The Potential Benefits Of New EU Merger Control Rules

By **Jacques Buhart, Stéphane Dionnet and Frédéric Pradelles** (June 8, 2023)

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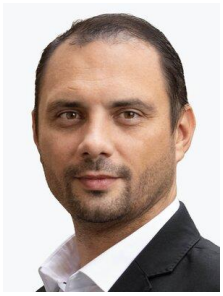

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On April 20, the EU Commission adopted and published a package to simplify the procedures for reviewing concentrations under the EU Merger Regulation.[1] This package includes a set of three materials comprising:

- A revised Merger Implementing Regulation;
- A notice on simplified procedure; and
- A communication on the transmission of documents to the commission.

The new notification forms — Form CO, Short Form CO, Form RS and Form RM — are also provided as annexes to the implementing regulation.

The core objective of the package is to simplify merger review procedures, with a targeted 25% reduction on reporting requirements. This evolution is more than welcome, especially in light of the very recent regulation on foreign subsidies distorting the internal market, known as FSR, which imposes additional burdens on M&A transactions.[2]

This analysis focuses on the novelties and potential benefits provided by this package. Since the initial 2005 notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004, undertakings engaged in merger and acquisition activities have faced additional obstacles, i.e., new foreign merger requirements, foreign direct investment screening and the new FSR. Consequently, any effort to reduce the administrative strain on parties is welcomed.

This new package intends to bring significant benefits for businesses and advisers in terms of easing preparatory work and related costs. Relieving this administrative burden lying on the parties to a concentration should hopefully speed up the approval process by the commission. The new package will apply from Sept. 1, 2023.

Background

In 2013, the commission implemented an initial simplified package, to streamline the review process for unproblematic cases and to further reduce the amount of information required for notifications at EU level.

In order to assess its effectiveness, in 2016 the commission initiated an evaluation of procedural and jurisdictional aspects of EU merger control. The 2023 merger simplification package concludes this process. Below, we highlight key takeaways for businesses and provide guidance on how best to follow the new requirements.

New Merger Simplification Package in a Nutshell

Expanded Scope of Application of the Simplified Procedure

The notice keeps the four existing categories of transactions that already benefit from the simplified procedure namely extraterritorial joint ventures, no horizontal or vertical relationship between parties, minor horizontal or vertical relationships between parties and switch from joint control to sole control.

At the same time, the notice introduces two new types of eligible concentrations, where under all plausible market definitions:

- The individual or combined upstream and downstream market shares of the merging parties are below 50%, the market concentration index (Herfindahl-Hirschman Index — HHI) is below 150, and the company with the smallest market share is the same in the upstream and downstream markets; or

- In a vertical relationship, the individual or combined upstream market share of the merging parties is below 30% and their combined purchasing share in the downstream market is below 30% of upstream inputs.

The notice explains that concentrations might fulfill the criteria for more than one category. The notifying parties could thus submit a notification on the basis of more than one category.

Certain cases could even qualify for a super-simplified procedure, for which parties can notify directly without prenotification contacts. Referring to its own experience, the commission considers that the following concentrations may be reviewed under this super-simplified procedure, in less than 25 working days:

- Two or more parties acquire joint control of a joint venture, provided that the joint venture has no current or expected turnover within the territory of the European Economic Area, and the parties concerned have not planned to transfer any assets within the EEA to the joint venture at the time of notification; and

- Two or more parties merge, or one or more undertakings acquire sole or joint control of another party, provided that none of the parties to the transaction are engaged in business activities in the same product and geographic market or in a relevant product market that is upstream or downstream from a product market in which any other party to the transaction is engaged.

As most concentrations reviewed by the commission are Phase 1 simplified decisions (e.g., approximately 80% of merger decisions in 2022), the extended simplified and super-simplified treatments should be a relief.

The Flexibility Clause

The notice allows the parties to request that the commission review certain concentrations under the simplified procedure, even if they do not satisfy the related conditions, with four specific situations provided for the flexibility clause:

- For horizontal overlaps, where the combined market shares of the parties are between 20%-25%;

- For vertical relationships where the individual or combined upstream and downstream market shares of the parties remains below 35%;

- For vertical relationships where the individual or combined market shares of the merging parties do not exceed 50% in one market and 10% in the other vertically related market; and

- For joint ventures with turnover and assets between €100 million ($108 million) and €150 million in the European Economic Area.

The categories above apply alternatively, but not cumulatively. However, and except for the joint venture clause, the notifying party may combine the application of the flexibility clause with the classical simplified treatment cases, when the concentration involves several markets.

In other words, if for certain markets the simplified treatment applies and for other markets the commission agrees to apply the flexibility clause, then the entire transaction would benefit from the simplified procedure.

Safeguards and Exclusions From the Simplified Procedure

The notice also extends and clarifies the circumstances through which the commission may investigate a case under the normal procedure. The notice includes a nonexhaustive list of examples of types of concentrations that may be excluded from the simplified procedure. It also clarifies that "the instance of one or more of the circumstances ... may be a reason for the Commission to inform the notifying parties that the simplified treatment is not suitable."

In particular, three situations are relevant to mention:

- Joint ventures with negligible activities in the EEA, as falling under the simplified procedure cases and the flexibility clause, where horizontal overlaps or vertical relationships exist between the parties to the concentration;

- Where one party to the concentration may have significant noncontrolling shareholdings in companies active in the market(s) where another party to the transaction is active; and

- Where at least two parties to the transaction are present in closely related neighboring markets, i.e., when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use. This can occur where one or more of the parties holds an individual or combined market share of 30% or more in any product market in which there is not horizontal overlap or vertical relationship.

Transmission Requirements to the Commission

For efficiency purposes, the new merger simplification package seeks to "optimize" the exchange of information between notifying parties and the commission. To facilitate this, the communication streamlines the application and review of both simplified and nonsimplified cases.

For the former, the implementing regulation introduces a new tick-the-box, short form CO, for the "super-simplified" categories of cases. For the nonsimplified process, information requirements are reduced and clarified, with a new Form CO.

Both forms are included in the annexes to the implementing regulation. Besides the form CO and short form CO, the commission has also revised and streamlined the other filings, including the referral request of mergers to or from the commission (form RS) and the remedy proposal (form RM).

More practically, the communication now requires notifications to be sent electronically, and the package also implements the use of the qualified electronic signature, or QES. This increased adoption of digital correspondence is a direct, and welcome, consequence of the COVID-19 period of remote administration. Exceptionally the commission will continue to accept notifications on paper, if it is agreed that signing documents with a QES is not feasible.

While it may prima facie appear that less information will be submitted with the notification forms, in fact the amount of information and internal documents that notifying parties will have to collect has not materially decreased. In certain domains, the information burden has increased, including more information required in the form CO in respect of "pipeline products" under development.

Finally, it is welcome that the commission may consider granting, in appropriate circumstances, waivers for additional categories of information.

How to Prepare for the Application of the New Simplified Package

Application of the New Merger Simplification Package — Timetable

The commission has published this new simplification package well in time before its entry into force, to allow companies, and outside counsel, to prepare for the new procedures. As

mentioned above, the notifying parties will have to use the new forms and procedure as of Sept. 1, 2023.

Until then, the current procedure and notification forms remain in force, although companies have the opportunity, and are encouraged, to initiate pre-notification contacts.

This new merger simplification package is welcomed by business, as it is intended to usher in quicker processing, faster transactions and, therefore, cost savings. It remains to be seen in practice whether it will lead to hoped-for increased legal certainty, and whether the companies will in fact obtain EU clearance decisions faster.

This latter objective seems optimistic, considering that the duration of prenotification in simplified cases has already been reduced to an average duration of 18 or 19 days, and that the commission still has to consult the Advisory Committee before any decision is taken on a concentration.

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[1] Regulation (EC) 139/2004 of January 20, 2004 (European Union Merger Regulation – EUMR).

[2] https://www.mwe.com/insights/eu-foreign-subsidies-regulation-enters-into-force-in-2023/.