
European Commission Aims to Reduce Red Tape for Companies Notifying Deals That Do Not Raise Antitrust Issues

2013-12-10

On December 5, 2013, the European Commission (EC) announced measures to reduce the administrative burden on companies needing clearance from the EC before merging with, or acquiring, another company. The measures, which are applicable as of January 1, 2014, will have the greatest impact on transactions that do not raise material antitrust issues.

Increased Use of the Short Form Notification

The EC allows companies to notify certain deals by means of a “Short Form” submission (also known as the Simplified Procedure). The Short Form requires less market information and, when applicable, the EC does not contact third parties to carry out a full investigation into the deal’s competitive effects.

The new measures increase the Short Form’s scope of application:¹ 1.

1. Currently, if the acquiring company and the company being acquired are active on the same market, the Short Form notification can be used if the companies’ combined *post*-transaction market share is *below 15%*. Under the new measures, the Short Form can be used provided the combined market shares are *below 20%*.
2. Currently, if the acquiring company and the company being acquired are active on markets that are upstream or downstream of each other, the Short Form can be used if, *post*-transaction, either company’s individual—or both companies’ combined—market share on any of these markets is *below 25%*. Under the new measures, this percentage is *raised to 30%*.
3. Under the new measures, it may also be possible to use the Short Form to notify deals that result only in a small increase in market share provided that, post-transaction, the companies’ combined market shares are below 50%.² For example, it may be possible to use the Short Form if a company with a 26% market share acquires a company with a 2% market share. In theory at least, if a company with a 40% market share acquires a company with a 1% share, it should also be possible to use the Short Form. However, the new measures make clear that the EC has discretion over whether to allow the Short Form’s

use to notify small increases in market share above combined market shares of 20%. In other words, while the Short Form “*will in principle apply*” in situations 1 and 2 above, it only “*may*” apply to situation 3. In situation 3, the EC will decide whether the Short Form can be used “on a case-by-case basis.” For example, the new measures indicate that the EC is less likely to allow use of the Short Form if the target company is a significant competitive force such as if it has promising pipeline products.

The EC estimates that the new measures will increase use of the Short Form by some 10%. However, companies still need to have reliable market share information to use the Short Form, and the EC requires that they also provide information on “any plausible alternative” market definitions, meaning sometimes it may be difficult to conclude that the Short Form is appropriate.

Somewhat Reduced Information Requirements and Possibility of a Streamlined Procedure

Companies have always been able to request waivers from the requirement to provide certain information to the EC. The new measures formalize this possibility. For example, parties are expressly allowed to request a waiver from providing market share data on both a value and a volume basis.

The new measures also include revised notification forms which may somewhat reduce the level of information that companies need to provide to the EC.

Before filing a formal notification, companies normally enter “pre-notification” discussions with the EC. While not obligatory, such discussions are highly advisable. Under the new measures, it is suggested that companies could avoid these discussions, provided they are not competitors and neither is active on markets that are upstream or downstream of each other. Not having pre-notification discussions could speed up receipt of clearance from the EC by some two weeks, but in most cases, it is still advisable to factor in some short pre-notification discussions.

Other Changes and Future Changes

The new measures also provide for (1) a revised standard form that should be used when companies want the EC to take jurisdiction over a deal which would otherwise be investigated by Member State competition authorities; and (2) updated standard documents on when a company offers the EC a remedy to enable the EC to clear a deal.

The EC is also considering other possible reforms to the EU Merger Regulation, notably extending its scope to acquisitions of non-controlling minority shareholdings and reforming the system of referral between the EC and Member State competition authorities.

This client alert has been prepared by John Ratliff, Cormac O'Daly and Thomas Jones.

¹ The Short Form can be used in other circumstances, such as to notify the creation of a joint

venture with no activity in the EEA. The new measures do not affect use of the Short Form in these circumstances, but the requirements for notifying the creation of a joint venture with no EEA activity are substantially reduced.

² What constitutes a “small” increase is determined by reference to the Herfindahl-Hirschman Index (HHI), which is a proxy for the level of market concentration before and after an acquisition. If the HHI delta (increase in market concentration level) is below 150, it is possible to use the Short Form. For example, if a company with a 26% market share acquires a competitor with a 2% market share, the delta is 104 and the Short Form in principle could be used, but if the same company acquires a competitor with a 3% market share, the delta is 156 and the Short Form is not available.

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