**Public Consultation on the Draft revised Merger Implementing Regulation ('Implementing Regulation') and the Notice on Simplified Procedure**

**Comments from the Association of Inhouse Competition Lawyers ('ICLA')**

**20 June 2022**

ICLA is an informal association of inhouse competition lawyers with currently about 500 members across the globe. The Association does not represent companies but is made up of individuals as inhouse experts in the area of competition law. This paper represents the position of ICLA and does not necessarily represent the views of all of its individual members.

ICLA welcomes the European Commission's decision to simplify and streamline the merger review process, and very much appreciates the efforts the Commission has undertaken to go through this exercise. In its review, the Commission should focus on those cases that are most likely to raise effective competition concerns in the market. Information requests in those instances should focus on the core issues at play. In cases that are unlikely to raise effective competition concerns, notifications and information requests should be as streamlined as possible, to minimize the overall burden on companies and not undermine the impact on innovation or jeopardize the pro-competitive effects that M&A transactions may have. It is important for the Commission to review its rules and procedures on a regular basis to make sure that they are aligned with its mission to promote competition and innovation in the market.

While we appreciate the overall streamlining and simplification efforts, there are further steps that we believe the Commission should undertake. We have listed those below.

## 1. Simplified procedure

ICLA generally welcomes the European Commission's efforts to streamline the simplified procedure by enlarging the scope with the inclusion of two new categories under Art. 5 and the scenarios foreseen under the flexibility clause in the draft Commission Notice on a simplified treatment of certain concentrations ('Draft Notice on Simplified Procedure'). Likewise, we welcome that the European Commission has introduced a further streamlined "super-simplified procedure" for extra-territorial JVs and all cases where there are no horizontal overlaps or non-horizontal relationships between the merging parties' activities. This will assist in further reducing the notifying parties' burdens in the notification process for transactions that do not have an impact in the EEA. However, the European Commission also introduced a number of new elements in the draft revised Notice and draft Short Form CO which will complicate rather than simplify the process for notifying parties and will create

significant uncertainty as to whether or not a transaction will eventually be dealt with under the simplified procedure.

In fact, we believe that more can be done to streamline the simplified procedure. It is important to bear in mind that the types of transactions that benefit from a simplified notification procedure are highly unlikely to raise any competition law concerns. ICLA therefore considers that the information requested for these types of transactions must be further streamlined, to further reduce the administrative burdens and save time and costs not only for the notifying parties but also for the European Commission – allowing the Commission to focus on more critical matters. Except for the few exceptions that may require a closer review, M&A transactions generally encourage innovation, result in pro-competitive effects on the market, and enhance consumer welfare more generally. Bearing in mind the Commission's broader mandate to seek to encourage innovation and promote R&D in the EEA, we include some suggestions to further streamline the simplified procedure:

- There should be no need to provide competitor contact details in case there are no reportable markets or where it is obvious from the facts that there is no impact on competition.
- Where it is obvious from the facts that there is no impact on competition within the EEA, there should be no requirement to provide internal documents from the parties to the transaction.
- There should be no need to provide market data for every plausible market, as referred to in Points 5(d) and Point 14 of the Draft Notice on Simplified Procedure, as well as Sections 7-10 of the Draft Short Form CO. At the very least, the Short Form CO should introduce a level of materiality when requiring that details be provided on those possible alternative markets. Providing such details is very burdensome when the parties only have a negligible presence in a certain market, while eventually being irrelevant to the broader competitive assessment.
- Beyond that, the revised Short Form CO introduces the requirement for notifying parties to provide data on "pipeline products". To ensure that the requirement to provide data for pipeline products does not become overly burdensome, the Commission should provide further clarity on the definition of "pipeline product". We propose that "pipeline product" should be defined to capture only products that are likely to be material to the Commission's assessment.
- Further, it is also unclear how notifying parties will have access to this kind of information. Absent public announcement, companies can usually only make a rough guess on whether any of their competitors or other companies on the market are actually developing a (important) pipeline product. They seldomly have reliable information on this as they should clearly not be exchanging this kind of information with competing companies. The Commission should therefore allow parties not to provide this information if (i) it is irrelevant to the sector concerned by the transaction, (ii) irrelevant for the kind of transaction subject to review (e.g. vertical mergers) or (iii) if parties do not have visibility on pipeline products of other companies.

With regard to the safeguards and exclusions whereby the European Commission might decide to revert a transaction that in principle would meet the simplified procedure to the ordinary one, we believe it is too broad and have the following comments:

- In para. 18(i), the Draft Notice on Simplified Procedure refers to "*indications that the proposed concentration would allow the parties to the concentration to hinder the expansion of their competitors or hamper rivals access to supplies or markets or increase barriers to entry*" as relevant factors based on which the Commission may be less likely to apply the simplified

procedure. While we appreciate that the hindering of expansion of competitors is also included in the current Notice, it is unclear what should be considered a hindering of expansion of competitors beyond hampering access to supplies or increasing market barriers. More generally, it should be borne in mind that any business that seeks to compete in the market will seek to outperform its competitors, grow its market share, and 'hinder the expansion of competitors'. We therefore propose to delete the initial reference to 'hindering the expansion of competitors', and maintain the more specific references later in the sentence.

- To require an ordinary review process in case of a change from joint control to sole control when the acquisition of joint control was previously not reviewed by either the European Commission or a National Competition Authority (NCA) (para. 20 of the Draft Notice on Simplified Procedure) continues to be an excessive requirement. The lack of a previous review does not speak to the impact that such transaction may have on competition. This exception should therefore be removed from the current draft, such that simplified procedures remain applicable for these types of transactions.
- The example under which the European Commission will revert to a normal review procedure because third parties have expressed concerns (para. 22 of the Draft Notice) would need to be clarified, such that only those concerns that are plausible and may result in potential competition law concerns should cause the European Commission to require a full Form CO notification.
- The list of safeguards and exclusions further also introduces some new concepts which are unclear and require further clarification:
    - "*The parties own or control important technological financial or competitively valuable assets, such as raw materials, intellectual property rights, patents, data or infrastructure*": Further guidance should be provided as to what the Commission considers "important" or "valuable" assets.
    - "*The parties have a significant user base and / or commercially valuable data inventories*": The terms "significant" and "commercially valuable" are vague and need further guidance. Also, the terms "user base" and "data inventories" should be defined.
    - The same applies to "*[…] capacity and production*", "*[T]he parties are <u>important innovators</u> in the overlapping markets*" and "*[T]he parties have brought to the market an <u>important pipeline product</u> within the last 5 years*": All of these terms need further clarification. In addition, ICLA doubts that bringing pipeline products to market is relevant for each sector. While this might play a role for transaction in the pharma industry, it is not a relevant criterion for most other businesses.
- Further guidance is also required on how the Commission will apply the list in practice. For example, will meeting one single exclusion be sufficient to fall outside of the scope of the simplified procedure?

Stricter time limits should be introduced especially in two situations: (i) for communications between the Commission and the NCAs related to the eventual referrals of the case to/from NCAs; and (ii) for the Commission to decide to ask the parties for an ordinary Form CO. The latter should avoid the risk of having to switch from a simplified to an ordinary process at the very end of the simplified procedure. The current deadline of 15 working days is significant, in particular if parties will be required to revert to a normal procedure on that basis.

Last, in order to speed up the review of the transaction subject to the simplified procedure, we propose to include a "positive silence" clause whereby, if the Commission does not give an answer within an established period of time after the day of notification (e.g., 15 working days), the transaction is presumed to be cleared.

## 2. Non-simplified procedure

In relation to non-simplified procedures, ICLA is of the view that the changes proposed by the Commission in the current draft to streamline non-simplified procedures are insufficient and that there is still room to further ease the notification process in this type of transactions. In particular, given that these procedures often produce the most burden on the companies:

- We see an increasing length of proceeding, with long pre-notification phases and an increasing number of stop-the-clocks. It would be helpful to agree on at least an indicative timeline early on, including for the pre-notification phase.
- We also see an ever-increasing amount of documents collected. In this context it would be useful to streamline the issues early on in the pre-notification phase by focusing the procedure on the markets that could be critical.

The draft revised Form CO sets out in point 3 that, according to Art. 4(2) of the Implementing Regulation, the notifying parties may request the European Commission to dispense with the obligation to provide the relevant information, in particular for Sub-Sections 3.4, 3.5, 3.6, and 3.7 and Section 10 of this Form CO, or any other requirement in the Form CO related to this information. This proposal is unclear because it seems to reduce the current scope for notifying parties to ask the European Commission to dispense with the obligation to provide information in any sections or subsections of the Form CO, as it is set out in the existing Form CO. We regret this change of approach and encourage the European Commission to make this obligation more flexible by allowing the notifying parties to request the Commission to skip the obligation to dispense relevant information in any of the sections of the Form CO based on proper grounds, whilst leaving it at the Commission's discretion to accept such request. Conversely, it is also unclear what the link is between this disposition and the waiver requests set out in point 3 of the draft revised Form CO, pursuant to which notifying parties can ask the European Commission to skip certain Sections or sub-Sections of the Form CO during the pre-notification phase. Further clarification on the difference between the waiver requests and the possibility to skip information of different sections under Art. 4 (2) of the draft revised Implementing Regulation would be welcome. In addition, we do not understand the coherence of allowing the notifying parties to request waivers of different sections throughout the questionnaire and narrow down the scope for the parties to request the Commission to dispense with the obligation to provide the relevant information only for certain sections (if this is what is meant). We believe this section should be revised and adapted in a way that notifying parties can request to be dispensed from the obligation to provide information for any of the sections of the Form CO.

More specifically to waiver requests, it is reasonable that the Commission can request that the notifying parties provide the information that was previously waivered if, after an initial analysis, the Commission decides the completion of the waived sections are key for its assessment. Nevertheless, in such circumstances, the Commission should set out the rationale for reversing its decision in full transparency to the notifying parties, and justify the unexpected additional burden.

While we appreciate that the introduction of tables in Sections 6, 7 & 8, as explained in the explanatory note, could be useful for the European Commission and the case teams in their analysis of the

concentration, it is still very burdensome for notifying parties to fill in the sections and provide all the required information. The amount of information requested in these sections should be further streamlined, focusing on the information that is relevant to carry out the competitive assessment. For instance, notifying parties could be exempted to provide data input on all plausible markets, as referred in Sections 6-9 of the Form CO. Providing such details can be very burdensome when the notifying parties only have a negligible presence in a certain market, while eventually being irrelevant to the broader competitive assessment. Therefore, the merging parties should be entitled to provide information to all plausible markets only when the information is relevant for the competition assessment.

We welcome the streamlining of Sections 9 and 10 (previous Section 8) with the removal of certain information requirements (particularly "Cooperative Agreements", "Trade between Member States and imports from outside the EEA", and "Trade associations"). Nevertheless, we believe that these sections could be susceptible to be ear-marked as potential opt-out sub-sections, as each of the sub-sections may not be relevant to the competitive analysis, depending on the transaction at stake (for instance 10.8. on R&D). Therefore, it would be preferable that the sub-sections in Sections 9 and 10 are configured with an opt-in mechanism in accordance with the relevance of each sub-section for the issue under consideration that could be triggered at the request of the merging parties in the pre-notification phase. This mechanism would reduce drastically the administrative burden for merging parties when filling out the Form CO, only leaving those sections that are key for a proper competitive analysis.

Furthermore, in addition to the comments on the format of the Form CO template, ICLA would also like to raise concerns with the content and the amount of information requested during a merger notification process. In the vast majority of cases, we find that the amount of information to be provided in non-simplified cases is excessive and too broad. In our experience, the amount of information to be provided has increased significantly over the last years, especially in the context of internal document requests. This is very burdensome on the filing parties' internal and financial resources, but also often has effect on the timing of the notification and subsequent review of the transaction. It also creates risks of incompleteness for companies, e.g., in relation to market studies or other documents that are not related to the transaction and that parties may not have identified in preparation of the filing.

In such procedures, we believe it is critical to streamline the review process by focusing on concerns in key markets that are critical in the context of the concrete transaction, rather than issuing broad information requests on all potential markets. Especially in Phase 2, the analysis should zoom in on the core issues, i.e., on the markets and theories of harm that are critical. For instance, concerns disregarded in a Phase 1 should not be re-opened in a Phase 2 unless new facts become available. Therefore, information requested along the process should focus on more narrow areas of analysis as the procedure evolves, rather than keeping a broad scope of information envisaged for analysis from the beginning to the end while a more narrow set of concerns has been identified. Often the European Commission's starting point is to issue as broad a request as possible and it is then for the parties to negotiate a narrower scope. It would be more efficient if there could be earlier engagement with the parties on the appropriate scope of RFIs.

This streamlining is particularly relevant for cases that are unlikely to raise competition issues, or for markets in which the proposed transaction is unlikely to raise such concerns. This will enable a more efficient use of resources and contribute to speeding up the process. In order to achieve this goal, the Commission should consider raising the market share thresholds for the definition of affected markets

under the Form CO, and only require details for those affected markets when those thresholds are met.

Also, time periods for data requests to the notifying parties sometimes go back far (up to 5 years in some requests). Whilst such requests create a significant burden on companies collecting this information, the data gathered often is outdated and not meaningful, as it no longer reflects the reality of the company that seeks to engage in the proposed transaction. It would make more sense to limit data requests to the last financial year. If the Commission can demonstrate the relevance of the 'older' information, RFIs in exceptional cases could cover a longer timeframe.

Furthermore, it should also be noted that information requested is not always readily available or collected in the format requested by the Commission, and efforts made for turning the information into the formatting needed are costly, time-consuming and often disproportionate to the relevance of the exercise. It would be helpful and more efficient if there is flexibility to discuss the format in which data is being provided, based on how the information is readily available, tracked or stored within the company.

While we advocate more generally for swift reviews and streamlined timelines, in case of complex RFIs, it is important however that the Commission provides notifying parties enough time to prepare a meaningful response. Often, notifying parties struggle with very tight time periods that can be onerous or insufficient in particular where close coordination among different subsidiaries, in different time zones and with outside counsel is advised.

Beyond streamlining information requests towards notifying parties, it is also important to address concerns in terms of information requests towards third parties. The practice of doing interviews with third parties during pre-notification stages should be encouraged. In particular, it would also be helpful if subsequently third parties receive more streamlined and targeted questionnaires once the transaction is notified (or can give feedback only in case concerns are raised in relation to the transaction).

In addition, it would be helpful if the Commission could systematically verify if there is an established point of contact for the companies to which third-party questionnaires are being sent, to avoid losing precious time due to questionnaires being lost in inboxes of business teams. ICLA has in the past assisted the merger registry in preparing an overview of key contact person(s) for a number of ICLA members. It would be very helpful if case teams ensure that these key contacts are systematically included in the outreach. We very much appreciate the Commission's efforts in this regard, but our members still experience questionnaires being sent to other contacts within the company, without copying the person identified in the merger registry.

### 3. OJ Notice – Electronic notification

ICLA welcomes the clarifications on the format of submissions, explicitly pointing out the possibilities to submit documents to the European Commission electronically.

### 4. Reforms to the substantive assessment

While preparing the input to the ongoing consultation, we also wanted to take the opportunity to share a few additional comments in relation to the substantive assessment of proposed transactions. Under the current climate, we believe it is vital that the European Commission evaluates its approach

to the substantive assessment, particularly with regard to efficiencies and investment incentives. We urge the Commission to consider replacing the economic theory of *perfect competition* (the more competitors, the better) with the concept of *sustainable competition,* to ensure long-term benefits for the European consumer welfare.

- M&A transactions may create efficiencies, have a positive impact on investment incentives, and enhance consumer welfare overall. These elements should be factored into the Commission's assessment alongside factors that currently form the focus of the Commission's review.
- Beyond that, benefits other than short-term price effects should be equally balanced in the competitive assessment. Therefore, the standard of proof for pro-competitive effects on quality and innovation, or consumer benefits such as ecological improvements should be equal to the standard for anti-competitive effects.

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