the global voice of
the legal profession

18 June, 2021

European Commission
For the attention of Marianna Cseh
EU Merger Regulation Simplification Impact Assessment team

Sent by email only: COMP-SIMPLIFICATION_IMPACT_ASSESSMENT@ec.europa.eu.

Dear Ms. Cseh

EU MERGER REGULATION SIMPLIFICATION IMPACT ASSESSMENT

We welcome the opportunity to comment on the European Commission's (the **Commission**) public consultation regarding its Simplification Impact Assessment on the revision of certain procedural aspects of EU merger control.

The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions in stakeholder consultations regarding the development and implementation of competition laws. The Section's Merger Working Group has prepared the enclosed submission for your consideration.

The Co-Chairs and representatives of the Mergers Working Group would be delighted to discuss the enclosed submission and its response to the Commission's online questionnaire in more detail with representatives of the Commission.

Yours sincerely

Daniel G. Swanson
Co-Chair Antitrust Section

Thomas Janssens
Co-Chair Antitrust Section

INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION MERGERS WORKING GROUP

SUBMISSION TO THE EUROPEAN COMMISSION REGARDING THE EU MERGER REGULATION SIMPLIFICATION IMPACT ASSESSMENT

June 18, 2021

1. INTRODUCTION

1.1 This submission is made to the European Commission (the **Commission**) on behalf of the Mergers Working Group (**Working Group**) of the Antitrust Section of the International Bar Association (**IBA**). The IBA Antitrust Section welcomes the opportunity to comment on the Commission's public consultation regarding its Simplification Impact Assessment on the revision of certain procedural aspects of EU merger control.

1.2 The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession across the world.

1.3 The IBA's 50,000-strong membership of individual lawyers from across the world places it in a unique position to provide an international and comparative analysis in the development of commercial laws. Further information on the IBA is available at http://www.ibanet.org/.

1.4 The Antitrust Section includes antitrust / competition law practitioners and experts with a wide range of jurisdictional backgrounds and professional experience. The Working Group's comments draw on the vast experience of the Section's members in merger control law and practice in jurisdictions worldwide. Further information on the Antitrust Section and its Working Groups is available at: https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx.

2. GENERAL OBSERVATIONS ON THE COMMISSION'S CONSULTATION

2.1 In addition to its questionnaire response, the Working Group provides further general observations and comments on the Commission's consultation in this submission. The Annex to this submission includes additional responses to some of the questions in the questionnaire where the response exceeded the 2,000 characters limit by a small amount.

2.2 The Working Group welcomes the Commission's consultation and supports its objective of focussing its resources on relevant cases and reducing administrative burdens where possible without compromising effective enforcement. While the 2014 simplification measures have been effective in increasing the application of simplified procedures to unproblematic mergers, the Working Group believes that further steps should be taken to reduce the administrative burden both for businesses and the Commission in terms of resources and time spent on merger review and that this can be achieved without compromising effective enforcement. The Working Group welcomes the Commission's recognition that there is room for further simplification and targeting of the rules.

Expanding the categories of simplified cases

2.3 The Working Group supports the Commission's objective of broadening the scope of concentrations that may utilize the simplified procedure. In spite of the 2014 simplification measures, the Commission still reviews a significant number of notified concentrations that neither qualify for the simplified procedure, nor warrant intervention in the form of conditions or an in-depth Phase 2 review. The Working Group believes that expanding the scope of the simplified procedure would create efficiencies for both businesses and the Commission, enabling the Commission to focus its resources on concentrations that truly present risks to competition.

2.4 While the Working Group appreciates the rationale behind a "flexibility clause" (namely to expand the scope of cases for the simplified procedure), it has concerns that, in practice, such a clause could be cumbersome and create uncertainties for businesses as to whether their transaction qualifies for the simplified procedure. Parties to concentrations may have significant uncertainty as to what it means to "slightly" exceed the current thresholds. They may, for example, take little comfort from "flexibility" in market shares ranging from 1 to 5% (depending on the threshold), given that even published market share sources can vary. In effect, the "flexibility clause," while well-intentioned, could create uncertainty that risks undermining the objective of extending

the simplified process to more non-problematic concentrations. In practice, application of the "flexibility clause" could end up in protracted discussions with the Commission with the effect that the benefits of the simplified procedure are significantly undermined.

2.5 The Working Group therefore respectfully suggests that instead of introducing a flexibility clause, the Commission may simply consider increasing the thresholds at which parties may use the simplified procedure to the top end of the spectrum envisaged by the flexibility clause. This has the advantage of enabling parties to non-problematic transactions to benefit from a clearer and more streamlined process. This also presents no risk to the Commission, as the Commission retains the discretion to revert to a normal review process and can raise questions about the application of the simplified procedure during pre-notification discussions.

Streamlining the review of simplified cases

2.6 The Working Group welcomes the Commission's consideration of ways to streamline the review of simplified cases. In particular, the Group supports the adoption of a tick-box form to replace the current Short Form CO.

2.7 Other jurisdictions, such as the US, use this type of form to good effect. For example, the HSR form utilized by the US federal competition enforcement agencies sets forth a series of questions seeking non-narrative responses from the parties. The information required by the form provides the agencies with relevant data in a standardized form regarding, e.g. the form of the transaction, the value of the transaction, revenues by standardized industry/product codes and revenue overlaps between the parties by standardized industry code. The form also specifies the categories of documents that must be listed on the form and submitted with the form. The HSR submission provides the enforcement agencies with standardized responses and information that allow the agencies to determine whether a more in-depth review of a proposed transaction is advisable. The US agencies have used this model successfully for many years to identify the small percentage of reportable transactions that will be subject to an in-depth Second Request review. *See, e.g.* Federal Trade Commission and Department of Justice, Hart-Scott-Rodino Annual Report (FY 2019) *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

2.8 If the Commission chooses not to replace the current Short Form CO by a tick-box form, other improvements could be made such as the reduction of information required by the form. Although the different sections that need to be filled out in the Short Form CO are less detailed than in the Form CO, the information requested is still very significant. Specifically, the information required in Section 1, Section 3, Section 6 and Section 7 could be substantially reduced.

2.9 As regards Section 6, the requirements to describe every relevant market and to identify every plausible alternative reportable market are disproportionate as the transactions notified by means of a Short Form CO raise no competition issues. Indeed, the conditions under which a Short Form CO may be used are already strict and, additionally, as noted above, if the Commission considers the transaction likely to raise competition concerns, it still has the discretion to revert to a normal review. Therefore, it would be proportionate to only describe concisely reportable markets deemed relevant by previous cases and the parties. Further details regarding the reduction of information in the other sections and related practical suggestions (including the use of a 'smart' form, ie one that adapts to the information inputted) are provided in the questionnaire response.

Streamlining the review of non-simplified cases and referral cases

Form CO

2.10 In a similar vein, the Working Group welcomes the Commission's consideration of ways to streamline the review of non-simplified cases and referral cases.

2.11 Separating factual information and advocacy under Option 1 will result in repetition of facts across both sections. Typically, a thorough and detailed argument relies on a comprehensive set of facts. However, if the facts have already been included in a separate section of the Form CO, they would need to be repeated in the advocacy section or there would need to be substantial cross referencing between the factual and advocacy sections, resulting in the advocacy section in particular being difficult to read. Therefore, the Working Group does not believe that it would be helpful to introduce separate sections for factual information and advocacy.

2.12 With regards to the potential for opt-outs for parts of section 8 of the Form CO under Option 2, the Working Group considers that this would be helpful. Substantial amounts of the information that is required to answer Section 8 fully is not normally readily accessible for parties. As examples, parties typically do not actively monitor the

importance of research and development on their ability to compete in the long term (with the possible of exception of specific sectors such as pharma), or the contact details of their competitors. Therefore, the parties have to invest substantial time and effort during the pre-notification process to gather this information, frequently causing delay and expense during pre-notification. The overall result is that parties are forced to wait longer for decisions, and to spend more money on the transaction. There would be no risk to effective enforcement by adopting an opt-out approach given that the Commission can still refuse the request by the parties for a waiver.

2.13 Details of other practical suggestions are provided in the questionnaire response including the introduction of a separate/additional section for the competitive assessment (at the moment it is included across Sections 6 and 7), a template table to outline the relevant and/or affected markets and the removal of duplicative information required by Sections 7 and 8.

Referrals

2.14 The Working Group considers that the Form RS is not necessary for Article 4(5) referrals and that it can be removed altogether and instead a brief section should be added to the Form CO where notifying parties are asked to identify whether their case is a referral case and provide any necessary jurisdictional information (currently Section 6.3 of Form RS). In making this suggestion, the Working Group recognises that as part of the Article 4(5) process, the Commission sends a copy of the Form RS to the Member States, triggering a 15 working day period in which any Member State competent to examine the concentration under its national competition law can object. The Working Group's suggestion to replace the Form RS with the Form CO does not impact this process; rather, the Working Group merely suggests that the Member States' decision-making process be made on the basis of the Form CO, not the Form RS.

2.15 Further, the Working Group considers that there is significant scope to reduce the information required under the Form RS for both Article 4(4) and, if retained, Article 4(5) referrals and to remove considerable duplication. As explained in further detail in the questionnaire response, the information provided in Section 1 (background information), Section 5 (details of the referral request and the reasons why the case should be referred) and Section 6 (declaration) should be adequate. The overall effect would be a shorter Form RS that would allow for expedited referrals.

Introducing electronic notifications

2.16 The Working Group welcomes the Commission's consideration of introducing electronic notifications. The Working Group is supportive of a move to electronic notification and consider that it is long overdue. This would result in clear efficiency benefits for businesses and would also be in line with the Commission's objective of becoming more environmentally friendly. In order to achieve these benefits however, the Working Group considers that the move should be to electronic notifications in full and that some sort of hybrid model where both electronic and hard copy notifications are required would undermine the benefits associated with electronification and should not therefore be adopted.

Final observations

2.17 The Working Group has identified the following issues for further consideration by the Commission as part of its consultation and simplification impact assessment.

2.18 ***Offshore joint ventures***: The Working Group suggests that the Commission may wish to review the treatment of "offshore" joint ventures. Although transactions involving joint ventures with no, or a limited, presence in the EEA are already covered by Paragraph 5(a) of the Notice, the Working Group respectfully suggests that the Commission should consider further reducing the administrative burdens on joint venture transactions that have no conceivable nexus to the EEA. More generally with respect to offshore joint ventures, the Working Group reiterates its view previously expressed to the Commission that such joint ventures should not fall within the jurisdiction of the Merger Regulation although the group recognises that this would entail legislative change to the regulation itself.

2.19 ***Article 22 referrals and the simplified procedure***: The second issue relates to the blanket exclusion of transactions referred to the Commission under Article 22 of the EUMR or for which a request for referral is made under Article 9 of the EUMR, currently set out in Paragraph 20 of the Notice.

2.20 With specific regard to Article 22, Paragraph 20 of the Notice pre-dates the Commission's communication of 26 March 2021, which encourages the referral of transactions to the Commission from Member States National Competition Authorities pursuant to Article 22 – even if the thresholds for notification at the national level are not met. The Working Group appreciates that the criteria for referral under Article 22 require that a transaction threatens to significantly affect competition in the Member State(s)

making the request. However, these criteria should not necessarily presume the requisite level of scrutiny or outcome – particularly for transactions that may have a limited nexus to the EEA. It may be the case that most cases referred under Article 22 will not be appropriate candidates for the simplified procedure. However, given the significant policy change regarding Article 22, the Working Group respectfully suggests that the Commission consider whether a blanket refusal to apply the simplified procedure to any transaction referred under Article 22 remains appropriate.

2.21 More generally, with respect to Article 22, the Working Group wishes to express its disappointment and regret that the Commission's revised policy regarding the application of Article 22 which was communicated on 26 March 2021 was not subject to any public consultation, in particular given the very significant change in policy. Accordingly, the Working Group would urge the Commission to consider consulting on the revised policy and its practical application at an appropriate time in the near future.

ANNEX

The Annex includes additional responses to some of the questions in the questionnaire where the response exceeded the 2,000 characters limit by a small amount.

1.4 (cont'd)

The Working group respectfully suggests that instead of introducing a flexibility clause, the Commission may simply consider increasing the thresholds at which parties may use the simplified procedure to the top end of the spectrum envisaged by the flexibility clause. This has the advantage of enabling parties to non-problematic transactions to benefit from a clearer and more streamlined process. This also presents no risk to the Commission, as the Commission retains the discretion to revert to a normal review process and can raise questions about the application of the simplified procedure during pre-notification discussions.

1.7 (cont'd)

As a separate matter, the Working Group also suggests that the Commission consider the need to require parties to apply the thresholds set out in the Notice to all plausible markets. This is addressed in greater detail in Section 2.2 below, but the Working Group notes it here given that the obligation to apply the thresholds to all plausible markets is burdensome and disproportionate.

1.12 (cont'd)

With specific regard to Article 22, Paragraph 20 of the Notice pre-dates the Commission's Communication of 26 March 2021, which encourages the referral of transactions to the Commission from Member States National Competition Authorities pursuant to Article 22 – even if the thresholds for notification at the national level are not met. The Working Group appreciates that the criteria for referral under Article 22 require that a transaction threaten to significantly affect competition in the Member State(s) making the request. However, these criteria should not necessarily presume the requisite level of scrutiny or outcome – particularly for transactions that may have a limited nexus to the EEA. It may be the case that most cases referred under Article 22 will not be appropriate candidates for the simplified procedure. However, given the significant policy change regarding Article 22 (which itself was not the subject of public consultation), the Working Group respectfully suggests that the Commission consider whether a

blanket refusal to apply the simplified procedure to any transaction referred under Article 22 remains appropriate.

3.5 (cont'd)

The Commission would maintain the ability to determine if a waiver should be granted. Therefore, if the Commission has concerns about effective enforcement, the Commission can still refuse the request by the parties for a waiver and exercise the Commission's ability to scrutinise the information provided by the parties. However, as the information would not always be required, the burden on notifying parties would be reduced.

3.14 (cont'd)

If Sections 2, 3 and 4 are removed, the Working Group thinks Sections 1, 5 and 6 can remain.