ROPES & GRAY

MEMORANDUM FOR THE EUROPEAN COMMISSION

Re: Consultation on the Commission Notice on Simplified Treatment for Concentrations under Council Regulation (EC) No 139/2004

June 2, 2022

INTRODUCTION

1. Ropes and Gray is a global law firm advising leading global clients on competition issues, including EU merger control laws and procedures.

2. We routinely rely on the European Commission ("**Commission**")'s Notice on Simplified Procedure,[1] in order to minimise the administrative burden for our clients in connection with acquisitions that do not give rise to competition concerns (in particular private equity transactions).

3. We appreciate the Commission's effort to further streamline the simplified procedure, and welcome the opportunity to submit comments on the *Annex to the draft Commission Notice on a simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* (the "**Draft Revised Notice**").

4. Subject to these comments and requests for additional clarification, we consider that the Draft Revised Notice offers helpful clarification of the Commission's procedural framework for simplified cases and offers sufficient flexibility to employ a common sense approach to merger control review in the EU.

COMMENTS ON THE COMMISSION'S PROPOSALS

The Table below summarises the Commission's proposals in the Draft Revised Notice on Simplified procedure and our response to them.

Section	Commission proposal	Response
II.A.5(a)	The Simplified Procedure will apply in principle where two or more undertakings acquire joint control of a joint venture, provided that the joint	We encourage the Commission to remove the notification obligation altogether (under the standard or simplified procedure) for joint ventures

[1] Commission Notice on a simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

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	venture has no current or expected turnover within the territory of the European Economic Area (EEA), and the undertakings concerned have not planned to transfer any assets within the EEA to the joint venture at the time of notification.	with no current or anticipated turnover within the EEA. Private equity investors are routinely notifying changes of control of joint ventures that have no market presence in the EEA whatsoever. Such transactions are highly unlikely to result in competition concerns within the EU, such that a filing obligation is disproportionate to the aim of safeguarding effective enforcement. Given the recent changes to the Commission's Guidance on Article 22 of the Merger Regulation (and its ability to call in transactions that do not have a Union dimension), the Commission retains the ability to call in non-EEA JVs for review. This safeguards the ability to review non-EEA JVs that might potentially be problematic. We would expect such transactions to be small in number. This is therefore a more proportionate approach to addressing this concern than requiring many unproblematic deals to await approval.
II.A.5(b)	The Simplified Procedure will apply in principle where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has negligible activities in the EEA. This includes concentrations where all of the following conditions are fulfilled: i) the annual current turnover of the joint venture and/or the turnover of the contributed activities as well as the	We encourage the Commission to remove the notification obligation altogether (under the standard or simplified procedure) for joint ventures generating current turnover of less than EUR 1 million in the EEA where the transaction does not give rise to any actual horizontal overlaps or vertical relationships. As explained above, Article 22 of the Merger Regulation would address any possible enforcement

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	expected annual turnover is less than EUR 100 million in the EEA; ii) the total value of asset transfers to the joint venture in the EEA planned at the time of notification is less than EUR 100 million.	gap. For joint ventures generating current annual turnover of more than EUR 1 million but less than EUR 100 million (or with total value of asset below EUR 100 million) in the EEA, we consider that the simplified procedure should always apply subject to the safeguards set out in Section II.C of the Draft Revised Notice. We would also encourage the Commission to remove the references to "expected turnover" (or alternatively to limit the forecast to 1 year) in order to limit inherently uncertain speculation on projected sales and provide additional legal certainty to the parties.
II.B	Under section II.B (flexibility clauses) notifying parties may request to file under the simplified procedure even if they do not meet the conditions set out in paragraph 5 of the Draft Revised Notice (provided they meet the conditions set out in paragraph 8 or 9)	We encourage the Commission to clarify the process for requesting to file under the simplified procedure based on paragraphs 8 or 9 of the Draft Revised Notice. In particular, it is unclear whether the parties would file a draft Short Form CO or engage with the case team before making any draft submission during the pre-notification phase. The benefits of simplified procedure (i.e., swift review and approval) must be safeguarded for parties looking to utilize this process.
II.C.3	This section provides that the simplified procedure may not be available where one party to the concentration has significant non-controlling shareholdings in companies active in the market(s) where another party to the concentration	We consider this safeguard unnecessary where the market shares of the parties to the concentration are below the thresholds set out in paragraph 5 of the Draft Revised Notice. As the current draft does not define

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	is active.	what a "*significant*" non-controlling shareholding would be, there is significant uncertainty in the parties' self-assessment. It also amounts to a significant burden for private equity investors that often have a multitude of minority investments across a specific industry or sector and no meaningful ability to influence their conduct.
II.C.4	Certain concentrations may not be suitable for review under the simplified procedure if they may increase the market power of the parties by combining technological, financial or other resources, or competitively valuable assets, such as raw materials, intellectual property rights (including for example patents, know-how, designs and brands), infrastructure, a significant user base or commercially valuable data inventories, even if the parties to the concentration do not operate in the same market.	We encourage the Commission to provide clearer guidelines on how to assess this safeguard in practice. A restriction on the availability of the simplified procedure based on this safeguard/exclusion might, for example, be limited to concentrations that have a clear anti-competitive effect. The Draft Revised Notice should take account of the fact that asset combinations can have pro-competitive effects and generate synergies and efficiencies that form part of the transaction rationale.
II.C.7	The simplified procedure may not be available in concentrations resulting in a change from joint to sole control resulting in the removal of any constraints previously exercised by the potentially diverging incentives of the other controlling shareholders and the adoption by the former joint venture of a less competitive market strategy.	We agree with the Commission that a change from joint to sole control may give rise to competition concerns only in exceptional circumstances. As such, it would be disproportionate if a concentration satisfying the requirements for simplified procedure set out in paragraphs 5, 8 or 9 of the Draft Revised Notice would revert to the normal procedure on the ground of section II.C.7 alone.

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We trust that these comments are helpful and stand ready to discuss any comment, question, or request for clarification.

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