STUDIENVEREINIGUNG KARTELLRECHT E.V.

www.studienvereinigung.de

Feldmühleplatz 1
40545 Düsseldorf | Germany

PO Box 10 17 43
40008 Düsseldorf | Germany

Office address of the Chairman:
Karl-Scharnagl-Ring 6
80539 Munich | Germany
Tel: +49 89 21667 0
Fax: +49 89 21667 111
ingo.brinker@gleisslutz.com

By e-mail:
European Commission
Place Madou / Madouplein 1
B-1210 Brussels

COMP-SIMPLIFICATION_IMPACT_ASSESSMENT@ec.europa.eu

3 June 2022

Contribution of the Studienvereinigung Kartellrecht e. V. to the consultation of the European Commission "Merger control in the EU – further simplification of procedures".

A. The Studienvereinigung Kartellrecht e. V.

(1) The Studienvereinigung Kartellrecht ("Studienvereinigung") is a registered association under German law whose purpose is to promote science and research in the field of national, European and international antitrust/competition law and whose members include more than 1,300 lawyers and competition economists from Germany, Austria and Switzerland. The members of the Studienvereinigung regularly advise and represent companies in proceedings before the European Commission and the national cartel authorities as well as before European courts.

B. Introduction

(2) The Studienvereinigung welcomes both the intention of the European Commission ("Commission") to increase the efficiency of the merger control procedure for all parties involved and the associated consultation "Merger control in the EU – further simplification of procedures" including the package of measures put forward for consultation therein.

(3) The proposed amendments to the Regulation implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Implementing Regulation"), to the Annexes to the Implementing Regulation including Form CO ("Annex Form CO"), Short Form CO ("Annex Short Form CO"), Form RS and Form

RM, to the Communication pursuant to Articles 3(2), 13(3), 20 and 22 of the Implementing Regulation ("Communication on the transmission of documents") and to the Commission Notice on a simplified treatment of certain concentrations under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings ("Simplified Procedure Notice", all together "Package of Measures") are, in principle, appropriate to achieve the objectives pursued by the Commission, i.e. to focus its resources on cases that may give rise to competition concerns and to reduce (as far as possible) the administrative burden associated with merger control without compromising its effective enforcement.

(4) From the Studienvereinigung's point of view, the Package of Measures is, in principle, also suitable for reducing the effort and costs associated with the merger control proceedings for the companies notifying a merger.

(5) At the same time, from the Studienvereinigung's perspective, however, there is further potential to simplify the procedure and increase its efficiency without jeopardising the effective implementation of merger control. In addition, the Studienvereinigung considers some further amendments to the Package of Measures to be sensible and necessary. In that respect, the Studienvereinigung focusses its comments on selected essential aspects of the Package of Measures.

(6) Furthermore it is desirable form the Studienvereinigung's point of view, to include some additional provisions in the Package of Measures for the sake of legal certainty and acceleration of merger control proceedings (or at least to address the issues promptly after the Package of Measures entering into effect). This applies, in particular, to the following issues:

- The "Best Practices on the conduct of EC merger control proceedings" ("Best Practices") published in 2004 should be revised and updated after almost 20 years. In doing so, they should be adapted to the legal framework of EU merger control as changed by the Package of Measures and the Commission's decisional practice since 2004 should be reflected as well. From the Studienvereinigung's point of view, a detailed description of the pre-notification phase would be particularly desirable. For example, the Commission points out in the draft Form CO (paragraph 8): *"Notifying parties are invited to engage in pre-notification discussions in all normal cases on the basis of a draft Form CO. The possibility to engage in pre-notification contacts is a ser-*

vice offered by the Commission to notifying parties on a voluntary basis in order to prepare the formal merger review proceedings. As such, while not mandatory, pre-notification contacts are extremely valuable to both the notifying parties and the Commission in determining, among other things, the precise amount of information required in a Form CO and, in the majority of cases, will result in a significant reduction of the information required."

The Studienvereinigung supports this clarification. On the other hand, in a new version of the "Best Practices" it would be desirable to have more detailed guidance on the timeframe of the pre-notification phase in relation to the formal duration of the procedure and in respect of the complexity of the case. Many members of the Studienvereinigung have experienced in a number of cases that pre-notification proceedings lasted significantly longer than they originally expected and significantly longer than it had been foreseeable, reasonable and proportionate based on the low or average complexity of the case. The merger control procedure before the Commission is, thus, often the significantly longest and, in terms of duration, the least predictable procedure in multi-jurisdictional merger control cases. It is therefore in the best interest of all stakeholders that pre-notification procedures are streamlined and conducted efficiently. The Commission should ideally provide indicative timelines based on different levels of complexity of cases (e.g. simple, average and complex or similar) in its Best Practices.

- The Studienvereinigung would also appreciate if the Commission enacted a notice on the submission and treatment of internal documents in merger control proceedings, which has been announced for some time, and started a public consultation in advance.

C. Detailed comments

I. New definition of the categories of concentrations to be treated under the simplified procedure

(7) The Studienvereinigung welcomes the approach taken in the draft of the revised Simplified Procedure Notice to (i) define categories of concentrations eligible for an "ultra-simplified" procedure in which pre-notification would not be necessary, (ii) introduce additional categories of concentrations to be treated under the simplified procedure, (iii) to introduce flexibility clauses in order to treat categories of concentrations that are not in themselves eligible for the simplified procedure nevertheless under this procedure, and (iv) to specify the criteria under which the Commission can examine a concentration that technically qualifies for the simplified procedure under the standard procedure. In the view of the Studienvereinigung, however, there is still a need for further specifications or adjustments with regard to individual aspects.

(8) **Super simplified procedure.** The Studienvereinigung expressly welcomes the fact that paragraph 26 of the draft Simplified Procedure Notice provides that concentrations which either have as their object the creation of a joint venture without a substantial link to the EEA (paragraph 5(a) of the draft "Simplified Procedure Notice") or where there are neither horizontal overlaps nor non-horizontal links between the activities of the undertakings concerned (paragraph 5(c) of the draft "Simplified Procedure Notice") can usually be notified without pre-notification in future. However, the Studienvereinigung points out that this option must also be available in practice and is not counteracted by the fact that according to paragraph 29 of the draft Simplified Procedure Notice, it is necessary to submit a case team allocation request at least one week before the planned filing under the "super simplified procedure". If no pre-notification is required, it should be possible that an application under the "super simplified procedure" is filed directly, i.e. without a Case Team Allocation Request, and assigned to a Case Team. In any case, it should be ensured that the formal act of submitting a Case Team Allocation Request does not indirectly lead to pre-notification consultations with the Commission delaying notification. The Studienvereinigung assumes that the form of the Case Team Allocation Request will be adapted after the implementation of the Package of Measures and that it

will include a separate category covering requests under the "super simplified procedure".

(9) Irrespective of the above, the Studienvereinigung points out that it should be considered in a future revision of the Merger Regulation to completely remove the concentrations covered by paragraph 5(a) of the draft Simplified Procedure Notice from the scope of the Merger Regulation. In particular, it should be clarified, in line with the ICN recommendations,[1] that concentrations without an appreciable impact on the internal market are not subject to EU merger control. This especially includes the creation of joint ventures whose scope does not cover the territory of the European Union.

(10) **Expansion of the merger categories to which the simplified procedure applies.** The Studienvereinigung considers the additional categories currently covered by the draft to be appropriate. However, in light of the complexity of the individual criteria of the categories, the Studienvereinigung points out that the Commission in practically applying the provisions should not require a disproportionate amount of information being necessary to assess the applicability of the simplified procedure and that the Commission should not examine this information in a disproportionately time-consuming way as compared to the time advantage resulting from the simplified procedure. Against this background, the Studienvereinigung suggests providing for an indicative timeframe within which the Commission has to decide if the concentration is suitable for an assessment under the simplified procedure.

(11) In this context, the Studienvereinigung also points out that the standards set by the Commission when examining the requirements of paragraph 5(d) should not be overstretched. This applies, in particular, in light of paragraph 14 of the draft Simplified Procedure Notice, according to which the Commission *"will not apply the simplified procedure where it is difficult to define the relevant markets or to determine the market shares of the parties to the concentration".* It would be helpful and useful to clarify and add as guidance that *"this will apply only if the market shares exceed the thresholds above which a simplified procedure is generally unavailable."*

---

[1] Cf. ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2017), II. C. p. 5, available at: https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/

(12) The Studienvereinigung also suggests a clarification in point 5(c) ("*provided that the parties to the concentration are neither active on one and the same product and geographic market nor on a product market which is upstream or downstream of the product market on which another party to the concentration is active*") to the effect that the conditions are fulfilled in the case of the creation of a joint venture ("JV") if the JV will be active on a product and geographic market on which only one parent undertaking is active or if there is a vertical relationship with only one parent undertaking, while all other undertakings concerned are neither active on the same market nor on an upstream or downstream market.[2] In such constellations, just like in the constellations clearly covered by the current wording of point 5(c), there is, in principle, no risk of horizontal or non-horizontal competition concerns.

Furthermore, the Studienvereinigung suggests that the simplified procedure should always be applied to concentrations that only affect (traditional) niche markets with a total sales-based market volume in the EEA of less than EUR 150 million. If it comes to a revision of the Merger Regulation in the future, the Commission should consider introducing a similarly worded *de minimis* exemption in the regulation itself (similar to Section 36 (1) sentence 2 no. 2 of the German Act against Restraints of Competition). In consequence of such a rule, the covered concentrations will be exempted from a substantive review, provided that they only concern traditional markets in which turnover is a suitable indicator of the parties' market position.

(13) **Flexibility clause.** The Studienvereinigung considers the introduction of a specific flexibility clause allowing the examination of certain concentrations under the simplified procedure, even if they do not belong to one of the categories of concentrations covered by paragraph 5, a positive change. However, the Studienvereinigung suggests defining the elements of the flexibility clause more broadly in light of the discretion the Commission has at its disposal. That includes raising the upper thresholds for flexible treatment and increase the margin of appreciation in the range above 20% market share (e.g. 30% instead of 25% in recital 8(a)). This helps to avoid that efficiency potentials are overly restricted by too narrow thresholds.

---

[2] See Commission in M.10548 - Telekom Deutschland /IFM Investors /JV and to the same effect at least also in M.10295 - Orange/APG/FibreCo, M.9464 - OMERS / Altice / Allianz / SFR FTTH and M.9072 - KKR / Altice / SFR Branch; but deviating in M.10087 - Proximus / Nexus Infrastructure / JV.

(14) **Safeguards and exclusions.** The Studienvereinigung welcomes that the draft Simplified Procedure Notice now explicitly includes specific criteria which, if met, may make a concentration ineligible for the simplified procedure, even though the formal requirements of paragraph 5 are fulfilled. This will make the application of the procedural rules more predictable. In this respect, the Studienvereinigung also supports the draft Simplified Procedure Notice stipulating in Section C that the existence of one or more of the circumstances listed there does not automatically preclude the simplified procedure as regards most of the circumstances listed there, but the decision is at the Commission's discretion.

(15) However, the Studienvereinigung would like to point out the following aspects:

- As explained above, when considering whether the definition of the relevant markets or the determination of the parties' market shares is "difficult" (C.2, paragraph 14), it is advisable that the Commission sets criteria that do not lead to paragraph 14 automatically precluding the application of the simplified procedure in a large number of cases.

- The Studienvereinigung points out that in particular the provisions in paragraph 16 (C.4) and paragraph 18 (C.6) include a large number of indeterminate legal terms, the interpretation of which can be unclear and raise problems in individual cases. Also, in this respect it is advisable that the Commission choses an approach and an interpretation that does not lead to these paragraphs automatically precluding the application of the simplified procedure in a large number of cases.

- According to paragraph 22 (C.8) of the German language version of the draft Simplified Procedure Notice, the Commission reverts to the standard procedure if Member States, EEA States or third parties raise *"mit Gründen versehene wettbewerbliche Bedenken hinsichtlich des angemeldeten Zusammenschlusses anmelde[n]. [express[s] substantiated competition concerns about the notified concentration"]*." The Studienvereinigung would like to make two comments in this regard: Firstly, the automatism of a transition to the standard procedure ("kehrt zurück" [reverts"]) apparently provided for in paragraph 22 contradicts the discretion granted to the Commission, in principle, in para 12 (*"[this] may be a reason for the Commission [dies kann für die Kommission ein Anlass sein]"*). Secondly, it should (also) be clarified in the German language version that not

every submission of a third-party complaint that includes reasons defined in a purely formalistic manner, but only the submission of a third-party complaint that is also well-founded, substantiated and plausible, leads to a transfer to the standard procedure. This is already expressed in the English language version (*"expresses substantiated competition concerns"*), but should also be clarified by adding *"and plausible"* in the English language version.

II. Examination of concentrations under the simplified procedure (amendments to the Short Form CO)

(16) The Studienvereinigung welcomes the considerable simplification of the Short Form CO, including the significant change to a multiple-choice form.

(17) However, the Studienvereinigung strongly suggests including optional input fields for free text and explanations in Sections 6 and 7 to allow the Commission a better analysis of information that is open or requires general explanations. The Studienvereinigung is of the opinion that there will be cases in which the information required by the Short Form cannot be adequately submitted by using only a multiple-choice questionnaire. This applies, in particular, to the assessment of the full functionality of joint ventures, information on the flexibility clause, information on safeguard clauses and exclusion conditions. The possibility to provide explanations immediately enhances the information basis provided and, thus, promotes the intended efficiency improvement of the procedure. At the same time, the possibility of supplementary explanations eliminates an unnecessary risk for companies of potentially submitting incomplete/incorrect information.

(18) Furthermore, the Studienvereinigung considers it appropriate to limit the information requested in the table formats of section 8 and 9 to quantitative information/data. Qualitative information should be provided in free text for the sake of clarity and because of the potential complexity of the information requested. In this regard, Studienvereinigung also suggests that the Commission applies some flexibility in accepting different types of answers instead of rigid formats. This applies, in particular, to notifications with a high number of relevant product and/or geographic markets.

III. Examination of concentrations in the regular procedure (amendments to the Annex Form CO)

(19) The Studienvereinigung welcomes that the draft of the amended Annex Form CO has reduced the information requests for markets benefiting from the flexibility clauses according to paragraph 8 of the draft Simplified Procedure Notice and that certain information requirements in section 8 of the current Annex Form CO concerning cooperation agreements, trade between Member States and imports from outside the EEA as well as trade associations have been deleted entirely. However, form the perspective of the Studienvereinigung further relief would be desirable, particularly with regard to the provision of quantitative information/market share data.

(20) In addition, the Studienvereinigung has the following comments on individual points of the Package of Measures as regards the draft revised Annex Form CO:

- The Studienvereinigung suggests clarifying paragraph 22 of the introduction to the Annex Form CO, in line with established practice, that reasons for the assertion of business secrets or other confidential information do not need to be submitted automatically upon filing of the Form CO, but that the undertakings concerned must assert business secrets or other confidential information and provide reasons for this only when a phase-2 procedure is initziated (especially in the case of third party requests for access to file) or this is necessary for preparing the public version of the decision.

- With regard to the, in principle, legitimate issue raised in paragraph 27 et seq. of the introduction to the draft revised Annex Form CO regarding the description of the quantitative economic data collected by the parties, the Studienvereinigung suggests clarifying in which section of the draft revised Annex Form CO this information will have to be provided. The Studienvereinigung would like to suggest that the Commission accepts such information as it is available in the companies' files and/or IT systems during the pre-notification phase and uses it as starting point for the Commission's further analysis. Due to the principle of proportionality, the Commission should generally not be entitled to require the parties to take significant effort and prepare their existing data according to detailed specifications, but should limit its requests to what is available in terms of data formats with the parties with reasonable effort.

- The Studienvereinigung is of the opinion that the expectation, apparently underlying Section 6, that the parties should elaborate on the decision practice of the Commission and case law of the EU-courts as comprehensively as possible or even exhaustively in respect of all plausible alternative market definitions is too far-reaching. Although the draft of section 6 uses the word *"can", so* that there is no legal obligation here, the Studienvereinigung nevertheless suggests clarifying that, at most, only the *"material"* or *“essential”* decision practice is to be listed. For example, chains of decisions on the same markets, each referring to the other, would not result in any appreciable gain in knowledge. Rather, in such a case, the most recent and/or most detailed decisions on the markets concerned should suffice. The Studienvereinigung notes that due to the proportionality principle, the task of compiling all decisions from over 30 years of EU merger control concerning market definition should not be imposed on the notifying parties.

- The Studienvereinigung considers the proposed table format in Section 6.2 useful and enhancing clarity.

- However, with regard to section 6.3 of the Annex Form CO, the Studienvereinigung suggests that for sake of legal certainty, when analyzing what is required for the notification to be complete, the list of criteria under which *"the notified concentration may have a significant impact [der angemeldete Zusammenschluss […] erhebliche Auswirkungen haben könnte]”* should be exhaustive. In this respect, the Studienvereinigung advocates deleting the words *"for example [zum Beispiel]"* after *"because [weil]" [in the German language version, in the English language the word before “for example” is “impact”].*

- In line with the comments on the draft Annex Short Form CO, the Studienvereinigung considers it appropriate to insert a text box for explanations in section 7.1 and especially in section 7.4 instead of a rigid multiple choice format. Reference is made to the reasons given above.

- Further, also in line with the comments on the draft Annex Short Form CO (cf. paragraph 17 above), the Studienvereinigung is of the opinion that the requests in the table formats of Sections 7 and 8 should be limited to quantitative information/data.

- In section 7.4, the Studienvereinigung suggests checking in the German language version whether the word *"Mandatsverflechtungen [cross-directorships]"* could be more accurately expressed by the words *"gesellschaftsrechtliche oder personelle Verflechtungen in den Organen der Unternehmen [links via corporate bodies based on corporate or personal interdependencies]."*

- As regards section 7.4. (field *"The relevant market share thresholds are exceeded in terms of capacity or production under any plausible market definition. [Die relevanten Marktanteilsschwellen in Bezug auf Kapazitäten oder Produktion werden bei einer oder mehreren der plausiblen Marktabgrenzungen überschritten]"*), the Studienvereinigung notes that this request partly requires the collection of data that, to date, is not requested under the current version of the Annex Form CO and that is not known or accessible to companies from public sources. This is a very good example showing why rigid multiple choice formats, as included here, have their limitation.

IV. Electronic notifications

(21) In the view of the Studienvereinigung, the Commission's practice of temporarily accepting notifications in digital format during the COVID pandemic has proven its worth. The Studienvereinigung, therefore, welcomes the plan to introduce rules creating legal certainty for the electronic submission of documents, in particular notifications in EU merger control proceedings. However, with regard to individual aspects of the draft Implementing Regulation and the draft Notice on the transmission of documents, there is still a need for adaptation or supplementation in the opinion of the Studienvereinigung.

(22) **Exclusivity of electronic transmission.** According to Article 22(1) of the draft Implementing Regulation, the transmission of documents to (and from) the Commission shall in future take place exclusively by electronic means, unless the Commission exceptionally agrees to transmission by registered mail or hand delivery. According to paragraph 24 of the draft Notice on the transmission of documents, the Studienvereinigung understands that such an exception will only be granted if the EU Send application is not available. The Studienvereinigung suggests that there should be a somewhat wider room for exceptions in this respect and that transmission by registered mail or by hand delivery should at least also be permissible if the

participating company demonstrates that transmission by electronic means would be associated with considerable expense or it could cause disadvantages for it. In any case, the Studienvereinigung suggests an interim regime of at least two years, during which an application signed in writing can also be effectively submitted, in order to give all companies and law firms sufficient time to introduce an electronic signature (QES) accepted under eIDAS Regulation (EU) No. 910/2014 and compatible with EU Send. In this regard, the Studienvereinigung points out that German lawyers, for example, use a qualified electronic signature with the special electronic lawyer's mailbox (Besonderes elektronsiches Anwaltspostfach, beA), which is not compatible with EU Send and therefore will be forced to make use of an additional digital signature solution.

(23) **Time of receipt.** Article 22(4) of the draft Implementing Regulation provides that submissions of Form CO, Short Form CO and Form RS sent to the Commission electronically on a working day shall be deemed to have been received on that day only if received before or during the opening hours indicated on DG Competition's website; forms received after the opening hours shall be deemed to have been received only on the following working day. While such a rule based on the Commission's opening hours seems understandable in the case of physical submission of forms, the Studienvereinigung considers that such a rule is no longer justified in the case of electronic transmission. The Studienvereinigung therefore suggests that forms should always be deemed to have been received on the working day on which they were received by DG Competition, as evidenced by the time stamp of an automatic acknowledgement of receipt.

(24) **Internal documents.** According to paragraph 23 of the draft Notice on the transmission of documents, internal documents transmitted as part of section 5.4 of the Form CO *"shall be transmitted in whole and unredacted. All underlying metadata must be kept intact."* In the view of the Studienvereinigung, it is essential to clarify here that the requirement of an "unredacted" transmission of documents

- (i) does not have the effect of restricting the attorney-client privilege and that documents/parts of documents which are subject to the attorney-client privilege may (of course) continue to be (partially) redacted before being transmitted to the Commission,

- (ii) does not result in an extension of the scope of Section 5.4 of the Form CO, i.e. that parts of documents not related to the notified concentration and, thus, not covered by Section 5.4 of the Form CO may continue to be (partially) redacted prior to transmission to the Commission in such a way that the lack of relevance [of the redacted parts] remains recognisable for the Commission (e.g. by submitting unredacted agendas/tables of contents).

* * *

The following members of Studienvereinigung Kartellrecht contributed to the preparation of this opinion:

Alexander Rinne, Marco Hartmann-Rüppel, Oliver Fleischmann and Philipp Pichler