White & Case LLP

Response to the European Commission consultation on the draft revised Merger Implementing Regulation and the draft revised Notice on Simplified Procedure

I. Introduction

1. White & Case LLP ("**White & Case**") welcomes the opportunity to comment on the draft revised Merger Implementing Regulation ("**Implementing Regulation**") and the draft revised Notice on Simplified Procedure ("**Notice**") published as part of the European Commission's ("**Commission**") proposed simplification measures regarding merger procedures.[1]

2. We endorse the Commission's efforts to expand and clarify the categories of simplified cases, to streamline the review of simplified and non-simplified cases, to make electronic notifications the standard approach[2], and welcome most of the changes introduced in the Implementing Regulation and in the Notice.

3. However, we respectfully submit that certain aspects/sections of the Implementing Regulation (and related annexes) should be further streamlined to ensure that the Commission and merging parties alike can direct their resources on cases which are more likely to raise competition concerns.

4. This submission focuses on a limited number of specific issues that we believe need to be addressed to ensure that the new instruments meet the stated and largely uncontroversial simplification objectives set forth by the Commission.[3] These points concern: (i) whether it is necessary, reasonable and proportionate to complete Section 11 of the Short Form CO on safeguards and exclusions in standard simplified cases (**Section II**); (ii) in cases where Section 7.4 of the Form CO and Section 11 of the Short Form CO on safeguards and exclusions need to be completed, the scope of some questions is unnecessarily broad (**Section III**); and (iii) whether it is necessary to provide detailed information on pipeline products in all cases (**Section IV**).

II. Not necessary to complete Section 11 on safeguards and exclusions in standard simplified cases

5. The revised Short Form CO indicates that "*Section 11* [Safeguards and exclusions] *must be completed in all cases, except for concentrations falling under point 5(a) or 5(c) of the Notice*". Points 5(a) and (c) of the Notice cover only extraterritorial JVs and cases in which there are no horizontal overlaps or vertical relationships. Accordingly, under the current draft, <u>in all other cases Section 11 of the Short Form CO needs to be completed</u>.

6. White & Case respectfully submits that this approach is disproportionately and unnecessarily burdensome for merging parties. Section 11 includes a number of broad questions that <u>should not be required in all standard simplified cases covered by point 5 of the Notice on Simplified Procedure</u> (including in all cases in which combined shares are below 20%). As shown by the Commission Staff Working Document Evaluation of Procedural and Jurisdictional Aspects of

---

1 See https://ec.europa.eu/competition-policy/public-consultations/2022-merger-simplification_en#objective-of-the-consultation.

2 See Commission "Revision of Merger Implementing Regulation and Revision of the Commission Notice on Simplified Procedure – Explanatory Note", pages 3-6.

3 See https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_22_2806 ("*1. Expand and clarify the categories of cases that can be treated under the simplified procedure; 2. Introduce refined safeguards so that the simplified procedure does not apply to cases that merit a more detailed review; 3. Ensure effective and proportionate information gathering, by introducing a new notification form for simplified cases, in a "tick-the-box" format; 4. Streamline the review of non-simplified cases by reducing and clarifying information requirements; 5. Introduce electronic notifications and the possibility for the parties to submit certain documents electronically.*").

EU Merger Control,[4] "[b]*etween 2014 and 2020, 22 cases were switched from a simplified to a normal review procedure after notification (i.e. around 1% of all simplified cases notified). None of them resulted, however in an intervention by the Commission*." On this basis, and in order to ensure that the simplification goals of the Commission can be achieved, we submit that there is no need to require merging parties to provide the extensive information of Section 11 of the Short Form CO in standard simplified cases. At most, merging parties could be required to fill out Section 11 of the Short Form CO (modified along the lines set out in Section III below) only in cases falling under the so-called flexibility clause (points 8-9 of the Notice).

7. We submit that this would not raise a significant risk of under enforcement. Indeed, the Commission still retains the possibility of asking the parties concerned for the information list in Section 11 if, and only if, the transaction characteristics, including the industry in which it takes place, raise any doubt about possible negative effects despite the low market shares.

III. Some questions in Section 7.4 of the Form CO and Section 11 of the Short Form CO are not necessary or they are too broad

8. In order to meet the Commission's simplification objectives, we recommend the deletion or modification of some of the questions included in Section 7.4 of the Form CO and Section 11 of the Short Form CO on safeguards and exclusions.

9. Currently, most questions appear to be too broad or subjective and cannot be answered with a "yes" or "no" answer. We suggest that the Commission simplifies the process by requesting clearer / more specific information and by eliminating questions that are redundant, broadly phrased or subjective. Merging parties might otherwise answer "yes" on a precautionary basis, which would unnecessarily and disproportionately increase both the informational requirements for merging parties and the Commission's workload. We would also recommend the introduction of an additional box at the end of the table in which parties could provide additional explanations, where deemed relevant, when they replied "no" to a question.

10. Our suggestions and reasons for changes are included in tables 1 and 2 below.

Table 1: Section 7.4 of the Form CO

Question	Answer	Reasons for suggesting to amend / delete the question

[4] See SWD_findings_of_evaluation.pdf (europa.eu).

Any of the parties to the concentration has ~~significant non-controlling~~ shareholdings ~~(i.e.~~ above 10%~~) or cross-directorships~~ in companies active in the same markets as any of the other parties or in vertically related markets ~~(e.g. the acquiring undertaking has a non-controlling minority shareholding or common directors in an undertaking active in the same market as the target)~~.	□Yes □No	Unclear what significant is / unnecessary. Extremely time consuming to identify all cross directorships in companies active in vertically related markets. Moreover, we would suggest to define "directorships" more clearly.
One or more of the parties' competitors have a ~~significant non-controlling~~ shareholding ~~(i.e.~~ above 10%~~)~~ in any of the undertakings concerned. If yes: indicate the shareholding %: indicate the rights attached to the shareholding:	□Yes □No	Unclear what significant is / unnecessary.
~~The parties own or control important technological, financial or competitively valuable assets, such as raw materials, intellectual property rights, patents, data or infrastructure.~~	~~□Yes~~ ~~□No~~	Subjective and broad definition of important assets.
~~The parties are active in closely related neighbouring markets and any of the parties individually holds a market share of 30% or more in any of these markets under any plausible market definition.~~	~~□Yes~~ ~~□No~~	Problem with defining closely related neighboring markets.
~~The parties have a significant user base and/or commercially valuable data inventories~~~~.~~	~~□Yes~~ ~~□No~~	Subjective and broad definition of significant user base and / or commercially valuable data inventories.
~~The concentration will allow the merged entity to gain access to commercially sensitive information regarding the upstream or downstream activities of rivals.~~	~~□Yes~~ ~~□No~~	Subjective and broad definition of commercially sensitive information regarding rivals.
There remain fewer than three competitors with market shares above 5% in any of the markets giving r~~a~~ise to horizontal overlaps or vertical relationships under any plausible market definition.	□Yes □No	
The relevant market share thresholds are exceeded in terms of capacity or production under any plausible market definition.	□Yes □No □N/A	

The parties (or one of them) are recent entrants in the overlapping markets (i.e. entered the market in the last three years).	□Yes □No	
~~The parties' activities overlap or have a vertical relationship in highly differentiated products. Indicate if:~~ ~~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.~~ ~~advertising is important in any of the overlapping markets.~~	~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~	Subjective and broad definition of : - Highly differentiated - Importance of brand recognition, branch and store location, technical specifications, etc. We suggest to remove this question or provide more details as to what "highly differentiated" and "important" mean.
~~The parties are important innovators in the overlapping markets.~~ The parties have brought to the market an important pipeline product within the last 5 years. Main activity of one or more companies focuses on R&D. Expenditure in terms of R&D: [please provide EUR million]	~~□Yes~~ ~~□No~~ -□Yes □No □Yes □No	Subjective definition of important innovator.
The concentration gives raise to pipeline-to-pipeline or pipeline-to-marketed product overlaps.	□Yes □No	Typo. We would also strongly recommend to define pipeline products more precisely (e.g. by specifying timeframe within which they are expected to be marketed and status of development needed)

One of the parties has plans to expand into product markets and / or geographic markets in which another party to the concentration is active or which are in a vertical relation with markets in which another party to the concentration is active. Explain the products or services concerned by such plans and their estimated timing:	□Yes □No	Timing would likely be an estimate.
~~In production chains with more than two levels, individual or combined market shares of the parties exceed 30% in any of the levels of the value chain (in terms of value, volume, production or capacity).~~	~~□Yes~~ ~~□No~~	Extremely time consuming.
If you answered "yes" to any of the questions above, explain why in your view the market concerned does not give rise to competition concerns and provide all relevant details:		
If you answered "no" to any of the questions above, and want to provide further clarification regarding the basis of your response in relation to a specific question, please provide details here.		

Table 2: Section 11 of the Short Form CO

Question	Answer	Reasons for suggesting to amend / delete the question
Any of the parties to the concentration has ~~significant non-controlling~~ shareholdings ~~(i.e.~~ above 10%)~~ or cross-directorships~~ in companies active in the same markets as any of the other parties or in vertically related markets ~~(e.g. the acquiring undertaking has a non-controlling minority shareholding or common directors in an undertaking active in the same market as the target).~~	□Yes □No	Unclear what "significant" is / unnecessary. Extremely time consuming to identify all cross directorships in companies active in vertically related markets. Moreover, we would suggest to define "directorships" more clearly.

One or more of the parties' customers or competitors have a ~~significant non-controlling~~ shareholding ~~(i.e.~~ above 10%~~)~~ in any of the undertakings concerned. If yes: indicate the shareholding %: indicate the rights attached to the shareholding:	□Yes □No	Unclear what "significant" is / unnecessary.
~~The parties own or control important technological, financial or competitively valuable assets, such as raw materials, intellectual property rights, patents, data or infrastructure~~	~~□Yes~~ ~~□No~~	Subjective and broad definition of important assets.
~~The parties are active in closely neighbouring markets and any of the Parties individually holds a market share of 30% or more in any of these markets under any plausible market definition~~	~~□Yes~~ ~~□No~~	Problem with defining closely related neighboring markets.
~~The parties have a significant user base and/or commercially valuable data inventories~~	~~□Yes~~ ~~□No~~	Subjective and broad definition of significant user base and / or commercially valuable data inventories.
~~The concentration will allow the merged entity to gain access to commercially sensitive information regarding the upstream or downstream activities of rivals.~~	~~□Yes~~ ~~□No~~	Subjective and broad definition of commercially sensitive information regarding rivals.
There will remain fewer than three competitors with market shares above 5% in any of the markets giving raise to horizontal overlaps or vertical relationships under any plausible market definition[5].	□Yes □No	
The relevant market share thresholds are exceeded in terms of capacity or production under any plausible market definition	□Yes □No □N/A	
The parties (or one of them) are recent entrants in the overlapping markets (i.e. entered the market in the last three years)	□Yes □No	

[5] Tick N/A if these metrics are not relevant for the markets concerned.

~~The parties' activities overlap or have a vertical relationship in highly differentiated products. Indicate if:~~ ~~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.~~ ~~Advertising is important in any of the overlapping markets.~~	~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~ ~~□Yes~~ ~~□No~~	Subjective and broad definition of : - Highly differentiated - Importance of brand recognition, branch and store location, technical specifications, etc. We suggest to remove this question or provide more details as to what "highly differentiated" and "important" mean.
~~The parties are important innovators in the overlapping markets.~~ The parties have brought to the market an important pipeline product within the last 5 years. The main activity of one or more companies focuses on R&D. Expenditure in terms of R&D: [please provide EUR million]	~~□Yes~~ ~~□No~~ □Yes □No □Yes □No	Subjective definition of important innovator.
The concentration gives raise to pipeline-to-pipeline or pipeline-to-marketed product overlaps.	□Yes □No	Typo. We would also strongly recommend to define pipeline products more precisely (e.g. by specifying timeframe within which they are expected to be marketed and status of development needed)

One of the parties has plans to expand into product markets and/or geographic markets in which the other party is active or which are in a vertical relation with products in which the other party is active. Explain the products or services concerned by such plans and their estimated timing:	□Yes □No	Timing would likely be an estimate.
~~In production chains with more than two levels, individual or combined market shares of the parties exceed 30% in any of the levels of the value chain (in terms of value, volume, production or capacity).~~	□Yes □No	Extremely time consuming.
If you answered "yes" to any of the questions above, explain why in your view the market concerned does not give rise to competition concerns and provide all relevant details.		
If you answered "no" to any of the questions above, and want to provide further clarification regarding the basis of your response in relation to a specific question, please provide details here.		

IV. Not necessary to provide detailed information on pipeline products in all cases

11. Section 8.2 of the revised Form CO, as well as sections 8, 9 and 10 of the revised Short Form CO require the parties to provide extensive information in table format about pipeline products, including in vertically-related markets. We respectfully submit that, while these questions may be relevant for certain innovation-driven industries, or in specific cases, in the vast majority of transactions the questions would be unnecessarily burdensome relative to the importance of the information for the competitive assessment of the transaction.

12. Moreover, frequently the parties struggle to identify the exact future application of products which have not yet been marketed and to classify them in specific relevant markets. As such, we recommend the deletion of Section 8.2 of the Form CO and of the requests on pipeline products included in sections 8, 9 and 10 of the Short Form CO to achieve the Commission's simplification goals. The Commission will still be able to request such information, where relevant, through ordinary requests for information where actually relevant.