

Client Alert

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European Commission Adopts Changes to EU Merger Rules: One Step Forward, Two Steps Back

By Svajune Sakalyte and Jens Hackl

The European Commission (the “Commission”) recently adopted a number of revisions¹ to the EU Merger Regulation intended to streamline and speed up the EU merger review process.² The new rules will enter into force on January 1, 2014. The stated purpose of the revisions is to reduce the administrative burden and cost for business. In reality, however, some of the revisions will significantly increase the burden on the parties who notify mergers to the Commission (the “Notifying Parties”) and could result in delays in the review process and increased transaction costs.

CHANGES

Extension of the Scope of the Simplified Procedure

The Commission has extended the scope of the simplified merger procedure, which allows the Notifying Parties to file their transactions on a notification form that seeks considerably less information than the standard Form CO. This extension is achieved (i) by raising market share thresholds for both horizontal mergers (from 15 to 20%) as well as vertical mergers (from 25 to 30%) which may benefit from the simplified procedure, and (ii) by introducing a new criterion, i.e., a merger may also be assessed under the simplified procedure when the combined market shares of the merging companies are between 20 to 50% and the increase in market concentration is less than 150 points under the Herfindahl-Hirschman Index.

As a result of these changes, the Commission expects an increase of 10% in the number of filings that will be treated under the simplified procedure.

Modification to the Form CO

In contrast, the changes to the existing notification forms are likely to significantly increase the burden on the Notifying Parties, and this increase may result in delays of the review process and increased transaction costs. The main changes to the Form CO include:

¹ See Press Release IP/13/1214.

² The general legal framework for assessing mergers under EU antitrust law is the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EU Merger Regulation”), Official Journal L 24, 29.01.2004, pp. 1-22.

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- The revised Form CO significantly increases the obligation under Section 5.4 of the Form CO to submit internal documents. In addition to copies of documents in which the transaction is analysed, parties will have to provide copies of presentations, reports and studies from the last two years relating to the affected markets which were prepared in the ordinary course of business (i.e. were not prepared in connection with the transaction).
- The market share thresholds for affected markets – where detailed market information needs to be provided – has increased to 20% (from 15%) for horizontal overlaps and 30% (from 25%) for vertical relationships.
- Parties are required to propose a “plausible alternative market” definition in addition to identifying relevant product and geographic markets.
- The Commission has introduced new questions relating to market exit during the previous five years. The revised Form CO also requests information about access barriers to customers, such as those resulting from product certification procedures or the importance of reputation.

PRELIMINARY ASSESSMENT AND EXPECTED IMPACT

On balance, we expect the new rules to increase the burden imposed on companies when a close review of the transaction is required in order to assess potential competitive effects. This increased burden may outweigh the benefits of the revision package.

- Although an increase in the number of cases falling under the simplified procedure and the higher market share thresholds for affected markets are positive developments, the changes to the standard Form CO are likely to make life more difficult for the cases that matter, i.e. those that raise potential substantive issues.
- The increased obligation to provide internal documents under Section 5.4 significantly increases the discovery burdens on the parties. This obligation could result in the need to produce several hundred documents, which may not add materially to the assessment of the transaction. It is also questionable whether the Commission services will always have the necessary resources to review these documents within the short deadlines of the EU Merger Regulation.
- While the Commission reiterates the possibility of obtaining waivers of these obligations, such discussions can be time-consuming and delay notifications.
- The definition of “plausible alternative markets” is extremely vague – this could also prolong pre-notification discussions and be a source of controversy as to whether a filing is complete.
- It is disappointing that the Commission still requires notifications of joint ventures that are active outside the EEA solely because of the parents’ revenues in Europe. Such transactions are unlikely to have any foreseeable impact in the EEA.

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