



Mergers: European Commission proposes changes to merger notification and review procedures

Mergers and full-function joint ventures must be notified to the European Commission for approval if the parties satisfy the jurisdictional thresholds laid down in the EU Merger Regulation. They cannot be implemented until approved by the Commission. In a typical year, the Commission receives between 250 and 300 notifications. Even though many notifications are dealt with under the 'simplified procedure', which requires a less extensive notification and involves a less extensive Commission investigation, the notification and review process imposes heavy burdens on both the Commission and merging parties.

The Commission has therefore proposed increasing the market share thresholds below which a merger can be reviewed under the simplified procedure, so that more mergers will be dealt with under that procedure and also revising the notification forms. In this way, the Commission aims to reduce both the burden on its services, so that its resources can be focused on investigating mergers that are more likely to give rise to competition concerns, and the administrative burden and costs for companies.

In this Briefing, we examine the principal changes proposed by the Commission. Whilst any reduction in the burden on companies required to notify a concentration under the EU Merger Regulation is to be welcomed, it is far from clear that this will necessarily be the case. Indeed, in some cases the burden may well increase, both because of requirements to identify those 'plausible' markets on which the parties have shares above the revised thresholds for 'affected markets' and then providing information on those markets, and also to provide increased categories of internal documents.

If you would like to discuss any of the issues raised in this briefing, or to obtain legal advice on any specific transaction or proposed transaction, please contact one of the members of our Competition Unit or your usual Burgess Salmon contact.

Background: the existing notification and merger review procedures

Mergers and the formation of full function joint ventures which satisfy the turnover-based jurisdictional thresholds of the EU Merger Regulation must be notified to the European Commission using a form known as 'Form CO'.

Even if the thresholds are not met, the parties may nevertheless request that the Commission review their merger or joint venture, if it would otherwise be notifiable in three or more Member States; the request is made using a form known as 'Form RS'. Parties can also use Form RS to request that a concentration falling within the Commission's jurisdiction be referred to the national authorities of one or more Member States for review under national law, if it would affect competition in such State(s).

Form CO requires the provision of detailed market information on markets that are affected by the concentration. A market is 'affected' if either: the parties are active on the same market and they have a combined market share of 15% or more (horizontal affected market), or the parties are active on markets that are upstream and downstream of each other and the parties' individual or combined market shares on either or both markets are 25% or more (vertical affected market). Information may also be required for other markets on which competition could be affected, for example if the parties are active on closely related markets (conglomerate markets). Completion of Form CO can be, and often is, a lengthy and time-consuming process, particularly where the parties are active on multiple markets.

Where there are no or very limited competitive overlaps between the parties, such that there are no affected markets, a concentration can be notified to the Commission using a 'Short Form CO'. This may also be used for a full-function joint venture with no or limited activities in the EEA and for an acquisition of sole control of a joint venture. A Short Form CO requires some, but less detailed, market information.

Whilst a Form RS requires less information than a Form CO, it still requires detailed market information on the markets on which the parties are active and on which competition concerns may exist.

Where a Short Form CO is used, the Commission will also apply its 'simplified procedure' when reviewing the merger. This is set out in the Commission's Simplified Procedure Notice. This means that the Commission will not undertake a full investigation of the concentration, unless a complaint is received from a Member State or a third party. However, the standard 25 working day Phase I review period still applies and the Commission will adopt a short-form clearance decision, only after which the concentration can be closed.

Proposed changes

The most significant change is that **the definition of 'affected markets' will be revised, with the thresholds increasing to 20% market share for horizontal overlaps and 30% for vertical relationships.**

The Commission expects that this will increase by 10% the number of mergers investigated under the simplified procedure, which will also be notified using Short Form CO. If so, this would reduce the workload of merging parties and the Commission. However, this may not necessarily be the case. This is because the Commission will require parties to provide detailed data on all 'plausible' alternative market definitions, however narrow: on very narrow product and/or geographic markets (or even temporal markets limited to certain hours of the day or weeks of the year), the parties may well have high individual and/or combined market shares over the revised thresholds. The concept of 'plausibility' will doubtless remain imprecise and flexible, with parties likely to be often required to provide market data on numerous possible segments and even sub-segments of markets. This is likely to increase merging parties' workloads in obtaining the necessary market information and data in order to submit a 'complete' notification, regardless of which Form is used.

The Commission proposes to revise Form CO, Short Form CO and Form RS. The most significant changes are proposed for Form CO.

In all three forms, it **emphasises the importance of pre-notification contacts with the Commission**, to ensure that: all relevant and necessary information is provided so that the notification is 'complete'; waivers are provided for information that the Commission considers is not necessary; and to identify those cases for which the simplified procedure would be appropriate. Pre-notification contacts are already a routine and often time-consuming aspect of EU merger control and this is unlikely to change.

The other main changes to Form CO are:

- **a new requirement to provide information on quantitative economic data held by the parties:** increasingly, the Commission's economists undertake sophisticated economic and econometric analysis and modelling of the likely effects of the merger on competition. Such data may include bidding data, revenues and profit margins, scanning data on consumer purchases and customer switching data. This may increase the use of quantitative analysis, including in Phase I reviews, and thus the demands on the parties. However, this could also reduce the number of Phase II reviews.
- **an extended obligation to provide pre-existing internal documents:** Form CO requires merging parties to provide internal documents that are created for their directors for the purpose of analysing the merger. The Commission proposes to extend the scope of this obligation, by requiring

the production of two new categories of documents: those analysing different acquisition options (not limited to the merger in question) and internal documents prepared in the previous three years that assess any of the 'affected markets' (which includes any narrow 'plausible' alternative markets). Whilst such documents may well contain information useful to the Commission's analysis, this is likely to increase the burden on merging parties to identify and locate such documents.

- **the provision of additional information on closeness of competition between the parties:** in analysing mergers, the Commission assesses how 'close' the parties are as competitors: where they are close competitors and their market shares are significant, the loss of competition between them may well lead to higher prices and thus to competition concerns (so-called 'unilateral effects'). The Commission proposes that merging parties produce detailed information on the rivalry between them and the closeness of substitution of their products, as well as barriers to entry and expansion by rivals. This may well further increase the use of unilateral effects analysis.
- **extended obligations to provide contact details and increased risk of a notification being 'incomplete':** the Commission will continue requiring detailed contact details for competitors, customers and market entrants. It will no longer routinely require them for suppliers or trade associations. In view of the requirement to provide data for all 'plausible affected markets', this could mean the provision of hundreds of contact details, particularly if there is a further segmentation by customer type or size. This is a major workload for the parties and their advisers and the revisions will not reduce this; indeed, they may well increase it. Incorrect details are a major source of difficulty in almost all merger investigations, despite the parties' best intentions to provide all information available to them. The revised Form CO contains an express warning that incorrect contact details (seemingly even a small number) may be sufficient ground for the Commission to reject a notification as 'incomplete', which mean that the review timetable would be reset to zero and recommence only once the Commission is satisfied that all details are correct. However, the Commission fails to recognise that often the parties simply do not possess and cannot obtain the precise contact details demanded by it. It is to be hoped that the Commission will recognise this and be flexible and pragmatic in assessing the sufficiency of contact details.

Few significant changes will be made to Short Form CO and Form RS. In Form RS, the Commission will continue to require an assessment to be provided of all 'plausible' markets on which the parties have any horizontal overlap or any vertical relationship. However, it will require slightly more detailed information than at present on such 'reportable markets'. In a new step, it will also be necessary to provide information

on the target company's activities, if there are no 'reportable' markets. The revised Form RS will also require the provision of market information on the basis of all 'plausible' affected markets (for which the revised thresholds also contained in the revised Form CO will also be applied).

Increased applicability of the simplified review procedure

The revisions to the thresholds for 'affected markets' will also change the applicability of the simplified review procedure. However, even where there are technically affected markets, the simplified review procedure (and Short Form CO) may also be applied by the Commission where, under any 'plausible' market definition, the combined market share is under 50% and the increase in market share on all markets is *de minimis* (by reference to the resulting increase in market concentration). The Commission will give itself additional new powers to require a concentration that would *prima facie* fall within the

scope of the simplified review procedure to be subject to a full investigation, for example where: a new joint venture is expected to have significant future sales in the EEA or its products are an important input for products sold in the EEA; or a merger with limited increases in market share or with potential conglomerate effects would nevertheless potentially harm competition.

Consultation process and next steps

The Commission's consultation process is open until 19 June 2013. Its consultation documents and the draft revised Implementing Regulation, draft Notice on the Simplified Procedure and draft notification forms can be found on its website at: http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html.

The Commission will take account of submissions received and then adopt a new Implementing Regulation to take effect from the end of 2013.

Burges Salmon Competition Unit

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Should you require any further information on the issues described in this Briefing or on any UK or EU competition law matter, please contact your usual contact or one of the members of our Competition Unit.



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