

Client Alert

The Commission simplifies its procedures for most mergers, but demands extra information for the rest

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Summary

On 5 December 2013, the European Commission (“Commission”) reformed its merger procedures. The new rules will apply as of 1 January 2014. The reforms will impact the standard procedure (Form CO), the simplified procedure (Short Form CO) and the referral procedure (Form RS). Three helpful changes are introduced. First, the Commission has increased the market share thresholds for the simplified procedure: mergers resulting in horizontal market shares below 20% (instead of 15% at present) and vertical shares below 30% (instead of 25% at present) can be notified via a Short Form CO, as can mergers where the increment in market share is small. Second, the Commission has committed to reduce the length of pre-notification discussions in all cases and to allow further categories of information to be eligible for waiver requests. Finally, the Commission has introduced a “super-simplified procedure” for two types of deals: transactions which do not result in any horizontal or vertical overlaps and “extraterritorial” joint ventures which will be active entirely outside the EEA. While these three changes are welcome, the Commission has introduced additional information requirements in each of the new EU filing forms.

Broader scope for the simplified procedure

Under the reform package, the Commission has increased the market share thresholds below which the parties can use a Short Form CO, which itself requires less information and market data:

- In the case of horizontal overlaps, where the parties’ combined market share in the relevant market is less than 20% (instead of 15% at present),
- In the case of vertical overlaps, where the parties’ individual or combined market shares in a market upstream or downstream to the market in which another party to the transaction is engaged are less than 30% (instead of 25% at present), and
- Where the parties’ combined market shares are between 20% and 50%, the increase in the parties’ market shares is very small, i.e. the increment of the HHI Index is below 150 (this criterion is new).

As a result of these changes, the Commission estimates that an additional 10% of cases may be dealt with under the simplified procedure, so that, in total, 60-70% of all notified mergers will qualify for a simplified merger review.

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Introduction of a “super-simplified procedure” for JVs outside the EEA and where there are no overlaps between the parties’ activities

The parties will also benefit from a new “super-simplified procedure” in the other two situations in which parties can use the Short Form CO, namely in the case of joint ventures with no or negligible activities in the EEA and where there are no horizontal or vertical overlaps in the parties’ activities. In both scenarios, the notifying party merely has to describe the business activities of all parties to the transaction and explain either that the joint venture will be active outside the EEA or that there will be no overlaps in the parties’ activities in the EEA, without supplying further market data.

It is to be welcomed that this super-simplified procedure will apply to joint ventures with no, or negligible, activities within the EEA (as before, defined as where the turnover and assets of the joint venture are less than EUR 100 million in the EEA). The Commission has been heavily criticised for taking jurisdiction over “extraterritorial” joint ventures with no link to the EEA.¹ The present reform is a welcome step forward – though an even better approach would be to amend the Merger Regulation to eliminate any need to file such deals in Brussels.

More timely pre-notification discussions

As part of the reforms, the Commission has introduced measures to reduce the length of pre-notification discussions. In particular, the Commission states up front in the new Form CO and Short Form CO that pre-notification discussions are useful to determine whether the submission of certain information can be waived in a given case and that, as stated in DG Competition’s Best Practices for handling merger cases, such decisions will be made within five working days. Helpfully, the new Form CO also identifies categories of information which are viewed as eligible for a waiver request (for example, information on previous acquisitions and capacity data).

Moreover, in the new Short Form CO, the Commission states that pre-notification discussions may be less useful in transactions resulting in no horizontal or vertical overlaps and that, in such cases, the parties may prefer to notify immediately. Since the length of pre-notification discussions in simple merger cases is an element that has generated significant criticism, the possibility of notifying immediately, without any pre-notification, is welcome. It is to be hoped that the Commission will be willing to shorten (or dispense with) pre-notification discussions in a broader range of cases.

Additional information requirements in the new EU filing forms – two steps forward, one back?

As with the new Short Form CO, the Commission has also dispensed with certain information requirements in the new Form CO and Form RS. Most significantly, the Commission will require less information in relation to “affected markets” in the new Form RS (for example, market share information is now only required for the three largest competitors).

By contrast, the Commission has increased the information burden on the parties in each of the new EU filing forms. For example:

- Both the new Form CO and the new Form RS require the parties to define and give market data in relation to “all plausible” alternative market definitions. The forms states that plausible alternative market definitions can be identified on the basis of previous Commission decisions and judgments of the EU courts and (in particular where no such precedents exist) by reference to industry reports, market studies and the parties’ internal documents.
- The new Form CO requires the submission of all reports prepared in the two years preceding the transaction which assess any of the “affected

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¹ Including by authors from White & Case, see [Time to End the EU’s Needless Review of Extraterritorial Joint Ventures](#).

markets” (although a waiver of this information is possible).

- The new Short Form CO requires the submission of all internal documents prepared for or by the parties’ corporate bodies which analyse the transaction, but only where the transaction gives rise to horizontal or vertical overlaps.

Other changes

In line with the market share thresholds governing the simplified procedure, the Commission has raised the thresholds for “affected markets”, which will lead to detailed market data being required in fewer cases:

- In the case of horizontal overlaps, where the parties’ combined market share in the relevant market is 20% or more (instead of 15% or more at present),
- In the case of vertical overlaps, where the parties’ individual or combined market shares in a market upstream or downstream to the market in which another party to the transaction is engaged are 30% or more (instead of 25% or more at present).

The Commission has also adopted several modifications to the standard model texts for commitments, notably to strengthen its monitoring of the implementation of the commitments.

Comment

The Commission’s new reform package includes a number of welcome changes. In particular, the introduction of the “super simplified procedure”, notably for “extraterritorial” joint ventures, is one change that White & Case has been advocating for some time. In addition to the substantive changes, the new EU filing forms are more intuitive and have been modernised, for example by deleting references to old Commission guidance documents which have since been replaced.

Overall, the changes are more significant for the Short Form CO, than for the Form CO and Form RS. So while simple deals may be cleared faster and with a less burdensome process, the changes to the Form CO do not guarantee that more complex deals will have a more efficient review. Achieving that goal will depend on how the Commission implements the reforms in practice: at the very least, it is to be hoped that the Commission can accelerate pre-notification talks in all cases.