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New EC Merger Simplification Package: Less burden, more efficiency?

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# New EC Merger Simplification Package: Less burden, more efficiency?

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On April 20, 2023, the European Commission (“Commission” or “EC”) adopted a new legislative package for further simplification of the merger review process under the EU Merger Regulation (the “2023 Simplification Package”). The 2023 Simplification Package, which is applicable as of September 1, 2023, includes (a) a revised Merger Implementing Regulation (the “Implementing Regulation”), (b) a Notice on Simplified Procedure (the “Notice”), and (c) a Communication on the transmission of documents (the “Communication”).

In line with the Commission’s objective to reduce reporting requirements by 25%, the new rules are expected to relieve merging businesses of the administrative burden and associated costs in numerous unproblematic mergers which are unlikely to raise competition concerns. The Commission, on the other hand, may focus its investigations on cases that require a more detailed review without compromising effective merger enforcement<sup>1</sup>.

## Key changes

### *New categories of simplified cases*

As regards vertical transactions, the Commission introduces two (2) new categories of concentrations that can benefit from simplified

treatment, namely cases where under all plausible market definitions:

- the individual or combined upstream market share of the parties to the concentration is below 30% and their combined purchasing share is below 30%; and
- the individual or combined upstream and downstream market shares of the parties to the concentration are below 50% and the market concentration index (HHI) delta is below 150 and the smaller undertaking in terms of market share is the same in the upstream and downstream markets.

### *Flexibility clauses*

The Notice introduces four (4) flexibility clauses granting the Commission the power to assess under the simplified procedure concentrations which are not *a priori* eligible for simplified treatment, namely:

- i. horizontal overlaps where the combined market share of the merging parties is 20-25%;
- ii. vertical relationships where the individual and combined upstream and downstream

<sup>1</sup> European Commission, *Commission Staff Working Document: Impact Assessment Report Accompanying the Documents Commission Implementing Regulation (EU) .../... implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004 and Commission Notice on a simplified treatment for certain concentrations under Council*

*Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, 20 April 2023, SWD(2023) 80 final, available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2023\)80&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2023)80&lang=en) [accessed 12 June 2023]

market shares of the parties are lower than 35%;

- iii. vertical relationships where the individual and combined upstream and downstream market shares of the parties are lower than 50% in one market and less than 10% in all the other vertically related markets; and
- iv. joint ventures with turnover and value of assets between EUR 100 and 150 million in the European Economic Area (EEA).

#### *Safeguards and exclusions from the simplified procedure*

The Notice includes an updated but still non-exhaustive list of cases in which the Commission may refuse simplified treatment. Two (2) noteworthy additions to this list are as follows:

- a) One party to the concentration has significant non-controlling shareholdings in undertakings active in the market(s) where another party is active; or one or more of the competitors of one party to the concentration have significant non-controlling shareholdings in any of the other parties to the concentration.
- b) Concentrations resulting in a combination of technological, financial or other resources, or competitively valuable assets, such as raw materials, intellectual property rights (for example, patents, know-how, designs and brands), infrastructure, a significant user base or commercially valuable data inventories; in such cases, even if the parties to the concentration do not operate in the same product market, the risk of a significant market power increase cannot be overlooked by the EC.

#### *Streamlining the review of simplified and non-simplified cases*

With a view to further cut red tape for merging businesses, the Commission introduces revised notification forms with fewer information requirements and open text questions.

Regarding simplified cases, there is a new “tick-the-box” Short Form CO consisting primarily of multiple-choice questions and tables covering both jurisdictional and substantive matters.

In addition, a “super-simplified” procedure providing for shorter time intervals and not requiring pre-notification contacts is introduced, for the following categories of cases:

- acquisition of joint control in joint ventures with no current or expected turnover within the EEA and no planned asset transfers within the EEA to the joint venture at the time of notification (“extra-EEA joint ventures”); and
- where there are no horizontal overlaps or vertical relationships between the merging parties’ activities.

Regarding non-simplified cases, under the revised Form CO there is more room for waiver requests by the parties<sup>2</sup>. Additionally, standardised tables requiring information on horizontal overlaps and vertical relationships involving pipeline products have been added. By providing for limited information requirements for markets falling within the flexibility clauses under i. – iii. above, the revised Form CO reduces the number of markets to be filled in in the tables requiring market share information on affected markets.

Apart from said notification forms, the Commission has also streamlined the referral

<sup>2</sup> Applicable, in particular, to information about support received from public authorities; required notifications in jurisdictions outside the EEA; significant non-controlling shareholdings of the parties to the concentration/of competitors in any of the parties to

the concentration; economic data collected by the parties in the ordinary course of their business operations; product differentiation and closeness of competition.

request of mergers to or from the Commission (Form RS) and the remedy proposal (Form RM).

### *Electronic transmission of documents*

Following the Covid-19 period of remote administration and to enhance the Commission's digital transformation, the Communication establishes the electronic transmission of documents, including notifications, by default. If electronic signing of documents is not feasible, the Commission may exceptionally allow hand-signed submissions.

### **Final remarks**

Upon first reading, one welcomes this reform which promises fewer costs, more clarity, faster clearance decisions, and more transactions being reviewed under the simplified procedure.

Additionally, the emphasis given to pipeline products, on which detailed information is requested, confirms the Commission's interest in protecting innovation as a key parameter of competition when assessing a concentration.

However, there are certain points that may call into question the legal certainty sought through this legislative reform.

Firstly, the extensive list of exclusions based on which transactions technically qualifying for simplified treatment can be ultimately reviewed under the normal procedure, may practically undermine the benefits of the new simplified procedure.

Moreover, certain information requirements may turn out to be quite complex in practice and inevitably lead to additional requests for information. For example, information about cross-directorship in companies active in the relevant markets, to the extent they are not

subject to any waiver, might be too burdensome to gather, especially for private equity investors.

As for waiver possibilities, the Commission's right to request at any time during the proceedings information for which a waiver has been granted<sup>3</sup> may result in significant delays in the assessment of the relevant transactions.

In relation to wording, the term "*very significant* market share" in the third category of exclusion from the simplified procedure (See the Notice, para. 15) is quite vague. Therefore, private equity and conglomerate firms – which are expected to fall under this category due to their non-controlling shareholdings in numerous companies across several markets – may find it difficult to assess whether they have a *very significant* market share and thus their transactions, although qualifying for simplified treatment, may be reviewed under the normal procedure.

Lastly, regarding the review of non-simplified cases, the provision of relevant information on all plausible market definitions may prove time-consuming for merging companies.

To sum up, in anticipation of the implementation of this reform, one cannot rule out borderline cases which may highlight the need for more straightforward rules. It is encouraging, though, that the Commission will continue to engage directly with stakeholders, e.g., via informal discussions, to understand any difficulties encountered by businesses when applying the revised rules and to assess whether these rules provide an appropriate level of legal certainty<sup>4</sup>.

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<sup>3</sup> See Annex I, para. 11 (Form CO) and Annex III, para. 8 (Form RS).

<sup>4</sup> European Commission, *supra* note 1, pages 61-62.

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