

Europe: The 2023 Simplification Package - Modernization of European Union Merger Control

In brief

From 1 September 2023, new procedural merger control rules apply in the European Union. New notification forms will need to be used. More merging parties will be able to avail themselves of the Simplified Procedure.

On 20 April 2023, the European Commission (the “**Commission**”) adopted a new legislative package including a [new Implementing Regulation](#), a new [Notice on Simplified Procedure](#) and a [Communication on the transmission of documents](#) (the “**Simplification Package**”).

The aim of the Simplification Package, is to simplify the Commission’s merger control procedures with clearer rules and guidance and to reduce the administrative burden on notifying parties and the Commission.

The main changes are:

- Introducing new merger control filing forms (Form CO,¹ Short Form CO,² Form RS³ and Form RM⁴);
- Expanding and clarifying the categories of cases dealt with under the Simplified Procedure;⁵ and
- Introducing new data requirements and facilitating increased digitalization of the merger notification process.

As of 1 September 2023, the Commission will no longer accept new notifications under the old rules and forms, which may delay the closing of transactions currently contemplated.

Key Takeaways

The 2023 Simplification Package expands the number of cases eligible for the Simplified Procedure and optimizes the (digital) transfer of documents.

However, it is questionable whether it will simplify the EU merger control process for cases of substance, as many aspects of the reforms may lead to an additional burden.

Contents

[Key Takeaways](#)

[In more detail](#)

[Notification \(and closure\) after 1 September risks significant delay](#)

¹ The **Form CO** is the official form for standard transaction notifications under the EU Merger Regulation that do not fall under the Simplified Procedure. The new filing form is available [here](#).

² The **Short Form CO** is a simplified version of the Form CO for notification under the Simplified Procedure. The Short Form CO requires less information and evidence than the Form CO and can be used for transactions that are unlikely to raise significant competition concerns in the EU. The new filing form is available [here](#).

³ The **Form RS** is a document that parties to a transaction can submit to the Commission to request a referral of the case to one or more national competition authorities of the EU member states, or to the Commission. The new form is available [here](#).

⁴ The **Form RM** is a document that parties to the transaction must submit to the Commission in relation to submission of Commitments (remedies). The new form is available [here](#).

⁵ The Simplified Procedure was first introduced by the Commission in 2000 for certain categories of mergers deemed unlikely to raise competition concerns. In 2013, the Commission adopted a ‘simplification package’, expanding the categories of simplified cases and reducing the information requirements for simplified merger notifications. The 2023 Simplification Package further amends and modernizes these rules.

- The Commission has a wide catalogue of exclusions which would allow it to review the case under the normal procedure. It is therefore more difficult for companies to predict whether they will actually be able to benefit from the Simplified Procedure (and there may be an increase in cases where notifying parties have to “flip” to a normal Form CO).
- Complex transactions involving companies with diversified global portfolios, different plausible markets, (pipeline) products, and multiple horizontal overlaps or vertical relationships might face significantly more complexity in completing the new Short Form CO or Form CO due to the new table-oriented format and additional information requirements.
- Under the normal procedure, companies are now required to submit data (i) that parties collect and store in the ordinary course of business; and (ii) which could be useful for a quantitative economic analysis, along with the description of the usage of such data in day-to-day activities and the materials prepared / decisions taken on the basis thereof.

It is unknown how pragmatic the Commission will be in enforcing the new Simplification Package, and to what extent the Commission will be willing to accept requests for waivers in respect of information or documentation that is difficult to provide.

Please contact your Baker McKenzie lawyers for more information and assistance in engaging with the Commission.

In more detail

1. Expanding and clarifying the categories of simplified cases

The 2023 Simplification Package:⁶

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| <p>Adds two new vertical categories which can benefit from the Simplified Procedure by default.</p> | <p>Two new vertical categories are introduced where:</p> <ul style="list-style-type: none"> (i) the individual or parties' combined upstream market share is below 30% and the downstream purchasing share⁷ of upstream inputs is below 30%, under all plausible market definitions. (ii) in both upstream and downstream markets the individual or parties' combined market share is below 50%, the HHI delta is below 150 and the smaller company (in terms of market share) is the same in both markets, under all plausible market definitions. |
| <p>Clarifies existing default categories relating to Joint Ventures (“JV”).</p> | <p>Previously, the establishment of a JV was able to benefit from the Simplified Procedure if the JV's (i) current turnover and (ii) value of asset transfers were less than EUR 100 million in the EEA. Under the new rules, it will also be required that the 'expected' turnover and 'planned' asset transfers are not anticipated to significantly surpass EUR 100 million in the EEA within the following three years.</p> |
| <p>Introduces flexibility clauses giving the Commission more leeway in applying the Simplified Procedure.</p> | <p>At the request of the notifying parties, the Commission may review transactions under the Simplified Procedure, even if they are not within any of the simplified treatment categories:</p> <ul style="list-style-type: none"> • For horizontal overlaps, where the parties' combined market share are below 25%; • For vertical relationships, where the individual or the parties' combined upstream or downstream market shares are lower than 35%, or are lower than 50% in one market and below 10% in all the other vertically related markets; • For JVs the annual current turnover of the JV, and the turnover of the contributed activities is less than EUR 150 million in the EEA; and the total value of assets transfers to the JV in the EEA planned at the time of notification is less than EUR 150 million. <p>The Commission clarifies that different categories may be combined, including with a flexibility clause, for a transaction to be eligible for the Simplified Procedure.⁸ In practice, notifying parties may request the application of the flexibility clause for certain markets, provided that all the remaining markets related to the Transaction fulfil the conditions for the Simplified Procedure.</p> |

⁶ See Annex I below for a summary of the transactions covered by the Simplification Package.

⁷ A company's purchasing share is calculated by dividing (i) the volume or value of the company's purchases of products in the upstream market with (ii) the total size of the upstream market (in terms of volume or value).

⁸ See: Commission, [Merger Control in the EU – Further simplification of procedures - Q&A](#).

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| Codifies the 'super-simplified procedure'. | <p>The super-simplified procedure allows parties to notify directly via the Short Form CO without the need to engage in pre-notification discussion with the Commission.⁹ This applies when the transaction:</p> <ul style="list-style-type: none"> (i) does not give rise to any horizontal overlaps or vertical relationships; or (ii) results in the acquisition of joint control over a non-EEA JV.¹⁰ <p>Under the procedure, parties can expect an approval in less than 25 working days, this is because those concentrations typically require less investigation. Parties will also not be required to fill in certain sections of the Short Form CO.¹¹ This is the Commission's current practice, but has now been codified in the Notice of Simplified Procedure¹² and the Short Form CO.¹³</p> |
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2. Increased discretion for the Commission to review concentrations under the normal procedure

The 2023 Simplification Package adds two new examples of circumstances to the non-exhaustive list of 'Safeguards and Exclusions' that enables the Commission to exclude a concentration from the Simplified Procedure and force the notifying parties to use the normal procedure¹⁴, in particular:

- **Significant non-controlling shareholdings.** The Commission can opt to apply the normal procedure to concentrations where either (i) one party to the concentration has a significant non-controlling shareholdings¹⁵ in a company active on the same market(s) as the target or in a vertically related market(s), or (ii) a competitor of one party to the concentration holds significant non-controlling shareholdings in any of the other parties to the concentration.
- **Competitively valuable assets.** The Commission can also opt to apply the normal procedure to concentrations involving any combination of competitively valuable assets, such as raw materials, IP rights, infrastructure, a significant user base or commercially valuable data inventories, even if there are no overlaps between the parties.

The 2023 Simplified Package also introduces a list of 'special circumstances' where the Commission is less likely to apply the Simplified Procedure. The list contains scenarios such as a highly concentrated market (with fewer than three competitors apart from the parties), and the elimination of an important actual or potential competitive force by the transaction.

While the Simplification Package aims to expand the number of cases eligible for the Simplified Procedure, companies will not have certainty as to whether they will actually benefit from it.

For example:

- The open definition of 'competitively valuable assets', which are involved in any transaction today (e.g., IP rights, infrastructure, significant user base, commercially valuable data inventories, etc.), enables the Commission to exclude any concentration from the Simplified Procedure.
- The 'significant non-controlling shareholdings' exclusion will likely require private equity funds to verify horizontal and vertical links between all their portfolio companies and the target even if the latter bears only a marginal market share increment.

3. New revised filing forms

The Simplification Package introduces new filing forms for all procedures (Form CO, Short Form CO as well as forms for referral requests and remedy proposals), with a greater emphasis on tick-the-box responses and pre-designed tables, instead of containing open text questions. The rationale behind the new format is to further streamline the submission and review of

⁹ However, parties are still requested to submit a Case Team Allocation Request (**CTAR**) at least one week before the expected date of notification under the super simplified procedure.

Under the procedure, parties can expect an approval in less than 25 working days. The review period will be shorter than under the normal Simplified Procedure because there are no pre-notification contacts that could significantly delay the submission date and the start of the review period of 25 working days. Parties will also not be required to fill in section 8 (horizontal overlaps), 9 (vertical relationships), and 11 (safeguards and exclusions) of the Short Form CO.

¹⁰ I.e., the JV will not have current / expected EEA turnover (over three years) and no planned assets transfers in EEA at time of notification.

¹¹ This would be section 8 (horizontal overlaps), section 9 (vertical relationships), and section 11 (safeguards and exclusions) of the Short Form CO.

¹² Commission, [Notice on Simplified Procedure](#), para. 25 and 26.

¹³ Commission, Short Form CO, section 7 (a) and (b)

¹⁴ Please see below Annex 1 for other examples of 'Safeguards and Exclusions' under the revised Forms. See also: Commission, [Notice on Simplified Procedure](#), section C 'Safeguards and exclusions', p. 6 - 9.

¹⁵ I.e., shareholdings of above 10% which do not grant control over the company.

mergers. However, it allows for less leeway of companies and their legal advisors to present information in a narrative format as they see fit – thereby risking a loss of advocacy and meaning.

The new filing forms include three types of tables:

- **Tick-the-box tables:** parties must tick the box most corresponding to the concentration in a multiple-choice manner. For example, the Short Form CO makes uses tick-the-box tables to: identify the legal basis of the notification; the type of concentration being notified; whether turnover exceeds a certain threshold; type of control; on which basis a JV is considered to be fully-functional; or which simplified category the concentration falls under.
- **Boilerplate tables:** parties must provide the information necessary for the Commission to have a general understanding of the transaction, the parties and their products / services in a pre-defined, but limiting format.
- **Complex market-related tables:** parties must provide information on plausible market definitions, horizontal overlaps / other (e.g., vertical) relationships between the parties and competitors, as well as sales figures and market shares in a pre-defined table format. For full-form filings under the normal procedure, this means that extensive amounts of market information across multiple years will need to be provided in a somewhat straight-jacketed fashion. The tables also include new requests for information on pipeline products of the parties and their competitors, which needs to be provided by default if there are horizontal overlaps or vertical relationships for such products.

While the new filing forms with increased use of tables would arguably simplify notification for the simpler and more traditional transactions, it is unclear whether the same would be true for the more complex and unconventional transactions with different or nuanced potential market definitions, (pipeline) products, and relationships.

While information may be included in annexes, all key information must be included in the body of the notification. The additional burden will be on the companies to fit the information / data within the constraints of the new Forms. There will also be challenges to ensure that important advocacy can still be fully deployed in a harmonious, coherent and logical way within the confines of the new notification forms.

4. Increased burden due to new information and data requirements

The new filings forms introduce new information requirements. These include the submission of a market share methodology note in the Short Form CO; and the completion of a 'Safeguards and Exclusions' table in the Form CO for all markets that could benefit from the Simplified Procedure.

Under the revised normal procedure, parties will now be required to submit all data (i) that they collect and store in the ordinary course of business and (ii) which could be useful for a quantitative economic analysis. Parties will also need to describe the usage of such data in day-to-day activities and the materials prepared / decisions taken on the basis thereof.

The new information and data requirements will provide the Commission with more data on how parties to the concentration use the submitted data in the ordinary course of business. While this might result in more holistic economic analysis by the Commission, this will increase the burden.

5. Keeping up with digitalization

The Simplification Package introduces digitalization changes:

- Electronic notifications via eTrustEx will be the default way of submitting documents to the Commission unless documents are over 10 GB. The latter will be hand delivered or sent by registered post on hard disk drives.
- All electronically submitted documents must be (i) signed using only Qualified Electronic Signature,¹⁶ (ii) in PDF or XLSX format, (iii) searchable,¹⁷ and (iv) unredacted and intact with all underlying data, formulas, and algorithms. The only exception is internal documents submitted pursuant to Section 5.4. of the Form CO¹⁸ which must be submitted in native format.

The requirement for the parties to submit all Section 5.4. documents in the native format will lead to larger size submissions to the Commission and enable the latter to read the documents' metadata including true authors, and time of creation / modification of the document.

¹⁶ Only notifications, reasoned submissions, comments on the Commission's objections, commitments offered by the undertakings concerned and the Form RM should be electronically signed with the Qualified Electronic Signature.

¹⁷ Documents in PDF shall be either digitally created PDFs or scanned for optical character recognition (OCR).

¹⁸ Section 5.4 of the Form CO relates to documents requested by the Commission concerning e.g., minutes of meetings discussing the transaction, documents assessing or analyzing the transaction, and document assessing the affected markets.

Notification (and closure) after 1 September 2023 risks significant delay

The Simplification Package enters into force on 1 September 2023. Transactions that have not been formally notified before 1 September 2023 will need to be notified on the new filing forms. If parties have started preparing draft filings on the basis of the current notification forms, they will need to reformat their draft notification to fit the new format and rules.

There will be delays in the notification of mergers at the EU level, due to the need to adapt to the new filing forms and additional information requirements.

Given the lack of practical experience with the new filing forms both at the Commission and for parties and their legal advisors, pre-notification discussions can be expected to take longer than previously, and in particular in the first few months after entry into force of the new package.

In addition, there will from the start be a period of learning when best practices for all sides emerge. The Commission may be reluctant to accept waivers or deviations from the new forms. In addition, the increase in data and documents that will need to be submitted to the Commission in particular under the normal procedure will likely contribute to delays and lead to longer investigations by the Commission.

Making sure that you have properly planned your regulatory timetable, including for appropriate internal preparation and review of the relevant forms (and the information and documentation required by them) will be essential to ensure that any potential delays are kept to a minimum. Proactively engaging with your merger control counsel to plan ahead and ensure your deal timetable is maintained will be essential.

Keywords

2023 - EU Merger Control - European Commission - Commission – EC - Modernization – Simplification Package – Notification - Form CO – Short Form CO – EC - Merger Filings – Merger Control - Digitalization.

Annex I: Summary of the transactions covered by the Simplification Package

| Simplified Package: | Transactions Covered: | Key Points: |
|---|---|---|
| <p>New: Codification of the 'super simplified procedure'</p> | <p>JV with no current / expected EEA turnover and no planned assets transfers in EEA at time of notification</p> <hr/> <p>No horizontal overlaps and no vertical relationships: Merging entities do not operate in the same market or in markets that are upstream or downstream to each other.</p> | <ul style="list-style-type: none"> Allows companies to notify directly via the Short Form CO without the need to engage in pre-notification discussion with the case team. There is no assurance for parties that there is application of the super-simplified procedure. The CTAR must be submitted at least 1 week before the expected date of notification under the 'super-simplified' procedure. |
| <p>Simplified Procedure <i>Different categories may be combined, including with a flexibility clause.</i></p> | <p>JVs with negligible activities in the EEA: Current / expected foreseen turnover and value of any (planned) asset transfers of JV in the EEA is less than EUR 100 million.</p> <hr/> <p>A party acquires sole control of an entity over which it already has joint control.</p> <hr/> <p>Vertical overlaps: Individual or combined market shares < 30% on the upstream / downstream markets.</p> <hr/> <p>Horizontal overlaps: Combined market share < 20%.</p> <hr/> <p>Horizontal overlaps - Combined market share < 50% and the HHI delta is < 150 under all plausible market definitions.</p> <hr/> <p>New: Vertical overlaps - Individual or combined upstream market shares < 30% and the parties active in the downstream market hold a purchasing share of upstream inputs < 30% under all plausible market definitions.</p> <hr/> <p>New: Vertical overlaps - Individual or combined upstream and downstream market shares < 50%, the HHI delta in both markets is < 150, and the smaller undertaking (in terms of market share) is the same in the upstream and downstream markets, under all plausible market definitions.</p> | <ul style="list-style-type: none"> New: The Commission will now look not only at current turnover, but also at expected turnover (over the next three years), which must not be expected to significantly surpass EUR 100 million in the EEA within the following three years. New: The value of any asset transfers now includes assets that the parties plan to contribute to the JV at the time of notification (regardless of the date it will be transferred), in addition to the assets actually transferred. <hr/> <p>No changes - category remains the same.</p> <hr/> <ul style="list-style-type: none"> Benefits from the Simplified Procedure by default. Limit on the upstream inputs, but no limit on the downstream. <hr/> <p>Benefits from the Simplified Procedure by default.</p> |
| <p>New: Flexibility clauses</p> | <p>For horizontal overlaps: The combined market share is 20 - 25%.</p> <hr/> <p>For vertical relationships: The individual or combined upstream or downstream market shares are 30 - 35%.</p> <hr/> <p>For vertical relationships: where the individual or combined market shares are < 50% in one market and < 10% in the vertically related market.</p> <hr/> <p>For JVs with current / expected turnover and value of any (planned) asset transfers between is less than EUR 150 million in the EEA</p> | <ul style="list-style-type: none"> Potential application of the Simplified Procedure to transactions that do not fall within the standard Simplified Procedure categories. Flexibility clauses are at the discretion of the Commission (i.e., it is not a default situation), and must be requested by the notifying parties. |
| <p>Exclusions and safeguards</p> | <p>New: Significant non-controlling shareholdings - Significant non-controlling shareholdings (i.e. shareholdings of above 10% which do not grant control) held by one party in a company with horizontal or vertical overlaps with the target or in a vertically related market.</p> <p>New: Competitively valuable assets - This would be any combination of competitively valuable assets, such as raw materials, IP rights, infrastructure, a significant user base or commercially valuable data inventories, even if there are no overlaps between the parties.</p> | <ul style="list-style-type: none"> Expansion of non-exhaustive list of circumstances in which the Commission may exercise its discretion to exclude the Simplified Procedure (or to refuse to apply the flexibility clause) and investigate under the normal procedure. Other examples of categories listed in the Short Form CO and Form CO are: (i) the parties' competitors hold a significant non-controlling interest in one of the undertakings concerned; (ii) the parties are active in closely neighbouring markets, where one of them has a 30% market share; (iii) there will remain |

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| | | <p>fewer than three competitors with market shares above 5%; (iv) market share thresholds are exceeded in terms of capacity; (v) the parties are new entrants in overlapping markets; (vi) the parties are important innovators in overlapping markets or introduced an important pipeline product within the last 5 years; (vi) there is an overlaps in pipeline-to-pipeline or pipeline-to marketed products; (vii) there are plans to expand in an overlapping or vertically related market; (viii) there is a market share above 30% in any of the levels of a production chain; (ix) the JV's turnover is expected to significantly surpass EUR 100 million or EUR 150 million in the EEA within the next three years.</p> |
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