Baker McKenzie.

RESPONSE TO CONSULTATION: MERGER CONTROL IN THE EU – FURTHER SIMPLIFICATION OF PROCEDURES

JUNE 2022

1. Introduction

1.1 Baker McKenzie welcomes the opportunity to provide views on the European Commission's (Commission) proposals to further simplify procedures under the EU Merger Regulation. Generally, we welcome the Commission's simplification policy and attempts to cut down the red-tape for undertakings engaged in M&A activities in Europe. We broadly support the changes outlined in the latest proposals as these will further reduce the regulatory burden for notifying parties.

1.2 However, we consider that the Commission could use this opportunity to simplify the procedure even further, as set out below.

2. Expanding and clarifying the categories of simplified cases

2.1 We note that the revised point 5(d)(i)(aa) and point 5(d)(ii)(aa) and (bb) of the draft Notice on Simplified Procedure (Draft Notice) retain the market share thresholds for parties with horizontal overlaps as 20%, and as 30% for parties in a vertical relationship. We consider that the thresholds could be increased to 25% (horizontal overlaps) and 35% (vertical relationships), as we would not expect a horizontal overlap share of 25% or vertical links with an upstream share or a downstream share of 35% to raise substantive concerns.

2.2 With regards to joint ventures that could benefit from the Simplified Procedure, we consider that the thresholds in point 5(b)(i) and (ii) of the Draft Notice should be increased to EUR 400 million. We would not expect joint ventures with asset or turnover value in the EEA below EUR 400 million to be truly economically significant (we note that EUR 400 million is the level of the German transaction value threshold, and the turnover threshold for notification under the proposed EU Regulation to address distortions caused by foreign subsidies in the Single Market).

2.3 We note that the Commission is seeking to address the above categories of cases with higher thresholds by introducing the use of flexibility clauses in point 8 of the Draft Notice (though for joint ventures the proposed threshold for the flexibility clause to apply is EUR 150 million). However, rather than having flexibility clauses, we would strongly favour amending point 5 of the Draft Notice to reflect the higher market share and turnover/assets thresholds suggested above as these categories would then automatically benefit from the Simplified Procedure. This would lead to a significant reduction in the number of long form cases, and the extent of long form notifications, as well as providing legal certainty to notifying parties in advance. Including these categories of cases in point 5 would provide greater clarity than having flexibility clauses. If the Commission decides to adopt the flexibility clauses instead of expanding point 5, we would welcome further guidance on how the flexibility clause procedure will work in practice.

2.4 We query the utility of retaining the reference to an increment of 150 HHI in point 5(d)(i)(bb) and point 5(d)(ii)(cc) of the Draft Notice, particularly when the references to HHI calculations have been deleted from the full Form CO. Greater simplicity and clarity for companies would arise with a clear market share threshold than an HHI threshold (even though the change in HHI can be calculated independently of the overall market concentration on the basis of the market shares of the parties). With an HHI delta, the threshold in market share terms will vary according to the combination – which is arguably inconsistent with a “bright line” test. For example, consider the following concentrations:

- Firms A and B have shares of 17% and 5% respectively. Pre-merger HHI ((17×17=289)+(5×5=25)) equals 314. Post-merger HHI (22×22) equals 484. Delta = 170. Combined share 22%. NOT A SIMPLIFIED PROCEDURE CANDIDATE.

- Firms C and D have shares of 27% and 3% respectively. Pre-merger HHI ((27×27=729)+(3×3=9)) equals 738. Post-merger HHI (30×30) equals 900. Delta = 162. Combined share 30%. NOT A SIMPLIFIED PROCEDURE CANDIDATE.

- Firms E and F have shares of 37% and 2% respectively. Pre-merger HHI ((37×37=1,369)+(2×2=4)) equals 1,373. Post-merger HHI (39×39) equals 1,521. Delta = 148. Combined share 40%. A SIMPLIFIED PROCEDURE CANDIDATE.

2.5 A very large number of permutations are possible and there is no clear "bright line" test that can be easily applied for the purposes of advising clients without engaging in HHI considerations (and this is made even more complex by the need to consider "plausible" markets). Therefore, we consider that the HHI threshold in point 5(d)(i)(bb) of the Draft Notice should be replaced with an incremental market share threshold and could be revised to state that the Simplified Procedure will apply where the combined market share is 50% or less and the increment is 3% or less. The Commission retains the right to ask for a full Form CO in any event so this should not be controversial. Similarly, point 5(d)(ii)(cc) could be revised to state that the Simplified Procedure will apply where the individual and combined markets shares of the parties in vertical relationships are lower than 50% on both the upstream and downstream markets and the increment is 3% or less on both the upstream and downstream markets, and the smaller undertaking in terms of market share is the same in the upstream and downstream markets.

2.6 We would note that the Commission's 2014 White Paper proposal to amend the EU Merger Regulation so that the creation of a full-function joint venture located and operating outside the EEA that would not have any effects on markets in the EEA would fall outside the Commission's competence, even if the turnover thresholds are met, has been dropped. We understand that legislative reform of the EU Merger Regulation is currently not contemplated - but this initiative would have introduced significant efficiencies to the overall merger control system in Europe. We strongly urge the Commission to re-consider introducing this legislative change. Whilst we note that the revised Draft Notice seeks to address these types of joint ventures by including them in point 5 (a), in our view this would still impose an unnecessary regulatory burden on the parties to such a joint venture. Given that such joint ventures are unlikely to give rise to effects in the EEA, we submit that they should automatically be deemed compatible with the EU Merger Regulation without any notification or formal decision.

3. Streamlining the review of simplified cases

3.1 We welcome the proposed revised draft Short Form CO and agree that the use of multiple choice questions and box-ticking should be easier and quicker to complete. We also agree with the proposal to expand the category of cases that can benefit from the super-simplified procedure to include both extra-EEA joint ventures (subject to our comments above advocating that such joint ventures should be removed from the Commission's competence altogether) and all cases where there are no horizontal overlaps or non-horizontal relationships between the merging parties' activities. The proposed changes should go a long way in significantly reducing the burden on businesses in terms of the volume of internal data, documents and senior management time resources that are required to complete a Short Form CO in a case that does not raise any substantive issues. Nonetheless, we still think that there is scope for further streamlining. We would recommend including non-binding indicative timelines in the Draft Notice for reviewing and approving draft Short Form COs in pre-notification (e.g. two weeks for point 5(a), (b), (c) and (e) cases, three weeks for point 5(d) cases), as this would increase efficiency.

3.2 In Section 2 of the draft Short Form CO, the proposed tables could be replaced with a tick box form for the parties to confirm that the EU Merger Regulation thresholds are met without actually having to provide details of turnover. Such a form could look like the following:

Article 1(2)	
Combined worldwide turnover exceeds EUR 5 billion?	[Yes/No]
Community-wide turnover of each of at least two parties exceeds EUR 250 million?	[Yes/No]
Each party achieves more than two-thirds of its Community-wide turnover within one and the same Member State?	[Yes/No]
Article 1(3) (*only to be completed if the Article 1(2) thresholds above are not met*)	[Yes/No]

Combined worldwide turnover exceeds EUR 2.5 billion?	[Yes/No]
In each of at least three Member States, combined turnover of all parties exceeds EUR 100 million?	[Yes/No]
If so, specify which three Member States.	[ ]
In each of at least those three Member States included for the purpose of the previous point, turnover of each of at least two parties exceeds EUR 25 million?	[Yes/No]
Community-wide turnover of each of at least two parties exceeds EUR 100 million?	[Yes/No]
Each party achieves more than two-thirds of its Community-wide turnover within one and the same Member State?	[Yes/No]

3.3 In Sections 8 and 9, the tables in the draft Short Form CO could be further simplified to require a simple list of the relevant market definitions, rather than requiring detailed market definition descriptions.

3.4 In addition, we consider that the notion of "plausible markets" should as a matter of policy be limited to the most reasonable commercial lenses through which competition takes place and not every conceivable segmentation that a Case Team can think up. In practice, and in our experience, this has been consistently used by Case Teams to systematically broaden the basis for the substantive appraisal (and thus the information requirements on the parties - even in no issue cases). Sections 8 and 9 of the draft Short Form CO effectively stipulates that the notifying parties must submit, in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions). Good practice should be to draft Form CO notifications to address genuine alternative product and geographic market definitions that are "*economically realistic*" (i.e. they make sense from the industry's perspective). Whilst splitting market data to take account of geographic alternatives is typically manageable (e.g. local, national, regional, global), problems can arise with respect to product market alternatives. Very many narrow niches and sub-sub-segments may be deemed "plausible" in certain circumstances, particularly if the Commission's Notice on Market Definition is applied strictly. Does a company, for example, have to provide details and data on a range of markets between "*the European snacks and confectionery market" and "the market for the sale of chocolate ice-cream in mobile vans in parks in Brussels on a Wednesday afternoon*"?

3.5 The Commission should define more precisely and clearly what is meant by "plausible" (e.g. "*generally held to be economically realistic in the industry under review*"). Market definition may be a very subjective exercise (even if the term "plausible" is applied in a wide sense), and new or different approaches to markets may be taken by different stakeholders. Ostensibly, in the context of a Simplified Procedure, the policy of the Commission should be to ask for less information, not more. Parties risk fines for providing incorrect, incomplete or misleading information. Case Teams should have confidence in the process, and the good faith intentions of notifying parties, to proceed to accept notifications without asking for multiple end-use application or sectoral splits of market definitions and the resulting volumes of segment data.

4. Streamlining the review of non-simplified cases

4.1 We welcome the proposals to streamline the long Form CO. We support the proposal to identify which parts of the Form CO are particularly suitable for a waiver request, and the reduction of certain information requirements in Section 8 of the current long Form CO.

4.2 However, we consider that there is scope for further simplification. The front end of the long Form CO could be restructured as is being suggested for the Short Form CO to render it more streamlined and to eliminate significant duplication of inputs. We suggest that Sections 2, 3, 4 of the draft long Form CO could be simplified in the same way as is being proposed for the corresponding sections of the revised

draft Short Form CO. In addition, the suggested approach above for the provision of turnover data, should also be applied in the long Form CO. Our remarks above in respect of "plausible markets" also apply to the long Form CO.

4.3 Furthermore, we generally believe that Sections 6, 7.2, 7.3 of the draft long Form CO could be dropped to a "*Market Share Annex*" and Sections 8, 9 and 10 could be dropped to be replaced with an "*Article 2(2) Advocacy Section*" in which the notifying parties would provide a focused treatment as to which the concentration does not result in an SIEC pursuant to Article 2(3) of the Merger Regulation (rather than filling out the numerated sections as currently provided by the Form CO).

4.4 Often, in substantively challenging cases, the analysis is highly fact-specific and the Form CO will ultimately diverge tremendously from the shape of the Form CO as a result of additional sections/chapters per product(s), horizontal/vertical/conglomerate analyses, and waivers granted by the Case Team not to provide certain information. Accordingly, one neat "*Article 2(2) Advocacy Section*" would allow the parties to present one consistent and non-duplicative advocacy piece as to why the concentration does not raise competition concerns.

4.5 Where efficiencies are relied on by the parties, we would expect this piece to be prepared by external economists, so would suggest Section 11 of the draft long Form CO be removed and replaced with an "*Efficiencies Annex*" rather than require the parties' external counsel to prepare a duplicative summary statement to be inserted in Section 11.

4.6 Finally, Section 12 of the draft long Form CO could also be replaced with a "*Joint Venture Annex*" that could be appended in joint venture cases (but is dropped for all non-joint venture cases).

5. Introducing electronic notifications

5.1 We fully support the proposal to introduce electronic notifications, reasoned submissions, comments on the Commission's objections, commitments offered by the undertakings concerned and the Form RM. This will be environmentally friendly and incur cost savings for the parties. However, we have concerns about some of the proposed technical requirements.

5.2 We welcome the proposal to increase the file size to 10gb. We request that the Commission confirms that it will issue the notifying parties with a delivery receipt from the EU Send system.

5.3 We note that all documents will be required to be in PDF or XLSX format. Converting lengthy PowerPoint files to PDF can be onerous - will it be possible for the parties to request an exemption from this requirement?

5.4 The Commission specifies ".XLSX" as the file extension for MS-Excel. However old versions of Excel may have simply ".XLS". Will .XLS files have to be converted (which may or may not be possible) or will the Commission accept the data as .XLS?

5.5 We have some concerns about the proposed naming convention. At present, many parties submit documents using a unique doc ID as the file name and then provide an index to the documents, which works well. There is a complication that if a document is relevant to more than one section of the Form CO, Short Form CO, Form RS or Form RM, the proposed naming convention does not work. We would prefer to retain an index-based approach to this which allows for more flexible descriptions of the documents submitted, including meta data, such as document source, relevance to the submission, original file name etc.

5.6 The proposed requirement that documents in PDF format must be marked on each page with corporate identification and consecutive document control numbers (e.g., ABC-00000001) will be extremely onerous for submissions not provided via an e-discovery platform. It is not clear why the Commission considers that it requires this and we would like to understand the reasoning behind this.

Baker McKenzie

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