

CLIENT ALERT

# European Commission Streamlines EU Merger Control Proceedings

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## AUTHORS

Jens-Olrik Murach | Philipp Girardet | Rahul Saha | Faustine Viala  
Addiped Cheng | Aurel Hille | Maud Boukhris | Friederike Hammwöhner

On 20 April 2023, the European Commission (“**Commission**”) adopted a merger simplification package, which will (i) make the Commission’s simplified merger control procedure available to a broader range of cases, (ii) introduce an even leaner super-simplified procedure, and (iii) streamline the normal (i.e. non-simplified) procedure (“**Simplification Package**”). The new rules and new filing forms will apply as from 1 September 2023.

## 1. Expanding the Simplified Procedure

To obtain EU merger clearance from the Commission, the parties must provide extensive information in the filing form (“**Form CO**”). Recognizing that notifications are costly and burdensome for the parties, the Commission allows non-problematic cases to be reviewed in a simplified procedure upon notification of a simplified version of the filing form (“**Short Form CO**”). In principle, the simplified procedure is available where the parties (i) do not have horizontal or vertical overlaps, (ii) have *de minimis* market shares,<sup>1</sup> (iii) acquire joint control of a joint venture that has no, or negligible, activity in the EEA, or to (iv) transactions involving a change from joint to sole control by one of the previously jointly controlling parent companies. Given that such cases are unlikely to give rise to competition concerns, the Short Form CO requires significantly

<sup>1</sup> *I.e.*, horizontal relationship resulting in combined market shares of less than 20% or vertical relationship resulting in combined market shares of less than 30%.

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less information inter alia on the markets affected by the deal. According to the Commission, a simplified procedure is on average shorter by more than five weeks compared to a normal procedure.<sup>2</sup>

The Simplification Package adds two categories of transactions which may be reviewed under the simplified procedure: cases where parties are active in vertically related markets but where they have (i) limited buying power<sup>3</sup> or (ii) where the increase in market concentration arising from the transaction is limited.<sup>4</sup>

The Simplification Package also introduces a “flexibility clause” that gives the Commission discretion to review additional deals under the simplified procedure, particularly where the thresholds for simplified treatment are only slightly<sup>5</sup> exceeded or where the parties have highly asymmetric market positions upstream and downstream.<sup>6</sup>

The Commission will retain the power to review seemingly “simple” cases under the normal procedure and vice versa. The Simplification Package sets out a list of factors aiming to provide more clarity on how the Commission will exercise its discretion.<sup>7</sup>

Out of an approximate 300-400 cases notified to the Commission each year, around 75-80% are currently cleared under the simplified procedure.<sup>8</sup> Once the current proposals are implemented, the Commission anticipates that an additional approximate 9% of all annually reported cases will be reviewed under the simplified procedure, allowing for quicker clearance decisions.<sup>9</sup>

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<sup>2</sup> Including pre-notification; cf. Commission Staff Working Document Impact Assessment Report, 20 April 2023, p.6, available [here](#).

<sup>3</sup> *I.e.*, where parties’ combined market shares on the upstream supply market are below 30% and parties active in the downstream market have a combined purchasing share of the upstream input below 30%.

<sup>4</sup> *I.e.*, where the parties’ combined market shares are below 50% in both the upstream and downstream market, the increment in market share upstream and downstream resulting from the transaction is limited (with an “HHI delta” less than 150) and where the party with the smaller market share is the same in the upstream and downstream markets. The HHI indicates the level of concentration in a market and is calculated as a sum of all squared market shares. It lies between 0 and 10,000 (monopoly).

<sup>5</sup> *I.e.*, less than 5% for horizontal or vertical relationships or less than €50m above the existing €100m threshold of EEA turnover or assets for joint ventures.

<sup>6</sup> *I.e.*, where the parties’ individual or combined market shares do not exceed 50% in one market and 10% in the vertically related market.

<sup>7</sup> The list of factors includes, for example, circumstances where any of the parties has significant non-controlling shareholdings (above 10%) or cross-directorships in companies active in the same markets or in vertically related markets; the parties are expected to expand or significantly surpass certain turnover thresholds in the next three years; and, where the parties are important innovators, they have brought an important pipeline product to the market or have pipeline-to-pipeline or pipeline-to-product overlaps.

<sup>8</sup> *Commission Merger Cases Statistics*, available [here](#).

<sup>9</sup> *Commission Staff Working Document Impact Assessment Report*, 20 April 2023, p.37.

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### 2. Introducing a “Super-simplified Procedure”

Even under a simplified procedure, the Commission expects that the parties go through the so-called pre-notification phase and submit a draft filing for review and discussion with the Commission before a Phase 1 investigation is formally commenced. The duration of the pre-notification phase is somewhat unpredictable, *inter alia* because it depends on the workload of the case team and can take up to several weeks.

To address this issue for evidently non-problematic cases, the Simplification Package introduces a new “super-simplified procedure” under which parties can notify a transaction without going through the pre-notification phase.<sup>10</sup> The new “super-simplified procedure” will apply to purely technical filings that are clearly non-problematic, i.e. (i) cases with no horizontal overlaps or vertical links or (ii) joint ventures that are not active in the EEA (where a filing is triggered only based on the parent companies’ revenues). According to the Commission, the super-simplified procedure should shorten the review process by more than six weeks on average.<sup>11</sup>

### 3. Changes to the Normal Procedure

With the new rules, the Commission also tries to limit the burden on parties when it reviews non-simplified cases. The new Form CO no longer requires information on cooperative agreements, trade between EU Member States and imports from outside the EEA, or trade associations. The section on waiver requests has been revised, aiming to facilitate obtaining waivers.

If the Commission decides to review a case under the normal procedure although the criteria of the flexibility clause are met (*i.e.*, the thresholds for simplified treatment are only slightly exceeded or the parties have highly asymmetric market positions upstream and downstream) and no safeguards and exclusions apply, the new rules grant the parties some benefits in the normal procedure. In such cases, in principle, parties do not have to complete the Form CO’s sections on market definition, market information, structure of supply and demand, product differentiation and closeness of competition, distribution systems and service networks, market entry and exit, research and development, as well as on contact details of certain competitors, customers, recent and potential market entrants.

Despite these efforts to simplify the process, the new rules also require additional information, such as for instance on pipeline products or whether the parties have significant non-controlling shareholdings (above 10%) or cross-directorships in companies active in the same or vertically related markets. This may lead to more burdensome information requirements, particularly for private equity firms if they hold a number of non-controlling interests in specific sectors. Moreover, the new Form CO contains an extensive request that each party should provide information on data it has collected and stored in

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<sup>10</sup> Parties must still submit a case team allocation request a week prior to the intended date of notification.

<sup>11</sup> Pre-notification contacts lasted on average 33 working days for simplified cases based on Commission data from 2012 to 2021, cf. *Commission Staff Working Document Impact Assessment Report*, 20 April 2023, p.41.

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the ordinary course of business and that could be helpful for a quantitative economic analysis. Parties have to provide inter alia information on the source and usage of such data. Such a requirement could further increase the burden on the parties.

### Assessment and Outlook

Overall, the Simplification Package is a welcome step in reducing the burden for the parties making merger control filings to the Commission. In non-problematic cases, information requirements will be reduced, and parties will benefit from the extended scope of (super-)simplified treatment. However, for cases that could potentially have an impact on competition and do not qualify for (super-)simplified treatment, the Commission has increased the information requirements. As the new rules will allow the Commission to streamline its review of non-problematic cases and put more focus on complex cases,<sup>12</sup> it can be expected that the Commission will continue to request significant amounts of information and data where a transaction could plausibly give rise to competition concerns.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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**Dr. Jens-Olrik Murach**

+32 2 290 1827

jmurach@willkie.com

**Philipp Girardet**

+44 203 580 4717

pgirardet@willkie.com

**Rahul Saha**

+44 203 580 4741

rsaha@willkie.com

**Faustine Viala**

+33 1 53 43 45 97

fviala@willkie.com

**Addiped Cheng**

+44 203 580 4932

acheng@willkie.com

**Aurel Hille**

+49 69 7930 2145

ahille@willkie.com

**Maud Boukhris**

+33 1 53 43 45 15

mboukhris@willkie.com

**Friederike Hammwöhner**

+32 2 290 1826

fhammwoehner@willkie.com

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<sup>12</sup> Commission Press Release, 20 April 2023, available [here](#).