SQUIRE PATTON BOGGS

Will New EU Merger Control Rules Be Good for Business?

EMEA – September 2023

From September 2023, a new "merger simplification package" applies to mergers and acquisitions that have to be notified to the European Commission (EC). Several of the changes are welcome – in particular, changes that should see more deals qualify for review under the simplified procedure, and some qualify for a new "super-simplified procedure". Other aspects of the package, however, could increase the burden on businesses engaged in M&A, in particular private equity firms and other investment groups.

In this briefing, we will summarise the key points of the new package and their expected impact.

More Categories of Deals Eligible for the Simplified Procedure

Since 2000, the EC has used two different merger review procedures:

- Certain categories of transactions that are assumed not to raise competition concerns qualify for the simplified procedure and are notified using the Short Form CO. In these cases, the notifying parties are obliged to provide less information about the deal than normal and the EC does not conduct a full market investigation.
- For all other transactions, the normal procedure applies and the full Form CO must be used. This requires the notifying parties to provide much more information, and the EC will extensively gather views on the deal from the market (e.g. the notifying parties' customers and competitors).

Cases under the simplified procedure currently last, on average, five weeks less than cases under the normal procedure. Notifying a deal under the simplified procedure is also significantly less expensive, due to reduced preparation time, advisers' costs and management effort for the notifying parties.

Under the new merger simplification package, more categories of deals will be eligible for the simplified procedure. It can now be used in any of the following cases:[1]

- The acquisition of control over a joint venture that has negligible activities in the European Economic Area (EEA), meaning current or expected EEA turnover of less than €100 million and assets in the EEA of less than €100 million
- Mergers and acquisitions that satisfy the following conditions under all plausible market definitions:
  - In the case of horizontal overlaps, the parties' combined market share meets at least one of the following conditions:
    - It is lower than 20%
    - It is lower than 50% and the increment of market concentration resulting from the deal is below 150 (using the Herfindahl-Hirschman Index (HHI))
  - In the case of vertical relationships, the parties' individual and combined market shares meet at least one of the following conditions:
    - They are lower than 30% on both the upstream and the downstream markets
    - They are lower than 30% on the upstream market, and parties to the deal that are active in the downstream market hold a purchasing share of less than 30% of upstream inputs
    - They are lower than 50% on both the upstream and downstream markets, the increment of market concentration (HHI) is below 150 on both the upstream and downstream markets, and the smaller party in terms of market share is the same in the upstream and downstream markets
- One party acquires sole control over a business that it currently controls jointly.

The EC expects that, by increasing the categories of simplified cases and introducing flexibility clauses (see below), around 10% of deals that previously required notification under the normal procedure will now qualify for the simplified procedure.[2] If correct, this would mean that at least 80% of all notified deals will benefit from the simplified procedure in the future.

[1] EC Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, point 5, available online.

[2] European Commission Competition Policy Brief, Issue 2 (September 2023), available online.

New Flexibility Clauses Further Extend Scope of Simplified Procedure

In addition to the categories of transactions that should always qualify for the simplified procedure (explained above), the merger simplification package has introduced four new situations in which the EC has discretion to apply the simplified procedure at the parties' request. The so-called flexibility clauses can apply in the following cases:

- Mergers and acquisitions in which the parties' combined market shares, in cases involving a horizontal overlap, are between 20% and 25%
- Mergers and acquisitions in which the parties' combined market shares, in cases involving a vertical relationship, are between 30% and 35%
- Mergers and acquisitions in which the parties' combined market shares are below 50% in one market and below 10% in another vertically related market
- The acquisition of joint control over a joint venture that has current or expected EEA turnover and planned assets in the EEA of between €100 million and €150 million

The new flexibility clauses should be a major benefit for borderline deals, i.e. deals that narrowly miss the thresholds for using the simplified procedure, for instance, because the parties' combined horizontal market share is marginally over 20%. The large majority of such cases will not raise any risk of harm to competition, and the possibility to extend the simplified procedure to these deals is welcome. How effectively this will streamline the merger process and reduce the burden on businesses, however, will depend on how the EC exercises its discretion.

Super-simplified Procedure for non-EEA Joint Ventures

In a further effort aimed at reducing the burden on businesses, the EC will now review the acquisition of joint ventures that will have no EEA turnover or assets (but meet the notification thresholds due to the buyers' EEA turnover), and deals that involve no horizontal or vertical overlaps, under what it calls the super-simplified procedure. This will apply to the following cases:

- The acquisition of control over a joint venture that has no current or expected turnover in the EEA and will have no assets in the EEA transferred to it by the buyers
- Mergers and acquisitions that give rise to no horizontal overlaps or vertical relationships

The super-simplified procedure will allow such deals, which will clearly have no effect on competition, to be notified to the EC directly without any pre-notification discussions. Avoiding pre-notification will save the parties at least two weeks, in a typical case, and in some cases considerably more. Deals notified under the super-simplified procedure will also have more streamlined filings, with less information being required than in the regular simple procedure.

This development will be particularly welcome for groups that generate revenue in the EEA (for example, due to EEA portfolio companies) but whose M&A focus is on other regions – for example, sovereign wealth funds and non-EEA private equity firms. When such entities invest in joint ventures outside the EEA, they should benefit from a more streamlined EC filing process and faster approval.

New Safeguards Requiring Use of the Normal Procedure

Although the EC has taken steps to increase the use of the simplified procedure, it continues to emphasise that all cases that require closer scrutiny should be reviewed under the normal procedure. To this end, it has set out a detailed list of safeguards, i.e. circumstances in which a deal that technically qualifies for simplified treatment should, nevertheless, be notified under the normal procedure.

Some of the safeguards are well established and were included in previous EC merger guidance. These include, for example, where the relevant markets are difficult to define and it is hard to establish the parties' market shares, or where the markets are already concentrated. However, the EC has also set out certain new safeguards.

Of particular note for private equity firms and other entities with large portfolios are the safeguards concerning non-controlling shareholdings. These establish that the EC may require a full notification where either:

- One party to the deal has a significant non-controlling shareholding in a company active in the market(s) where another party to the deal is active (e.g. if the buyer has a minority shareholding in one of the target's competitors or a company active upstream or downstream of the target)
- A competitor of one party to the deal has a significant non-controlling shareholding in any of the other parties to the deal (e.g. a competitor of the buyer has a minority shareholding in the target)

Certain other safeguards involve an assessment of future or potential competition, including:

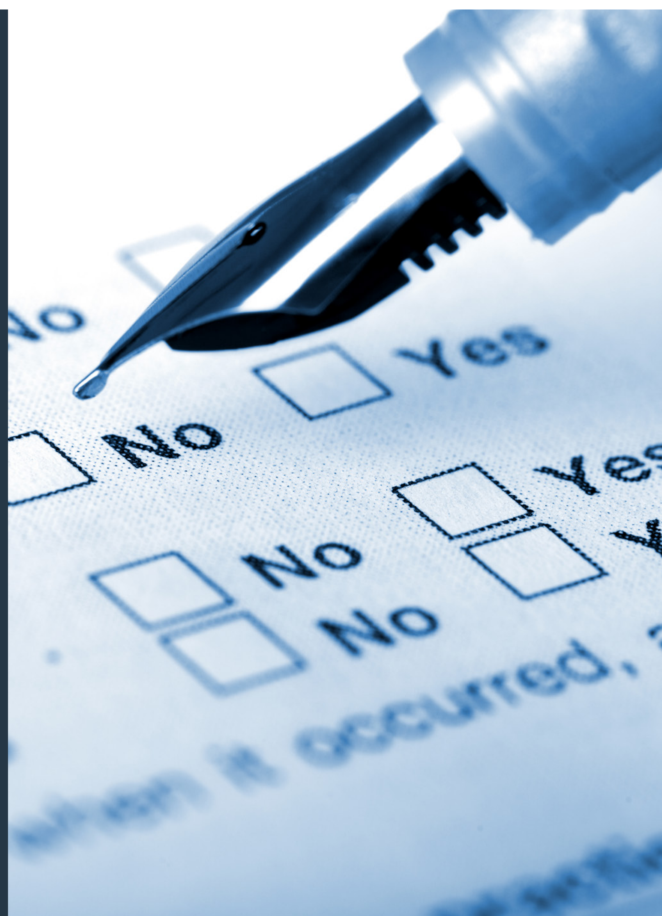
- One party to the deal plans to expand in a product or geographic market in which another party is active
- The parties exceed the relevant market share thresholds in terms of capacity, rather than sales
- The deal would combine two important innovators or involves a business that has promising pipeline products

In the new Short Form CO, the notifying parties must declare whether any of the safeguard circumstances apply. If they do, the parties must provide further information and explain why the deal does not require a review under the normal procedure. Complying with these new requirements and showing that none of the safeguards apply, or if they do, that they raise no concerns, will add a new burden for notifying parties. As noted above, these changes could have a particular impact on private equity firms and other portfolio investors.

Overhaul of Short Form CO

The Short Form co, which is used to notify deals under the simplified procedure, has been significantly changed. The open questions that previously invited parties to provide written descriptions of the deal, the relevant markets and the effects on competition, under the old Short Form CO, have been replaced by a "tick-the-box" questionnaire format, standardised tables for market information and a series of "yes/no" questions.

In principle, the overhaul of the Short Form CO should make it quicker and easier to prepare a filing. However, some of the information that must be provided does not lend itself easily to a "tick-the-box" approach. For instance, the parties must provide their assessment of the substantive effects of their deal in response to a series of multiple-choice questions, but are not invited to explain which are the "plausible" market definitions. Since market definition can be critical in determining whether a deal qualifies for the simplified procedure, or gives rise to overlaps that might affect competition, it is an area that invariably triggers debate with the EC and requires some advocacy. It is anticipated that lawyers for the parties will make extensive use of the few available open text boxes to submit reasoned arguments, as they would have under the previous regime, in all but the most straightforward cases.



Changes to the Normal Form CO, Including New Internal Data Requirements

The normal Form CO, for deals that are not eligible for the simplified procedure, has also been amended, although not as extensively as the Short Form CO. Some of these changes should streamline the preparation of a filing, while others appear likely to add work and complexity for the notifying parties.

As with the Short Form CO, standardised tables will now be used to provide information on horizontal overlaps, vertical relationships and market shares. A "tick-the-box" format will also be used to provide information on markets that fall within the scope of a flexibility clause (i.e. the borderline cases that only marginally exceed the thresholds for the normal procedure). This will mean that, in cases where the parties have substantial market shares in only one market and relatively low market shares in others, they can limit the information that must be provided on the latter. The EC has also removed some categories of information from the Form CO altogether – for instance, notifying parties no longer need to provide information on cooperative agreements in the affected markets. All of these changes are broadly positive.

In some areas, however, more information must be provided than was previously the case. In particular, the new Form CO requires more information on competition between the parties' pipeline products and pipeline-to-marketed product competition. This change is consistent with the EC's interest in assessing the effects of mergers on innovation, which has grown significantly in recent years.

In addition, the new Form CO requires parties to provide more internal documents and data than before. Under the previous Form CO, the notifying parties were already obliged to gather and submit extensive internal documentation on the transaction and the relevant markets. This was frequently one of the most demanding aspects of the filing for the parties to complete. The new Form CO now also asks the notifying parties to submit all data that they collect and store in the ordinary course of business and which "could be useful for a quantitative economic analysis". They must also explain how the business uses this data in the ordinary course and the datasets, internal reporting and analysis that it produces with it.

This is likely to add significantly to the burden on notifying parties when they prepare a filing. It will, in effect, require the parties to gather and submit, at the outset of the procedure, the type of internal data that in the past was only requested in complex cases, when the EC wished to conduct economic analyses. There may be some room for debate over what internal data "could be useful" for such analyses, and what need not be provided – however, given the obligation to submit full and complete information in the Form CO, or face heavy financial penalties, notifying parties may err on the side of caution and provide more data rather than less.

Conclusion

The new merger simplification package makes several changes that should reduce the burden on notifying parties, speed up the filing process, and result in transactions being approved more quickly. Efforts by the EC to increase the use of the simplified procedure, and to streamline that procedure and reduce the size of Short Form CO filings, are timely and welcome.

There are also changes that seem less likely to be good for business. In some cases, parties will have to go to greater lengths to justify their use of the Short Form CO – e.g. when the deal brings non-controlling shareholdings into play, or requires consideration of the parties' expansion plans. Moreover, if the parties are required to submit a full Form CO under the normal procedure, they may find that they must provide more information, not less, in particular in terms of internal data. On balance, these changes are in line with the EC's stated aim of scrutinising potentially problematic deals more closely while speeding up the review of the vast majority of deals, which raise no competition concerns.

Contacts

Diarmuid Ryan
Partner
T +44 207 655 1310
E diarmuid.ryan@squirepb.com

Will Sparks
Partner
T +322 627 76 10
E william.sparks@squirepb.com

Brian Hartnett
Partner
T +322 627 11 01
E brian.hartnett@squirepb.com

Oliver Geiss
Partner
T +322 627 11 12
E oliver.geiss@squirepb.com

Francesco Liberatore
Partner
T +44 207 655 1505
E francesco.liberatore@squirepb.com

Gorka Navea
Partner
T +34 91 426 4805
E gorka.navea@squirepb.com

Erling Estellon
Of Counsel
T +33 1 5383 7060
E erling.estellon@squirepb.com

Tatiana Siakka
Senior Associate
T +44 207 655 1692
E tatiana.siakka@squirepb.com

Sam Hare
Senior Associate
T +44 207 655 1154
E sam.hare@squirepb.com

The opinions expressed in this update are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

© Squire Patton Boggs. All Rights Reserved 2023

63285/09/23