Linklaters

Response by Linklaters LLP to the Commission's Consultation on the revision of the Merger Implementing Regulation and of the Commission Notice on Simplified Procedure

1 Introduction

We welcome the opportunity to comment on the Commission's draft revised Merger Implementing Regulation ('**Draft Regulation**') and Notice on Simplified Procedure ('**Draft Notice**').[1]

We support the Commission's stated goals of better targeting transactions that merit review and reducing the administrative cost and burden of EU merger control procedures. In particular, we are supportive of measures that lead to an expanded use of the simplified procedure (especially in borderline cases) and minimise the amount of information that needs to be provided in these as well as in non-simplified cases. However, we encourage the Commission to avoid changes that risk adding further formalistic requirements that may unintentionally increase the practical burden for the notifying parties.

Our response follows the structure of the Commission's Explanatory Note.

2 Expanding and clarifying the categories of simplified cases

New categories for simplified treatment and introduction of flexibility clauses

We are supportive of expanding the use of the simplified procedure, provided the changes do not lead to prolonged discussions regarding eligibility or significantly increase the burden of supplying market share data.

The two new categories for simplified treatment and flexibility provisions rely on market share data to confirm eligibility.[2] Market shares, especially in theoretical (and often overly narrow) segments considered to fall within '*all plausible market definitions*', are an inexact science, and may not be available to the notifying parties. Businesses do not typically collect (or even have the potential to obtain visibility of) market data along such lines and providing the Commission upfront with this level of detail is burdensome, costly and inefficient.

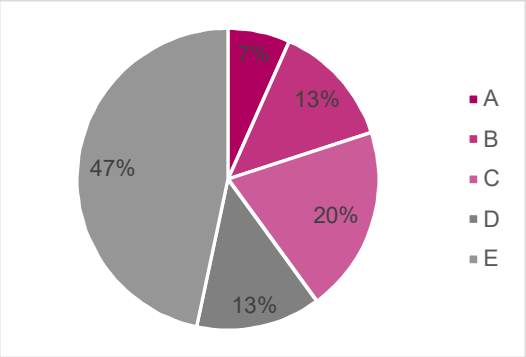
The Commission regularly asks parties to provide market shares for hypothetical product market segmentations or geographic markets during prenotification. The market shares in such hypothetical markets may exceed the thresholds or be unavailable thereby potentially triggering a normal procedure notification. The more hypothetical market share data needs to be provided, the less likely it is that the thresholds for simplified procedure or for flexible treatment will be met. To illustrate this point we have looked at the normal procedure Form CO's that we have submitted in the past three years.

None of the normal procedure cases that we submitted in the past three years would have been eligible for simplified procedure under the new rules (see Table 1 below). One third of these cases could have been eligible, if not for market definition issues. In 13% of normal procedure cases, the simplified procedure form could have been used if the Commission had only requested market share data for the (final) market definitions used in the final decision (category B). In 20% of cases, the simplified procedure could have been used only if the Commission had allowed the parties to use the most favourable market definition in the range of plausible product or geographic market definitions used in the final decision (category C).

[1] The views expressed herein are those of the Linklaters lawyers who prepared this response and cannot be assumed to represent the views of any clients of Linklaters.

[2] Point 5(d)(ii)(bb) and (cc) and point 8 of the Draft Notice.

Table 1: eligibility of Linklaters' normal procedure Form CO's for simplified procedure (May '19-Jun '22)



A = Eligible for simplified procedure but excluded under exclusions grounds; **B** = Eligible if parties would have been allowed to use market definition used in decision; **C** = Eligible if parties would have been allowed to use the most favourable market definition of the range of plausible market definitions used in the decision; **D** = Asymmetric case but not eligible because market share in one or a few markets is clearly above thresholds; **E** = Not eligible.

We recommend that the Commission does not use overly hypothetical market definitions or ask for market share data for '*all plausible market definitions*' to establish whether a case is eligible for simplified treatment. The Commission could instead rely on factors that are more telling of the competitive environment, such as statements regarding closeness of competition and the number of competing firms providing similar products (as well as their relative size).

Although the Commission indicated that approximately 10% of normal procedure cases would be eligible for simplified treatment under the new rules,[3] we are not convinced that the new thresholds go far enough to have a meaningful impact. While the flexibility clause would enable the Commission to use the simplified procedure in cases where market shares slightly exceed the relevant thresholds this would not reduce the burden of having to generate heavily segmented market data upfront.

Joint ventures

It is disappointing that the Commission has not removed the need (or even significantly reduced the level of information required) for parties to submit a merger notification for acquisitions of joint control or the creation of a new full-function joint venture with activities that have no nexus to the EU.[4] In such cases, where the activities of the parties give rise to horizontal overlaps or vertical relationships, the Commission goes as far as requesting the notifying parties to provide all data and information relating to the definition of such markets.[5]

Given the absence of any plausible harm to European consumers in these cases, the cost and delay associated with such notifications is clearly disproportionate and goes beyond what the Commission had in mind in its 2021 Staff Working Document.[6] We note that, arguably, keeping the one-stop-shop review for extra-territorial joint ventures has a benefit if those cases would otherwise fall under the

[3] Brussels Matters, *DG COMP's merger simplification project – is less more?*, 1 June 2022.

[4] Point 5(a) of the Draft Notice. In 2014, the Commission wanted to exclude no nexus joint-ventures. See, European Commission, Staff Working Document, 'Towards more effective EU merger control', 9 July 2014, SWD(2014) 221 final, para. 180: '*The Commission suggests amending Article 1 of the Merger Regulation so that a full-function joint-venture, located and operating outside the EEA and without any effects on EEA markets, falls outside the Commission's competence, even if the turnover thresholds are met.*'

[5] Footnote 36 of the Draft Notice.

[6] European Commission, Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control', SWD(2021) 66 final, 26 March 2021, footnote 193: '*Under such super simplified procedure, the information requirements are limited to the description of the companies' business activities, the description of the transaction and the provision of the turnover figures.*'

national merger control laws of several Member States.[7] However, the Commission could do more to keep the information requirements as limited as possible, by waiving the requirement to provide all data and information relating to the definition of markets (i.e. in line with the proposal set out in the 2021 Staff Working Document).

The flexibility clause, allowing the Commission to review under the simplified procedure joint ventures with turnover and assets between EUR 100 and 150 million in the EEA (point 9(a) of the Draft Notice), is welcome.

3 Streamlining the review of simplified cases

Pre-notification contacts

The Commission has abandoned the need for pre-notification discussions and case allocation requests for 'super-simplified' concentrations.[8] We would support the same approach in all simplified cases where there are no reasonable grounds for discussing jurisdictional issues or simplified procedure eligibility.

However, if pre-notification remains important for the Commission in such cases, we would welcome a timing commitment from the Commission. We suggest that the Commission commits to a maximum period of 2 weeks for the pre-notification phase in simplified cases.[9] Save for exceptional circumstances, or where the parties cause delays, this would contribute to a streamlining of the total duration for a simplified procedure notification.

Draft Short Form CO

We are supportive of the Commission's ambition to streamline the review of simplified cases.

However, it is questionable whether this will be achieved with a new Short Form CO format that is more than 2,000 words longer than the current form and has multiple choice boxes and standardised tables that may, depending on the market in question, prove difficult to address.[10] For example, the boxes to be ticked in Sections 2, 6, 7 and 11 are detailed and text heavy, which makes the draft Short Form CO more complex to read, especially for business people who do not deal with merger notifications on a frequent basis.

Further, the format of Sections 8, 9 and 10 does not facilitate advocacy that the notifying parties would normally want to put forward when discussing horizontal overlaps and vertical relationships (even if only technical in nature). As noted above, market share data continues to be key in the proposed procedure and this may not be reasonably available or accurate (particularly where required for "*all plausible markets*". The same applies to the information on competitors' pipeline products. Requiring parties to complete such tables when the information is not reasonably available – under the risk of being held liable for incorrect information – does not materially reduce the burden of completing the notification.

In addition, the amount of information can and should be reduced for the following sections:

- **Section 2 (turnover):** Such information (e.g. broken down by individual geographies) can be challenging and time consuming for the notifying parties to collect and often has little

[7] European Commission, Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control', SWD(2021) 66 final, 26 March 2021, para. 184.

[8] Draft Notice, point 26.

[9] Instead of asking the notifying parties to engage with the Commission at least 1-2 weeks before the expected date of notification (e.g. points 28 and 29 of the Draft Notice).

[10] According to our count, the current Short Form CO has 6,330 words and the new Short Form CO counts 8,526.

relevance to whether or not jurisdiction can be established. We therefore suggest requiring the notifying parties to simply confirm if the primary or secondary threshold is met.

- **Section 6.2 (acquisition of control):** We suggest that the Commission only asks notifying parties to confirm that they will acquire control and provide the underlying transaction documents as an annex. We understand that the Commission does not want to extend merger control approvals to transactions that should be subject to the cartel prohibition, but notifying parties will still want implicit reassurance that the Commission agrees with their characterisation of the transaction (i.e. ticking a box places burden on the notifying parties in cases of uncertainty).
- **Section 11 (non-controlling shareholdings):** The new requirement to provide information on non-controlling shareholdings above 10% and cross-directorships increases the burden on notifying parties (particularly passive financial investors).[11] Given that the participation or representation does not amount to control and is unlikely to influence the competitive assessment in a simplified procedure case (given market shares are already confirmed to be low), we do not believe such information should be required or lead to the exclusion of such cases from the simplified procedure.[12]
- **Section 11 (exclusion grounds)**: Several of the 'tick the box' questions would require burdensome clarifications. This is not only the case for non-controlling shareholdings as mentioned above, but also for the concept of 'valuable assets' and any other exclusion grounds where notifying parties cannot answer with an unequivocal 'no'.[13]

4 Streamlining the review of non-simplified cases

Draft Form CO

We are supportive of the goal to streamline the review process and associated administrative workload of non-simplified cases. However, in our view the amendments proposed do not go far enough to achieve this.

Information requests and market share data

We welcome the Commission's proposal to limit the information requirements in relation to the markets that would benefit from a simplified review. Nonetheless, the information requested from the notifying parties in the draft Form CO remains extensive.

Several of the considerations we outlined above also apply to the draft Form CO.[14] In particular, we encourage the Commission to take a more practical approach that would rely less on market share data based on various segmentations (at least at the beginning of the engagement with the notifying parties) and give more importance to internal documents and third party feedback to screen for potential concerns. Such an approach would avoid burdensome data exercises that may ultimately prove immaterial to the substantive assessment.

Waivers

[11] Especially for funds, which tend to operate through complex chains of control.

[12] See point 15 of the Draft Notice.

[13] See point 16 of the Draft Notice.

[14] See our comments on non-controlling shareholdings, cross-directorships and the approach to pre-defined tables based on market shares and pipeline products above. These comments equally apply to Sections 3.6, 3.7, 6, and 8 of the draft Form CO.

As for waivers, we are in favour of identifying parts of the Form CO that are particularly suitable for waiver requests and introducing time limits for the Commission to assess waivers.[15] We share the Commission's view that waivers can be particularly appropriate regarding transaction parties' participation in other undertakings[16] and past acquisitions of undertakings.[17] We also welcome removing information requests for cooperative agreements[18] and trade association contacts[19] from the draft Form CO entirely. In all Form COs that we submitted in the past three years , waivers were requested for the current versions of these Sections.

However, we did not submit waiver requests for the other Sections identified by the Commission as particularly suitable for waivers, namely regarding public financial support[20] and jurisdictions outside the EEA where a concentration must be notified.[21] Such questions (and those mentioned in the preceding paragraph) are typically straightforward for notifying parties to answer and so the burden associated with responding is relatively minor.

We would rather have seen the Commission's propose flexibility for internal documents,[22] information on certain affected markets,[23] total market size estimations,[24] and total Union- and EEA-wide capacity,[25] as waivers for these Sections were also requested in all Form COs we submitted between 2019 and 2021. Further, in almost a third of the Form CO's that we submitted, we requested a waiver for market share estimations[26] or competitors' market shares.[27] It is unfortunate that the Commission does not consider this further, as these sections are among the most burdensome to complete.

In light of this, we hope that case teams remain able to assess (and grant) waivers referring to information other than the sections specifically mentioned. Further, more clarity would be welcome on the information that the Commission could be expected to waive under Section B.2 as '*not reasonably available*'. It often happens that certain information requested in the Form CO or in an RFI is not available to parties or not available generally.

Other proposed improvements

In addition to the comments above, we would also invite the Commission to consider more general improvements to the review of non-simplified cases. They build on the fact that the time and burden associated with non-simplified reviews is not necessarily driven by the content of the Form CO itself, but rather by the lack of predictability over the scope of the process and information requests. In particular, we believe that the following suggestions would further streamline and simplify the review process:

[15] Introduction - Sections B.2.6 and B.4.10 of the draft Form CO)

[16] Draft Form CO Section 3.6, previously reflected in Section 3.5.

[17] Draft Form CO Section 3.7, previously (for the most part) reflected in Section 3.6.

[18] Previously reflected in the current Form CO Section 8.11.

[19] Previously reflected in the current Form CO Section 8.14(c).

[20] Draft Form CO Section 3.4.

[21] Draft Form CO Section 3.5.

[22] Current Form CO Sections 5.4(ii-iii).

[23] Current Form CO Section 6.

[24] Current Form CO Section 7.2.

[25] Current Form CO Section 7.5.

[26] Current Form CO Section 7.3.

[27] Current Form CO Section 7.4.

- **Increased transparency on timeline:** Increasing the transparency on the timeline of the review process, e.g. by sharing the Commission's internal timeline and co-operating with the parties to align on a common schedule;
- **Improved dialogue:** Establishing a better dialogue with the notifying parties, e.g. by increasing the number of meetings early on to establish a common view of the issues being considered and allowing the case team and the notifying parties to focus on the most substantive issues;
- **Limiting RFIs:** Promoting best practice by limiting the number of RFIs on one substantive matter, e.g. a commitment to limit subsequent RFIs only to new information, so that requests become progressively narrower;
- **More lenient approach to complex RFIs as regards timing:** Being more lenient on the timing for obtaining responses to complex RFIs, e.g. when they cover extensive data requests and document production. Further, requests for documents should cover only necessary documents which serve an identified purpose in the proceedings.

Flexibility clause

We welcome the Commission's proposal to dispense with certain information requirements in circumstances where a market may be technically affected but which is unlikely to raise substantive concerns (in line with the categories of cases identified for simplified treatment). However, for the same reasons described above, as the criteria are driven by market share data the associated burden may not be meaningfully reduced in practice.

Supplementary statements of objections

The Commission reserves the right to '*address one or more supplementary statement(s) of objections to the notifying parties, if the Commission wishes to raise new objections or modify the intrinsic nature of the objections that were previously raised*'.[28] It would be helpful if the Commission could elaborate on how a supplementary statement of objection would be reconciled with the right to be heard and the parties' rights of defence. It would also be helpful if the Commission could explain how this new right would not further increase the duration of Phase II proceedings.

Draft Form RM

With reference to the proposed changes to the Form RM, we note that:

- Certain of the information to be provided would now have to be provided for the entire business from which the business to be divested would be carved out. This will materially increase the burden associated with preparing the Form RM (particularly for large companies with activities of little to no relevance to the divested business).
- The draft Form RM is not clear on what information would need to be provided in case of remedies that are not divestitures. Divestitures are the main commitments proposed, but they are not the only possible remedy. It would be helpful to have more guidance on what would be expected from the notifying parties in the case of a non-divestiture remedy.
- The draft Form RM and the commitments have to be signed by the notifying parties and '*any other involved parties*' (on which the commitments impose obligations).[29] It would be helpful

[28] Draft Implementing Regulation

[29] Article 20(3) of the Draft Regulation.

if the Commission could give some guidance on the circumstances that this change is intended to cover and hence which other parties may be considered necessary.

5 Introducing electronic notifications

We strongly support the Commission's proposal to transmit documents (to and from the Commission) via digital means and its encouragement to introduce electronic forms in the future.[30] We note that the Commission has already largely dispensed with the requirement to provide significant volumes of paper originals, particularly as regards printed annexes, and fully support the further work in line with the Digital Transformation. We particularly welcome that the Commission intends to accept electronically signed Power of Attorneys as part of the electronic notification procedure.

We believe that the obligation to sign submissions sent to the Commission could be waived altogether (even electronically), when such documents are transmitted via EU Send Web.[31] This would be in line with the European Courts' guidance for lodging documents via e-Curia.[32]

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[30] See e.g. recitals 5 and 16 and Article 22 of the Draft Regulation.

[31] See e.g. Communication implementing Articles 3(2), 13(3), 20 and 22 of the Draft Regulation.

[32] See e.g. para. 79 of the General Court's Practice Rules, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-11/tra-doc-en-div-t-0000-2018-201810283-05_02.pdf.

[33] The Linklaters lawyers who contributed to this paper are, in particular, Neil Hoolihan, Francesca Crotti, Matilde Faglia, Joost Dibbits and Vincent Gedeon.