

The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions in stakeholder consultations regarding the development and implementation of competition laws. The Section's Mergers Working Group has prepared the enclosed submission for your consideration.

We were grateful for the opportunity to talk to you and your colleagues on 18 May about the Commission's draft revised materials and the changes proposed by the Commission. The Co-Chairs and representatives of the Mergers Working Group would be delighted to discuss the enclosed submission in more detail with representatives of the Commission.

Yours sincerely

Daniel G Swanson / Thomas Janssens

Co-Chairs, Antitrust Section
International Bar Association

INTERNATIONAL BAR ASSOCIATION
ANTITRUST SECTION MERGERS WORKING GROUP SUBMISSION TO THE EUROPEAN
COMMISSION REGARDING THE REVISION OF THE MERGER IMPLEMENTING
REGULATION AND REVISION OF THE COMMISSION NOTICE ON SIMPLIFIED
PROCEDURE

June 3, 2021

1. INTRODUCTION

- 1.1 This submission is made to the European Commission (**Commission**) on behalf of the Mergers Working Group (**Working Group**) of the Antitrust Section of the International Bar Association (**IBA**). The IBA Antitrust Section welcomes the opportunity to comment on the Commission's public consultation regarding its draft revisions of the Merger Implementing Regulation and the Notice on Simplified Procedure. The IBA Antitrust Section also provided a written submission dated 18 May 2021 and completed questionnaire in response to the Commission's previous consultation on the same topic during 2021.
- 1.2 The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession throughout the world. The IBA has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community¹. The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions on developments related to the implementation and refinement of competition laws worldwide.
- 1.3 The IBA's Antitrust Section includes antitrust / competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The Working Group's contributions draw on the vast experience of the Section's members in merger control law and practice

¹ Further information about the IBA is available at <http://ibanet.org>.

around the world².

2. GENERAL OBSERVATIONS

- 2.1 The Working Group welcomes the Commission's consultation and supports its objective of focussing its resources on relevant cases and reducing administrative burdens where possible without compromising effective enforcement. While the 2014 simplification measures have been effective in increasing the application of simplified procedures to unproblematic mergers, the Working Group believes that further steps should be taken to reduce the administrative burden both for businesses and the Commission in terms of resources and time spent on merger review and that this can be achieved without compromising effective enforcement. The Working Group welcomes the Commission's recognition that there is room for further simplification and targeting of the rules.
- 2.2 In this regard, the Working Group welcomes several aspects of the proposed revisions:
- 2.2.1 the introduction of new categories of cases that can be treated as simplified;
 - 2.2.2 the introduction of a "flexibility clause" for transactions that do not fall under the traditional Short Form CO criteria but which may still be treated as simplified;
 - 2.2.3 a new "super simplified" procedure (involving no pre-notification contacts) for cases where there are no reportable markets;
 - 2.2.4 the use of tick boxes and provision of more data-driven and less open text questions; and
 - 2.2.5 the transmission of documents electronically and the use of electronic signatures.
- 2.3 Nevertheless, the Working Group also has concerns about certain aspects of the proposed revisions which risk running counter to, and thereby undermining, the Commission's stated objective of making the notification of simplified cases become "faster and less burdensome". In particular, the Working Group is concerned by the apparent shift of responsibility and burden onto notifying parties for the competition assessment by introducing new questions and confirmation requests in the Short Form CO. Far from simplifying the process and reducing burdens for businesses in relation to

² Further information about the Antitrust Section and its Working Groups is available at: <https://www.ibanet.org/LPD/AntitrustSection/Antitrust/Default.aspx>.

cases that prima facie do not raise competition concerns, these changes risk increasing the burdens for business.

- 2.4 As a practical matter, the Working Group strongly encourages the Commission to consider implementing a trial period (or some other practical testing arrangement) for the proposed new filing forms in order to test properly how they work in practice.
- 2.5 The Working Group's comments are set out in more detail in the remainder of this submission.

3. **SIMPLIFIED NOTICE**

Expanding the categories of simplified cases

- 3.1 The Working Group supports the Commission's objective of broadening the scope of concentrations that may utilize the simplified procedure. In spite of the 2014 simplification measures, the Commission still reviews a significant number of notified concentrations that neither qualify for the simplified procedure, nor warrant intervention in the form of conditions or an in-depth Phase 2 review.³ The Working Group believes that expanding the scope of the simplified procedure would create efficiencies for both businesses and the Commission, enabling the Commission to focus its resources on concentrations that truly present risks to competition.
- 3.2 The introduction of two new categories of cases is therefore to be welcomed. That said, the Working Group is uncertain whether the new categories will result in a material number of new cases falling within the simplified procedure. As a consequence, it may remain the case that a significant number of cases will still be reviewed under the normal procedure despite being better suited for simplified treatment (i.e. on the basis that they present no risk of raising competition concerns).
- 3.3 In this regard, the Working Group respectfully submits that:
 - 3.3.1 the third category of flexibility clauses, namely vertical relationships where the individual or combined market shares of the parties to the concentration do not

³ For example, in 2021 the Commission's Merger Case Statistics indicate that the Commission issued unconditional clearance decisions pursuant to Article 6(1)(b) EUMR in 384 cases, 309 of which were decided under the simplified procedure (around 80%). This means that around 20% of the cases that are unconditionally approved by the Commission in Phase 1 were subjected to a full Phase 1 review even though these cases warranted neither conditions or an in-depth Phase 2 review. At the same time, the Commission has noted that "[a]mong the concentrations that have an EU dimension and are notified to the Commission each year, ~93% are found not to raise competition concerns and receive unconditional clearance." See https://ec.europa.eu/competition-policy/mergers/statistics_en; European Commission, Explanatory Note: Revision of the Merger Implementing Regulation and Revision of the Commission Notice on Simplified Procedure.

exceed 50% on one market and 10% in the other market, would be more appropriately treated as a new category for simplified treatment; and

- 3.3.2 a new category of simplified cases should be introduced in respect of “low-value” vertical links. This would capture low-value vertical relationships between parties to a concentration, regardless of market shares on upstream and downstream markets. Such relationships will rarely give rise to competition concerns given their limited value to either the upstream or downstream company.
- 3.4 These new categories would result in further cases qualifying for simplified treatment while at the same time not creating any risk for the Commission given that it will still have the discretion to revert to the ordinary procedure.

Introduction of flexibility clauses

- 3.5 The Working Group welcomes the proposed introduction of flexibility clauses. In its prior submission dated 18 May 2021, the Working Group had expressed concern that the flexibility clause concept might create uncertainty for businesses as to whether the clause would apply or not. However, this has been addressed by the proposal to include clear parameters (e.g. in terms of market share, revenue or asset value) within which the flexibility clauses would apply.
- 3.6 Nevertheless, the Working Group respectfully submits that there would be benefit in introducing a flexibility clause for the category of simplified treatment under point 6 of the Notice on Simplified Procedure, namely where the combined market share of all parties in a horizontal relationship is less than 50% and the HHI increment resulting from the concentration is below 150. For example, the flexibility clause could apply where the combined market share marginally exceeds 50% (e.g. 50-55%) or where the HHI increment marginally exceeds 150 (e.g. 150-200). As a practical matter, such concentrations are likely to present a negligible (if any) impact on the competitive landscape because the increment at issue would be *de minimis*. Moreover, in the unlikely event that such a transaction could present competitive concerns, the Commission would retain the ability to revert to the ordinary procedure.

Streamlining the review of simplified cases

- 3.7 The Working Group welcomes the Commission’s consideration of ways to streamline the review of simplified cases. In particular, the Group supports, in principle, the adoption of

a tick box form to replace much of the current Short Form CO and the focus on provision of data and less open text questions. As noted in its previous submission, other jurisdictions, such as the HSR form in the US, use a tick box notification form to good effect.

3.8 The proposed use of tick boxes is well suited to a number of sections in the Short Form CO such as section 1 (general case information), section 5 (jurisdiction) and section 7 (category of simplified treatment). However, the Working Group has a number of concerns about the proposed tick box format in the draft revised Short Form CO:

3.8.1 The form introduces a long list of exclusions and safeguards (for example in relation to minority stakes; cross-directorships; activities in neighbouring markets; ownership / control of “important” or “valuable” assets such as raw materials, IP, data or infrastructure, valuable data inventories, significant user base; access to competitively sensitive information; whether the parties are important innovators; whether pipeline products are involved and expansion plans) that notifying parties are now required to confirm.

3.8.2 While many (but not all) of these safeguards/exclusions feature in some form or other in existing Commission guidance and the Notice on Simplified Procedure, it is not necessary to pro-actively provide information on all of these topics in the current Short Form CO, and notifying parties are not required to indicate their applicability through absolute “Yes/No” answers. In sum, the extent of these questions would go beyond the scope of the current Short Form CO and thus introduce additional and unnecessary burdens to the parties.

3.8.3 Furthermore, some of the questions include concepts which are not defined and are inherently subjective, thereby not easily lending themselves to binary Yes/No answers. This will inevitably lead to some uncertainty and is likely to mean that notifying parties will, in addition to ticking a box, need to provide open text responses to provide further explanation and detail. In this way, the purpose and associated benefits of a tick box approach will be lost.

3.9 As a result, the proposed new approach shifts significant additional responsibility to the notifying parties and runs contrary to the Commission’s stated intention to make notification faster and less burdensome.

Super-simplified procedure

- 3.10 The Working Group welcomes the proposal to create a new “super simplified” procedure, which will further streamline the notification process by removing the need to complete sections 8-11 of the Short Form and removing the need for any pre-notification engagement with the Commission. However, the resulting benefits will to a large extent depend on case teams being disciplined and not re-requesting the absent information following formal notification.

Other observations on the simplified procedure

- 3.11 The requirements to identify “all plausible markets” and provide associated market share data are disproportionate as the transactions notified by means of a Short Form CO, by definition, raise no competition issues. Indeed, the conditions under which a Short Form CO may be used are already strict and, additionally, as noted above, if the Commission considers the transaction likely to raise competition concerns, it still has the discretion to revert to a normal review. Therefore, the Working Group considers that it would be proportionate to only describe concisely reportable markets deemed relevant by previous cases and the parties.
- 3.12 The Working Group questions whether it remains appropriate to apply a blank ban on simplified treatment for Article 22 and 9 referral cases. For further details, please see the IBA’s submission dated 18 May 2021.
- 3.13 Finally, the Working Group welcomes the additional clarification in footnote 18 of the Notice on Simplified Procedure on the definition of a true vertical relationship, which appears to reflect the Commission’s approach in *CVC/Schuitema* (M.5176) where the Commission recognised that a true vertical relationship must relate to goods or services that are part of the same value-creation chain and not merely accessory to the activity of one of the parties.

4. STREAMLINING NON-SIMPLIFIED CASES

Form CO

- 4.1 The Working Group welcomes the use of the tick box approach for section 7 of the revised Form CO but considers that this format could be used in other sections as well, for example, section 3 (details of the concentration, ownership and control) and section 4 (turnover), in a similar way to that proposed for the revised Short Form CO for the

equivalent sections and information.

- 4.2 The Working Group welcomes the changes to section 9 (formerly section 8), shortening it to only the essential information. However, the group suggests that notifying parties only provide elements from section 9 (formerly section 8) that are relevant to the competitive assessment of the case at hand in a single competitive assessment section (i.e. combining sections 9, 10 and, where appropriate, 11). Further, in relation to section 9, while structures of demand and supply (formerly 8.1 and 8.2) and closeness of competition (formerly section 8.3, now section 10.1) will nearly always be relevant, other elements of the former section 8 are more sector/case specific and should not be obligatory for the Form CO's completeness and can be requested at a later stage, if judged helpful by case teams. This includes, for example, section 10.2 (distribution systems and service networks) and section 10.8 (research and development).

Referrals

- 4.3 As stated in its previous submission, the Working Group considers that the Form RS is not necessary for Article 4(5) referrals and that it can be removed altogether and instead a brief section should be added to the Form CO where notifying parties are asked to identify whether their case is a referral case and provide any necessary jurisdictional information (currently Section 6.3 of Form RS). Please refer to the IBA's submission dated 18 May 2021 for further details.
- 4.4 Further, the Working Group considers that there is significant scope to reduce the information required under the Form RS for both Article 4(4) and, if retained, Article 4(5) referrals and to remove considerable duplication. Again, please see the IBA's submission dated 18 May 2021 for further details.

5. OTHER REMARKS

- 5.1 Finally, the Working Group welcomes the Commission's proposal to introduce electronic notifications. The Working Group is supportive of a move to electronic notification and consider that it is long overdue. This would result in clear efficiency benefits for businesses and would also be in line with the Commission's objective of becoming more environmentally friendly. The Working Group also welcomes the proposal to use electronic signatures.