8 JUNE 2022

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Response by De Brauw Blackstone Westbroek N.V. to the Commission's consultation on the draft revised rules on the simplification of the EU merger filing rules

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1 INTRODUCTION

1.1 De Brauw Blackstone Westbroek NV welcomes the opportunity to provide feedback on the European Commission's (the "**Commission**") draft revised rules on the simplification of the merger control process in the European Union. Our feedback is a reflection of our experience in advising clients through simple and complex merger control proceedings before the Commission. We support the Commission's goal to simplify overly formalistic elements of the merger control process and allow it to be completed in an efficient manner. This efficiency is in the interest of the Commission, as well as the parties involved in the merger.

2 DRAFT REVISED IMPLEMENTING REGULATION

General

2.1 The most obvious change to the Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 ("**Implementing Regulation**") is the option to submit documents through electronical means. This is a significant and welcome step forward, which will mean an important improvement for businesses compared to the pre Covid-19 procedures. We therefore fully support this improvement. The sections below provide our views on this and some other factors relevant to evaluating the new proposals.

Article 13 – Decisions on the substance of the case

2.2 While the issuance of a supplementary SO or letter of facts is common practice (the options being described in the Commission's Antitrust Manual of Procedures from November 2019), we note that the issuance of such documents may considerably delay the conclusion of the investigation.[1] In addition, unrestricted use of these "stop-the-clock"-decisions during Phase 2 leads to highly unpredictable timelines, which in turn impacts deal certainty. We would therefore invite the Commission to consider potential improvements to the review of non-simplified cases by issuing stop-the-clock decisions exceptionally and through open dialogue with the parties, regardless of whether a supplementary SO or a letter of facts has been sent by the Commission.

Article 22 – Transmission and signature of documents

2.3 We fully support the Commission in making digital submission of notifications, in combination with a valid digital signature, the default route for submission. Recently we have experienced divergent applications of the rules, particularly in relation to the signatures on the Power of Attorney by different case teams. While digital submissions were accepted during the Covid-19 pandemic, some case

[1] As is also noted in the Antitrust Manual of Procedures, module 11 – Drafting of Statement of Objections (SO), page 3/15.

teams accepted the submission of a digitally (i.e. through DocuSign) signed power of attorney, which we deemed to be the original, while other case teams required the submission of a signed (wet ink) paper copy, even for DocuSigned powers of attorney which – from a legal perspective – constitute an original and legally binding document. We therefore appreciate the additions and clarifications regarding digital submission in the Implementing Regulation.

Article 23 – Setting of time limits

2.4 In recent cases, we have experienced that the Commission is less responsive during the summer period (July and August) and the Christmas holiday period. The Commission moreover is not receptive to accepting notifications and / or to conducting market investigations during these periods. We believe these temporary decreases in availability can and should be avoided, since most businesses continue their operations during these periods and flexible staffing arrangements can be employed (e.g. remote working). While we agree that public holidays should be respected, businesses should be able to trust on the Commission's availability in the summer period and the holiday period. This is even more important given the case teams themselves may well issue requests for information during these periods, often with tight response times. We believe it should be possible to find a more equal middle ground whereby businesses can be provided (where necessary) with additional time to answer requests for information during a holiday period – particularly if key staff are not available – but where the case remains sufficiently staffed at the Commission's end to ensure the case continues to move forward.

3 COMMISSION NOTICE ON A SIMPLIFIED TREATMENT OF CERTAIN CONCENTRATIONS

Pre-notification process

3.1 When reviewing the revised Commission's Notice on a simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("**Simplified Procedure Notice**"), we believe that pre-notification discussion continues to be an important element of the merger control review, except for super-simplified cases. In point 28 of the Simplified Procedure Notice, the Commission invites the parties to engage with the Commission at least two weeks before the expected date of the notification of a transaction that would likely be treated under the simplified procedure. However, the Commission does not set a maximum timetable for the pre-notification phase of such simplified cases. We would kindly suggest that the Commission defines a maximum pre-notification review period (e.g., one month), which may still be subject to certain exceptions (e.g., parties' significant delay in responding to customary questions). In any event, the merger filing process would benefit from the pre-notification discussions being a precursory step before

the formal notifications, rather than being an opportunity for prolonged questions on each and every plausible market definition and related market shares in straightforward cases. We understand that such "tick-the-box" exercises arise from a (legal service) requirement to demonstrate that every plausible market definition has been explored and has led to overlaps which remain below the safe harbours. However, in cases where both the Commission and the parties know that such exercises will not change the lack of anti-competitive effects arising from the merger, a more pragmatic mechanism should be found. In our view, spending many weeks in pre-notification eliminates the benefits of a simplified procedure option.

3.2 Sometimes these cases end in "flipping" the Short Form CO into a simplified Long Form CO. Therefore, in addition to finding a more pragmatic solution as part of the simplified procedure, it would also be helpful for the Commission to specify the flexibility that parties have to adopting a simplified Long Form CO approach up-front where market definition complexities could otherwise require multiple sets of analysis on multiple sub- (and sub-sub-) markets. This could include guidance on the ability to rely on waivers for certain types of information in certain situations.

Flexibility clause

3.3 In principle, we welcome the introduction of a flexibility clause, as set out in point 8 and 9 of the Simplified Procedure Notice. However, we are concerned that the underlying rationale of this mechanism would be undermined if a case team issues various RFIs and engages in lengthy discussions to assess the applicability of such a clause. In line with the points made in the paragraphs above, it may be more efficient in these cases to obtain comfort to file a simplified Long Form CO rather than spending weeks debating whether or not a Long Form CO can become a Short Form CO. Whatever the solution chosen, it is imperative that the Commission reaches a view quickly on whether the case may be eligible (or not) based on the information provided.

3.4 In the alternative, the Commission may consider increasing the relevant thresholds of the simplified procedure to the thresholds envisaged for the flexibility clause as the Commission has the right to request a full Form CO to be submitted by the parties, should it deem necessary.

Extraterritorial joint ventures

3.5 In line with prominent merger control regimes, we consider that the extraterritorial joint ventures mentioned in point 5 of the Simplified Procedure Notice should only be reviewed under non-simplified procedure when the JV or the contributed assets/business generate a material amount of revenue in the EU. We therefore

find the EUR 100 million threshold for simplified cases and EUR 150 million for flexibility clause cases low.

4 DRAFT REVISED SHORT FORM CO

General

4.1 A number of significant changes have been made to the Short Form CO. One notable change is the format that is chosen, essentially a "tick-the-box" exercise, rather than a form with "open" areas that parties are required to fill in. In general, we welcome this revision as it certainly makes it clearer for certain parts what information is requested by the Commission. However, we would invite the Commission to confirm that written sections can still be included, as it benefits the submissions if parties can include further explanation and/or substantiation where they believe it is appropriate. Otherwise, this simplification risks leading to a situation where the process may appear to become simpler for the case team but could actually increase the workload on the parties – and the risk of misinformation – if the form does not allow clarifications and explanations to be included.

Section 6.2 – Acquisition of control

4.2 In Section 6.2 of the revised Short Form CO, rather extensive information about the change of control is requested. The requested information is more extensive than in the current Short Form CO, requiring parties to differentiate, for example, between positive sole control, negative sole control, and de facto control. However, when determining whether a party acquires control over a company, it may very well be that a party has both (active) voting rights on certain strategic decisions, while it has veto rights on other strategic decisions. The combination of the different voting and veto rights is taking into consideration in the analysis that leads to the conclusion of whether or not a party will acquire control. This is however not always as clear as being able to tick a "positive sole control" or "negative sole control" box.

4.3 For the acquisition of joint control, even more detailed information seems to be requested from all undertakings that will have control over the target in a "tick-the-box" format, while there seems to be no room attributed for elaboration regarding structures and situations that deviate from the suggestions in the columns under Section 6.2 (i.e., no "other, explain" option).

4.4 Furthermore, we would expect the Commission to make an assessment of the control situation when reviewing the input in a (Short) Form CO. It would be helpful if the Commission could also then ensure that relevant factors relating to the control analysis are outlined clearly in the decision, also for future purposes, thereby increasing legal certainty in this respect. We invite the Commission to

reconsider the abovementioned described changes, and leave room for a more tailor-made way of providing information regarding the acquisition of control.

Sections 8 and 9 – Horizontal overlaps and Vertical relationships

4.5 In Sections 8 and 9 of the Short Form CO, the Commission requests detailed information regarding market share estimates on the basis of value and volume on markets where there is horizontal overlap or vertical overlap, including pipeline products, for three preceding years. For vertical overlap, market shares on both the upstream market and the downstream market are to be provided. For competitors, market share estimates are requested only from the most recent year available.

4.6 As the position currently stands today, the requested information regarding estimated market shares (on the basis of volume and value) is often very burdensome and – depending on available market data – sometimes challenging for undertakings to collect. Requiring this information for the last three years for a Short Form CO leads to an increased burden on parties, while it is likely that a transaction under the simplified treatment will not give rise to any problematic overlaps.

4.7 Moreover, this exercise requires that market definition for all relevant markets is already clearly delineated. It is our experience that often in Short Form CO cases there may be some minor potential overlap on the basis of previously considered (wide) market definitions (e.g., when taking the broadest possible product or geographical market), while it is clear from the facts of the case at hand that there is no potentially problematic horizontal or vertical overlap. In those cases, it would be a disproportionate burden for the submitting parties to collect market shares estimates on these markets (especially in markets without available sophisticated market data), for the preceding three years.

4.8 Furthermore, in the revised Short Form CO, additional emphasis is given to innovation theories of harm, as parties are requested to provide information on pipeline-to-pipeline products and pipeline-to-marketed products (for the preceding three years) for all horizontal overlaps and vertical relationships. In our experience, especially for certain markets, these are very difficult figures to come up with. We thus consider this request to be burdensome and – potentially – unnecessary, considering the fact that concentrations that are notified via the simplified procedure are likely to be unproblematic. Next to this, the Commission provides very little guidance on what is meant by pipeline products and at what stage of development those products need to be in in order to qualify as "pipeline product".

4.9 In our view, it would be much better to consider asking for specific innovation-related data during the review process if needed, once the case team has had

an opportunity to understand the relationship between the merging parties and the markets in question. In addition, although we understand the interest of the Commission in pipeline products within their review of concentrations, we do wonder if the Commission could express an emphasis on certain markets / areas / business in which the Commission is especially interested in further information regarding pipeline products. We kindly ask the Commission to provide more guidance on this matter.

4.10 In light of the above, we would invite the Commission to reconsider the abovementioned parts of Sections 8 and 9 of the revised Short Form CO.

Section 11 – Safeguards and exclusions

4.11 In Section 11, it is amongst other things requested to reply with a "yes" or "no" to the question whether the parties have a significant user base and/or commercially valuable data inventories. There is no further guidance provided as to what is meant by "significant user base" and "commercially valuable data inventories". However, we can imagine that it can be rather vague to parties whether this is the case for their business, or not. Given the fact that this is a "yes" or "no" question, we suggest the Commission includes some further guidance, explanation and/or examples of what is meant here.

5 DRAFT REVISED FORM CO

Sections 6, 7 and 8 – Market definitions, markets under simplified procedure and affected markets and pipeline products

5.1 An accurate definition of the product and geographic market is crucial for the provision of correct and comprehensive information in these sections of the Form CO. In practice it can however be challenging to accurately pinpoint which market definitions might be relevant. In addition, the available data often does not match the identified market definitions, which further complicates the completion of the pre-defined table format. While we fully recognise that parties may need to provide more detailed information in a Form CO, we nonetheless refer to our comments above regarding market definitions, the availability of matching data and market share information regarding pipeline products made in the context of the Short Form CO in *Sections 8 and 9 – Horizontal overlaps and Vertical relationships*. These comments are, albeit it to a lesser extent, also relevant for sections 6, 7 and 8 in the Form CO.

6 ART 22 EUMR

6.1 The merger control regime as laid down in the European Union Merger Regulation ("**EUMR**")[2] divides competence for scrutinizing concentrations between the European Commission and National Competition Authorities ("**NCAs**"). Concentrations meeting specific turnover-linked quantitative thresholds fall under the sole jurisdiction of the Commission, whereas those meeting other (typically lower) thresholds are reviewed by NCAs (provided they satisfy the national thresholds).

6.2 However, the EUMR also contains a referral mechanisms whereby a concentration not meeting turnover thresholds can nonetheless be scrutinized by the Commission. This is outlined in Article 22 of the EUMR, which provides Member States with the possibility to request the Commission to examine any concentration that does not have a community dimension, but:

(i) affects trade between Member States, and

(ii) threatens to significantly affect competition within the territory of the Member State or States making the request.

6.3 The Article 22 provision was originally meant as a "safety net" for Member States lacking national merger control legislation. However as all Member States (except for Luxembourg) have to date adopted national merger control legislation, the relevance of Article 22 EUMR has been greatly diminished, and limitation of its scope was even considered in 2014.[3]

6.4 In March of 2021, the Commission outlined in Guidance[4] its aim to use the referral system of Article 22 EUMR to fill a perceived enforcement gap in relation to concentrations where the Target's current turnover does not reflect their future competitive potential. These acquisitions would typically not be caught by the turnover-based merger control thresholds, but it has been argued they could still harm future competition. This is potentially of particular relevance for certain industries, such as the digital or pharmaceutical industries.

6.5 The Commission's guidance contains some examples of potentially relevant transactions that could be caught by Article 22 EUMR. The non-exhaustive list mentions, for example, undertakings that: (i) are start-ups with significant

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2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

3 European Commission, 'White Paper towards a more effective EU merger control' (2014).

4 Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C 113/01, 26th of March 2021.

competitive potential, (ii) are concluding potentially important research or (iii) have access to competitively significant assets (such as data or infrastructure).

6.6 In our view, the novel guidance of the Commission in relation to Article 22 of the EUMR to be used as a possible catch-all provision for nascent Targets has an extremely negative impact on legal certainty and the regulatory clearance process of M&A transactions. This is exemplified by the ongoing standstill in the Illumina/Grail acquisition, whereby the Commission's decision to intervene in this transaction is currently pending at the EU General Court, and an in-depth phase II review at the Commission. A lack of support for the Commission's approach in this instance is also exhibited by national regulators, like Germany's Federal Cartel Office. Given the European Commission process has been upheld as the leading example of a merger control regime that is clear, well-defined and predictable, it would be extremely detrimental to lose such a perception due to opportunistic and unpredictable use of a mechanism that was not invented for such a purpose.

6.7 The Commission's Guidance could result in challenging timelines for companies which are regularly involved in M&A work, particularly in certain industries. For instance, it could result in a burdensome 27 MS notification process for deals that may have previously not been notifiable in Europe. Furthermore, M&A documentation would be impacted as Closing Protocols will now need to provide for the possibilities and consequences of an Article 22 referral (for instance in relation to indemnities and long stop dates).

6.8 However a lack of legal certainty is especially concerning, since referrals can theoretically be requested up to six months after closing (and even later in exceptional cases, as per the Commission's Guidance).[5] This would mean the Commission could theoretically accept (and potentially undo) any transaction, no matter how long after closing – in exceptional situations – based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers.

6.9 We would respectfully recommend that the Commission should reconsider its Article 22 guidance, or tighten it significantly for the sake of legal certainty. If the Commission will not close the loop-hole, it should – at the very least – make it clearer, and in more certain terms, which deals would be potentially subject to an Article 22 referral and in which circumstances, and a pragmatic approach to making a deal known to NCAs should be instituted.

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[5] EC Merger Control Regulation, Article 22(4). The Commission's Guidance asserts that the Commission may exceptionally accept later referrals.