JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE EUROPEAN COMMISSION'S EVALUATION OF CERTAIN PROCEDURAL ASPECTS OF EU MERGER CONTROL

June 7, 2022

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law and International Law Sections of the American Bar Association ("ABA") (collectively, the "Sections") welcome the opportunity to provide comments to the European Commission ("Commission") in response to the Commission's consultation on certain procedural aspects of EU merger control. The Sections offer these comments in the hope that they may assist in simplifying the review process under the EU Merger Regulation ("EUMR") and related implementing regulations and notices.

The Sections' comments reflect their members' expertise and experience with competition law in the United States of America, as well as in the European Union and in numerous other jurisdictions worldwide. The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, nonprofit organizations, consulting firms, and federal and state government agencies, as well as judges, professors and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[1]

The International Law Section is the ABA section dedicated to bringing together lawyers from around the globe to focus on international legal issues, promote the rule of law, and provide legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 10,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The Section's more than 50 substantive committees include an Antitrust Committee that covers a range of legal issues worldwide. Throughout its century-plus of existence, the Section has provided input to debates relating to international legal policy.[2]

[1] Past comments can be accessed on the Antitrust Law Section's website at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

[2] International Law Section policy is available at https://www.americanbar.org/groups/international_law/policy/about/. Past submissions may be accessed at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives.

I. The Proposed Amendments

The Sections support the Commission's efforts to simplify the EU's merger review processes, including by adding new categories of vertical mergers that can be treated under the simplified procedure and "flexibility clauses" to allow that procedure to be used in cases that raise no substantive antitrust issues but do not satisfy all of the formal criteria for application of the procedure. Because those criteria depend in some cases on the existence of overlaps in "plausible alternative" markets, the Sections respectfully suggest that the Commission provide additional guidance on the meaning of this phrase to facilitate determinations regarding the availability of the simplified procedure in individual cases.

Also, the Sections welcome the introduction of a "tick-the-box" format for notifications in the simplified procedure, the provision for electronic notifications, and a "super-simplified procedure" for notification of extra-EEA joint ventures. On the other hand, the Sections do not see a need to expand the criteria for closer examination of transactions under the normal procedure and note that revisions for this purpose seem to run counter to the objective of "simplification."

The Sections also support the Commission's efforts to improve the review of non-simplified cases by reducing information requirements in Form CO and expanding the use of electronic notifications and document submissions.

The Sections respectfully question the Commission's preliminary decision not to pursue possibilities to streamline the referral process under Articles 4(4) and 4(5) EUMR. The Sections support the Commission's proposals in the 2014 White Paper "Towards more effective EU merger control" to (i) abolish the two-step procedure under Article 4(5) of the Merger Regulation, and (ii) remove the requirement under Article 4(4) that parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral to an EU Member State or Member States.

Beyond the changes the Commission currently proposes, the Sections believe there are other opportunities for improvement in the EU Merger Review process, as discussed below. The Sections respectfully suggest establishing a working group to consider best practices for document requests, how Requests for Information ("RFIs") to non-parties/third parties might be streamlined, and changes that could be made to the pre-notification process to increase transparency and predictability.

II. Approach to document requests and best practices

The Sections support the Commission's proposed Communication regarding the format of, method for, and technical specification of documents to be submitted with the Form CO, reasoned submissions, comments on the Commission's objections, and the Form RM. These are helpful clarifications for the notifying parties.

The Sections, however, respectfully suggest that the Commission take the opportunity to pursue further best practices for internal document requests made to notifying parties. Specifically, the Sections believe the Commission could improve the current process in three ways:

1. Streamlining document requests

The Sections welcome the Commission's use of a standard template for its document requests issued to notifying parties. However, the current scope of documents requested can make the process very burdensome for notifying parties and cause undue delay because of the time taken to search for, review, and produce the volume of documents required to be produced.

The Sections believe that there are two areas for improvement in the Commission's template and approach to document requests.

First, the Commission's standard template search terms could be adapted so that there is a clear focus on business and industry-related search terms, rather than including multiple legal search terms (e.g. "divestment"), which can result in overly broad results.

Second, for each request, the Commission should consider including focused document requests and case-specific search terms, thereby reducing the burden on notifying parties reviewing large volumes of non-responsive documents. This would also reduce the burden on Commission case teams by ensuring the documents produced are relevant to the case team's questions and concerns.

2. Use of technology assisted review ("TAR") and e-discovery tools

The process of collecting and producing internal documents using e-discovery technology has rapidly advanced over the past five years. The Sections submit that notifying parties and reviewing authorities would benefit from sharing and harmonizing best practices among authorities commonly involved in parallel merger reviews, such as the Commission, the UK CMA, and the U.S. DOJ and FTC. The Sections propose that the Commission consider establishing a working group with representatives of such authorities and other stakeholders to review the process for document requests and responses. In particular, such a working group could consider the use of modern e-discovery tools and attempt to reach consensus on circumstances in which the use of TAR and other e-discovery tools is appropriate and on preferred methods for deploying such tools (e.g., the relevancy thresholds that should be reached using the technology before production).

3. Improving and Streamlining the Third Party RFI Process

Compared to the U.S. authorities and those in many other jurisdictions, the Commission's EUMR review processes rely heavily on market tests directed to the notifying parties' customers, competitors and suppliers. The Sections have observed a significant increase in the length and complexity of the RFIs directed to third parties that can be very burdensome for those parties.

The Sections respectfully submit that the burdens of the Commission's third-party RFI practices have significant disadvantages both for third parties and for the Commission's review process. For non-notifying parties, responding to Commission RFIs requires a significant investment of time and resources in relation to issues that are often of no direct interest to them. Many companies do invest the required time and effort because they appreciate the importance of merger reviews and wish to support the Commission's work, but some do not. Indeed, comments from Commission officials indicate that the rate of responses to RFIs issued to customers, competitors, and suppliers is often low. The results of the Commission's market tests thus risk being skewed by responses from a small number of companies with concerns –

or self-interest – about a transaction, while companies that do not have such concerns and/or lack the required resources or the tradition of engaging with the Commission do not reply.

The Sections respectfully recommend that the Commission explore changes to the current practices in relation to third-party RFIs. One approach could involve reducing reliance on multiple-choice questionnaires in favor of shorter, more targeted questionnaires. Another could involve offering customers, suppliers, and competitors the option of participating in a short interview with Commission officials as an alternative to responding in writing. The Sections respectfully submit that changes to the current third-party RFI process have significant potential to reduce the burden on third parties while improving the response rate and thus the quality and timeliness of the feedback the Commission receives.

4. Increasing the Transparency and Predictability of the Pre-Notification Process

The Sections further suggest that the Commission consider improvements to the pre-notification process to increase transparency and predictability regarding timing. The Sections appreciate the flexibility of the current pre-notification system, which allows the parties to engage with the Case Team on matters of substance and jurisdiction without the pressure of strict time deadlines. Although the Sections recognize the benefits that parties realize from engaging with the Case Team (e.g., potentially narrowing issues), the unbounded time and scope of the pre-notification phase can contribute to a lack of predictability and undue delay and expense for notifying parties.

There are likely multiple ways to provide some structure to the process to support clearer guidance regarding the milestones and schedule of the pre-notification phase. Measures could be introduced to help support a better understanding between the parties and the Case Team on a general timeline for pre-notification, including when to expect RFIs, when responses will be due, and when meetings with the Case Team will occur. The Sections therefore respectfully recommend that the Commission hold consultations on what makes the most sense for both the Commission and parties.

The Sections further suggest that the Commission consider whether to provide greater transparency upfront as to what information the Case Team will require to deem a notification complete. Under the current system, notifying parties have limited visibility as to what will be sufficient to satisfy the completeness requirement. The U.S. concept of a model voluntary access letter listing specific categories of documents and data the Case Team will request during pre-notification may have merit in the EUMR context.

The Sections do not take a view at this stage on what the Commission should ultimately require, but recommend improvements to make the pre-notification process more transparent and predictable.

The Sections appreciate this opportunity to provide views based on the experience of its members and remain available for further consultation.