



SIMPLIFICATION OF EU MERGER CONTROL FILING PROCEDURES

1 MAY 2023

Introduction

On 20 April 2023, the European Commission (the “Commission”) adopted a package of measures to simplify the merger control process for transactions that do not raise competition concerns (the “New Package”) under the EU Merger Regulation.

The New Package is the result of an evaluation launched by the Commission in 2016 with the purpose of evaluating the procedural and jurisdictional aspects of the existing EU merger

control procedures. The purpose of the New Package is to make the EU merger control procedures more focused and effective.

The New Package will (i) expand and/or clarify which cases that qualify for the simplified procedure, (ii) streamline the review process under the simplified procedure, (iii) streamline the review of cases under the normal procedure, and (iv) introduce an electronic system for notifications.

Main Changes following from the New Package

Cases falling under the definition of “simplified cases”

As a first significant change, the Commission expands the number of cases that qualifies for a process under the simplified procedure.

The New Package introduces two new categories of cases that can benefit from the simplified procedure:

- (i) the individual or combined upstream market shares of the merging parties are below 30 % and their combined purchasing share is below 30 %.
- (ii) the individual or combined upstream and downstream market shares of the merging parties are below 50 %, the market concentration index (HHI delta) is below 150, and the company with the smallest market share is the same in the upstream and downstream markets.

Secondly, the New Package grants the Commission the right to treat certain cases under the simplified procedure even if the case does not fall under any of the default categories. This includes the following cases:

- (i) for horizontal overlaps where the combined market share of the merging parties is between 20-25 %.
- (ii) transactions involving vertical relationships where the individual or combined upstream or downstream market share of the parties is between 30-35 %.
- (iii) for vertical relationships where the individual or combined market share of the merging parties does not exceed 50 % in one market and 10 % in the other vertically relation market.

- (iv) for joint ventures with turnover and assets between EUR 100 million and EUR 150 million within the European Economic Area (EEA).

Super-simplified Treatment

The New Package also introduces a “super-simplified” treatment in cases within EEA where there are (i) no current or planned horizontal overlaps or (ii) non-horizontal relationships between the merging parties’ activities.

This will speed up the process even more as the Commission provides for the parties to skip the pre-notification discussions and notify the case directly with the Commission. Even though the Commission aims for a faster process, it notes that the review period continues to be 25 business days from the date of notification – the same period as for Phase I investigations.

Safeguards and exclusions

The New Package contains also a clearer and more detailed list of situations where the Commission may investigate a case under the normal procedure, even though it qualifies for simplified treatment, for example:

- (i) cases in which one merging party may have significant noncontrolling shareholdings in companies active in the markets where another party to the transaction is active.
- (ii) certain types of cases that may increase the market power of the parties even if the merging parties do not operate in the same market, e.g., combining technological, financial, or other resources or competitively valuable assets, such as raw materials, intellectual property rights, and infrastructure.

Short Form CO and Electronical Notification

The New Package introduces a new notification form, a “tick-the-box” form, for simplified cases (the “Short Form”). This Short Form primarily consists of multiple-choice questions and tables. Also, the Short Form includes a reduction and clarification of information requirements.

As a starting point the Commission will not request further information than the information included in the Short Form, however, if the information provided for in the Short Form does not support the conclusion of the notifying parties regarding jurisdiction, the Commission may request any further information, e.g., it has been informed by the merging parties that there is

joint control based on veto rights, but there is no information on veto rights described in the notification.

During the COVID-19 pandemic the Commission temporarily accepted notifications in a digital format. Based on the experience during the pandemic, the New Package provides for those notifications to the Commission to be made electronically by default on the Commission's online exchange platform (EU Send Web).

Timing

The New Package will enter into force as of 1 September 2023. The Short Form is required to be used for all cases notified on or after that date.

Companies and advisors therefore need to start using the Short Form in the pre-notification discussions with the Commission in advance of that date, if a notification will be made after 31 August 2023, as the old notification forms will not be accepted after such date disregard that a pre-notification process has been started.

The Commission's Expectation for Impact of the New Package

The Commission states that by expanding and clarifying the categories of cases treated under the simplified procedure (see a description above), the expectation is that approximately 11 cases a year will be captured by the new simplified procedure as set out in the New Package. This corresponds in total to 9.5 % of non-simplified cases and 2 % of the overall number of simplified cases.

Our Comments

The new simplified process enables the merging parties to provide less information and obtain a clearance decision faster than under the normal procedure.

Expectedly for simple non-issue filings, the merging parties may find a cost and time reduction in the process against obtaining an EU merger clearance. Further the Commission will save resources on the simplified cases and save these for the complex cases that potentially could raise competition concerns.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us.



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