

## NEW EU MERGER REGULATION SIMPLIFIED PROCEDURES AND FILING FORMS

The European Commission has set out new rules for determining which transactions qualify for a simplified filing procedure under the EU Merger Regulation (**EUMR**), as well as revised notification forms.

The reforms, which will apply from 1 September 2023, will increase (albeit marginally) the scope of transactions that can benefit from the simplified procedure. They will also make the filing forms quicker to complete, although the amount of information and documents that will need to be gathered in order to complete the forms has not been materially reduced.

### LESS RED TAPE?

After two rounds of consultation in 2021 and 2022, the Commission, on 20 April 2023, published a package of reforms that, it claims, "is expected to bring significant benefits for businesses and advisers in terms of preparatory work and related costs." The reforms expand the scope of transactions that can benefit from a simplified "Short Form CO" filing form, as well as streamlining the various filing forms and eliminating the need for filings to be submitted in paper format.

### The new Simplified Procedure Notice

The Simplified Procedure Notice (**SPN**) defines the transaction that can be notified using the Short Form CO. At present, qualifying transactions are primarily those involving joint ventures with EU turnover or assets of less than €100 million, parties with no competitively-related activities, parties that compete (in any plausibly defined market) with combined market shares of less than 20% and parties that are active on vertically-related markets (i.e. one supplies products or services of a type that are purchased by the other) and have combined market shares of less than 30% on both the upstream and downstream markets.

The new SPN will restrict the existing category relating to JVs, by introducing a requirement that expected turnover of the JV in the next three years must also be less than €100 million, and that the assets to be taken into account when assessing the threshold include those that the parties plan to contribute to the JV in the future. It will also expand the definition of "vertically-related"

#### The reforms at a glance

- Certain new categories of transaction will benefit from the simplified filing procedure under the EUMR.
- Filing forms will be streamlined, and therefore easier to complete, although the overall information burden on notifying parties will not be materially reduced.
- It will be possible to submit all filings and documents electronically.
- Very simple transactions will not require pre-notification discussions.

markets to include those where the upstream product is "used directly" in the downstream firm's own production or is re-sold by the downstream firm, in contrast to the current SPN which requires that such inputs must be "important".

The most important change to the SPN is the introduction of new, alternative categories of transactions that qualify, in principle, for the simplified procedure. These are transactions where:

- the parties compete and have a combined market share of less than 50%, and the transaction results in only small increment in market share. What is considered to be small for these purposes will depend on the size of the largest market share but, for example, a business with a 30% market share would qualify if it acquired a competitor with a market share of 2%; and
- the parties are active on vertically-related markets and have either:
  - combined market shares of less than 30% on the upstream supply market and account for less than 30% of the purchases of the products sold on the upstream market (in contrast to the existing category which requires the parties to have a combined share of less than 30% of the downstream market for supplying products that are produced using those inputs); or
  - market shares of less than 50% on both the upstream and downstream markets, provided the transaction results in no more than a small increment in market share in both markets (determined in the way described in the first bullet point above) and the same party has the smallest market share in both upstream and downstream markets.

The new SPN also introduces a "flexibility clause" which will allow notifying parties to ask for their transaction to be subject to the simplified procedure in cases where the thresholds for simplified treatment are only marginally exceeded (*e.g.*, where they compete and have a market share of between 20-25%). At the same time, it expands the list of circumstances in which the Commission may exercise its discretion not to apply the simplified procedure (or to refuse to apply the flexibility clause), even though the relevant criteria are met, such as those in which there are non-controlling shareholding links between the parties and third-party competitors.

Finally, the revised Notice foresees a "super-simplified" procedure for transactions involving parties with no competitively related activities and extra-territorial JVs, which can be notified without any pre-notification discussions with the Commission.

## **The New Filing Forms**

The various forms for notifying mergers (Form CO and Short Form CO), requesting referrals of mergers to or from the Commission (Form RS) and submitting remedy proposals (Form RM) have been streamlined and revised.

The new Short Form CO and (long) Form CO now provide for much of the information to be provided in the form of tables, or yes/no tick-boxes. This is likely to reduce the amount of time it takes to complete the form. However, the amount of information and internal documents that notifying parties will have to gather in order to complete the form has not been materially reduced, except in respect of certain information regarding cooperative agreements,

trade flows and trade associations, and markets that fall within one of the new categories that qualify for simplified treatment described above.

In certain areas the information burden has increased, including more information required in Form CO in respect of "pipeline products" under development and the types of business data collected and used by the merging parties, as well as additional information in Form RM in respect of remedies involving a "carve out" of a divestment business from the parties' existing business structures. However, the new forms also identify additional categories of information in respect of which the Commission may be open to granting waivers, in appropriate circumstances.

### **Electronic submission of documents**

The reforms will implement an entirely digital system for the submission of filings and other documents, with specifications for electronic signing of the relevant documents, so doing away with the current requirement for paper copies of filings to be delivered.

### **COMMENT**

While the expanded categories of transactions and markets that qualify for simplified treatment is welcomed, this is unlikely to lead to the significant reduction in red tape that is claimed by the Commission. The Commission's impact assessment indicates that only around an additional 2% of notifiable deals (about 8 per year) will benefit from simplified treatment as a result of the reforms. Similarly, while the new filing forms will be quicker to complete, the amount of information and internal documents that will need to be gathered in order to complete them has not been materially reduced, contrary to the wishes expressed by many stakeholders in response to consultations on the proposed reforms.

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