

European Commission Adopts Merger Simplification Package – Cutting Red Tape for Merging Businesses?

WOLF THEISS / 22 JUNE 2023 / HITS: 11509



On April 20, 2023, the European Commission ("**Commission**") adopted a merger simplification package ("**Package**") aimed at simplifying the Commission's review of concentrations under the EU Merger Regulation. The core of the Package is the expansion of the categories of cases which can be treated under the Commission's simplified procedure. In addition, the Package aims to streamline the review of simplified and non-simplified cases by introducing new notification forms.

Expanding the scope of application of the simplified procedure

Concentrations reviewed under the simplified procedure require less information from the parties and are normally cleared faster by the Commission. The Commission's aim to increase the number of concentrations which are eligible for simplified treatment is, therefore, welcome.

In addition to the existing categories of cases which can benefit from simplified treatment, the Package identifies two new scenarios concerning vertical relationships which can be reviewed under the simplified procedure: (i) the parties' individual or combined market shares are below 30% in the upstream market and the parties' combined purchasing share in the downstream market is below 30%; and (ii) the parties' individual or combined upstream and downstream

market shares are below 50%, the increment of the market concentration index (HHI) is below 150 in the upstream and downstream market, and the party with the smaller market share is the same in the upstream and downstream market.

Furthermore, the Package introduces flexibility clauses under which the Commission has discretion to review certain concentrations under the simplified procedure even though they do a priori not qualify for simplified treatment. Flexibility clauses exist (i) for horizontal overlaps with combined market shares between 20 and 25%, (ii) for vertical relationships with individual or combined market shares between 30 and 35%, (iii) for vertical relationships with individual or combined market shares below 50% in one market and below 10% in the other vertically related market, and (iv) for joint ventures with turnover and assets between EUR 100 million and EUR 150 million in the European Economic Area ("EEA").

The Package also introduces a "super-simplified" procedure for joint ventures with no turnover and assets in the EEA and for concentrations which do not give rise to horizontal overlaps and vertical relationships. The Commission invites the parties to such concentrations to notify the concentration directly without any pre-notification contacts with the Commission.

Safeguards and exclusions

The Package includes a detailed list of circumstances referred to as safeguards and exclusions. If one or more of these circumstances are present, the Commission will decide on a case-by-case basis whether the concentration has to be reviewed under the normal procedure although it is technically eligible for simplified treatment. As regards markets which fall under the flexibility clauses described above, the simplified procedure will usually not be applied if one or more of these circumstances are present.

The list of circumstances which can exclude the application of the simplified procedure is extensive and gives the Commission broad discretion in applying the simplified procedure.

New notification forms for simplified and non-simplified cases

The new Short Form CO (i.e., the notification form for concentrations qualifying for simplified treatment) has a "tick-the-box format" which primarily includes multiple-choice questions and tables. The parties will however still have to collect a substantial amount of information in order to be able to answer all multiple-choice questions correctly. In particular, the parties will have to indicate in the Short Form CO whether any of the circumstances referred to as safeguards and exclusions are applicable.

With regard to the (long) Form CO, the new Form CO eliminates certain information requests and includes clearer information on waiver possibilities. On the other hand, the Commission decided not to streamline the internal document requirements and even introduced a new extensive

request that each party should provide information on data that it collects and stores in the ordinary course of business and which could be useful for a quantitative economic analysis.

Outlook

The new rules will apply to concentrations which will be notified to the Commission on or after September 1, 2023.

The Package's objectives of increasing the number of cases reviewed under the simplified procedure and of streamlining the notification forms are welcome. Some newly introduced information requirements however risk complicating the preparation of notifications in practice and may require discussions with the Commission during the pre-notification contacts. Time will show how the Commission will apply and interpret its new rules in practice.

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