

EU Commission adopts package aimed at simplifying its procedures under the EU Merger Regulation

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On 5 December 2013, the European Commission (the “**Commission**”) published a package of measures (the “**Package**”) designed to simplify its procedures under the EU Merger Regulation (the “**EUMR**”). In particular, three main issues have been addressed:

1. The types of concentration eligible for treatment under the Commission’s simplified procedure have been widened;
2. For all merger cases, the information that notified parties have to provide has been allegedly reduced;
3. The pre-notification process has been streamlined.

The Package will enter into force on 1 January 2014, and will be implemented through amendments to the Commission Notice on Simplified Procedure and the Commission Implementing Regulation, including the Forms CO and RS.

Possible positive aspects: the extension of the application of the simplified procedure, as well as the possibility to skip the pre-notification process altogether for those concentrations without any horizontal or vertical impact should reduce the burden associated with notifying transactions which do not raise any competition issue.

Possible negative aspects: the focus on internal documents could increase the notification burden for concentrations raising competition concerns.

1. Simplified merger review procedure

Market share thresholds under which cases qualify for a simplified merger review have been raised as follows:

- For horizontal overlap market the threshold is raised from 15% to 20%;
- For vertically related markets, the threshold is raised from 25% to 30%;
- Mergers can also qualify for a simplified review when the companies’ combined market shares are between 20% and 50%, provided that the post-merger increase in market share is limited. These are cases where the merger’s change to the level of concentration in the market (the so-called HHI delta) is less than 150.

As a result of this reform, a higher number of merger notifications will be treated under the simplified procedure.

The Commission still reserves the right to revert to its standard procedure, including where it is difficult to define the relevant markets (and thereby determine whether the share thresholds are met), for “*concentrations that involve novel legal issues of a general interest,*” and “*situations which exceptionally require a closer investigation.*”

2. Information requirements to notify a concentration

The Package amends the requirements of each of Form CO, Short Form CO, and Form RS, as follows.

- Streamlining information requirements. The Commission has reduced the level of information required in certain sections of its notification forms, by:

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Bruxelles

Mario Todino
Tel. +32 2 3401550
mtodino@gop.it

Rome

Milan

Bologna

Padua

Turin

Abu Dhabi

Brussels

London

New York

www.gop.it

- (1) raising the market share thresholds at which parties are required to submit detailed substantive information (the so called "affected markets") from 15% to 20% for horizontal overlaps, and from 25% to 30% for vertical relationships;
 - (2) omitting formalistic requirements that are less relevant to the Commission's substantive review (e.g., the provision of complete subsidiary lists and HHI calculations);
 - (3) introducing a "super-simplified" notification for joint ventures that are not active in Europe.
- Additional requirements to submit internal documents. Reflecting the Commission's increased use of internal documents in recent years, revised Form CO significantly expands on the obligation to provide internal documents. Notifying parties will now be obliged to produce the following additional categories:
 - (1) minutes of board and shareholder meetings at which the transaction has been discussed;
 - (2) board and shareholder documents that discuss alternative acquisitions;
 - (3) board and shareholder analyses from the last two years that assess any of the affected markets under review. The revised Short Form CO now also requires the parties to submit board and shareholder presentations if the transaction results in either a horizontal or a vertical reportable market.
 - Plausible alternative market definitions. The revised forms now require the notifying parties to submit information not only on the markets they consider to be relevant, but "*all plausible alternative product and geographic market definitions which can be identified on the basis of previous Commission decisions and judgments of the EU Courts and (in particular where there are no Commission or Court precedents) by reference to industry reports, market studies and the notifying parties' internal documents.*" The Commissions' emphasis is therefore on the notion of plausible markets, meaning implicitly that information on unrealistic market definitions will not be requested to the parties. This reflects by and large the Commission's current practice, and is not expected to bring about any significant change in the type of information DG Comp typically requires notifying parties to provide in connection with the relevant markets.

3. Pre-notification process

The Package aims to streamline the pre-notification process:

- First, the Commission states that the reduction of information requirements will shorten the time needed for pre-notification;
- Second, the revised notification forms all emphasize that notifying parties can request waivers from the obligation to provide any information that is not necessary for the examination of the case. In particular, revised Form CO invites notifying parties to request waivers for certain categories of information, including the requirements to provide internal documents and substantive information on all potentially affected markets;
- Finally, the Commission now invites the parties to directly notify – *i.e.* without any pre-notification process at all - those concentrations which do not give rise to any horizontal overlap or vertical links.