Freshfields Bruckhaus Deringer

Note

Date
2 June 2022

Response to European Commission Consultation: Merger control in the EU—further simplification of procedures

1. Introduction

1.1 This submission is made on behalf of Freshfields Bruckhaus Deringer LLP.

1.2 Freshfields Bruckhaus Deringer is a global law firm with significant expertise in law and practice in the fields of antitrust, competition and trade. within the European Union and across the world, as well as cross-border M&A and other areas of law

1.3 Freshfields Bruckhaus Deringer represents an extensive range of clients of different ownership, nationality, and sectoral focus across the globe. Against this background we welcome the opportunity to participate in this public consultation. Our comments are based on our experience and expertise as a global law firm, advising a diverse range of clients from around the world. The comments contained in this response are submitted on behalf of Freshfields Bruckhaus Deringer. They do not necessarily represent the views of any of our individual clients. Likewise, this submission does not necessarily represent the personal views of all Freshfields Bruckhaus Deringer lawyers.

1.4 Below we set out our views on the proposed revisions to the EU merger control process to further simplify the procedure and the likely impacts.

1.5 We welcome the Commission's continuing focus to streamline non-problematic cases. In particular, we welcome the Commission's objective to expand the categories of cases that will benefit from simplified treatment, including the introduction of the flexibility clause, and the efforts to streamline the Form CO and Short Form CO notification forms, in particular through the use of tick boxes and provision of more data-driven and less open text questions.

1.6 Below we expand on our views on the proposed changes and the efficiencies they will bring and also highlight a few areas where we think the proposal could be further improved. Of particular concern appears to be the new approach in relation to the "safeguards and exclusions" listed in Section II.C of the simplified notice (and section 7.4 of the revised Form CO template and section 11 of the revised Short Form CO template), which we anticipate may significantly increase the burden for notifying parties when preparing the notification form.

1.7 We would also, as a practical matter, suggest that the Commission consider employing a pilot or trial period for the use of the new forms to better be able to ascertain what

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the practical problems are that parties may run into. Recently, the Commission introduced the eRFI system, which parties need to use to respond to requests of information via an electronic system (similar to the system used to gather third party data in a market investigation) which has a number of areas for improvement (such as the ability to insert footnotes and tables, to name a few). The experience with the introduction of the system without an appropriate pilot or trial period, has revealed a number of technical issues which parties now face without having the possibility to suggests improvements to the Commission or otherwise provide feedback. While we have set out our views with regard to the current proposal below based on past practice, the only way to truly test these changes would be through practical application.

2. Implementing Regulation

Article 16(2)

2.1 The additional requirement for parties to prepare non-confidential versions of statements of objection within 5 working days for each iteration, in addition to responding to each letter of facts the Commission may send, would significantly increase the already substantial volume of work that as Phase II investigation entails for both the parties and the Commission. In order to allow for more flexibility in relation to the preparation of non-confidential versions, the Commission may consider removing the 5 working days and replacing it with a broader deadline of e.g., 10 working days.

Article 22

2.2 We welcome the proposal to allow the transmission of documents electronically, as well as the use of digital signatures for formal notifications. In our view, this will make the process of notification more efficient (and more environmentally friendly) both for the notifying parties and for the Commission in processing those submissions.

3. Simplified Notice

3.1 We welcome the proposal to streamline the Short Form procedure and the inclusion of new categories of cases that can be treated as simplified, as well as the super-simplified procedure that allows concentrations to be notified directly (without pre-notification).

Revised Thresholds for Vertical Mergers

3.2 We welcome the additional clarification in FN 18 on the definition of a true vertical relationship. This appears to reflect the approach in *CVC/Schuitema* (M.5176) where the Commission noted that there was a vertical relationship between the target and the acquirer, but did not analyse this relationship in detail "*since the services provided by* [acquirer] *are merely accessory to the activity of* [target] *and not part of a value-creation chain, i.e., there are no onward sales by* [target] *of these services*." This is a sensible approach, and we welcome that it will now be applied consistently, hopefully

reducing detailed scrutiny of relationships that are not part of the same value-creation chain.

3.3 We also welcome the introduction of additional categories of vertical mergers that can qualify for the simplified procedure, i.e., if the parties' individual or combined market shares: (a) are lower than 30% on the upstream and downstream markets; (b) they are lower than 30% on the upstream market and parties active in the downstream market hold a purchasing share of less than 30% regarding the upstream inputs; (c) they are lower than 50% on both the upstream and downstream markets, the increment (HHI delta) resulting from the concentration is below 150 on both the upstream and downstream markets, and the smaller undertaking in terms of market share is in the same in the upstream and downstream markets.[1]

3.4 In order to simplify and streamline the process, we suggest the inclusion of an additional "low-value" vertical relationship clause. This would aim to capture low-value vertical relationships between parties to a concentration. These relationships cannot by definition give rise to competition concerns given their limited value to either the upstream or downstream company. That said, we recognise that some markets are niche and worth only a few million euros in total, meaning the cut-off value should be set at a low enough level which we leave to the Commission's discretion to set. In any event, the Commission would still have sufficient safeguards and exclusions to prevent any misuse of a simplified procedure in this respect (e.g., if the low value relationship is a particular key pipeline product or innovation).

Flexibility Clause

3.5 We consider that the proposed "flexibility clause" whereby certain transactions can qualify for simplified treatment if they are slightly above the traditional thresholds will greatly increase the efficiency of the merger control process and avoid lengthy reviews of cases that cannot reasonably give rise to competition concerns. This mechanism will allow case teams to adopt a more holistic view of cases.

3.6 On this point, however, we consider that the continuation of the requirements that parties submit information for all plausible markets for cases qualifying for simplified treatment, even if these do not reflect actual market conditions, will limit the efficiency of the revised process. Moreover, the use of market share thresholds to determine whether a simplified procedure is warranted requires the parties to undertake a detailed market definition exercise before filing. This automatically increases information requirements, as the Commission routinely requires market data in relation to multiple narrow alternative and hypothetical market definitions, even in situations where it is

[1] NB: the current drafting is ambiguous and could be misinterpreted. Footnote 26 clearly describes the scenario the Commission intends to capture, but perhaps the body of the text could be amended to clarify the point that this clause (cc) applies to a situation where there is vertical overlap and horizontal overlap, and that the HHI increment relates to the horizontal overlap.

clear that no competition concerns can arise or where hypothetical markets are truly hypothetical (and do not reflect market dynamics accurately).

3.7 The flexibility clause may thus cause an additional delay if the Commission requires multiple requests for information and/or discussions with the parties on whether to apply the flexibility approach or not. This could potentially result in the changing of applicable forms after the provision of extensive information. If this system is to work effectively, it will rely on the Commission being expeditious and efficient in the consideration of whether to grant the flexibility or not early on in prenotification, such that parties to a concentration can quickly provide the Commission with the appropriate notification form.

Safeguard and Exclusions

3.8 Although many of the "safeguards and exclusions" in Section II.C of the simplified notice listing examples of concentrations which may be excluded from the simplified procedure are, in some form or another, part of existing Commission guidance and the existing simplified notice, the proposed revised simplified notice proposes to fundamentally change the application. In addition, the Commission proposes to introduce new categories and has provided further details on a number of existing categories, which may still be drafted broadly and could as such result in extensive discussions between the case team and parties to a concentration.

3.9 The new proposal incorporates elements that are typically part of the substantive assessment as set out in the Horizontal Merger Guidelines and elevates these to gating items for jurisdictional purposes.

3.10 In addition, mandatory confirmations are sought from the notifying parties for a significant range of topics in all cases, which until now did not necessarily require pro-active input from notifying parties, while the Commission always had the possibility to raise follow-up questions in relation to specific topics if considered relevant in a particular case. This approach risks increasing the burden.

3.11 Moreover, the fact that the confirmations are sought in the form of absolute yes/no answers, where some topics require more nuance, creates risks for notifying parties and the Commission.

3.12 To include these safeguards and exclusions explicitly as a condition for simplified treatment (by way of the tick the box) may in fact be counterproductive and achieve the opposite of what this proposal is intended to do by increasing the burden (in terms of information requirement and timing preparation) on businesses.

3.13 In our view, this does not align with the purpose of these revisions, i.e., streamlining and simplifying the procedure. Below we set out the changes in this section we consider to be key.

(a) ***C.1 Joint Ventures with negligible activities in the EEA***. We query whether the requirement in footnote 36, whereby the notifying parties are required to provide all the data and information relating to market definition for all markets where the parties overlap contradicts the super-simplified process. It is also not clear which markets the footnote refers to in cases falling under point 5(a) where the joint venture has no activity in the EEA, i.e., whether the parties will have to define all markets outside the EEA that the joint venture operates in or only the EEA markets that the parents operate in. If the latter applies, then para. 7 is clear that overlaps/links between the controlling parents are not relevant overlaps/links if they are different markets from the joint venture, in which case they should not be considered relevant.

(b) ***C.3 Non-controlling shareholdings***. The reference to non-controlling minority shareholdings is an entirely new parameter, particularly as a jurisdictional matter. It also does not appear in its current form in either the horizontal or non-horizontal merger guidelines, yet could now become a determinative factor for jurisdiction, while at the same time being very burdensome on parties (notably financial sponsors with large portfolios). This criterion should not be included as a jurisdictional matter under the revised simplified notice.

(c) ***C.4 Other competitively valuable assets***. The references to "a significant user base" or "commercially valuable data inventories" appear to be new, and very broad. Parties to a concentration may find it very difficult to answer questions on whether they have for example, a significant user base or have commercially valuable data inventories, especially in the form of absolute yes/no confirmations. Notifying parties will inevitably have to provide additional open text which could result in it being more cumbersome than for the present form, and therefore in this respect complicate rather than simplifying the process (unlike the current HSR form). Moreover, the existence of one commercially valuable data inventory appears to be sufficient on its own for the short form procedure to (potentially) no longer be applicable, despite no overlaps. This criterion should either be further defined in a way that provides certainty to the notifying parties or removed as a jurisdictional matter.

(d) ***C.6 Circumstances mentioned in the Commission's Guidelines on the assessment of horizontal and non-horizontal mergers and other special circumstances***. While the reference to the Horizontal and Non-Horizontal Merger Guidelines exists currently, some references have been rephrased to apply (arguably) more broadly. For instance, the reference to the "elimination of potential competition" is new in this form and the revised simplified notice requires no further assessment of the substance of said removal (i.e., no creation of a dominant position, analysis of the significant constraints of the potential competition, etc.). Moreover, points (b)-(d) on capacity or production shares,

recent entrants, and differentiated products are also new in this form as a jurisdictional matter.

3.14 On balance we consider that the "safeguards and exclusions" in Section 11 can significantly increase the burden on notifying parties when having to prepare the notification form.

Super-simplified procedure

3.15 We welcome the proposal to create a new "super simplified" procedure, which goes further in streamlining the process and reducing the burden on the parties as it would require less detailed information from the parties where there are clearly no issues.

3.16 However, the time reduction will to a large extent depend on how case teams react to the new tick-the-box format and the absence of any pre-notification. If the information lost due to the move from the current Short Form CO to a tick-the-box format will simply be requested following formal notification, then no time will be gained in practice and may in fact result in time constraints given the statutory deadline of the phase I investigation.

4. Revised Form CO Template

4.1 As stated in our previous submission of 18 June 2021 to the Commission's consultation, the Form CO template could be further revised and simplified to follow the structure of a typical Commission decision, i.e., (i) a description of the parties, (ii) grounds for the Commission's jurisdiction, (iii) definition of relevant markets according to the parties' relevant activities, and (iv) the competitive assessment. A request for supporting documents (transaction documents, shareholders' agreement, internal documents currently falling under the section 5.4 criteria, financial statements and annual reports) can feature at the end of the Form CO.

Sections 1 – 5

4.2 We suggest removing Section 1 as its purpose can be covered by sections 2 and 3. Section 2 would contain a description of the business of the undertakings concerned and contact details for each. It can also include a description of the rationale of the notifying parties. Section 3 should serve to establish the Commission's jurisdiction, i.e., include a description of the concentration and a legal analysis of its nature under the EUMR, and the provision of turnover data to establish that the concentration has a Union dimension. The non-confidential summary of the concentration can be provided at the end of this section 3. Like the Short Form CO, this could take the form of a dynamic tick-the-box exercise with an option to provide additional detail in written-out format.

4.3 Other parts of section 3 (e.g., 3.4 describing financial support received from public authorities, 3.5 asking a list of undertakings in which notifying parties have a >10% shareholding and which are active in affected markets, 3.6 on past transactions

involving the affected markets) we suggest removing as we do not consider this information needed, or at least not be mandatory for a Form CO's completeness. The Commission in any case retains the liberty to request this information during pre-notification, Phase I or Phase II.

Section 7

4.4 We consider that the detailed templates provided in section 7 for identifying horizontal overlaps and vertical relationships within the Form CO will make the process more straightforward for the notifying parties and more efficient for the Commission to review. We also support the change to only having to provide competitor information for the past year, as historical competitor information would be speculative at best.

4.5 We think the current template could further clarify which sections should be completed under which circumstances and that the exception applies at the market level rather than the transaction level. The introduction to section 7 of the Form CO template refers to the flexibility clause of the simplified notice, noting that:

> "*For markets falling under point 8 of the Notice on Simplified Procedure, in principle only section 7 needs to be filled in. However, where any of the circumstances listed in Section II.C of the Notice on Simplified Procedure are present, the flexibility clause will normally not be applied. In this case, Sections 6, 8, 9 and 10 of this form should be completed*."

4.6 However, it appears that section 7 of the Form CO could effectively be used as a standalone application for simplified treatment of certain markets, which would create an extra step and burden for the parties that does not currently exist. As explained above, the tick-box format to confirm whether the transaction meets any criteria in Section II.C of the simplified notice goes beyond what is currently required to determine jurisdiction. The questions are more complex than simple yes/no answers and will require significant up-front work to accurately respond to, even where a transaction clearly meets the other thresholds for simplified treatment (cf. financial sponsors). Our understanding is that sections 1-5 need to be completed in this situation for the transaction as a whole—this could also benefit from further clarification in the instructions in the template. In our view, without this clarification, this could give rise to the following scenarios:

(a) The parties could consult with the case team on whether they would qualify for simplified treatment. In our experience, the case team would be very unlikely to provide any definitive view without seeing an application in writing, in which case the parties would need to complete section 7 of the full Form CO. As explained further below, it is not entirely clear from the current wording of section 7 whether the parties would also need to complete sections 1-5 as part of this process. In any event, it would result in additional time and burden for the parties and the Commission to assess whether simplified treatment is appropriate.

(b) The parties may alternatively take a view that their transaction qualifies for simplified treatment, in which case they would complete the same tick-the-box table in the Short Form CO template, however the case team may disagree with the parties' assessment and require them to switch to the Form CO. It is moreover not entirely clear whether the new section 7 applies at a transaction level or for each individual market, such that parties might need to submit the full sections 6 and 8-10 for some markets but only section 7 for others. Additional clarification would be welcome as this approach could easily become quite convoluted, especially if the parties and the Commission disagree about market definition and, consequently, which markets might qualify for simplified treatment.

(c) The parties may opt to submit a full Form CO notification, even though their transaction may qualify for simplified treatment. This would largely detract from the purpose of the flexibility clause and this revised notice.

(d) As indicated above, parties who have submitted a full Form CO when it was not necessary, will also face a more significant burden than necessary.

Sections 8 – 10

4.7 We further welcome the changes to section 9 (formerly section 8), shortening it to only the essential information. This proposal better reflects the different structures of markets featured in notifications, particularly those in digital and software markets. However, as stated in our previous submissions, we suggest that notifying parties only provide elements from section 9 (formerly section 8) that are relevant to the competitive assessment of the case at hand in a single competitive assessment section. While we agree that structures of demand and supply (formerly 8.1 and 8.2, now section 9) will practically always be relevant, as will closeness of competition (formerly section 8.3, now section 10.1), other elements of section 8 (now sections 10.2-10-8) are more sector-specific and should not have to be filled in for the Form CO's completeness and can be requested at a later stage, if judged helpful by case teams. Many of these elements are also typically already covered in sections 6 and 7 in any event.

Pipeline products

4.8 With respect to the market share data to be provided for pipeline products, the table in section 8 included in the proposal asks for three-year data for competitors as well as the parties. In our view, the Form CO should not request significant historical data for pipeline products, which, by definition, have not yet come to market and for which market data would—by its very nature—be speculative at best.

5. Revised Short Form CO Template

5.1 We welcome the introduction of the tick-the-box responses the proposal provides, in particular the use of NACE product codes, for determining jurisdiction.

Market definition and share data

5.2 We further welcome the detailed templates provided for identifying horizontal overlaps and vertical relationships within the Short Form CO, as well as only having to provide competitor information for the past year. However, the revised form now requires information for the parties for the past three years, which goes beyond what is currently required and would increase the burden on them—in particular as that information also needs to be provided in markets where shares are low. We therefore suggest not to require the parties to provide their combined market shares and HHI for the past three years, but to also limit this to one year.

5.3 In our view, it would be possible to further streamline the market definition portion of the Short Form CO. The current template still requires the parties to provide information for all plausible market definitions, even where these hypothetical markets would not give rise to concerns. In any event, the Commission can always disapply simplified treatment if it has concerns. The information on market definition should be limited to prior precedents and what the parties consider appropriate.

5.4 As stated in our previous submission of 18 June 2021, the Commission could provide a drop-down list in a "smart form", containing relevant market definitions by economic sector that have been defined in previous cases and which align with the NACE codes the parties have provided. This would allow the parties to use the boxes to "*describe the parties' activities in this market*" and "*provide further details here (in particular if there are no precedents, you should provide the parties' views on product/geographic market definition*" to describe any other relevant market if they deem it necessary.

Internal documents

5.5 As mentioned in our previous submission, we suggest that the Commission dispenses with the need to provide all internal documents in the Short Form CO template or at least limit this request even if there are reportable markets. This requirement is at odds with the very nature of the simplified procedure and creates unnecessary amounts of front-loaded work for the parties, which inevitably entails significant costs.

6. Revised Form RS and RM

6.1 As stated in our previous submission, we consider that the Form RS and the Form CO are unnecessarily duplicative. Therefore, we suggest to fully integrate the reasoned submission element of Article 4(5) into the (short) Form CO, and more particularly, into the section which establishes the Commission's jurisdiction. As the Form CO requires a higher standard of information than the Form RS, this would ensure that no necessary information is excluded. If a concentration does not have a Union dimension, notifying parties could indicate in which three (or more) Member States the concentration needs to be notified, and include a short, written submission on why

the Commission is better placed to review it. Aside from this short, written submission, the remainder can be integrated into (Short) Form CO.

6.2 If a draft (Short) Form CO is submitted with the jurisdictional section indicating that a referral request is being made, the Commission would then inform the relevant Member States.

6.3 We would also suggest that the Form RS could be streamlined for Article 4(4) referrals as the issues regarding duplication remain; although we understand that there are practical issues that mean that it may be somewhat challenging to do so for referrals to national jurisdictions, based on language and different format of national filing forms.

6.4 We welcome the changes made to the Form RM.

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