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The 2023 EU Merger Simplification Package – Cutting Red Tape… Really?

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On 20 April 2023 the EU Commission adopted a new legislative package aimed at simplifying its procedures for reviewing transactions under EU merger control rules. Under the new rules the Commission seeks to assess more cases under the simplified procedure and reduce overall reporting requirements by 25%. The new rules will apply as of 1 September 2023.

The merger simplification package consists of a revised Implementing Regulation, a revised Notice on Simplified Procedure ("Commission Notice") and a Communication on the transmission of documents.

The main changes of the merger simplification package

The Commission has added new categories of transactions that can benefit from the simplified procedure. Unsurprisingly, it continues to be the case that the market share thresholds need to be met under all plausible market definitions.

New categories principally benefiting from simplified treatment

The new rules introduce two new categories of transactions that can generally benefit from simplified treatment relating to vertical relationships:[1]

- The individual or combined upstream market share of the parties is below 30% and the purchasing share of upstream inputs is below 30% (under the previous Commission notice of 2013: downstream product markets[2]).
- The individual or combined upstream and downstream market shares of the merging parties are below 50%, the market concentration index (so-called 'HHI delta') is below 150, and the company with the smallest market share is the same in the upstream and downstream markets. This category aims to capture small increments to pre-existing vertical integration.

The other categories of transactions eligible for simplified treatment essentially remain the same as was the case under the prior notice.[3] However, it is worth mentioning that in case of an acquisition of joint control of a joint venture ("JV") the requirements have been increased compared to before:

- The JV must have an expected turnover of less than EUR 100 million in the EEA in the next three years following notification (in addition to having no current turnover that would exceed this threshold).[4] If the threshold is expected to exceed the threshold "significantly" during this time period, the Commission may not allow for a simplified procedure.[5]
- Also, the parties must not have planned to transfer any assets to the joint venture at the time of the notification (wording under the previous notice: assets transferred to the joint venture at the time of the notification).[6]

In addition, different from before, the following categories of cases may be reviewed under a **super-simplified procedure not requiring any pre-notification**:[7]

- The acquisition of joint control over an extra-EEA JVs[8]; and
- Transactions where there is no horizontal overlap between any of the parties to the transaction or any vertical relationships.[9]

Additional new categories that may benefit from simplified treatment (flexibility clause)

Furthermore, the Commission will have discretion to allow for the following new categories of cases to be treated under the simplified procedure:[10]

- For **horizontal overlaps** where the combined market shares of the parties are **below 25%**.
- For **vertical relationships** where the individual or combined upstream and downstream market shares of the merging parties are **below 35%**;
- For **vertical relationships** where the individual or combined market shares of the merging

parties **are lower than 50%** in one market and less than **10%** in the other vertically related market; and
- For **JVs** with turnover and assets between **€100-150 million** in the EEA.

Exclusions from the simplified treatment

The new Commission Notice includes a broad "non-exhaustive" list of "examples" under which the application of the simplified procedure "may be excluded". These apply to both categories of transactions – those that in generally benefit from simplified treatment and those for which the Commission has discretion to allow for a simplified procedure if the relevant conditions are met.

This general mechanism is not new but two categories have been added:

- "Significant minority shareholdings" of one party in a company active on the same market as the target or in vertically related market as well as competitors of one party having a significant stake in any of the other parties to the transaction.[11]
- "Other competitively valuable assets" such as raw materials, IP rights, infrastructure, a significant user base or commercially valuable data inventories (even in the absence of overlaps).[12]

In addition, a list of "special circumstances" under which the Commission is less likely to apply the simplified procedure has been included (almost entirely taken from the Commission's horizontal and non-horizontal merger guidelines).[13]

Other aspects

New notification forms

The Implementing Regulation introduces a new Form CO for non-simplified procedures. Importantly, for markets that fall within the scope of the flexibility clause only Section 7 needs to be filled in and not Sections 6, 8, 9 and 10 does not have to be filled in.[14] There is also a clearer mechanism for waiver requests by the parties.[15]

For transactions eligible to the simplified procedure, a new Short Form CO partly consisting of multiple choice questions ("tick the box") and tables.

Electronic Submissions

The new rules introduce electronic notifications by default. Digital signatures will have to be used for Form COs.[16]

Observations

The introduction of new categories of cases that will be reviewed under the simplified procedure is certainly welcome. It is also helpful that certain categories of cases will not have to go through pre-notification going forward, notably extra-EEA JV cases. In such situations it has been difficult to explain to clients why such transactions have to be notified in the EU at all in the absence of a local nexus of the JV and why the procedure would take approximately two months. Having "tick the box" categories in the notification forms should also help to simplify the preparation of the filings.

However, companies still not have full certainty that they will in fact benefit from the simplified procedure given the broad catalogue of exclusions based on which the Commission can decide to review the case under the normal procedure. New and vaguely formulated categories such as "significant non-controlling shareholdings"[17] and "other competitively valuable assets" (not requiring an overlap) have been added, the Commission continues to enjoy wide discretion and stricter requirements apply in a JV scenario. Therefore, the parties' self-assessment of whether their case falls into the simplified category will remain complex at least in borderline cases and there will continue to be timing delays if the Commission decides to review the deal under the normal merger procedure. From the authors' perspective, a bolder, more "black and white" approach by the Commission in its simplification efforts would have been preferred.

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[1] See para. 5(d)(ii)(bb) and (cc) of the Commission Notice.

[2] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366/5, para. 5 (c) (ii).

[3] For details see para. 5(a)-(e) of the Commission Notice.

[4] Para. 5(a) of the Commission Notice.

[5] Para. 13 of the Commission Notice. Under the old notice, the expectation that the JV would significantly surpass the turnover threshold in the next three years gave the Commission discretion to carry out an assessment under the normal procedure, see para. 14.

[6] Para. 5(a) of the Commission Notice.

[7] See para. 26 of the Commission Notice.

[8] Para. 5(a) of the Commission Notice.

[9] Para. 5(c) of the Commission Notice.

[10] Paras. 8 and 9 of the Commission Notice.

[11] See para. 15 of the Commission Notice.

[12] See para. 16 of the Commission Notice.

[13] The old Commission notice had referred to these circumstances without listing them expressly, see para. 11.

[14] See section 7 of Annex 1 of the Implementing Regulation.

[15] See B.4 of Annex 1 of the Implementing Regulation.

[16] See Article 22 of the Implementing Regulation. Documents submitted through digital means must be signed using least one Qualified Electronic Signature (QES) complying with the requirements set out in Regulation (EU) No 910/2014.

[17] According to the Form CO (Section 3.7), these are shareholdings above 10%.

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