



EU Simplified procedure for the treatment of certain concentrations

**EU-China Trade Project - Competition Week
Workshop on Simplified Merger Procedure
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Presentations

- Morning session: **Comparison of EU criteria and procedural rules applicable to simplified procedure and 'normal' procedure merger cases**
- Afternoon session: **Pre-notification contacts in simplified cases and the proposed changes to the EU's simplified procedure**



Morning session outline

- 1. Putting things in context:** brief background to merger review at EU level
- 2. Rationale and impact** of simplified procedure
- 3. Criteria for applying the simplified procedure:**
(i) policy choices (ii) current criteria (iii) pitfalls and safeguards
- 4. Procedural rules – comparison of simplified and normal cases:** *(i) key steps and timelines (ii) information requirements (iii) incomplete notification/reverting to normal procedure (iv) simplified merger review process (v) appeals*



1. Putting things in context: Brief background to merger review at EU level

- Concentrations meeting turnover thresholds in EU Merger Regulation
- Notification under the simplified procedure (Short Form CO) or under ‘normal’ procedure (Form CO)
- Procedure in both types of cases: pre-notification contacts, phase I timelines, investigation, decisions
- Merger simplification initiative



2. Rationale and impact of simplified procedure

- **Reasons for having a Simplified Procedure**
 - European Commission's experience in applying the Merger Regulation since 1989
 - Minimising resources spent by the private sector and the Commission on non-problematic mergers



- **Impact of the Simplified Procedure on the Commission:**

- Indispensable instrument to keep the workload in mergers at manageable levels
- Resources are freed to focus on more complex/ problematic cases
- Simplified cases currently represent approximately 60% of the Commission's merger cases.
- Approximately 2,100 short-form decisions adopted since 2000

Simplified v 'normal' cases, some statistics:

| | 2008 – 2010 | | | | | 2011 | | 2012 | |
|-------------------|-------------------------|------|------|---------------|---------------|--------|------|--------|------|
| | Number of phase I cases | | | | % | Number | % | Number | % |
| | 2008 | 2009 | 2010 | 2008- 2010 | 2008- 2010 | | | | |
| Total | 336 | 243 | 271 | 850 | 100% | 312 | 100% | 292 | 100% |
| Normal | 146 | 100 | 128 | 374 | 44% | 121 | 39% | 103 | 35% |
| Simplified | 190 | 143 | 143 | 476 | 56% | 191 | 61% | 170 | 58% |



- **Impact of the Simplified Procedure on stakeholders:**
 - **Parties:** less information requirements, costs, more focused pre-notification, fewer requests for clarification/information, generally quicker clearance
 - **Third parties:** transparent system - Commission may still be informed by third party comments, reduced costs



3. Criteria for applying the simplified procedure

(I) Policy choices in designing the Simplified Procedure

- Objective criteria - hard and fast rules
- Simplified Procedure Notice defines ex-ante criteria/categories of merger cases which normally do not raise competition concerns and can be cleared unconditionally in phase I
- No 'safe-harbour'

(II) Criteria for eligibility for review under the Simplified Procedure

- Current criteria:
 - JVs with no or limited actual or foreseen activities in the EEA
 - Concentrations with no or limited horizontal overlaps (combined market share below 15%) and no or limited vertical relationships (single or combined market share below 25% on upstream and downstream markets).
 - Concentrations involving the shift from joint to sole control
- Merger Simplification Initiative

Categories of cases eligible for simplified procedure

| Basis for simplified procedure | Type of concentration | Reportable markets |
|--|--|--------------------|
| Simplified Procedure Notice point 5(a) | JV only active outside EEA (no effect on markets in EEA) | No |
| 5 (a) | JV active in EEA | No |
| 5 (a) | JV active in EEA | Yes |
| 5 (b) | Merger / acquisition / JV | No |
| 5 (c) | Merger / acquisition / JV | Yes |
| 5 (d) | JV: one existing parent acquiring sole control | No |
| 5 (d) | JV: one existing parent acquiring sole control | Yes |



(III) Pitfalls of the simplified procedure and related safeguards

- Risk - notified case more problematic than initially presented /important information missing
- Safeguards - right to declare the notification incomplete and/or to revert to the normal phase I procedure at any time before the clearance
- Commission will apply the simplified procedure when all the necessary conditions are met *and* provided that no special circumstances render a case unsuitable



- **Simplified Procedure Notice – contains indicative examples of cases which may be exceptionally excluded**

- Market definition / Market shares are difficult to determine
- In such cases: encourage parties in pre-notification to notify under the normal procedure; notification declared incomplete and/or reversion to normal procedure; Examples of past Commission cases



- **When the Simplified Procedure Notice criteria are not met:**
 - Normal notification and merger review procedure
 - If case falls under normal procedure due to narrow miss of market share thresholds - possibility to apply lighter procedures: waivers of certain information requirements in the Full Form CO; limited/no market investigation

4. Procedural rules – comparison of simplified and normal cases

| | Simplified Procedure | Time | Normal Procedure | Time |
|----------------------------------|--|---|--|---|
| Pre-notification contacts | Voluntary / Parties' discretion | Preferably 2 weeks before expected date of notification | Voluntary / Parties' discretion | Preferably 2 weeks before expected date of notification |
| Notification | Short Form | Exact date at parties' discretion | Form CO | Exact date at parties' discretion |
| Member States | Copy of notification sent to MS | Once case is notified | Copy of notification sent to MS | Once case is notified |
| Publication of Notice | Notice of the concentration published in the EU's Official Journal | Once case is notified | Notice of the concentration published in the EU's Official Journal | Once case is notified |
| Other publication | Summary of the transaction published on DG Competition's website | Once case is notified | Summary of the transaction published on DG Competition's website | Once case is notified |

| | Simplified Procedure | Time | Normal Procedure | Time |
|--|-----------------------------|-------------|---|--|
| Meetings parties/third parties; site visits | N/A | N/A | Usually in more complex cases | Usually during pre-notification or beginning of phase I |
| Market Investigation | N/A | N/A | Yes | Normally launched on first working day after notification. Contact with third parties may also take place during pre-notification. |
| State of play meeting | N/A | N/A | To communicate results of market investigation - usually when serious doubts are identified | Post-market investigation |

| | Simplified Procedure | Time | Normal Procedure | Time |
|------------------------------|---|--|---|---|
| Decision | Short-form decision | Within 25 working days but generally within 15-20 working days | Fully reasoned decision | Within 25 working days (possible extension if remedies submitted) |
| Publication of Notice | Notice of the concentration published in the EU's Official Journal | | Notice of the concentration published in the EU's Official Journal | |
| Press | Short notice published on DG Competition's website | | Press release published on DG Competition's website | |
| Appeal | Parties: Within 2 months from notification of decision Third parties: within 2 months from publication in OJ | | Parties: Within 2 months from notification of decision Third parties: within 2 months from publication in OJ | |

- **Timeline for deciding whether a case is suitable for review under the simplified procedure:**
 - Typically compliance with the Simplified Procedure Notice criteria is established in pre-notification – in particular check of plausibility of market definitions/ market shares
 - Right to declare the notification incomplete and/or to revert to the normal phase I procedure at any time before the clearance decision



(II) Notification – Information requirements Short Form CO v Form CO

- Principle guiding design of information requirements
- Short Form CO as a lighter version of the Form CO
 - Section 1 - 4 – standard information requirements for establishing Commission jurisdiction
 - Section 5 - documentation
 - Section 6 - market definition
 - Section 7 - market data
 - Section 8 - cooperative effects of JV
- What information is not required in the Short Form?
- Further streamlining anticipated through the Merger Simplification Initiative



(III) Declaring a notification incomplete and reverting to the normal procedure

- Short Form notification may be treated as incomplete if:
 - (i) conditions for using the Short Form are not met
 - (ii) although these are met notification under Form CO appears necessary
 - (iii) Member State or third party expresses substantiated concerns
 - (iv) contains incorrect or misleading information
- Notification is declared incomplete by a decision
- Examples from past Commission cases



(IV) Merger review process in simplified cases

- During pre-notification and during the review procedure – ensure that criteria and circumstances are established with sufficient clarity
- Substantiated concerns: third party complaints, EU Member States; Examples of past Commission cases
- No market investigation, generally no meetings, no state of play meetings, lighter internal procedures, Short Form Clearance Decision, generally quicker timelines, publication
- Possibility to revoke clearance decision



(V) Appeal of clearance decisions

- All Commission decisions are subject to review
- 2 months from publication of the Notice of the decision in the Official Journal
- If successful all or part of the decision declared void - the Commission must re-examine the concentration
- Very rare for simplified cases: necessary safeguards in place to avert such situations



Afternoon session:

Pre-notification contacts in simplified cases and the proposed changes to the EU's simplified procedure



Outline

1. Pre-Notification in simplified cases:

(i) Rationale

(ii) Duration

2. Merger Simplification Initiative:

(i) Rationale, objectives and benefits

(ii) How further simplification is achieved in the simplified procedure

(iii) Establishing new thresholds and criteria

(iv) Tailoring and streamlining Short Form



1. Pre-notification in simplified cases

(I) Rationale for pre-notification contacts

- Voluntary process - service for stakeholders
- Important phase of simplified procedure cases – crucial jurisdictional matters and criteria/conditions for applicability of simplified procedure checked



(II) Duration of pre-notification phase

- Case-dependent; role of parties
- Commission Best Practices on the handling of merger cases



2. Merger Simplification Initiative

(I) Rationale, objectives and benefits

- The Initiative - making EU merger review more 'stakeholder-friendly'; more efficient also for Commission
- Drawing on experience in applying the Merger Regulation and simplified procedure – Scope for extension of simplified procedure with important impact on Commission resources



- **Benefits for Commission**

- Increase of approximately 10% in total number of simplified cases (approximately 70% of cases anticipated to fall under simplified procedure)
- Resources freed to focus on more complex cases

- **Benefits for stakeholders**

- Benefits for parties: reduction in the preparatory work for notification, more focused pre-notification; reduced costs and fees
- Benefits for third parties – reduced costs but Commission still informed by third party complaints



(II) How further simplification is achieved in the simplified procedure

1. Extending the scope of application the Simplified Procedure Notice:

- Raising the market share threshold criteria for application of the simplified procedure from <15% to <20% for horizontal overlaps and from <25% to <30% for vertical relationships
- Introducing a new category cases - small market share increments (combined market share up to 50% and HHI delta <150)

2. Streamlining and tailoring information in the Short Form CO



(III) Establishing new thresholds and criteria

- In designing the new rules:
 - (i) retain simplicity
 - (ii) respect the substantive rules in Commission Substantive Guidance documents
 - (iii) stay within the limits revealed by the analysis of past case practice
 - (iv) ensure that safeguards are in place



(III) Establishing new thresholds and criteria

- Vertical links – in line with Commission's Substantive Guidance
- Horizontal overlaps – increase of threshold to 20%
- HHI criterion – simple criterion allowing for even more cases to be reviewed under the simplified procedure
- Safe to increase the thresholds/introduce HHI criterion – Risk is minimal
- Always the possibility to revert to the normal procedure



(IV) Tailoring and streamlining Short Form

- Guiding principle
- Information requirements tailored to each case category:
 - Standard information sections
 - JVs: information to analyse cooperative effects of the JV
 - No reportable markets: super-simplified notification
 - Reportable markets: parties' activities, relevant market, plausible alternatives, total size of market, market shares
 - HHI criterion: information to rule out the likelihood of competition problems



Thank you

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