Authority for Consumers & Markets

Muzenstraat 41
2511 WB The Hague
+31 (0)70 722 20 00
www.acm.nl

Non confidential

European Commission
Directorate-General for Competition
Unit A.2. – Merger Case Support and Policy
By e-mail: COMP-SIMPLIFICATION_IMPACT_ASSESSMENT@ec.europa.eu

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Your reference	: HT.6038
Our reference	: ACM/UITNZP/001452
Contact person	: Stefan Haasbeek | Stefan.Haasbeek@acm.nl | 070 722 2175
Subject	: Reaction ACM on consultation merger control | further simplification of procedures

Dear Julia Brockhoff,

On 6 May 2022, the European Commission (hereinafter: Commission) launched a public consultation on a draft revised Merger Implementing Regulation and a draft revised Notice on Simplified Procedure. In this consultation the Commission proposes to expand and clarify the categories of cases that could benefit from simplified treatment. Additionally, the Commission proposes to streamline the review of simplified and non-simplified cases. The Commission also proposes some changes regarding the transmission of documents to the Commission (including notifications).

With this letter the Netherlands Authority for Consumers and Markets (hereinafter: ACM) would like to provide feedback on this consultation. In general the ACM supports and welcomes the proposed changes to the Merger Implementing Regulation and the Notice on Simplified Procedure. The ACM supports that the Commission constantly is looking to prevent any unnecessary burden to parties (and the Commission) involved in a merger and to keep on clarifying circumstances when a case (technically qualifying for simplified treatment) should be reviewed as non-simplified by the Commission.

Background
The ACM understands that the Evaluation[1] showed that there may be some 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.

Main proposals
In this section the ACM describes in more detail the main proposals of the Commission. The ACM will – were needed – provide a response to the proposals.

<u>Expanding scope of simplified procedure</u>
As the ACM understands the Commission has made some proposals to expand the scope of their simplified procedure. The Commission identifies two new categories of cases that can benefit from simplified treatment, when they involve vertical relationships. Under all plausible market definitions the individual or combined upstream market share of the parties to the concentration is (i) below 30% and their combined

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

purchasing share is below 30%, and (ii) 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.

The Commission also proposes to introduce so-called flexibility clauses in the draft revised Notice on Simplified Procedure. For example, a flexibility clause for horizontal overlaps where the combined market share 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%. The Commission also introduces a flexibility clause for joint ventures with turnover and assets between EUR 100 and 150 million in the EEA, and 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 market. These clauses would allow the Commission to treat under the simplified procedure concentrations which *a priori* do not fall under any of the simplified treatment categories.

Additionally 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.

The ACM recognizes that – as an authority – you frequently have to evaluate the process for merger cases to look whether the process (i.e. simplified procedures) creates unnecessary burden to an authority and merging parties and may lead to delays. On different occasions the ACM has evaluated their merger procedure on cases deemed from the outset not to raise competition concerns. Previously, the ACM for example could only abbreviate a decision if the joint market share of the merging parties in a horizontal market relationship did not exceed 25% and the market share of the parties in a vertical relationship did not exceed 30%. For several years now the ACM can shorten more merger decisions - without providing detailed reasons - for which the market shares of the merging companies no longer serve as a criterion. This change contributed to an even more efficient use of the capacity available at the ACM. In addition, it limits the burden on companies. For example, the ACM no longer needs to consult with the companies involved about the question which information in the decision is of a confidential nature and which should be omitted from the public version.

In light of the above mentioned the ACM supports the proposed changes of the Commission to add new categories in vertical cases and the introduction of flexibility clauses. However, the ACM is of the opinion that certain cases which might fall within the flexibility clauses (i.e. asymmetric cases: the possibility for the merging parties to leverage their relatively high market share in market A to strengthen their relatively small market share in market B) could still be appropriate to assess under a non-simplified procedure. The ACM therefore also welcomes the clearer and more detailed list of circumstances when a concentration that technically qualifies for simplified procedure treatment has to be investigated as a non-simplified case.

<u>Streamlining the review of (non)-simplified cases</u>
The Commission introduces with this consultation a revised Short Form CO which contains primarily multiple choice questions and tables that must be completed with words and figures. The Commission also introduces a new category of cases that can benefit from so-called “super-simplified” treatment. In certain cases the notifying parties only have to tick the relevant boxes of the draft revised Short Form CO without having to complete certain sections of this form.

The ACM also understands that, as a result of the Evaluation, it would be appropriate to introduce modifications to the structure of the Form CO and to reduce information requirements. Such modifications includes i.e. instructions for waiver requests, including tables requiring information on horizontal overlap and vertical relationships involving pipeline products and eliminating certain information concerning Trades between Member States and imports from outside the EEA.

In the Netherlands the notifying parties have to fill in for each notifiable merger a notification form. The ACM has a form for Phase 1 cases and a separate form for Phase 2 cases. The ACM does not have shorter

notification forms available. However, the ACM always advices the merging parties to discuss with the ACM for a (license) application which information is necessary and which information does not have to be provided.[2] The ACM can understand the goal of the Commission to revise the current Short Form CO with less open text questions and more multiple choice questions and tables. The ACM sees this development as a way forward, however the Commission has to bear in mind that there have to be enough possibilities for the merging parties to give a reasoned submission on certain questions.

Introducing electronic notifications by default

The Commission proposes to establish transmission of documents to and from the Commission shall take place in principle through digital means, including notifications.

On 6th October 2021 the ACM published its new working method in merger control cases. One of the updates in this document is that all notifications (Phase 1 and Phase 2) can now be submitted via email and its digital filesharing system.[3] In the case of digital transmission, it is not necessary to send a physical copy. The ACM therefore supports the proposal of the Commission to introduce an electronic notification system by default.

Questions?

If you have any further questions relating to the information requested, please do not hesitate to contact Stefan Haasbeek; phone number +31 70 722 2175, e-mail stefan.haasbeek@acm.nl.

On behalf of the Netherlands Authority for Consumers an Markets,

Michiel Denkers
Director Competition Department

[2] See working method in merger control cases, (De ACM publiceert de nieuwe werkwijze bij concentratiezaken), paragraph 5.5.2.
[3] See, working method in merger control cases, paragraph 5.2.