Comments on the draft revised Merger Implementing Regulation and the draft revised Notice on Simplified Procedure

The Swedish Competition Authority (SCA) welcomes the opportunity to comment on the draft revised Merger Implementing Regulation and the draft revised Notice on Simplified Procedure. The comments below constitute the SCA's views on the current draft. They should not be interpreted as necessarily conveying the Swedish government's views, nor can they be taken to bind the Swedish government's own possible position on the matters in question.

The SCA focuses its comments on the proposed "tick the box" solution.

The SCA is positive towards the European Commission (the "Commission") making simplifications, and at the outset, we believe that a "tick the box" solution may be a good way to do so. However, with respect to certain types of questions, which are complex and/or a matter of conclusion/view of the parties (as opposed to clear-cut facts), we believe that a "tick the box" solution with "yes and no" questions may entail difficulties for both the Commission and the parties. Considering especially the fact that the notifying parties face the risk of being subject to fines for providing misleading information, it is important that it is clear for the parties which information they shall provide.

We recognise that the parties and the Commission may solve issues regarding interpretation via the notifying parties seeking further guidance during the pre-notification process, or making clarifications on scope, etc. in conjunction with ticking a box. Furthermore, the Commission can also request additional information. However, we believe it would be optimal to set a structure whereby additional work pertaining to such correspondence, etc. is avoided.

Considering the above, we note in particular the below issues and sections from the draft Short Form CO and the draft Form CO:

- **Short Form CO, Section 6.2 (acquisition of joint control), page 14:** The parties shall tick a box indicating whether there are veto rights on the

Address SE-103 85 Stockholm, Sweden
Visiting Address Ringvägen 100
Telephone +46 8 700 16 00
konkurrensverket@kkv.se
www.konkurrensverket.se

adoption of the business plan. As the degree to which a veto right on the adoption of the business plan may confer control is dependent on the contents of the business plan (as set out in the Commission Jurisdictional Notice, para. 70), we would believe that a notifying party ticking "yes" would not be sufficient for the Commission to make its assessment. Therefore, it may be worthwhile to include a requirement (if "yes" is ticked) by which the parties shall also explain more precisely how the veto right supports the conclusion that joint control is acquired, with reference to the contents of the business plan (and that the latest business plan is to be submitted). Indeed, there may be situations where there is joint control regardless of the existence a veto right on the business plan, which would mean it would be redundant for the Commission to further investigate the contents of the business plan. It may yet be worthwhile to include the above-mentioned requirement, but perhaps clarifying that such further elaboration is only required in case the notifying party considers the veto right in the business plan to be – alone or together with other veto rights – decisive for the question of control.

- **Short Form CO, Section 6.3 (full-functionality), page 15:** The parties shall tick boxes indicating (i) that "*the joint venture will have sufficient resources to operate independently on the market, notably a dedicated management, sufficient financial resources, staff, and assets*", and (ii) that "*the joint venture will have its own access to or presence on the market independent from its parent companies*". The fulfillment of these criteria is the result of a case-by-case assessment, and we believe that there may be situations when the Commission and the notifying parties do not have a common understanding of the fulfillment of the criteria. We would therefore suggest including a requirement by which the parties are to provide some reasoning as to why the JV meets the criteria.

- **Short Form CO, Section 11, and Form CO, Section 7.4 (safeguards and exclusions):** The parties shall tick boxes indicating whether certain circumstances apply, e.g. whether advertising is important in any of the overlapping markets. Firstly, many of the questions in section 11 of the Short Form CO and section 7.4 of the Form CO do not regard clear-cut facts, but rather judgments or conclusions (e.g., whether a certain aspect is "important" or "significant"). We would expect there to be situations when the Commission and the notifying parties do not have a common understanding of the matters. Therefore, merely requesting the parties to tick boxes, as opposed to providing further reasoning and argumentation, does not appear optimal. Secondly, several of the questions do not appear to be suitable as "yes or no" questions, e.g. whether a certain aspect is "important" is naturally a matter of degree. As mentioned above, it is important that it is clear for the parties which information they shall provide, and "tick the box" questions should hence be precise and not

open to interpretation. On that basis, we would suggest opting for "open text" questions inviting the notifying parties to specify, for example, to what extent they consider a certain aspect to be important, and the reasoning for this. See the below examples:

- *"The parties own or control important technological, financial or competitively valuable assets, such as raw materials, intellectual property rights, patents, data or infrastructure"*;
- *"The parties have a significant user base and/or commercially valuable data inventories"*;
- *"brand recognition is important in any of the overlapping markets"*;
- *"branch or store locations are important in any of the overlapping markets"*;
- *"Technical specifications, quality or level of service is important in any of the overlapping markets"*; and
- *"Advertising is important in any of the overlapping markets."*