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Changes to EU Merger Review Procedures

The European Commission (Commission) has adopted important revisions to its merger control procedures under what it characterizes as a Merger Simplification Package that will enter into force on January 1, 2014. The new rules include changes to the EU Implementing Regulation, including to the texts of the EU filing forms (FORM CO and FORM RS), and to the EU notice on the simplified ("short form") notification procedure. In parallel, the Commission has updated its model texts for divestiture commitments and trustee mandates and has issued revised guidelines on best practices for divestiture commitments.[1]

The Commission has presented the Merger Simplification Package as streamlining the EU merger control review process by: (i) reducing the information to be provided in a FORM CO and FORM RS notification; (ii) expanding the scope of the simplified filing procedure; and (iii) adopting measures to shorten (and in certain cases eliminate) the prenotification process.

However, many of the simplifying measures remain discretionary — the Commission can decide to request additional information and can revert to the normal, more burdensome process. For example, while the Commission acknowledges that certain information required in the filing is unnecessary for its review of a significant number of cases, it does not eliminate the requirement. Rather, the new procedures would give the parties the option of requesting a waiver for specified categories of information (an option already available under the existing system). In addition, in cases involving affected markets, the new rules are likely to substantially increase the information burdens imposed on notifying parties.

The most important new rule involves the expansion of Section 5.4 of the FORM CO, which, absent a waiver, will now require the notifying parties to submit copies of all presentations, reports and studies relating to affected markets that have been prepared in the prior two years for the board or shareholders meeting in the ordinary course of business. This change substantially expands the existing requirement to provide documents relating to the proposed transaction, covers documents not specifically required in an HSR filing and will provide the Commission with considerably more internal materials than in the past, including materials that are not directly related to the notified transaction. Under the new definition of Section 5.4 documents, parties also will be required to submit minutes of board or shareholders' meetings and documents discussing potential alternative transactions. Since the Commission, like the U.S. agencies, relies heavily on the parties' internal documents, this change will require firms to devote increased attention to the preparation of such documents on an on-going basis. The change also means that in transactions that are subject to both EU and U.S. filings, parties may no longer be able to submit the same set of documents in response to the requirements under the two procedures (a practice which, until now, has been routinely accepted by the Commission).

1 As expected, the revisions do not contain provisions that would subject noncontrolling minority shareholdings to review under the EU merger regulation (the EUMR). This major innovation is under active consideration, with the Commission planning to issue a white paper on the proposed treatment of minority shareholdings before deciding whether to amend the EUMR.

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The other changes involve a mixed bag of measures that will in some cases lighten and in others increase the burden of filing under the EUMR. The principal measures that will reduce the burdens are:

- Raising the market share thresholds for "affected markets" (for which very detailed information is required) from 15 percent to 20 percent in the case of horizontal mergers and from 25 percent to 30 percent in the case of vertical mergers;
- Extending the simplified notification procedure under which the parties' informational requirements are considerably reduced to:
  - horizontal and vertical mergers beneath the new thresholds for affected markets; and
  - to horizontal mergers where the combined market share of the merging firms is below 50 percent and the increase in market concentration as a result of the merger is less than 150 on the Herfindahl-Hirschman Index (HHI);
- Eliminating the need for prenotification contacts in cases where there is no horizontal overlap or vertical link between the parties' activities;
- Formalization of procedures for requesting waivers with respect to information required in FORM CO.

Conversely, in cases that do not qualify for the simplified procedure, the new rules introduce potentially significant additional information and document production requirements in addition to the expansion of the Section 5.4. In particular, the new rules require the notifying parties to explain *"all plausible alternative product and geographic market definitions"* and, as set out in the introduction to the Form CO, *"[i]n cases in which quantitative economic analysis for the affected markets is likely to be useful, [the parties are invited to] briefly describe the data that each of the undertakings concerned collects and stores in the ordinary course of its business operations and which could be useful for such analysis."* (Emphasis added.)

On the whole, the revisions modestly expand the safe harbour for transactions that raise no substantive issues, and parties to such mergers will benefit from streamlined procedures and reduced information requirements. For other transactions, however, the changes significantly increase the informational burdens imposed on notifying parties while also formalizing certain practices that the Commission has been using for a number of years. For these latter cases, in which the new procedures will increase informational burdens, the parties will need to prepare early and carefully and to pay particular attention to documents they generate during the normal course of business.