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EU merger simplification – Further work needed to cut red tape

Rosanna Connolly (Sidley Austin LLP) · Monday, December 14th, 2015

The European Commission boldly announced its 2013 merger simplification package with the headline “*Commission cuts red tape for businesses.*” Nearly two years on, further refinement of the Commission’s procedures is needed to reduce the information required to be included in notification Form CO, and so shorten the time needed to “start the clock” on the Commission’s formal review.

The main element of the simplification package was to increase the number of transactions qualifying for the Commission’s “simplified” review procedure. Steps were also taken to “streamline” the pre-notification process. These included raising the thresholds for “affected markets” and “reportable markets” (thereby reducing the information required), and identifying information that might be suitable for waiver requests. However, at the same time, the Commission made other changes to its Form CO that increased the information burden on parties.

Specifically, submission of more internal documents is now required, even in simplified cases (albeit only those with “reportable markets”). Notifying parties are also now required to provide information on “*all plausible alternative product and geographic market definitions*” in addition to the market definitions they consider relevant. The Commission suggested that this was not a change from its pre-2014 practice. However, case teams can now not only *themselves* explore potential market definitions that bear little resemblance to the real market conditions, but also *require* further information from the parties on such bases.

The front-loading of such information requirements can result in protracted pre-notification discussions and “short form” Form COs that are upwards of 50 or even 100 pages in length.

Even if it is the case, as Commissioner Vestager indicated in March 2015, that “*the pre-notification stage has become shorter for both normal and simplified cases,*” that does not necessarily mean that the path to closing transactions requiring EU merger clearance is getting quicker. Rather, parties may be spending more and more time gathering the information to complete the first drafts of the Form CO in order to start the pre-notification period. As such, it might be argued that the Commission has not substantially cut red tape, and further work is needed.

By way of contrast, the Commission’s reviews of simplified mergers often take appreciably fewer than 25 working days. Indeed, in a number of recent cases, the Commission has issued approval decisions in simplified cases some eight or nine working days in advance of the expiry of the 25

working day Phase I review period. This suggests that by the time the notifications are formally accepted as complete, there is no longer any substantive review to be performed. It also suggests that too much of the burden has been shifted onto notifying parties during pre-notification, and not enough is being done by the Commission during its formal review process.

The length and scope of pre-notification in all cases remains unpredictable and is not particularly satisfactory in light of the need for certainty around deal timing for the market and those involved in transactions. The Commission continues to look at fine-tuning its EU merger procedures, and its 2014 consultation on expanding the Commission's jurisdiction to review acquisitions of non-controlling minority shareholdings did include further proposals to amend the 2013 simplification package. So perhaps the situation will improve. Let's wait and see.

Rosanna Connolly is a senior associate at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP or its partners. This article has been prepared for informational purposes only and does not constitute legal advice.

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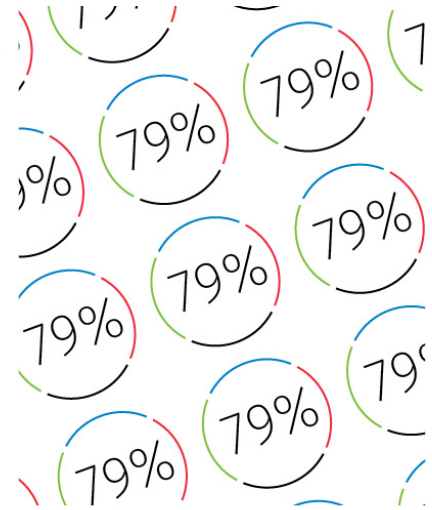
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