EU Merger Control – New Measures Aimed to Reduce Administrative Burden

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On 5 December, the European Commission published a package of measures to reduce the administrative burden of EU merger control, which will apply as of 1 January 2014.
The package extends the scope of the simplified procedure for non-problematic cases. This means that more transactions may be notified using the Short Form CO, which will reduce the burden notwithstanding the fact the "Short" Form CO is still a fairly lengthy document. The European Commission considers that its proposed changes could allow up to 60-70% of all notified mergers to qualify for review under the simplified procedure, which is about 10% more than today.

The European Commission has also introduced various amendments to all its notification forms, aimed at streamlining the information which notifying parties are required to provide in these forms.

The changes are welcome news for business and should reduce the workload and costs involved in seeking clearance for most transactions which require notification to the European Commission but do not raise competition law issues.

What is the simplified procedure?

A simplified procedure was introduced by the European Commission in 2000 for the assessment of transactions which are not expected to raise significant competition concerns. The simplified procedure is in principle available for certain categories of transactions, although its use always requires the consent of the Commission which should not automatically be assumed. Under this procedure transactions can be notified using a Short Form CO, which involves the provision of less extensive information than the standard notification form, the Form CO. The simplified merger procedure may also lead to a quicker review process. The European Commission states that it "will endeavour" to adopt a short-form decision as soon as practicable after 15 working days (it generally has a total of 25 working days to decide whether to grant approval or open a Phase II in-depth investigation).

Expansion of scope for simplified procedure

At present, the simplified procedure is available in cases where the parties' combined market shares are below 15% for horizontal overlaps and 25% for vertical relationships, and for joint ventures, which have no, or de minimis, actual or foreseen activities within the European Economic Area (EEA).

As from 1 January 2014, the Commission will increase the market share limits and add a new category of transaction that may benefit from the simplified procedure. The European Commission's Notice on a simplified procedure for the treatment of certain concentrations under Council Regulation (EC) No 139/2004 (the "Notice"), will thus be amended so that it covers:

- (i) Transactions where parties' combined markets shares are below 20% for horizontal overlaps and below 30% for vertical relationships.
- (ii) Joint ventures which have no, or *de minimis*, actual or foreseen activities within the European Economic Area (EEA). A turnover and asset transfer test of less than EUR100 million is used to determine this.
- (iii) Horizontal mergers which lead to only small increments in market shares. This will apply where the combined horizontal market shares are less than 50% and the increment ("delta") of the Herfindahl-Hirschman Index ("HHI") resulting from the transaction is below 150.

On this last point, however, the European Commission notes in the revised Short Form CO that it will "*decide on a case-by-case basis whether, under the particular*

circumstances of the case at hand, the increase in market concentration level indicated by the HHI delta is such that a Short Form CO can be accepted. The Commission is less likely to accept a Short Form CO if any of the special circumstances mentioned in the Commission's guidelines on the assessment of horizontal mergers are present; for instance – but not limited to – where the market is already concentrated, in the case of a concentration that eliminates an important competitive force, in the case of a concentration between two important innovators, or in the case of a concentration involving a firm that has promising pipeline products".

Amendments to merger notification forms

The European Commission has introduced a number of amendments to all the notification forms, namely the Form CO, the Short Form CO, and Form RS (the form in which parties can request a referral back to one or more EU member states or for the European Commission to consider the case rather than individual EU member states).

Amendments to the Form CO include:

- The definition of "affected markets" has been revised in accordance with the proposed new Notice. Parties now only have to submit detailed information for "affected markets" where there are horizontal overlaps of more than 20% (previously 15%) and vertical overlaps of more than 30% (previously 25%). The form no longer requires detailed information about each affected market to be provided for the EEA territory, for the EU, for EFTA and for each Member State. The information must, however, be provided for "*all relevant product and geographic markets, as well as plausible alternative relevant product and geographic markets*".
- Further guidance regarding the possibility to request waivers from providing certain information. The Form highlights the specific categories of information in the form that the parties may want to seek a waiver from providing. These include (i) a list of all other undertakings which are active in affected markets in which the undertakings hold individually or collectively 10% or more of the voting rights, issued share capital or other securities; (ii) acquisitions made during the last three years by group undertakings active in affected markets; (iii) analyses, reports, studies, surveys, presentations and any comparable documents for the purpose of

assessing or analysing the transaction; (iv) analyses, reports, studies, surveys and any comparable documents of the last two years for the purposes of assessing any of the affected markets; (v) identification of all affected markets, including all plausible alternative market definitions; (vi) estimate of the total size of the market in terms of sales value and volume; (vii) estimate of the total EU-wide and EEA-wide capacity for the last three years; (viii) details of the most important cooperative agreements engaged in by the parties to the transaction in the affected markets; and (ix) details of trade associations in the affected markets.

- A request for a description of quantitative economic data. The new form asks the parties to briefly describe the data that each of the parties "*collects and stores in the ordinary course of it business operations*" in cases where quantitative economic analysis for the affected markets is likely to be useful. It notes that this information is not required for the Form CO to be considered complete, but that "*given the statutory deadlines for Union merger control, notifying parties are encouraged to provide such descriptions as early as possible in cases and for the markets in which quantitative analysis is likely to be useful"*.
- Encouragement to submit together with the Form CO a list of those jurisdictions outside the EEA where the transaction is subject to merger control clearance before closing, as well as waivers of confidentiality that would enable the European Commission to share information with other competition authorities outside the EEA about the transaction.
- Additional supporting documentation. The new Form adds some additional requirements for supporting documentation. These requirements have fortunately been reduced as compared with the draft package which was published for consultation earlier this year.

The new Form requests:

"copies of the following documents prepared by or for or received by any member(s)of the board of management, the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting:

(i) minutes of the meetings of the board of management, board of directors, supervisory board and shareholders' meeting at which the transaction has been

discussed, or excerpts of those minutes relating to the discussion of the transaction;

(ii) analyses, reports, studies, surveys, presentations and any comparable documents for the purpose of assessing or analysing the concentration with respect to its rationale (including documents where the transaction is discussed in relation to potential alternative acquisitions), market shares, competitive conditions, competitors (actual and potential), potential for sales growth conditions;

(iii) analyses, reports, studies, surveys and any comparable documents from the last two years for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential) and/or potential for sales growth or expansion into other product or geographic markets."

- Alternative market definitions. The new Form states that, when presenting relevant product and geographic markets, the parties must submit, in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions. The new Form explains that plausible alternatives can be identified on the basis of previous Commission decisions and judgments of the Union 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
- Other markets in which the notified operation may have a significant impact. The new Form continues to require information regarding these markets, but has amended the market share thresholds for when this information may be required as follows: from 25% to 20% for markets in which the parties are potential competitors; from 25% to 30% for markets where the other party holds important IP rights; and from 25 % to 30% for neighbouring markets.

Amendments to the Short Form CO include:

- Reportable markets. The new Short Form CO clarifies that market definition information and market information are only required if the transaction gives rise to "reportable markets". The definition of "reportable markets"

has been modified to clarify that, in the case of acquisition of joint control in a joint venture, the relevant test applies to the joint venture and at least one of the acquiring parties. The test also applies only to activities in the EEA territory, meaning that if the parties are active in worldwide markets but not in the EEA, there will be no reportable markets. These changes essentially mean that extra-territorial joint ventures can now be notified using an abbreviated version of the Short Form CO, or as the European Commission terms it in its accompanying press release in a "super-simplified notification".

- Additional supporting documentation. For the first time, the new Short Form CO requires production of the following internal documents analysing the transaction, although only if there are reportable markets in the EEA: *"copies of all presentations prepared by or for or received by any members of the board of management, or the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analysing the notified concentration."*
- Pre-notification contacts. The new Short Form CO explains that there may be no need for pre-notification contacts where there are no horizontal or vertical overlaps.

Conclusion

Whilst the package is a welcome cut in red tape for EU merger clearance, it is yet to be seen whether in practice the initiative will radically reduce overall information requirements and expenses. The European Commission retains a wide discretion whether to accept information waiver requests, and to revert to a full notification process.

Extra-territorial joint ventures that have no actual or foreseeable effects within the EEA still require notification. This is because under the current EU Merger Regulation, the turnover thresholds can be met solely on the basis of two joint-controlling parent companies' turnover. This is the case, irrespective of the geographic location of the joint venture, its size and whether the joint venture could raise competition concerns within the EEA. The European Commission has chosen not to tackle the issue at this stage by amending the turnover thresholds of the EU Merger Regulation. Instead, it has chosen to reform around the edges by

maintaining the notification requirement but reducing the quantity of information that is required in the notification form for these transactions. These transactions can now be notified using an abbreviated Short Form, which is called by the Commission in its accompanying press release to the package a “super-simplified notification”. This essentially requires a description of the transaction, business activities and turnover of the parties without a description of markets or the provision of supporting documentation.

This post originally appeared on the Kluwer Competition Law blog.