

European Commission Adopts Package Aimed At Simplifying Its Procedures Under The EU Merger Regulation

On December 5, 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”).¹ In particular, the Package seeks to: (1) expand the types of concentration eligible for treatment under the Commission’s simplified procedure; (2) reduce the amount of information that notifying parties must provide; and (3) streamline the pre-notification process.

The Package will enter into force on January 1, 2014, and will be implemented through updates to the Commission Notice on Simplified Procedure² and the Commission Implementing Regulation.³ In parallel, the Commission is updating its model texts for divestiture commitments⁴ and trustee mandates,⁵ and is issuing a new set of explanatory guidelines on best practices for divestiture commitments.⁶

The Commission’s decision to increase the number of transactions that are eligible for notification under the simplified procedure is welcome and should reduce the burden placed on companies involved in such concentrations. In respect of concentrations that are not eligible for simplified treatment, however, the Package may increase the amount of information that need be provided, *inter alia*, because the Commission has identified additional categories of internal documents that must be provided and will now require notifying parties to submit detailed market data on “*all plausible alternative product and geographic market definitions.*”

¹ See http://europa.eu/rapid/press-release_IP-13-1214_en.htm.

² See http://ec.europa.eu/competition/mergers/legislation/simplified_procedure.html.

³ See http://ec.europa.eu/competition/mergers/legislation/amending_regulation_en.pdf, http://ec.europa.eu/competition/mergers/legislation/form_co_en.pdf, http://ec.europa.eu/competition/mergers/legislation/short_form_co_en.pdf, and http://ec.europa.eu/competition/mergers/legislation/form_rs_en.pdf.

⁴ See http://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf.

⁵ See http://ec.europa.eu/competition/mergers/legislation/trustee_mandate_en.pdf.

⁶ See http://ec.europa.eu/competition/mergers/legislation/best_practice_commitments_trustee_en.pdf.

I. THE COMMISSION'S SIMPLIFIED PROCEDURE

The existing Commission Notice on Simplified Procedures provides the possibility for parties to notify certain types of transaction that tend not to raise competition concerns, by submitting a "Short Form CO" notification that requires materially less information than the standard "Form CO" notification.

The simplified procedure is already available for joint ventures with negligible EEA activities, transitions from joint to sole control, and concentrations that do not involve horizontal overlaps with a combined market share of 15% or vertical relationships involving a market share of 25%. The Package seeks to broaden the application of the simplified procedure such that it will apply to more than 60-70% of notifiable concentrations by: (1) raising the combined market share threshold for horizontal overlaps to 20%; (2) raising the market share threshold for vertical relationships to 30%; and (3) providing that horizontal mergers that involve a combined market share of up to 50% can qualify where they effect only a small increase to pre-existing concentration levels (specifically, they must feature a Herfindahl-Hirschman Index ("HHI") delta of under 150).⁷

The Commission currently 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.*"⁸ The Package provides further guidance, referring to the circumstances cited in the Commission's Horizontal Merger Guidelines where competition concerns may arise despite modest concentration levels.⁹ It also makes clear that the Commission will decide on a case-by-case basis whether the simplified

⁷ HHI calculations measure market concentration levels, and work by summing the square of each firm's market share. In practice, this limb may not catch many transactions, as an HHI delta of 150 would require a negligible overlap where one of the parties has a sizeable share. For example, a merger between firms with shares of 20% and 5% would result in a HHI delta of 200, while a merger between firms with shares of 38% and 2% would result in an HHI delta of 152; both would continue to fall outside the simplified procedure.

⁸ Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, May 3, 2005, paragraphs 6 and 7.

⁹ The identified special circumstances are: (1) mergers involving potential or recent entrants; (2) where one or more merging firms are important innovators; (3) where there are significant cross-shareholdings between the market participants; (4) where one of the merging firms is a maverick; (5) where there are indications of past or ongoing coordination; and (6) where one of the merging firms has a pre-merger market share of 50% or more. See the Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, February 5, 2004, paragraph 20. The Package also cites a series of further situations where the simplified procedure might not be appropriate, including: (a) combinations of resources in closely related neighboring markets; (b) joint ventures whose EEA turnover can be expected to significantly increase in the next three years; and (c) where there is a risk of coordination between a joint venture's parents.

procedure is appropriate for cases caught by the new limb (*i.e.*, horizontal mergers with a combined share of less than 50% and an HHI delta of under 150).

II. INFORMATION REQUIRED TO NOTIFY CONCENTRATIONS

The Commission's Implementing Regulation sets out the procedural framework for transactions reviewed under the EUMR, including by specifying the information that notifying parties must submit under the full procedure (using Form CO), simplified procedure (using Short Form CO), or when asking for a concentration to be referred to/from the Commission (using "Form RS").

In addition to some minor changes to the operative provisions of the Implementing Regulation,¹⁰ the Package amends the requirements of each of Form CO, Short Form CO, and Form RS. Many of these amendments codify the Commission's existing practice, though several bear mention in particular:¹¹

- **Streamlining information requirements.** The Commission has reduced the level of information required in certain sections of its notification forms, including by: (1) raising the market share thresholds at which parties are required to submit detailed substantive information (these are known as "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); and (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.

¹⁰ *Inter alia*, these changes make clear that: (1) only external representatives are required to produce written proof of their authority to act to render a notification complete; (2) the right of access to file does not extend to correspondence between the Commission and other competition authorities outside of Europe; and (3) where a party submits commitments before the 55th working day of Phase II and subsequently revises them after the 55th working day, those revised commitments will be deemed new commitments that extend the Commission's Phase II review period by fifteen working days.

¹¹ The following additions to the introductory text of the revised forms also bear particular mention: (1) all three forms now encourage notifying parties to submit a list of all jurisdictions where the concentration is subject to regulatory clearance, and Form CO encourages the provision of waivers for each such jurisdiction; and (2) revised Form CO now encourages notifying parties to briefly describe the economic data collected in the ordinary course of business. (The Commission provides three examples of cases where such data could be useful: (a) bidding data for concentrations between undertakings that tender through structured procurement processes; (b) scanning data for concentrations between producers of retail products sold to final consumers; and (c) customer switching data for concentrations between mobile telephony service providers.)

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;¹² and (3) board and shareholder analyses from the last two years that assess any of the affected markets under review.¹³ The revised Short Form CO also now requires the provision of board and shareholder presentations that analyze the notified transaction.

- **Plausible alternative market definitions.** The substantive sections of the Commission's notification forms are structured around the identification of markets featuring horizontal or vertical relationships. The revised forms follow this structure, but stress the need for 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 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.*" Whether the Package will reduce the overall burden on notifying parties will to a large extent depend on the Commission's practice in interpreting this requirement. The Commission claims this is merely intended to reflect its existing practice,¹⁴ and indeed Case Teams frequently request the provision of market data on alternative bases as part of the pre-notification process. However, there does appear to be a risk that codifying this practice will provide Case Teams with more latitude to request information on a disproportionate number of segmentations that bear little relationship to economically meaningful markets.

III. PRE-NOTIFICATION PROCESS

The Commission already strongly encourages parties to discuss draft notifications before submitting any formal notifications. While this process can increase the efficiency of the Commission's investigations, especially during Phase I, there have been increasing complaints in recent years about the length and burden of these pre-notification discussions.

¹² In response to criticisms leveled at this requirement during consultation, the Commission has stated that it "*certainly does not want to look at a company's entire internal M&A track record...Documents that are completely unrelated to the notified transaction do not have to be provided. Documents that are relevant are those that analyse the transaction that is notified in relation to alternative acquisitions.*" See http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm.

¹³ This relates to documents that discuss market shares, competitive conditions, competitors (actual and potential) and/or potential for sales growth or expansion into other product or geographic markets.

¹⁴ See http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm.

The Package aims to streamline the pre-notification process:

- First, the Commission states that the reduction of information requirements (described above) 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. (Whether this will provide significant relief will, of course, turn on the Commission's willingness to grant waivers in practice.)
- Finally, the Commission now invites the notification of concentrations without horizontal or vertical relationships without any pre-notification process at all. The Commission estimates this will benefit some 25% of cases that currently qualify for review under its simplified procedure.

IV. MODEL TEXTS FOR DIVESTITURE COMMITMENTS

The Commission has also published updated model texts for divestiture commitments and trustee mandates, and issued a new set of explanatory guidelines on best practices for divestiture commitments. While the new guidelines largely summarise the scheme envisaged by the existing model texts, it is worth highlighting two sets of amendments made to the revised model texts:

- **Increased Monitoring Trustee involvement in the sale process.** The new texts envisage the Monitoring Trustee playing an increased role in the sale process. Specifically, the revised model divestiture commitments include: (1) a requirement for the seller to submit a list of all potential purchasers to the Commission and Monitoring Trustee “*at each and every stage of the divestiture process,*” together with a copy of all the offers made by potential purchasers; and (2) anticipate that the Monitoring Trustee should “*act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments.*” In negotiating commitments and structuring an auction processes, sellers will need to be conscious of the possibility of parallel communications between the Monitoring Trustee and bidders throughout the sale process.
- **Ring-fencing.** The revised texts provide for stricter ring-fencing provisions to limit the flow of sensitive information from the divestment business to the retained business. In addition to a new requirement to ensure that no such information is shared through on-going supply relationships, the revised texts require the retained business to eliminate any confidential information relating to

the divestment business that was obtained before the Commission's clearance decision. While this should be realistic in cases involving the sale of assets acquired from the target company, sellers will need to consider carefully whether this limitation is feasible where a divestment business comes from their own portfolios.

V. CONCLUSIONS

The Commission has come under increasing criticism in recent years for the burdensome nature of the EUMR notification requirements, and the length of pre-notification discussions. In this context, any attempt to mitigate the burdens of the notification process is welcome. In particular, the extension of the application of the simplified procedure, and invitation for the notification of concentrations without horizontal or vertical relationships without any pre-notification process, should tangibly reduce the burden associated with notifying transactions that do not raise any substantive issues.

It remains to be seen, however, whether the Package will materially reduce the burden of notifying transactions where there are more significant horizontal or vertical relationships between the merging firms. While the Commission has streamlined certain aspects of its notification forms, the majority of the omitted requirements do not currently present a significant burden on notifying parties. Moreover, the increased focus on internal documents and information on all plausible alternative markets could increase the notification burden for concentrations that have the potential to raise substantive issues. Much will come down, as it does at present, to the approach taken by individual Case Teams. It is to be hoped that the stated aim of Commission Vice President Almunia to "*reduce the administrative burden and cost for business at a time when it needs to most*" will be respected by the Commission Services.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of the partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website at <http://www.clearygottlieb.com>.

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