ERT response to EC on reforms to merger control process

1. Introduction

1.1. The Competition Policy Working Group of the European Round Table for Industry (the "**ERT**") welcomes the European Commission's continued engagement with stakeholders on revisions to certain procedural aspects of EU merger control.

1.2. As noted in ERT's submission to the European Commission (the "**EC**") dated 18 June 2021 (the "**Expert Paper**"),[1] it is positive that steps are being proposed to reduce the burden that the EC's merger control processes create, particularly in light of the leading role the EC has among competition agencies worldwide. While simplifying and streamlining notification processes is painstaking, it is often a thankless task. ERT truly appreciates DG COMP's efforts in this regard and encourages DG COMP to examine how such an approach could also be applied to 'normal' merger control processes in due course.

1.3. ERT considers below the EC's proposed reforms, focusing in particular on: (i) eligibility for the simplified procedure, (ii) burdens arising from use of the simplified and non-simplified procedures; (iii) requests for pre-notification referral; and (iv) reforms to the substantive assessment.

1.4. ERT largely welcomes the EC's proposed reforms, but it believes that certain reforms could go further and/or that further clarity is required in relation to certain reforms – this is addressed in further detail below.

2. Eligibility for the simplified procedure

Expansion of categories of cases eligible for simplified procedure

2.1. As regards eligibility for the simplified procedure, ERT welcomes the introduction of a 'flexibility' clause and two new categories of concentration eligible for the simplified procedure – ERT notes that the flexibility clause in particular should serve to bring within the scope of the simplified procedure transactions that would otherwise have been subject to review via the non-simplified procedure (and believes that case teams should be encouraged to make use of the flexibility clause where appropriate).

2.2. However, ERT considers that, in addition to the measures outlined above, further provision should be made for 'holistic' review of cases that do not meet the thresholds for the simplified procedure. In such cases, ERT considers that it should

[1] Please see Annex 1.

be possible for notifying parties to present arguments to the EC as to why the transaction should be reviewed under the simplified procedure, notwithstanding that it does not meet the applicable thresholds.

2.3. ERT believes that this could be dealt with as part of the pre-notification phase, and that such a measure would give the EC greater flexibility in deciding whether transactions should be reviewed under the simplified procedure at an early stage in the process.

2.4. As an additional measure, ERT believes that the thresholds for qualifying for the simplified procedure should be raised as the current thresholds are unduly narrow in terms of the transactions to which they apply (see further ERT's response to Question 1.4 of the EC's 'Questionnaire on Revision of certain procedural aspects of EU merger control' dated 18 June 2021 (the '**Questionnaire'**)).[2]

Safeguards and exclusions

2.5. While ERT welcomes guidance provided in the draft revised Notice on the Simplified Procedure as to the types of transaction that may be excluded from the simplified procedure because they fall within the safeguards and exclusions listed in Section 11 of the draft revised Short Form CO, ERT believes that: (i) the list as drafted remains broad and (ii) further clarity is required on the scope of potential safeguards and exclusions (and related questions, such as whether responding 'Yes' to one or more items on the list is likely to be taken as indicative that the transaction is not suitable for the simplified procedure). In particular:

(A) "*The parties own or control important technological financial or competitively valuable assets, such as raw materials, intellectual property rights, patents, data or infrastructure.*" ERT considers that criteria such as 'important' and 'valuable' are (without further elucidation) vague and subjective and, as such, that the EC should provide further clarity around the type(s) of assets which may be considered 'important' or "valuable" in this context.

(B) "*The parties have a significant user base and / or commercially valuable data inventories*." ERT considers that 'significant' and 'commercially valuable' are similarly vague and subjective, and that the definition of 'user base' and 'data inventories' should also be clarified. In the absence of such clarification, ERT believes that it is likely to be difficult for notifying parties to determine whether this criterion applies (but notes that it could in theory apply to many notifying parties).

(C) The same comments as above apply to "*[…] capacity and production*", "*[T]he parties are <u>important innovators</u> in the overlapping markets*" and "*[T]he parties have brought to the market an <u>important pipeline product</u> within the last 5 years*" (terms which ERT believes would benefit from further

[2] The Questionnaire is provided as Annex 2 to this paper.

clarification are underlined). As regards pipeline products, ERT further notes that it is not clear whether this question is relevant to the EC's assessment of transactions outside the pharma and other pipeline-based industries. ERT would welcome clarity on this point.

(D) "*The concentration will allow the merged entity to gain access to commercially sensitive information regarding the upstream activities of rivals*." ERT considers that this may be difficult for the notifying parties to confirm when completing the Short Form CO, as in practice it requires notifying parties to consider the types of information they collect and whether this could be used for anti-competitive purposes. ERT considers that this is an excessively burdensome requirement in the context of completing the Short Form CO. ERT further notes that, in any event, parties are obliged under Article 101 TFEU to put in place appropriate safeguards to prevent anti-competitive information exchange.

2.6. ERT considers that if these provisions are maintained in their current form, many transactions risk being ineligible for a simplified procedure even if other requirements for eligibility are met.

2.7. In addition to providing further clarity on the above, ERT believes that the EC should make provision for notifying parties to provide a textual response (instead of indicating 'Yes' or 'No' only) and to qualify 'Yes'/'No' responses where appropriate when completing Section 11 of the Short Form CO.

Reverting from simplified to non-simplified procedure

2.8. ERT notes that a change from joint to sole control may exceptionally be reviewed under the non-simplified procedure in circumstances where neither the EC nor the relevant NCAs have reviewed the prior acquisition of joint control of the joint venture in question. ERT believes that this exception should be removed, as the absence of a prior review should not be taken as indicative that the transaction is likely to impact competition in such a way as to merit review under the non-simplified procedure.

2.9. ERT thinks it is a welcome change for the EC to have discretion over whether to revert to the non-simplified procedure in circumstances where a third party expresses 'substantiated competition concerns' about the transaction (having previously been obliged to revert to the non-simplified procedure in such circumstances).[3]

2.10. This is in keeping with the EC's apparent practice on this (despite the language of the Notice on Simplified Procedure). However, ERT considers that the definition

[3] ERT notes that the language in point 22 of the draft revised Notice on the Simplified Procedure (" […] the Commission will revert to the normal procedure") may need to be revised to align with point 5(14) of the draft revised Short Form CO (" […] the Commission may require full, or where appropriate, partial, notification under the Form CO. This may be the case […]".

of 'substantiated competition concerns' would benefit from further clarification, with a view to ensuring that only concerns which could plausibly result in harm to competition should be taken as indicative that it is necessary for the EC to adopt the non-simplified procedure. ERT notes that this would also be a welcome clarification for third parties, who would benefit from knowing what information they need to provide (particularly given the narrow window for providing this information).

3. Reforms to streamline the simplified and non-simplified procedures

3.1. While ERT welcomes the measures outlined above as regards expanding the category of cases eligible for the simplified procedure,[4] ERT considers that there remains scope for the EC to further reduce administrative (and other) burdens arising from use of the simplified and non-simplified procedures. ERT outlines below areas which it believes would benefit from further reform and sets out proposals for reform where applicable.

*Requests for information ('**RFIs**')*

3.2. As noted in the Expert Paper, notifying parties often invest disproportionate amounts of time and resources in responding to RFIs from the EC. In many cases, ERT members have found the scope of RFIs to be excessively broad, resulting in a burdensome – and costly – process to gather the information requested.[5]

3.3. ERT considers that RFIs should be targeted and proportionate, and should focus on the issue(s) that are critical to the EC's assessment of the transaction. ERT recognises that this may evolve over the course of the EC's assessment, but considers that the EC should ensure that it has sufficiently refined its analysis using available information before issuing further RFIs. ERT considers that this could also be achieved by the EC engaging with the notifying parties to discuss the scope of RFIs before formally issuing the RFI – this would enable the EC to eliminate or anyway reduce potentially superfluous requests.

3.4. As regards document requests specifically, ERT notes that requests which are broad in scope may require the notifying parties to instruct forensic experts to manage their document collection processes. This is typically the case where (for example) the notifying parties are required to provide detailed information on the provenance of data; file types, etc. and / or the notifying parties are required to convert documents into a particular file type before they are submitted to the EC. ERT considers that in such circumstances, provision should be made for documents to be submitted in their original format to the EC.

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[4] ERT also welcomes guidance provided in the draft revised Notice on the Simplified Procedure in relation to the "super-simplified" procedure.

[5] The number of documents produced by ERT members to the EC has exceeded 500,000 in several cases.

3.5. ERT further considers that the time period for documents requested by the EC in RFIs is sometimes excessive (for example where the EC requests documents over a five year timeframe), and notes that this may result in the notifying parties producing documents that are outdated and therefore unlikely to have a meaningful impact on the EC's assessment. ERT believes that it would be preferable to limit document requests to a narrower timeframe.[6] ERT considers that (unless the particular circumstances of the transaction suggest otherwise) one year would be more appropriate.

3.6. ERT believes that the EC should in any event be willing to engage with notifying parties to narrow the scope of document requests where they appear to be yielding a large number of irrelevant documents (whether due to the timeframe or search terms[7] involved).

3.7. More broadly, ERT considers that the publication by the EC of guidance on the collection and treatment of internal documents in merger investigations would help to achieve greater clarity and certainty in connection with document requests. ERT would also welcome guidance on the application of legal professional privilege and the assessment of privacy claims in the context of document requests, as ERT members have experienced inconsistencies in the EC's approach across different merger investigations.

Streamlining the review of simplified cases

3.8. As noted in ERT's response to the Questionnaire,[8] ERT considers that the Short Form CO should be streamlined and certain information requests could be excluded from the Short Form CO without materially impacting the EC's assessment.

3.9. ERT welcomes the implementation of certain reforms in the draft revised Short Form CO. For example, Sections 1–3 are now largely 'tick-box' (save where information is required in relation to the notifying parties' turnover and/or products concerned). However, ERT believes that scope remains for further reforms. These include:

(A) **Data on plausible markets:** ERT considers that it is excessively burdensome for notifying parties to be required to provide data on all plausible markets. As noted in ERT's response to the Questionnaire, ERT believes that materiality thresholds should be applied, such that notifying parties are only required to address plausible markets in pre-notification

[6] As noted in ERT's response to the Questionnaire, ERT also believes that the EC's document production system should be updated to accommodate submissions in complex cases – ERT considers that the current size limits of 4GB per submission, 500 documents per submission and 100MB per document are not sufficient for this purpose.

[7] ERT members have encountered cases where the use of overly broad search terms has led to lengthy and complex document reviews that do not yield a significant number of relevant documents.

[8] Please see ERT's response to Question 2.2 of the Questionnaire.

discussions with the EC and the Short Form CO where certain turnover and market share thresholds are met.[9]

(B) **Market share tables:** ERT considers that provision should be made for the notifying parties to provide shares by volume <u>or</u> value (and not both) if: (i) there is no significant discrepancy between the two or (ii) shares by either metric are not a sensible metric for the relevant industry. ERT further notes that, instead of providing data for three years, it should be possible for notifying parties to provide shares for Year X-1 and confirm that shares would not be materially different for Years X-2 and X-3.

(C) **Information on pipeline products:** ERT notes that 'pipeline product' is a well-established concept in the context of the pharma industry. However, it is not clear how the EC defines 'pipeline products' in the context of other industries. ERT considers that this is particularly critical in circumstances where many notifying parties will be innovating with a view to launching new products and / or improving existing products. To ensure that the requirement to provide data for pipeline products does not become overly burdensome, ERT believes that the EC should provide further clarity on the definition of 'pipeline product' – and that 'pipeline product' should be defined in such a way as to capture only products that are likely to be material to the EC's assessment.

(D) **Competitor contact details:** ERT notes that gathering contact details in the format required by the EC can be a burdensome exercise, and believes that notifying parties should not be required to provide competitor contact details for markets in which competition concerns are unlikely to arise, for example where certain market share thresholds are not exceeded.

3.10. As regards the EC's procedure for reviewing simplified cases:

(A) **Time limits:** ERT considers that the EC should set a stricter time limit for reversion to the non-simplified procedure (in circumstances where this is required) – ERT believes that the current approach (under which the EC may revert to the non-simplified procedure at any time during the 25 working day review period) introduces uncertainty into the process and may result in significant prolongation of the timeline for approval. ERT considers that 10 – 15 working days may be a suitable time limit.

(B) **Timeline for pre-notification:** ERT considers that pre-notification should be streamlined to ensure that: (i) RFIs are targeted at establishing whether cases qualify for the simplified procedure; and (ii) parties are able to formally notify as soon as the EC is satisfied this is the case.

[9] Please see ERT's response to Question 2.2 of the Questionnaire.

(C) **Timeline for approval of transactions:** to expedite approval of transactions subject to the simplified procedure, ERT believes that the EC should formalise its current approach of cases under the simplified procedure being decided within 16 – 18 working days of formal notification as this will enable parties to plan their transaction timetables more accurately and effectively.

Streamlining the review of non-simplified cases

3.11. ERT welcomes the implementation of certain reforms in the draft revised Form CO, including the removal of certain information requirements from Sections 9 and 10 of the draft revised Form CO (formerly Section 8 of the Form CO) - i.e. in relation to 'Cooperative Agreements', 'Trade between Member States and imports from outside the EEA' and 'Trade associations'. However, ERT believes that scope remains for further reforms to the draft revised Form CO. In particular:

(A) **Threshold for affected markets:** as noted in ERT's response to the Questionnaire, ERT considers that the threshold for horizontally affected markets should be raised from 20% to 30%, and related information requests should only apply to markets where the revised threshold is met.

(B) **Waiver requests:** while ERT appreciates that it may in certain cases become necessary for the EC to request information that was previously excluded under a waiver, ERT considers that the EC should in all cases provide a justification for doing so, as this is likely to create an additional burden on the notifying parties from an information gathering perspective.

(C) **Sections 9 and 10 of draft revised Form CO:** as noted above, ERT welcomes the removal of certain information requirements from Sections 9 and 10 of the draft revised Form CO. However, ERT believes that the administrative burden on notifying parties could be reduced further by making Sections 9 and 10 of the draft revised Form CO 'opt in', such that notifying parties would work with the EC in the pre-notification phase to identify sub-sections that should be completed, but otherwise would not complete these sections.

(D) **Description of quantitative economic data collected by the undertakings concerned:** ERT notes that this is now required in all cases for the Form CO to be deemed complete. However, ERT considers that many cases do not require quantitative econometric analysis and, even if the description provided can in principle be brief, it will often be complex and burdensome for notifying parties to identify all categories of potentially relevant data. ERT further notes that it is unclear what constitutes 'quantitative economic data' in this context, and that the complexity of preparing a response is likely to increase significantly. In light of this, ERT considers that the EC should revert to the approach taken previously (i.e. not requiring such a description to be provided in every case for the Form CO to be deemed complete).

(E) ERT's comments in relation to information on pipeline products and market share tables (see paragraph 3.9 C above) apply equally to the draft revised Form CO where applicable.

4. Requests for referrals under Article 4(4) and 4(5) of the Implementing Regulation

4.1. As regards requests for referrals under Article 4(4) and 4(5) of the Implementing Regulation, ERT considers that three further reforms would be hugely beneficial to businesses:

(A) The Form RS should be replaced by a free form paper in which the notifying parties explain to the EC why the transaction is suitable for referral under Article 4(4) or Article 4(5) of the Implementing Regulation (although ERT believes that this should be supplemented by guidance from the EC as to what notifying parties should include in such a paper to demonstrate that the requirements for referral are met).[10]

(B) In the alternative, ERT considers that the amount of information required for a Form RS to be deemed complete should be reduced. At present, preparation of a Form RS entails an information gathering exercise that is costly and time consuming for the notifying parties, and which leads to delays in the overall timeline for obtaining approval. ERT notes that the contents of the revised draft Form RS (and its predecessor) overlap significantly with the contents of the Form CO, and that this requires the notifying parties to provide information that may not in practice be relevant to the EC's decision on the referral request.

(C) ERT further considers that stricter time limits should apply to communications between the EC and NCAs in relation to requests for referrals. ERT believes that 10 working days would be an appropriate alternative timeframe in this context.

5. Reforms to the substantive assessment

5.1. ERT believes that, in addition to reviewing the procedural aspects of the merger control process, it is vital in the current climate that the EC evaluates its approach to the substantive assessment, particularly with regard to efficiencies and investment incentives.

5.2. The prospect for consolidation to have a positive impact on efficiencies and investment incentives – and therefore overall consumer welfare – should be factored into the EC's assessment alongside factors that currently form the focus of the EC's review (such as short term pricing effects). ERT believes that it is important for the EC to consider the sustainability of industries as part of its

[10] See further ERT's response to Question 3.13 of the Questionnaire.

assessment. This is particularly true of markets/industries with large fixed costs, where players need to be able to recover their costs from a sufficiently large customer base to justify the significant levels of upfront investment required.

5.3. ERT considers that the EC's assessment should therefore:

(A) Acknowledge the role of minimum viable scale in markets with high fixed costs on investment incentives. ERT believes that (artificially) persisting with sub-optimal market structures is likely to constrain the ability of smaller players to invest and therefore compete effectively.

(B) Place less weight on short term pricing effects and more weight on non-price related consumer and efficiency benefits, such as innovation and quality, which can be achieved through (for example) increased rivalry in investment (while appreciating that rivalry is not just a factor of total number of players).

(C) Consider the competitive effects of a transaction over a number of years in order to ascertain its impact on (for example) investment that may not occur in the immediate short term. At present, ERT considers that the EC does not look at a sufficiently long timeframe when considering efficiencies that may arise from a merger. Consequently, ERT believes that broader consideration of long-term dynamic efficiencies is necessary (and that the standard of proof for demonstrating such efficiencies should not be unduly high[11]). ERT considers that this will be particularly important in strategic markets/ industries that are essential to European sovereignty and security.

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[11] See further paragraphs 11.1 – 11.4 of the Expert Paper.

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This Expert Paper has been prepared by the Competition Policy Working Group of the European Round Table for Industry.
More info and previous papers on: https://ert.eu/focus-areas/competition-policy

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