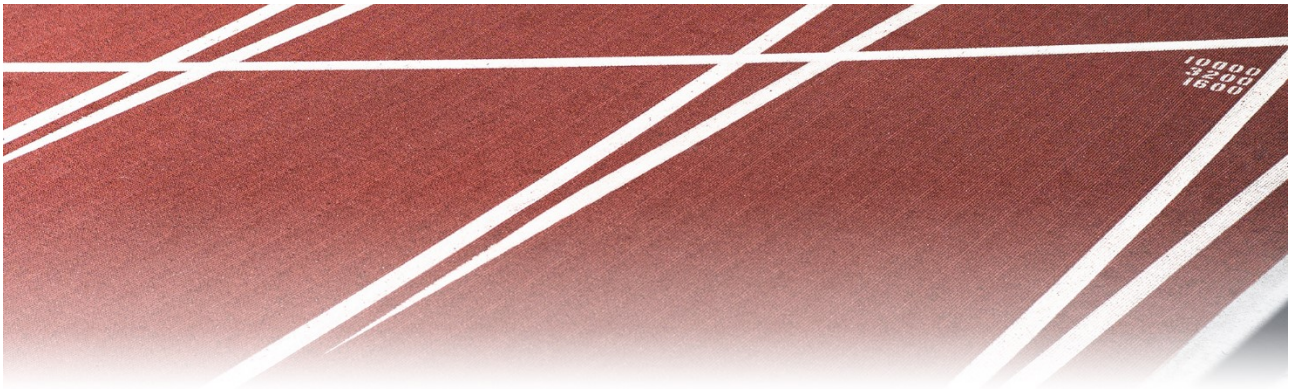

European Commission's 2023 Merger Simplification Package: simplifying, streamlining and optimising EU merger review procedures

On 20 April 2023, the European Commission (hereinafter "EC") adopted a package to further simplify its procedures for reviewing concentrations under Council Regulation (EC) No 139/2004 (the "**EU Merger Regulation**"). The package includes: (i) a revised Merger Implementing Regulation ("**Implementing Regulation**"), (ii) a Notice on Simplified Procedure ("**Notice**"), and (iii) a Communication on the transmission of documents ("**Communication**").

The newly adopted legislative package, which will be applicable as of 1 September 2023, is expected to bring significant benefits for businesses and advisers in terms of preparatory work (drafting and data gathering) and respective costs. It aims to simplify and expand the scope of the EC's review process of unproblematic mergers (the so-called "simplified cases"). It also seeks to reduce the amount of information required for notifying transactions in all cases and to optimise the transmission of documents.

I. Background and objectives pursued

The EC has sought over the years to focus its resources on those cases that could potentially raise competition concerns, while simultaneously reducing to the extent possible the administrative burden involved in merger reviews without impairing effective enforcement. To that end, the EC introduced in 2000 for the first time a simplified procedure for categories of merger cases deemed from the outset not to raise competition concerns, and in 2013 adopted a "Simplification Package" comprising of an Implementing Regulation and Notice on

Simplified Procedure aimed principally at extending the categories of simplified cases and at reducing the information requirements for merger notifications.

Subsequently, the EC launched in 2016 an Evaluation of procedural and jurisdictional aspects of EU merger control, which resulted in March 2021 in a Commission Staff Working Document that revealed, *inter alia*, that the 2013 Simplification Package had increased the application of simplified procedures to unproblematic mergers, thereby reducing the administrative burden for businesses and the EC while ensuring effective enforcement, but that there were still cases that were not captured by the simplified procedure despite being mostly unproblematic. The evaluation also illustrated that the relevant rules were not sufficiently clear in identifying the circumstances under which cases that meet the requirements for simplified treatment are nonetheless subject to normal review. Finally, the evaluation showed that in certain cases information requirements may be more extensive than what is necessary. On the basis of these findings, the EC launched in March 2021 an Impact Assessment to explore the different options for addressing the issues that had been identified in the evaluation and revising the existing framework accordingly. During this Impact Assessment, the EC gathered evidence through a wide consultation process.

The end result of this procedure is the 2023 Merger Simplification Package, which crystalises the EC's stance to the optimal manner of simplifying and streamlining the EU merger review procedures. The principal changes of the new legislative package are set out below (see also the Explanatory Note and the Q&A document on this initiative).

II. Overview of major changes

A. New categories of transactions benefiting from the simplified procedure and "flexibility clauses"

The Notice expands the scope of the simplified procedure by introducing new categories and giving more flexibility to the EC to grant simplified treatment.

- Two new categories of cases benefiting from simplified treatment, notably for:
  - vertical transactions where under all plausible market definitions, the individual or combined upstream market share of the parties to the concentration is below 30% and their combined purchasing share is below 30%; and
  - vertical transactions where under all plausible market definitions, the individual or combined upstream and downstream market shares of the parties to the concentration are below 50% and the market concentration index (HHI) delta is below 150 and the smaller undertaking in terms of market share is the same in the upstream and down-stream markets.
- Four "flexibility clauses" granting the EC discretion to treat certain types of cases under the simplified procedure that do not fall under the default categories for simplified treatment, notably for:
  - horizontal overlaps where the combined market shares of the parties to the concentration is 20-25%;

- vertical relationships where the individual or combined upstream and downstream market shares of the parties are 30-35%;
- vertical relationships where the individual or combined market shares of the parties to the concentration do not exceed 50% in one market and 10% in the other vertically related market; and
- joint ventures with turnover and assets between EUR 100 and 150 million in the EEA.

B. Safeguards and exclusions for transactions requiring a more detailed review

The Notice provides more details regarding the circumstances under which the EC may refuse to apply the simplified procedure. Indicatively, two potential exclusion categories are worth mentioning, namely:

- where one party to the concentration has significant non-controlling shareholdings in companies active in the markets where another party to the concentration is active; and
- where the parties to the concentration combine technological, financial or other resources, or competitively valuable assets, such as raw materials, intellectual property rights (including patents, know-how, designs and brands), a significant user base or commercially valuable data inventories, even if the parties do not operate in the same market.

C. Streaming simplified cases and non-simplified cases and introduction of electronic notifications

First, the Implementing Regulation introduces a new notification form ("tick-the-box" Short Form CO) for simplified cases. This form includes primarily multiple-choice questions and tables, and streamlined questions on both the jurisdictional and substantive assessment of cases.

Second, for transactions without any horizontal overlap between the parties' activities or any vertical relationship, or for cases which concern the acquisition of joint control over a joint venture that has no activity and no assets in the EEA at all, the Notice foresees the so-called "super simplified procedure" whereby the companies are invited to formally notify without any pre-notification contact.

Third, the Implementing Regulation reduces and clarifies the information requirements in the notification form for non-simplified cases (Form CO), which now includes clearer information on waiver possibilities, introduces tables for information on affected markets, and eliminates certain information requirements.

Finally, based on the experience in the context of Covid-19 (when the EC has been accepting notifications in digital format), it has been established that going forward the transmission of documents to and from the EC shall take place in principle through digital means. In this regard, the new Communication introduces electronic notifications by default.

III. Expected implications

The EC has adopted the new Merger Simplification Package in pursuit of its goal of creating a more streamlined and flexible system for its procedures for reviewing concentrations under the EU Merger Regulation, particularly towards alleviating administrative burdens for both companies notifying transactions (qualifying either for the simplified procedure or the normal procedure) and the EC.

The revised legal framework is indeed of significant practical relevance to companies engaging in transactions that require notification under the EU Merger Regulation. In this regard, the amendments are certainly helpful for companies and their advisers in that it:

- enlarges the reach of the simplified merger procedure;
- clarifies the categories of cases that can be treated under the simplified merger procedure;
- streamlines the review of simplified cases by ensuring effective and proportionate information gathering and introducing a new notification form for simplified cases;
- streamlines the review of non-simplified cases by reducing and clarifying information requirements;
- optimises the transmission of documents to the EC by introducing electronic notifications by default; and
- by implication, simplifies and accelerates the pre-notification discussions.

As such, the adoption of the Merger Simplification Package benefits companies in that it is an important move towards reducing the administrative burden involved in a merger filing, increasing legal certainty, and speeding up the overall procedure for approval. In fact, notifications should become faster, less burdensome, and less costly to prepare, particularly for transactions that are unlikely to raise competition concerns.

The EC itself is also expected to benefit from the revised rules as the reduction of its administrative burden will enable the EC to redirect resources on the most complex cases, thereby being a key component in its efforts to maintain market structures that are favourable to effective competition and to further stimulate competition. In any event, the new legislative package is expected to contribute in achieving the EC's objective to reduce reporting requirements by 25% (as per its Communication on Long-term competitiveness of the EU).

IV. Preliminary evaluation of legislative package and general observations

All in all, the adoption of the 2023 Merger Simplification Package should be regarded as a welcome initiative in that it further simplifies, streamlines, and optimises the EU merger control regime. The major changes brought about with effect on 1 September 2023 are intented to further reduce the burden on businesses while also promoting legal certainty and the swift review of notifiable mergers, potentially leading to a more efficient merger review process by the EC.

One may perhaps criticise the EC for being too timid in its reform. Indeed, given that most simplified cases have no or only a limited impact on competition in the EEA, certain categories of transactions should perhaps have been entirely exempted from the obligation of prior notification to the EC, such as those involving changes from joint to sole control in relation to a party which already has joint control or concentrations without any horizontal or vertical overlaps in the EEA. However, the EC probably feared that such an exemption would jeopardise the existing legal certainty regarding the eligibility of a transaction for *ex ante* merger control. In any event, the practical implications of the new Merger Simplification Package remain to be seen, especially since the EC retains certain discretion to revert to the full merger review procedure.

On a separate note, it is worth mentioning that the legislative package in question does not offer any comfort to companies contemplating transactions that may be regarded as candidates for EC's new policy aimed at catching "killer acquisitions" flying under the radar of EU and national merger notification thresholds. In a similar vein, when acquirers are companies with dominant position and their acquisition falls outside the radar of the EU and national regulators (i.e. outside *ex ante* control), these companies should be aware of the possibility that the prohibition on abuse of dominance may be applied (*ex post*).

According to its most recent Annual Report, the Commission adopted in 2022 a total number of 368 merger decisions (371 notifications). The vast majority of mergers notified in 2022 did not raise competition concerns and were speedily reviewed. The simplified procedure was applied in 78 % of all notified transactions under the EU Merger Regulation in 2022. Moreover, last year the Commission opened in-depth investigations (the "Phase II") only in eight cases. Although very few notified concentrations go to Phase II and extremely few are prohibited (in the past ten years, the Commission has approved over 3,000 mergers and has only prohibited 10), the pre-notification period – till the EC case team gives the green light for a formal notification – still takes quite long and delays significantly the closing of transactions. Hopefully the above-presented reform will reduce this delay for a good number of notifiable transactions while also save significant costs and resources for notifying parties.

By analogy to previous EC merger control reforms that were followed by the Greek NCA, we expect that this one will also be endorsed and will further cut the red tape for transactions meeting the Greek merger control thresholds.

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