

What To Expect From A Simplified EU Merger Control System

By **Axel Gutermuth and Lukas Šimas** (September 28, 2022)

The European Commission recently published long-awaited draft amendments to the EU merger control system. The amendments are included in revised draft versions of the commission's Simplified Procedure Notice and Merger Implementing Regulation.[1]

Interested stakeholders were given the opportunity to submit comments until early June. The revised texts are expected to be formally adopted shortly and to become applicable in 2023.

Principal Changes

The principal changes are as follows:

- Expansion of the types of transactions notified under the EU Merger Regulation[2] that the commission can review under its simplified procedure, although at the same time the commission clarifies and expands the circumstances under which the simplified procedure may not be suitable even if the transaction meets its general eligibility criteria;
- Reduction of the information that merging parties have to provide in the simplified merger notification form, known as the Short Form CO;
- Amendments to the information requirements in the Form CO that is used to notify nonsimplified cases; and
- Introduction of an electronic merger filing system.

The amendments are of significant practical relevance to companies engaging in transactions that require notification under the EU Merger Regulation.

They are to be welcomed as they reduce the administrative burden in transactions that in the future can benefit from the simplified procedure. This also frees up commission resources that can be redeployed to more complex cases.

Expansion and Clarification of Transaction Categories That Qualify for Simplified Review

The most significant change is the extension of the simplified merger review procedure to some transactions that previously did not qualify for it. The existing categories proved effectively to reduce the overall burden for companies and did not negatively affect merger control enforcement.

However, the commission recognized that certain transactions that slightly exceeded the



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existing eligibility criteria for the simplified procedure are generally unproblematic on substance and therefore could also be treated under the simplified procedure.

The draft notice therefore keeps the four main categories of transactions that already benefit from the simplified procedure, although significantly broadening the scope of one of them:

1. Extraterritorial Joint Ventures

This category currently applies to the acquisition of joint control of a joint venture if the joint venture, or activities transferred by the parties to the joint venture, has an European Economic Area-wide turnover of less than €100 million (\$96.5 million) and the value of the assets located in the EEA is less than €100 million.

The substance of this category remains largely unchanged in paragraphs 5(a) and (b) of the draft notice.

2. No Horizontal or Vertical Relationship Between Parties

This category applies if the parties involved in the transaction have no overlapping activities — horizontal overlaps — and also are not active in markets that are upstream and downstream to each other — vertical relationships — on any market within the EEA or including the EEA.

This category remains largely unchanged in paragraph 5(c) of the draft notice.

3. Minor Horizontal or Vertical Relationships Between Parties

This category will be expanded significantly. It currently applies if the parties have, under all plausible market definitions, on all markets within the EEA or including the EEA:

- Combined market shares below 20% in horizontal overlap markets; and
- Individual or combined market shares below 30% in vertically related markets.

The 20% and 30% market share thresholds continue to apply, but paragraph 5(d) of the draft notice makes the simplified procedure available also if:

- On horizontal overlap markets, the parties' combined market share exceeds 20% but is below 50% and the market share increment is small — the delta of the Herfindahl-Hirschman Index must be below 150; and if
- On vertically related markets, either the upstream market share is below 30% and at the same time the parties' combined purchasing shares are below 30% regarding the upstream inputs; or if both parties are already active on both, the upstream and downstream markets, the combined market shares are below 50%, the Herfindahl-Hirschman Index delta is below 150, and the same party has the smaller market share on both the upstream and the downstream markets.

4. Switch From Joint Control to Sole Control

This category applies if a party acquires sole control of an undertaking over which it already has joint control.

This category remains unchanged in paragraph 5(e) of the draft notice.

In a further welcome development, the draft notice expands the scope of the simplified procedure even further by introducing so-called flexibility clauses. These allow the commission, upon request by the parties, to treat transactions as simplified cases even if the above-mentioned thresholds are slightly exceeded.

This flexibility concerns:

- Extraterritorial joint ventures, if the joint venture's EEA turnover or asset value exceeds €100 million but the turnover and asset value fall below €150 million (\$144.3 million); and

- Minor horizontal or vertical relationships between the parties, if:
 - In horizontal overlap cases, the parties' combined market share exceeds 20% but is below 25%; or

 - In vertical relationships, if the parties' market shares exceed 30% on the upstream or downstream market, but either the market shares remain below 35% on the upstream and downstream market, or the market share is below 50% on one vertically related market and below 10% on the other vertically related market.

The draft notice also includes clearer and more detailed descriptions of the situations in which the commission may exercise its discretion to exclude a transaction from the simplified procedure even if it otherwise qualifies for it.

The draft notice mentions 10 such exclusion situations,^[3] at least two of which are new:

- Transactions in which one party has significant noncontrolling shareholdings in companies active in the market where another party is active;^[4] and

- Where a transaction may increase the market power of the parties by combining technological, financial, or other resources or competitively valuable assets, such as raw materials, intellectual property rights, e.g., patents, know-how, designs, and brands, infrastructure, a significant user base or commercially valuable data inventories, even if the parties to the transaction do not operate in the same market.^[5] Moreover, the draft notice makes clear that if the parties seek to invoke the simplified procedure because of the absence or minor significance of

horizontal overlaps and vertical relationships, it is important to demonstrate in the filing form that the relevant market share thresholds would not be exceeded under any plausible market definition. This means that the parties need to carefully consider and provide market share information potentially for a significant number of alternative market definitions, which can be a difficult exercise.

Reduction of Amount of Information to Be Included in a Short Form CO

In a welcome move towards reducing the administrative burden involved in a merger filing, the amendments significantly reduce the amount of information parties must provide to the commission in simplified cases.

The current Short Form CO largely consists of open text questions that require the parties to draft narrative responses. It will be replaced by a new Short Form CO that will mostly include multiple choice questions and tables to be completed with words and figures.

As a result, notifications of simplified cases should become faster, less burdensome, and less costly to prepare. Moreover, specific sections of the revised draft Short Form CO do not have to be completed in transactions that:

- Concern a joint venture with no turnover or assets in the EEA; or
- Do not lead to any horizontal overlaps or nonhorizontal relationships between the parties. In these "super-simplified" cases, the parties are also encouraged to notify directly without first engaging in the otherwise recommended prenotification contacts with the commission. This will significantly reduce the time and burden involved in filing super-simplified cases.

Changes in Form CO Used in Normal Review Cases

The amendments also affect the Form CO that is used to notify normal, i.e., nonsimplified, cases. Some of these changes reduce the burden on the parties, but others will increase the burden. The key points are:

- Clearer explanations regarding the possibility for the parties to request a waiver from the obligation to provide certain information requested in the Form CO.[6]
- Given the increased importance of pipeline products for the substantive assessment, the revised draft Form CO, and, similarly, the revised draft Short Form CO, asks for information on horizontal overlaps and vertical relationships involving pipeline products.[7] The information concerns the parties and their competitors' pipeline products, the stage of development, the estimated sales and expected market shares over the next three to five years.

- Removal from the Form CO of questions asking for information on cooperative agreements, trade between states and imports from outside the EEA, and trade associations.[8]
- Introduction of new questions requiring the parties to describe the data that they collect and store in the ordinary course of their business and that could be useful for quantitative economic analysis.[9] The required description will include, for example, the type of data, the time period for which the data is available, and the source of the data, e.g., CRM software, dataset purchased from external providers.
- Introduction of new questions asking whether any of the parties' competitor holds a significant noncontrolling shareholding, i.e., above 10%, in any of the parties.[10]

Switch to Electronic Notification System

The commission will introduce a fully electronic notification system. Currently, notifications must be submitted in hard copy, i.e., paper copies and CD-ROMs. During COVID-19, the obligation to submit hard copy was temporarily suspended, but the commission still required a signed paper document during the review process.

Conclusion

The amendments have largely received positive feedback. Extending the simplified procedure to additional categories of transactions is to be welcomed. These categories of cases have almost never raised substantive concerns when reviewed by the commission under the normal review procedure in the past.

The reduced information requirements under the revised draft Short Form CO will benefit all transactions notified as simplified cases.

The changes to the full Form CO on balance increase the amount of information requested by the filing form, but in many past cases the commission already requested the information that in the future will have to be provided as part of the Form CO, for example on pipeline products and data collected by the parties.

Overall, the simplification package is a helpful development for companies and their advisers.

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[1] European Commission, 'Merger control in the EU - further simplification of procedures', available here: <https://competition-policy.ec.europa.eu/public->

consultations/2022-merger-simplification_en.

[2] EC Merger Regulation, Council Regulation (EC) No 139/2004, customarily referred to as the EU Merger Regulation (EUMR).

[3] Section C of the revised draft Simplified Procedure Notice.

[4] *Ibid.*, Section C.3, para. 15.

[5] *Ibid.*, Section C.4, para. 16.

[6] Applicable for sections 3.4, 3.5, 3.6 and 3.7 and Section 10 of the draft revised Form CO.

[7] Section 8 of the draft revised Form CO and draft revised Short Form CO.

[8] Section 8 of the draft revised Form CO.

[9] *Ibid.*, Introduction, Section G.

[10] *Ibid.*, Section 3.7.