INTESA SANPAOLO

"DRAFT REVISED MERGER IMPLEMENTING REGULATION AND NOTICE ON SIMPLIFIED PROCEDURE"

POSITION PAPER OF INTESA SANPAOLO TO THE COMMISSION'S CONSULTATION*

Intesa Sanpaolo (*infra*, also "the Bank") would like to thank the Commission for the opportunity to provide a response to the consultation on the draft revised Merger Implementing Regulation[1] (*infra*, also "the Implementing Regulation") and the Notice on Simplified Procedure[2] (*infra*, also "the Notice"). As a stakeholder, Intesa Sanpaolo is pleased to participate in the review process of the procedural and jurisdictional merger rules and would like to share some short relevant points with the Commission hereof.

This contribution will be structured in three sections: 1. General comments; 2. Expanding the categories of simplified cases; 3. Behavioral remedies; 4. Conclusions.
This paper represents the position of Intesa Sanpaolo on specific issues and it does not intend to be a comprehensive study on the matter.

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1. General comments

Since their adoption, the Implementing Regulation[3] and the Notice[4], currently in force, have been essential tools to support companies during their relevant mergers under EU antitrust law, because they provide legal certainty and cost-effective compliance.
They have also been important in pursuing competitiveness between companies within the European Union, as the objective of merger control regulation is to prevent transactions from leading to the creation or strengthening of a dominant position, thereby depriving

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[1] Annex to the Communication from the Commission - Approval of the content of a draft for a Commission Regulation (EU) [No [X]/2023 of [X] 2023] implementing Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, C(2022) 2918 final, Annex I, 06.05.2022.
[2] Annex to the Communication from the Commission - Approval of the content of a draft for a Commission Notice on a simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings C(2022) 2919 final, 06.05.2022.
[3] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, p. 1, 30.4.2004. It has been amended by: Commission Regulation (EC) No 1792/2006 of 23 October 2006, OJ L 362, p. 1, 20.12.2006; Commission Regulation (EC) No 1033/2008 of 20 October 2008, OJ L 279, p. 3, 22.10.2008; Commission Regulation (EU) No 519/2013 of 21 February 2013, OJ L 158, p. 74, 10.6.2013; Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013, OJ L 336, p. 1, 14.12.2013. It has been corrected by Corrigendum, OJ L 172, 6.5.2004, p. 9 (802/2004).
[4] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, 2013/C 366/04, OJ C 366/5, 14.12.2013.

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consumers of the benefits of effective competition, such as low prices, high quality products, wide choice of goods and services and innovation[5].

In general, merger control legislation has effectively ensured strong and fair competition in the single market over the years. However, a review of this discipline at the EU level has now become necessary due to the role that merger control, efficiency and competition policy can play in supporting developments, arising from the digitization of the economy and the broad recovery from the Covid-19 pandemic, while ensuring an international level playing field. Moreover, merger control procedures have become **increasingly burdensome for companies** in terms of money and use of resources, time and effort to a level that is not justifiable for non-problematic transactions, which are unlikely to cause any competitive concerns. In this context, Intesa Sanpaolo welcomes the Commission's objective to further simplify the merger review process for the benefit of companies, but also for the Commission itself. Indeed, it is essential that the Commission focuses its resources and efforts on those transactions that raise potential competition issues, while spending as little time as possible on the deals that are not able to cause concerns[6]. This would **avoid any unnecessary delays** in processing of such mergers, to the benefit of economic market dynamics.

Indeed, the Bank supports the objectives pursued by the Commission in its in-depth review, launched in August 2016, of the merger procedural and jurisdictional rules, of (i) expanding and clarifying the categories of cases that can be handled under the simplified procedure; (ii) introducing refined safeguards so that the simplified procedure does not apply to cases that merit more detailed scrutiny; (iii) ensuring effective and proportionate information gathering, by introducing a new notification form for simplified cases in a "tick-the-box" format; (iv) streamlining the review of non-simplified cases by clarifying information requirements; (v) introducing electronic notifications and the possibility for parties to submit certain documents electronically.

More specifically, Intesa Sanpaolo appreciates the changes, introduced by the Commission in the draft revised Notice and Implementing Regulation, regarding the **extension of cases** which can be examined under the **simplified procedure**[7], because it is necessary to make it as available, fast and effective as possible.
The introduction of the **flexibility clause**[8] which allows the Commission to assess a larger number of non-problematic mergers under the simplified procedure, that would otherwise - with strict thresholds - have to be assessed under the normal notification procedure, is also welcome. In fact, it provides benefit for companies in terms of cost savings, also for external legal and economic analysis advice, as well as a reduction of information and documentation burdens. The examination of such a transaction under the simplified procedure would allow for a quicker scrutiny, to the benefit of companies receiving authorization in a shorter timeframe. Furthermore, it should be noted that – in case of a non-

[5] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation"), OJ L 24/1, 29.01.2004, art. 2, paragraph 2. See also: Moritz Lorenz, "Merger Control", 05.05.2013 (link).
[6] Speech, Executive Vice-President Vestager, 06.05.2022 (link): "*Our initiative aims to further ease administrative burden on both businesses and the Commission and will allow us to focus resources on the mergers that merit a detailed investigation*".
[7] Draft revised Notice, paragraph 5.
[8] Draft revised Notice, paragraphs 7-8.

problematic merger - it is essential for companies to be able to proceed with the **closing in a short time**, in order to benefit from the economic and synergy effects of the transaction.

In addition, the Bank appreciates the **streamlining of information requirements** in both **simplified and non-simplified cases** because, on average, the length of the procedure[9], including the merger filing process, had become excessively long and time-consuming. In fact, the introduction of tables or multiple-choice questions (the so called "tick-the-box") in the simplified Form CO and the removal of certain requirements in Section 8 of the currently used Form CO, concerning "Cooperation Agreements", "Trade between Member States and imports from outside the EEA" and "Trade associations", will make filings simpler and more consistent. The collection of all these information imposes a burden on the companies involved, either large and small, where their real utility for the merger assessment is not always obvious.

Finally, Intesa Sanpaolo appreciates that the transmission of documents to and from the Commission is, in principle[10], effected by digital means, including merger notifications[11]. Thus, electronic notifications, accepted by the Commission due to the restrictions associated with the Covid-19 pandemic[12], will finally become standard practice within the EU. Indeed, **electronic notifications**, including digital signatures, have a positive environmental impact, as the use of paper could be significantly reduced. In addition, they result in time savings for companies, as electronic notifications are much more immediate, and cost reductions in terms of postage.

The Merger Simplification Package[13] has been effective in increasing the application of the simplified procedures to non-problematic mergers[14]. However, there is now a need to reduce the administrative burden for both companies and the Commission, in terms of resources and time spent reviewing mergers, without compromising their effective

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[9] European Court of Auditors, "The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight", Special report n. 24, 2020, paragraphs 48-56 (link).

[10] Annex of Communication from the Commission - Approval of the content of the draft Communication from the Commission, "Communication pursuant to Articles 3(2), 13(3), 20 and 22 of Regulation (EU) Articles 20 and 22 of Commission Regulation (EU) [No. [X]/2023 of [X] 2023] of the Commission implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings", C(2022) 2916 final Annex, 06.05.2022. A fall-back mechanism is also foreseen whereby documents can be transmitted to the Commission's Directorate General for Competition by post or by means of hand delivery (in exceptional circumstances and for business continuity reasons).

[11] Draft revised Implementing Regulation, art. 22.

[12] European Commission, "Merger rules and coronavirus - Special measures due to coronavirus / covid-19" (link). See also: Latham & Watkins LLP, "Impact of Covid-19 on global merger control reviews", 12.05, 2021 (link).

[13] Press release, European Commission, "Mergers: Commission cuts red tape for businesses", 05.12.2013 (link): "*The European Commission has adopted a package to simplify its procedures for reviewing concentrations under the EU Merger Regulation. This package widens the scope of its simplified procedure to review unproblematic mergers, bringing the total ratio of cases treated under this procedure to 60-70%*".

[14] Commission Staff Working Document, "Evaluation of procedural and jurisdictional aspects of EU merger control", {SEC(2021) 156 final} - {SWD(2021) 67 final}, SWD(2021) 66 final, 26.03.2021, paragraph 157. See also: Commission Staff Working Document, "Executive Summary of the Evaluation of procedural and jurisdictional aspects of EU merger control", {SEC(2021) 156 final} - {SWD(2021) 66 final, SWD(2021) 67 final}, 26.3.2021, p. 3.

application. As a consequence, according to Intesa Sanpaolo, some improvements in the current merger control framework would be desirable, as outlined below.

2. Expanding the categories of simplified cases

As mentioned above, Intesa Sanpaolo appreciates the extension of the number of cases, that can be examined under the simplified procedure in the interest of legal certainty for companies. Indeed, it is important for firms to have **reasonable certainty**, regarding the extent to which their merger analysis under the simplified procedure, is admissible. In this regard, the Bank is confident that the Commission will exercise its discretion, linked to the flexibility clause, in order to facilitate the examination of transaction, without competition concerns, under the simplified procedure.
These changes will lead to a **significant reduction** in the number of cases, that will be examined under the **normal procedure**, for the benefit of the market economy and a more efficient and streamlined merger control process. For instance, during 2020, despite the coronavirus pandemic, 361 transactions were notified to the Commission. As in previous years, most of the notified mergers did not raise competition concerns and could be handled quickly. In particular, the simplified procedure was used in 76% of all deals notified in 2020[15]. This number is therefore likely to increase in the coming years, with the aim of streamlining unproblematic transactions.

Intesa Sanpaolo appreciates the revision, introduced in the Notice, concerning the possibility for companies to benefit from **super-simplified treatment**[16] for the so-called "**extra-EEA joint ventures**". This concerns joint ventures[17] that do not have current or expected turnover in the territory of the European Economic Area ("EEA") and the undertakings concerned have no plans to transfer any assets within the EEA to the joint venture at the time of filing[18]. This would prevent unnecessary formalities, delays and resources, for both the Commission and the companies and will reduce transaction costs, although it is desirable to amend the EU Merger Regulation, in order to avoid the notification requirement for such mergers completely[19].

However, the provision[20] according to which, where two or more undertakings acquire joint control over a joint venture with only **negligible activities** in the EEA territory, such a concentration may be excluded from simplified scrutiny, raises some concerns. This is specifically the case where a joint venture qualifying under point 5(b), assuming that there are horizontal overlaps or relationships between the parties to the concentration or if there

[15] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Report on Competition Policy 2020", {SWD(2021) 177 final}, COM(2021) 373 final, 07.07.2021, p. 8.
[16] The parties must notify these concentrations by ticking the relevant boxes of the draft revised Short Form CO (Section 7) without having to complete sections 8-11.
[17] For a further analysis, see: OECD - Policy Roundtables, Directorate for Financial and Enterprise Affairs Competition Committee, "Definition of transaction for the Purpose of Merger Control Review", DAF/COMP(2013)25, 24.01.2014, p. 83 ss. (link).
[18] Draft revised Notice, point 5(a).
[19] European Commission, "White Paper - Towards more effective EU merger control", SWD(2014) 217 final}{SWD(2014) 218 final}{SWD(2014) 221 final}, COM(2014) 449 final, 09.07.2014, paragraph 77 (link).
[20] Draft revised Notice, Section C.1.

is any safeguards or exclusions under Section II.C. In particular, it is unclear why doubts might arise under antitrust law, when the joint venture carries out activities of a negligible nature within the EEA. Indeed, an undertaking that detains a low market share should not represent a risk for competition. This **limitation** also seems **unreasonable** given that the Commission could, in any event, assess the cooperative dimension of a joint venture: this information requirement is, in fact, requested in the Short Form CO[21].

Thus, Intesa Sanpaolo suggests to the Commission to **remove, as a safeguard or exclusion** from the simplified procedure for concentrations under point 5(b), the assessment of the existence of horizontal overlaps or vertical relationships between the merging parties.

3. Behavioral remedies

The other issue that Intesa Sanpaolo wants to submit to the Commission's attention relates to behavioral remedies[22].
Although the regulation of remedies is not the subject of this consultation, we believe it is appropriate to highlight some aspects on remedies as a means of removing competitive risks, arising from mergers between companies.

In particular, it is the responsibility of the parties to propose[23] and implement remedies[24] on the basis of the competition concerns identified; however, their exact form and scope are usually the subject of negotiations with competition authorities and sometimes between the parties to the transaction[25].

In this context, the Commission seems to be very focused on **structural remedies**[26] which, while appropriate to address competition concerns in specific cases, may be **disproportionate** in other cases.
The Commission's preference for structural remedies, such as the sale of a business unit, is also clear from the Notice on remedies[27]. In fact, it is specified that commitments of a structural nature are in principle preferable according to the purpose of the EC Merger Regulation, as they prevent, in a lasting manner the occurrence of competition concerns as a consequence of the merger as notified. However, the possibility, that other types of

[21] Section 12 – Cooperative effects of a Joint Venture, Short Form CO.
[22] Regarding the convergence between antitrust and merger remedies policy, see: Concurrences Revue des droits de la concurrence Competition Law Journal, "Structural remedies: A unique antitrust tool", Tendances I Concurrences N° 2-2013 – pp. 12-31, pp. 25 ss. (link).
[23] In this regard, please see: Francisco Enrique González-Díaz, Daniel P Culley and Julia Blanco, "Negotiating the Remedy: A Practitioner's Perspective", Cleary Gottlieb Steen & Hamilton, 08.11.2021 (link).
[24] For a further analysis, see: Thomson Reuters - Practical Law Competition, "EU merger remedies" (link). Pablo Trevisán; "Merger Remedies", Concurrences (link).
[25] See also: DG Competition, "Best Practices on the conduct of EC merger control proceedings", 20/01/2004, paragraphs 40 ss.
[26] In this regard, see: Frank Maier-Rigaud & Benjamin Loertscher, "Structural vs. Behavioral Remedies", CPI Antitrust Chronicle April 2020, Comparison of Antitrust and Merger Decisions - figure 1, pp. 7-8 (link). Damien Gerard and Assimakis Komninos, "Remedies in EU Competition Law: Substance, Process and Policy", Wolters Kluwer, 2020, p. 69.
[27] Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008/C 267/01, OJ C 267/1, 22.10.2008, paragraph 15.

commitments may also prevent a significant impediment to effective competition, cannot be automatically excluded[28].
In this regard, given that the Commission is in any case bound to respect the **principles of indispensability and proportionality** when adopting a decision, Intesa Sanpaolo considers that behavioral remedies should be more widely accepted, in order to approve those concentrations that are potentially problematic from a competition perspective.

In this context, the Bank disagrees with the argument according to which, especially for mergers of horizontal nature, the adoption of structural remedies is preferred[29]. First, it does not appear to be true in all cases for structural remedies to prevent competition concerns, raised by the notified merger, in a more lasting manner. Nor they appear to be more effective, simply because such measures are generally adopted on a lump-sum basis and there is no need for continuous monitoring in the medium or long term.
By contrast, behavioral remedies may **effectively address competition concerns**, arising from the merger and they can be subject to monitoring by authorities or third parties such as, for example, **trustees**[30]. Behavioral remedies also provide greater **flexibility and reversibility**[31], which make them capable of solving critical competitive issues even for mergers involving innovative markets and, therefore, subject to rapid evolution[32]. In addition, sometimes structural remedies may also present critical issues, for instance when the divestiture cannot be implemented within a reasonable timeframe.

Moreover, some **national authorities**[33] have already shown **more openness** for behavioral remedies.

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[28] ECJ, judgment in Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, paragraph 86; CFI, judgment of 25 March 1999 in Case T-102/96 Gencor v Commission [1999] ECR II-753, paragraphs 319 et seq.; CFI, judgment of 30 September 2003 in Case T-158/00 ARD v Commission [2003] ECR II-3825, paragraph 193; CFI in Case T-177/04 easyJet v Commission [2006] ECR II-1931, paragraph 182; CFI, judgment in Case T87/05 EDP v Commission [2005] ECR II-3745, paragraph 101.
[29] OECD, Directorate for Financial and Enterprise Affairs Competition Committee, "Remedies in merger cases", DAF/COMP(2011)13, 30.07.2012, p. 11 ss. (link). Speech, Vestager, Executive Vice-President Vestager, "Defending competition in a digital age", Florence Competition Summer Conference, 24.06.2021 (link): "*If divestments can't solve the problem, we consider other types of remedies such as open access or interoperability. These remedies need to be considered because in many vertical or conglomerate mergers, the only alternative to behavioural or quasi-structural remedies is often to block the merger*".
[30] In this regard see, for example, COMP/M.3280-Air France/KLM, decision of 11 February 2004 and COMP/M.3770-Lufthansa/Swiss, decision of 4 July 2005.
[31] Ariel Ezrachi, "Under (and Over) Prescribing of Behavioural Remedies", The University of Oxford Centre for Competition Law and Policy, Working Paper (L) 13/05, p. 4 (link).
[32] With regard to mergers, involving digital markets, where behavioural remedies have been accepted and a monitoring trustee has been appointed, see: M.8124 Microsoft/Linkedin, decision of 6 December 2016; Case M.9660 – Google/FitBit, decision of 17 December 2020. See also: European Commission "Competition Merger brief", Issue 1/2017 - May (link).
[33] Thomas Wilson (Kirkland & Ellis), "Merger remedies – is it time to go more behavioural?", Kluwer Competition Law Blog, 21.02.2020 (link). Simon Vande Walle, "Remedies in EU Merger Control – An Essential Guide", 12.05.2021, pp. 33 ss. (link). Allen & Overy, "Global trends in merger control Enforcement", February 2019, p. 12.

France, for example, is a jurisdiction where behavioral remedies are used more frequently in merger control[34]. In a recent study on such remedies, the Autorité de la concurrence concluded that, although behavioral remedies are not generally its preferred remedies in merger control, they nevertheless play a non-negligible role in its decision-making practice[35].

In conclusion, Intesa Sanpaolo suggests to the Commission a **greater openness** towards the acceptance of **behavioral remedies**, adopting a more balanced mix between structural and behavioral remedies also in horizontal mergers, not just vertical[36] or conglomerate[37] cases.

4. Conclusions

As briefly explained above, Intesa Sanpaolo believes that the draft revised Implementing Regulation and the Notice on Simplified Procedure will ensure a reduction of burdens and costs for companies in favor of legal certainty and efficiency. However, in order to better address the current challenges to antitrust law, a **revision** of the rules concerning **exclusions** for the purpose of assessing the transaction under the **simplified procedure** and greater consideration of **behavioral remedies** would be **desirable**.

Intesa Sanpaolo would like to thank the Commission again for the opportunity and is available to further discuss the proposed issues.

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[34] In France, for instance, 1/3 of the commitments in merger control are behavioural remedies, see press release: The Autorité de la concurrence, "The Autorité de la concurrence publishes a new study on Behavioural remedies in competition law", 17.01.2020 (link).

[35] Autorité de la concurrence, "Les Engagements Comportementaux", Les Essentiels, p. 100 (link): "*Ainsi, si les engagements comportementaux ne sont généralement pas les remèdes privilégiés par l'Autorité en droit des concentrations, ils tiennent tout de même une place non négligeable dans sa pratique décisionnelle*".

[36] COMP/M.7873—Worldline/Equens/PaySquare, decision of 20 April 2016.

[37] COMP/M.7822—Dentsply/Sirona, decision of 25 February 2016.