RESPONSE OF CLIFFORD CHANCE TO THE EUROPEAN COMMISSION CONSULTATION ON MERGER CONTROL IN THE EU – FURTHER SIMPLIFICATION OF PROCEDURES

Clifford Chance welcomes the opportunity to respond to the consultation of the European Commission (**Commission**) on "merger control in the EU – further simplification of procedures", including revised drafts of the Implementing Regulation (the **Draft Regulation**), the Simplified Procedure Notice (the **Draft Notice**), the Communication pursuant to Articles 3(2), 13(3), 20, and 22 of the Implementing Regulation (the **Draft Communication**), Short Form CO and Forms CO, RM and RS. Our observations below are based on the substantial experience of our antitrust lawyers of advising on merger control proceedings in the EU and a large number of other jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

1. DRAFT SIMPLIFIED PROCEDURE NOTICE

Expanded categories of candidate cases for the simplified procedure

1.1 We broadly support the proposed expansion of candidate cases for the simplified procedure relating to vertical relationships in paragraph 5(d) of the Notice. As noted in our response to the previous consultation, we agree that such cases are highly unlikely to give rise to competition concerns, such that their inclusion will give rise to significant administrative efficiencies for notifying parties.

1.2 In relation to the first new category of cases that would benefit from simplified treatment pursuant to point 5(d) of the Draft Notice (*i.e.*, the case in which, under all plausible market definitions, the individual or combined upstream market share of the parties to the concentration is below 30% and their combined purchasing share is below 30%), we consider that the simplified procedure should also be available in cases where one party has a market share above 30%, or where the combined purchasing share is over 30%, but where there is no genuine vertical relationship on the market in question. This could, for instance, be the case where the upstream party does not sell the input used by the downstream party in that market segment.

1.3 We also welcome the sensible clarification in paragraph 7 of the Draft Notice that, in the case of an acquisition of joint control, pre-existing overlaps and relationships that are not increased as a result of the concentration are not taken into account for the purposes of the application of points 5(c) and 5(d).

New flexibility clause

1.4 While we welcome the inclusion of flexibility for the Commission to apply the simplified procedure to certain horizontal and vertical relationships that marginally exceed the thresholds set out in paragraph 5, we consider that the benefits of this will be limited unless the Commission provides specific guidance in the Notice on the circumstances in which it is and is not likely to exercise its discretion for each of the relevant categories.

1.5 Our experience of the current category for which the Commission has significant discretion (the category based on HHI deltas in point 6 of the Simplified Procedure Notice) is that persuading the Commission to exercise its discretion can require the provision of substantial amounts of information, such that the burden is not much less than would exist if the normal procedure is used. In our view, this is principally because the guidance on that category in point 18 of the Simplified Procedure Notice is too vague to assist case teams in their assessment.

Addition of a new requirement that a joint venture must have expected turnover in the three years following notification of less than EUR 100 million

1.6 We do not consider this change (in paragraph 5(b) and footnote 11 of the Draft Notice) to be justified by reference to the body of EUMR decisions. It will catch transactions in which the parties envisage making significant investments to grow the sales of the JV, either in the form of a greenfield JV or a small existing business. The likelihood of competition issues arising is therefore comparable to cases involving greenfield JVs which, as the Commission will be aware, is very low. Such JVs are innately pro-competitive, as they expand capacity in the market and create new competitive offerings. The cases in which the Commission has identified competition concerns in such cases have been very rare, and tended to involve JVs between all or most of the major players in the sector (such as Case No COMP/M.6314 – *Telefónica UK/Vodafone UK/ Everything Everywhere/JV*), or where the JV has won a public tender that will result in it being the exclusive or dominant provider of certain services (such as Case No COMP/M.2903 - *DaimlerChrysler/Deutsche Telekom/JV*). Such cases will be readily identifiable to case teams, which can exercise their discretion to revert to the long form procedure. Adding a threshold based on expected turnover will create uncertainty and administrative costs that are not, in our view, justified by the low likelihood that such transactions will give rise to competition issues.

1.7 We would also welcome a clarification in footnote 11 that, when calculating the turnover and assets of the JV for the purposes of the Draft Notice, parties can disregard the second sentence of paragraph 139 of the Consolidated Jurisdictional Notice (**CJN**), whereby a parent company's turnover must be aggregated with that of the JV in cases of sole-to-joint control where the selling parent is retaining decisive influence.

Inclusion of planned future financing in the calculation of JV assets

1.8 For the same reason as set out in 1.5 above, we do not agree with the proposal to introduce a threshold based on assets that are planned to be transferred to the JV. While that might be justifiable if the relevant assets were limited to existing business assets, the definition of assets in the Draft Notice retains (and even expands on) the inclusion of financial support provided by the parents ("financing, including access to 'cash', credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee"). Again, the result is that greenfield JVs, and comparable expansions of small existing JVs, will be subject to onerous long form filing requirements, notwithstanding their low probability of giving rise to competition concerns. As noted in our response to the prior consultation, we favour instead an approach that excludes financial assets from the definition of assets, both for existing assets of the JV and planned future transfers.

Expansion of the definition of vertical links

1.9 The Draft Notice no longer states that a vertical link normally presupposes that an input is "important", and instead states (in footnote 18) that it normally presupposes that it is used directly for (integrated into) the production of the downstream entity, or is re-sold. In doing so, it creates an inconsistency with the Notice on the Assessment of Non-Horizontal Mergers, which (correctly, in our view) states that "input foreclosure may raise competition problems only if it concerns an important input for the downstream product", such as where it "represents a significant cost factor relative to the price of the downstream product". The new approach would mean that any input that is "integrated" into the downstream product amounts to a vertical link, no matter how insignificant its role in the final product (e.g. nuts and bolts used in the manufacture of a submarine).

1.10 If the Commission is concerned that vertical relationships can give rise to foreclosure effects even if they do not represent a significant cost factor, a better approach, in our view, would be to set a clear threshold for the cost of the input as a proportion to that of the final product (e.g. 10%). At minimum, the Commission should amend the last line of footnote 18 to make it clear that the definition does not catch "links with services <u>and products</u> provided to various sectors".

Exclusion of JVs with negligible activities in the EEA where competition concerns "cannot be excluded"

1.11 Paragraph 13 of the Draft Notice repeats the statement in the existing Notice that the normal procedure may be considered appropriate for JVs with negligible activities in the EEA "where horizontal overlaps or vertical relationships exist between the parties to the concentration, on the basis of which it cannot be excluded that the concentration will raise serious doubts as to its compatibility with the internal market". Our concern here is that this allows case teams to take the view that such concerns cannot be excluded if the 20/30% thresholds in paragraphs 5(d) are exceeded. That would render pointless the inclusion of the category of JVs with negligible EEA activities as a candidate for the simplified procedure in the first place. Worse still, it would create additional costs and delays for notifying parties, which would have to incur the time and cost of arguing with the case team over whether the simplified procedure can apply.

1.12 We therefore consider that the Commission should supplement the Draft Notice with specific guidance on the circumstances in which it considers that a JV with negligible EEA activities might nonetheless give rise to competition concerns. In that respect, the Commission might refer to the joint guidance of the German Bundeskartellamt and the Austrian Bundeswettbewerbsbehörde on the application of their respective transaction value thresholds for mandatory merger notifications, which state that:[1]

1.12.1 a party's activities will not be considered significant if they generate turnover below a certain threshold and this turnover "adequately reflects its market position and competitive potential";

[1] Available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden_Transaktionsschwelle.html?nn=3590338

1.12.2 this is likely to be the case if the company's products generate significant turnover abroad but not in the country in question; and

1.12.3 the situation is different if domestic turnover is not an adequate indicator, for instance, because the company is active on a market that is not characterised by turnover.[2]

Inclusion of new "safeguards and exclusions" and "special circumstances" justifying withdrawal of the simplified procedure

1.13 The Draft Notice contains a longer list of special circumstances that may justify withdrawal of the simplified procedure, based on certain statements in the horizontal and non-horizontal guidelines.

1.14 Our view is that some of the elements listed by the Commission in, for instance, paragraphs 16 and 17 of the Draft Notice require a substantive assessment and thus a potentially burdensome data gathering exercise for the parties. This may thus remove the inherent advantages of the simplified procedure in terms of time gains and efficiencies for both the Commission and the parties. In addition, we consider that it may not always be straightforward for the parties to a transaction to be able to answer the questions listed in Section 11 of the Short Form CO with a simple ticked "yes" or "no", in particular when a substantive assessment is required.

1.15 In point 18, we also consider that the inclusion of two new circumstances is not justified: point 18(d) ("overlaps arise in markets where products are highly differentiated")[3] and point 18(i) ("indications that the proposed concentration would allow the parties to the concentration to […] hamper rivals' access to supplies or markets or increase barriers to entry"). It is important to recall that the market share thresholds that must be satisfied by the parties to qualify for simplified procedure are based on the narrowest plausible alternative product and geographic market definitions. Indeed, a common gripe of notifying parties and their advisers is that case teams often insist on implausibly narrow market definitions, particularly in markets that are characterised by significant product differentiation. In practice, this process of assessment based on the narrowest plausible market acts to ensure that concerns of the type highlighted in points 18(d) and 18(i) of the Draft Notice will not arise. Consequently, our view is that those points should be deleted from the final version of the notice, in order to avoid excessive legal uncertainty regarding possible withdrawal of the simplified procedure.

Other points

1.16 Footnote 52 might usefully refer to the recent relevant judgment of the General Court in Case T-251/19, *Wieland-Werke AG.*

---

[2] The other example given – "because its product has only recently come onto the market so that the low turnover generated so far does not reflect the competitive potential" – will not be relevant if the Commission retains its approach of including future, expected turnover when assessing whether the threshold is satisfied.

[3] We recognise that the existing Notice already refers to any of the special circumstances mentioned in the Horizontal Guidelines, but the absence of this factor from the list that is expressly set out in the text of the Notice serves to indicate that it is less likely to be relevant for cases meeting the criteria for the simplified procedure.

1.17 The definition of a "non-horizontal relationship" in footnote 34 ("a relationship that is not a horizontal overlap") is not clear. We suggest clarifying that this definition is intended to comprise both vertical relationships and scenarios in which the parties are active in closely related neighbouring markets.

2. DRAFT FORM CO

2.1 We welcome the efforts to streamline the information requirements of Form CO and, in particular, the creation of a new Section 7 for transactions meeting the criteria of the Draft Notice, including "flexibility clause" cases, and the removal of certain information requirements for affected markets relating to cooperative agreements, trade associations and trade between member states/imports.

2.2 However, we have some reservations that the format of "yes / no" tick boxes may not materially reduce the time and resources that are required to complete Form CO, given that many of the confirmations are required to be supplemented by explanations, which will end up involving a similar amount of drafting to that which is required for the current version of the form.

2.3 We have the following comments on specific provisions of the Draft Form CO.

Definition of vertical relationship and non-horizontal relationship

2.4 Paragraphs 25(d), (e) and (f) of the Draft Form CO should include the same clarification as in point 7 of the Draft Notice (that relationships that exist only between the parents to a joint venture are not considered to be horizontal overlaps or vertical relationships) and paragraph 25(f) could also usefully include the clarification in footnote 18 of the Draft Notice (that a vertical relationship presupposes that the input has certain characteristics).

2.5 As noted above, the definition of "non-horizontal relationships" is not clear. We suggest deleting it, as it is not used anywhere in the Draft Form CO. This comment also applies to the Draft Form RS.

Section 6 of Introduction: Quantitative economic data

2.6 Paragraphs 27 and 28 of the revised Draft Form CO now require the parties to provide descriptions of quantitative economic data in order for their Form CO to be considered complete by the Commission. This requirement includes the description of new additional data elements listed in paragraphs 27(d) and 28. We consider that the requirement to provide descriptions of such data in all cases is disproportionate and recommend that the current requirements be preserved, *i.e.*, that such information should only be submitted "in cases in which quantitative economic analysis for the affected markets is likely to be useful" and that such information should in any event not be required for the Form CO to be considered as complete.

Section 3.4: State aid

2.7 The new clarification that parties should "indicate whether any of the parties to the concentration has been the beneficiary of aid that is or has been subject to Union State aid proceedings" is unclear. Does the Commission expect details of all aid received that has been cleared by the Commission, including aid received under a cleared scheme?

If so, that seems to us to be an excessive requirement, as many companies are not aware whether a given grant, loan or tax break to which they were entitled under a national scheme was the subject of a State aid clearance decision. We suggest specifying that "Union State aid proceedings" for these purposes means a Phase 2 investigation.

2.8 The Commission should also consider whether this section should incorporate a comparable question regarding subsidies falling within the scope of the Regulation on foreign subsidies distorting the internal market, when adopted.

Section 6.2: Summary of affected markets

2.9 The text of section 6.2 requires the notifying party to "provide summary information on the activities of the parties to the concentration in each plausible relevant market" and then provides a table, which indicates that only information on product/geographic market definition and market shares is to be provided. It is not clear whether completing the table is considered sufficient information about the parties' activities, or whether they are expected to supplement it with additional information about their activities.

Section 6.3: potential competitors

2.10 Section 6.3 now lowers from 30% to 20% the market share threshold above which a notifying party is "invited" to provide information in sections 7-10 if it is acquiring a potential competitor. While we recognise that "killer acquisitions" are an enforcement focus of the Commission at present, the cases that have raised concerns have invariably involved a dominant or near dominant acquirer. Consequently, we submit that this market share threshold should remain unchanged.

Sections 7.1-7.4: markets falling under the flexibility clause

2.11 We consider that the tabular format for providing the requested information should go some way to reducing information burdens for such markets. However, the questions in 7.4 are broad and vague, so given the applicable penalties for providing false or misleading information, it will be necessary for notifying parties to provide textual explanations as to why they have answered "no" to certain questions, not just (as is currently indicated) explanations as to why they have answered "yes".

Section 10.6: pipeline products

2.12 It seems to us that this section is redundant, given that the relevant information will already have been provided in the revised Section 8.

3. SHORT FORM CO

3.1 We welcome the streamlined format of the Draft Short Form CO and have the following specific comments (in addition to our comments on the Draft Notice which are also relevant to the content of the Short Form CO).

Section 6.2: Acquisition of control

3.2 The tick box table for *de facto* sole control appears to suggest that additional confirmations are required only if an undertaking is highly likely to achieve a majority at the target's shareholders' meetings. However, the additional conformations include

some which address scenarios of commonality of interest, which can arise even if an undertaking is not likely to achieve a majority at the target's shareholders' meetings, e.g. because the undertaking and other shareholders with which it shares strong common interests will have, in combination, negative veto rights falling short of a majority interest. The text of the primary question should be amended to include this scenario, and also to make it clear that it applies if an undertaking, in combination with any other shareholders with which it shares strong common interests, is likely to be able to veto strategic commercial decisions of the target. We also suggest adding a footnote to explain that if those other shareholders are undertakings, this will usually be considered to be an acquisition of joint control, such that the table relating to joint control should be completed instead.

Section 6.3: full functionality

3.3 The table of required confirmations includes "there are no third party or external decisions pending that are central to starting the joint venture's business activity". We recognise that this derives from paragraph 105 of the CJN, but consider that the wording of the required confirmation is not appropriate, as it suggests that a filing cannot be made until the point in time when all clearances, licences or contracts have been obtained (save those that are mere formalities). In our view, that would be inconsistent with Article 4(1) EUMR, which permits filings to be made where an agreement to bring about a concentration has been entered into, or where the parties can demonstrate a good faith intention to conclude such an agreement.

3.4 If the Commission's position is that parties cannot notify JVs until all regulatory approvals, licences and contracts have been awarded that would create unnecessary and unjustified delays. Moreover, as paragraph 105 of the CJN makes clear, at the point in time at which such third party decisions have been obtained "a concentration arises", which suggests that (if all other full functionality criteria are met) parties must have obtained EUMR clearance before the third party decisions are obtained, in order to avoid having implemented the transaction in breach of Article 7 EUMR. Indeed, in Case No COMP/ M.3275 – *Shell Espana/ Cepsa/ SIS JJ*, the Commission considered that an Article 7 derogation was required before the parties could, among other things: (i) sign administrative contracts for the services to be performed by the JV; and (ii) obtain any necessary Civil Aviation Authority authorisations. Similarly, in Case No COMP/M.4472 *William Hill / Codere / JV*, a derogation was required before signing the concession agreement(s) that would be performed by the JV.

3.5 We therefore suggest amending the wording of the required confirmation to "*The parties have a good faith intention to obtain all third party or external decisions that are central to starting the joint venture's business activity*."

Section 8-10: market share tables

3.6 We note that the market share tables in Sections 8 to 10 of the Short Form CO remain very detailed and require a burdensome data gathering exercise from the parties. We consider that, for cases qualifying for simplified treatment, less data should be requested from the parties (*e.g.*, by allowing the parties simply to confirm that their market shares do not exceed the thresholds for eligibility to the simplified procedure, or by requesting only the provision of one type of volume or value metric data, as opposed to both).

4. DRAFT IMPLEMENTING REGULATION AND COMMUNICATION

4.1 We welcome the move to accepting electronic filings. Our only comments on the related changes to the Draft Regulation and Draft Communication are as follows:

4.1.1 The Draft Communication does not adequately distinguish between Forms CO/RM/RS and the supporting documents that are submitted along with those forms. In particular, paragraph 6 of the Draft Communication could be misconstrued as requiring all supporting documents to be electronically signed.

4.1.2 The requirement for all documents other than Section 5(4) documents to be in either pdf or xlxs format creates unnecessary burdens for notifying parties, both in preparing the relevant pdfs and in checking that the pdf versions properly match the original. Given that the Commission is prepared to accept section 5(4) documents in native format, a more efficient filing process could be achieved if the Commission were prepared to accept supporting documents also in (at least) Word (.doc / .docx) and PowerPoint (.ppt / .pptx) formats. The requirement for corporate identification and consecutive document control numbers could be achieved through appropriate file-naming conventions instead.

Clifford Chance LLP
June 2022