

Revision of Merger Implementing Regulation, its Annexes and Revision of the Commission Notice on Simplified Procedure

Explanatory note

I. Introduction

EU merger control aims to ensure that major corporate reorganisations (“concentrations”)¹ do not result in lasting damage to competition by significantly impeding effective competition in the internal market or in a substantial part of it. The EU Merger Regulation² contains the main rules for the assessment of concentrations. Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing the EU Merger Regulation covers procedural issues of EU merger control (the “Merger Implementing Regulation”).³

Among the concentrations that have an EU dimension and are notified to the Commission each year, ~93% are found not to raise competition concerns and receive unconditional clearance.⁴ Against this background, the Commission has sought over the years to (i) focus its resources on cases that could potentially raise competition concerns and (ii) reduce (where possible) the administrative burden involved in merger reviews – but without impairing effective enforcement.

In 2000, the Commission introduced a simplified procedure for categories of merger cases deemed from the outset not to raise competition concerns. In these cases, notifying parties are required to provide less information to the Commission (notably through the use of a shorter notification form), and the Commission does not conduct a comprehensive market investigation, which also results in less information being required from third parties. Such procedures are normally completed faster.⁵

In 2013, the Commission adopted a number of measures (the “2013 simplification package”) aimed principally at extending the categories of simplified cases and at reducing the information requirements for merger notifications.⁶

In 2016, the Commission launched an evaluation of procedural and jurisdictional aspects of EU merger control (the “Evaluation”).⁷

¹ For a definition of concentrations in EU merger control, see Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1 (the “EU Merger Regulation”).

² The EU Merger Regulation replaced Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1.

³ OJ L 133, 30.04.2004, p. 1. The Merger Implementing Regulation replaced Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89, OJ L 61, 02.03.1998, p. 1.

⁴ In 1990-2020, the Commission concluded that concentrations may significantly impede effective competition on average in 7.14% of all notified mergers annually.

⁵ Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89, OJ C 217, 29.07.2000, p. 32.

⁶ The 2013 simplification package included the Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 336, 14.12.2013, p. 1) and Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p. 6) (the “Notice on Simplified Procedure”).

In March 2021, the Commission published a summary of the results of the Evaluation.⁸ The Evaluation showed that the 2013 simplification package better focussed the Commission's resources on the most complicated cases and reduced administrative burden, without negatively affecting the effectiveness of EU merger control. As a result, the 2013 simplification package has yielded significant cost savings for merging parties and the Commission. The Evaluation also suggested that there are additional cases which are typically unproblematic but currently are not captured by the simplified procedure and that information requirements in notifications may be too broad for certain concentrations. This creates unnecessary burden for the Commission and the parties involved in a merger and also leads to delays. At the same time, the Evaluation indicated that more clarity is needed on the circumstances when a case technically qualifying for simplified treatment should be reviewed as non-simplified by the Commission.

In parallel, also in March 2021, the Commission launched an impact assessment to explore different options for the revision of the Merger Implementing Regulation and the Notice on the Simplified Procedure.⁹ During this impact assessment phase, the Commission gathered evidence through (i) an open public consultation (26 March 2021-18 June 2021) and consultations of stakeholders (6 May 2022-3 June 2022; 5 October 2022-19 October 2022); (ii) discussions with stakeholders and national competition authorities in the EEA; and (iii) internal research and consultations to assess the risks and benefits of different options.

Based on this evidence, the Commission prepared a draft revised Merger Implementing Regulation; a draft revised Notice on Simplified Procedure. These draft documents take into account all the evidence collected so far as part of the Commission's impact assessment.

II. Overview and explanation of main changes in the draft documents

The remainder of this note summarises and explains the main changes in the final draft Merger Implementing Regulation (and its annexes) and in the final draft Notice on Simplified Procedure. It is structured as follows. Section II.A discusses the Commission's proposal to expand and clarify the categories of cases that could benefit from simplified treatment. Sections II.B and II.C respectively look into the Commission's proposals to streamline the review of simplified and non-simplified cases. Section II.D focuses on the proposals regarding the transmission of documents to the Commission (including notifications).

II.A. Expanding and clarifying the categories of simplified cases

⁷ Roadmap on the evaluation of procedural and jurisdictional aspects of EU merger control, available at https://ec.europa.eu/smart-regulation/roadmaps/docs/2017_comp_003_evaluation.pdf.

⁸ Commission Staff Working Document, "Evaluation of procedural and jurisdictional aspects of EU merger control", 26.03.2021, SWD (2021) 66 final.

⁹ "Revision of Commission Regulation (EC) No 802/2004 implementing Council Regulation No 139/2004 on the control of concentrations between undertakings and of the Commission Notice on a simplified procedure for treatment of certain concentrations", Ref. Ares(2021)2139418 - 26/03/2021, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12957-Merger-control-in-the-EU-further-simplification-of-procedures_en. The general objective pursued with this impact assessment is to improve the EU merger control procedures which aim at preventing lasting damage to competition in the internal market stemming from anti-competitive mergers. The specific objectives are to (i) better target the merger review process, allowing the Commission to focus its investigations on the cases that merit a more detailed review and (ii) reduce the administrative costs and burdens of the merger review process.

The Evaluation showed that there may be some, albeit potentially limited, scope for further expansion of the categories of simplified cases or for introducing additional flexibility to the review of cases under the simplified procedure that do not fall under any of the current categories of simplified cases but where no competition concerns are likely. The Evaluation also suggested clarifying the scenarios when the Commission can review a concentration under the non-simplified procedure although the case would technically qualify for simplified treatment.

Against this background and building on the evidence collected, the Commission proposes the following changes in the Notice on Simplified Procedure.

First, the Commission proposes to revise point 5 of the Notice on Simplified Procedure to identify two new categories of cases that can benefit from simplified treatment, notably cases where:

- a. Under all plausible market definitions, the individual or combined upstream market share of the parties to the concentration is below 30% and their combined purchasing share is below 30%; and
- b. Under all plausible market definitions, the individual or combined upstream and downstream market shares of the parties to the concentration are below 50% and the HHI delta is below 150 and the smaller undertaking in terms of market share is the same in the upstream and downstream markets.

Second, the Commission proposes to introduce flexibility clauses in the draft revised Notice on Simplified Procedure (points 8 and 9). These would allow the Commission to treat under the simplified procedure concentrations which *a priori* do not fall under any of the simplified treatment categories (set out in point 5). The draft revised Notice on Simplified Procedure includes:

- a. A flexibility clause for horizontal overlaps where the combined market shares of the parties to the concentration is 20-25% and for vertical relationships where the individual or combined upstream and downstream market shares of the parties are 30-35%;
- b. A flexibility clause for joint ventures with turnover and assets between EUR 100 and 150 million in the EEA; and
- c. A flexibility clause for vertical relationships where the individual or combined market shares of the parties to the concentration do not exceed 50% in one market and 10% in the other vertically related market.

Third, the Commission proposes to revise the Notice on Simplified Procedure to include a clearer and more detailed list of the circumstances when a concentration that technically qualifies for simplified treatment has to be investigated as a non-simplified case.¹⁰

II.B. Streamlining the review of simplified cases

The Evaluation showed that following the 2013 simplification package, there has been a general reduction in the information requirements in a number of cases and the duration of pre-notification discussions decreased, in particular for simplified cases. However, there may be room to further streamline the information requirements in simplified cases and to notify more of these cases without pre-notification.

¹⁰ Points 12ff. of the draft revised Notice on Simplified Procedure.

Against this background and building on the evidence collected, the Commission proposes to replace the Short Form CO (in Annex II of the Merger Implementing Regulation) with a new Short Form CO in a “tick-the-box format”.

Contrary to the Short Form CO which contains mostly open text questions, the new Short Form CO in a “tick-the-box format” includes primarily multiple choice questions and tables that must be completed by the notifying parties with words and figures. Notification of simplified cases would thus become faster and less burdensome for the parties to the concentration and for the Commission. In more detail:

- a. The new Short Form CO in a “tick-the-box format” streamlines the Commission’s questions regarding jurisdictional assessment of the concentration. While Section 3 of the Short Form CO contains open text questions, Section 6 of the new Short Form CO in a “tick-the-box format” includes a list of statements on the basic facts relevant for the jurisdictional assessment of the concentration. Notifying parties must select one or more of these statements.
- b. The new Short Form CO in a “tick-the-box format” also streamlines the Commission’s questions regarding the substantive assessment of the concentration. The Short Form CO includes Sections 6 and 7,¹¹ 8,¹² and 9¹³ all requiring open text replies. Instead, the new Short Form CO in a “tick-the-box format” contains:
 - i. Section 7 on the category of simplified treatment where the concentration belongs. In this section, the notifying parties must select one or more categories (by ticking the relevant box);
 - ii. Sections 8-10 on horizontal overlaps and vertical relationships. These sections contain mostly tables where the notifying parties need to complete words (e.g., names of competitors) or figures (e.g., market shares); and
 - iii. Section 11 on “safeguards and exclusions”. This concerns the circumstances under which the Commission could review under the non-simplified procedure a case which technically qualifies for simplified treatment. The section includes a list of the relevant safeguards and exclusions and the notifying parties must indicate if any of them are applicable by selecting “Yes” or “No”.

Finally, the Commission proposes to revise the Notice on Simplified Procedure to introduce a new category of cases that can benefit from “super-simplified” treatment. This category includes concentrations which fall under point 5(a) of the draft revised Notice on Simplified Procedure (“extra-EEA joint ventures”) and all cases where there are no horizontal overlaps or non-horizontal relationships between the merging parties’ activities. The parties must notify these concentrations by ticking the relevant boxes of the Tick-the-box Form (Section 7). Parties are invited to notify these concentrations directly without any pre-notification contacts.

II.C. Streamlining the review of non-simplified cases

Based on the experience gained by the Commission in its enforcement practice over the years and the results of the Evaluation, it is clear that some information requirements in non-simplified cases

¹¹ Regarding market information for cases where the concentration gives rise to horizontal overlaps or vertical relationships.

¹² Regarding market information for cases where the concentration does not give rise to horizontal overlaps or vertical relationships.

¹³ Regarding the cooperative effects of joint ventures.

could be streamlined. In particular, it would be appropriate to introduce modifications to the structure of the Form CO and to reduce information requirements.

Against this background and building on the evidence collected in the context of the impact assessment, the Commission proposes to revise the Form CO (in Annex I of the Merger Implementing Regulation) as follows.¹⁴

First, the Commission proposes to provide clear instructions to notifying parties who plan to request waivers for certain Sections or sub-Sections of the Form CO.¹⁵ The Commission also proposes to identify the parts of the Form CO which are particularly suitable for a waiver request¹⁶ (including several questions from Section 8 of the current Form CO).

Second, the Commission proposes to eliminate altogether certain information requirements in Section 8 of the current Form CO, concerning “Cooperative Agreements”, “Trade between Member States and imports from outside the EEA”, and “Trade associations”.

Third, the Commission proposes limit the information requirements for markets that benefit from the flexibility clauses in point 8 of the draft revised Notice on Simplified Procedure, in order to streamline the relevant sections of the current Form CO, where these markets are considered affected and the applicable information requirements are much more extensive. This reduces the number of markets to be filled in in the tables requiring (market share) information on affected markets¹⁷ (where the activities of the parties give rise to a horizontal overlap or a vertical relationship).

Fourth, the Commission proposes to include tables requiring information on horizontal overlaps and vertical relationships involving pipeline products. With these tables, the Commission seeks to homogenise information requests from different case teams on pipeline products and formalise the practice of notifying parties to provide detailed information on pipeline products, in particular in sectors where innovation is a key parameter of competition.

II.D. Introducing electronic notifications

Due to exceptional measures taken in the context of Covid-19, the Commission temporarily has been accepting, and in fact encouraging, notifications in digital format since May 2020. Based on this experience and to promote the Commission’s digital transformation, it is appropriate to establish (permanent) rules on digital transmissions of documents in the context of EU merger control.

Against this background and building on the evidence collected in the context of the impact assessment, the Commission proposes to revise the Merger Implementing Regulation to establish that going forward, transmission of documents to and from the Commission shall take place in principle through digital means (Article 21 of the revised Merger Implementing Regulation). This includes notifications.¹⁸

¹⁴ The Commission also proposes to revise the Form RS (in Annex III of the Merger Implementing Regulation) and the Form RM (in Annex IV of the Merger Implementing Regulation).

¹⁵ The Commission proposes to include similar instructions in the revised draft Form RS.

¹⁶ Sub-Sections 3.4, 3.5, 3.6, and 3.7 and Section 10 of this Form CO.

¹⁷ The Commission proposes to include similar tables in the revised draft Form RS.

¹⁸ A fall-back mechanism is also foreseen whereby documents can be transmitted to the Commission’s Directorate General for Competition by post or by means of hand delivery (in exceptional circumstances and for business continuity reasons).