BDI

POSITION | COMPETITION | MERGER CONTROL

European Merger Control

Revision of procedural aspects
(Translation)

15 June 2022

Introduction

On 6 May 2022, the European Commission published its drafts for a revised Merger Implementing Regulation and a revised Notice on the Simplified Procedure in Merger Control. The accompanying forms (Form CO, Short Form CO, etc.) have also been revised. The aim of the initiative is to streamline merger control in cases that are not likely to raise competition concerns and are processed under the simplified procedure. In addition, the Commission also announces a streamlining of the regular procedure.

The Federation of German Industries (BDI) welcomes the Commission's initiative to reform the merger control procedures, which are often lengthy and costly for companies. There is an urgent need to reduce the excessive information and document requests to a reasonable level that is manageable for all parties involved and to shorten the procedures - especially the pre-notification phase - at least in uncomplicated cases. The impression often arises that information is requested "pro forma", although it cannot contribute to the actual competitive examination in the specific case or is not taken into consideration. Often, the requested market data is not directly available to the companies, but must be individually determined or estimated, which leads to considerable personnel and time expenditure.

With regard to requests for information, the case team should respect the principle of proportionality and also be given the necessary authority and support within its own hierarchy to request only the information relevant to the decision, depending on the case. It should be ensured that questions are clear, specific and tailored to the party in question. Requests for information should - as far as possible - be summarised and consolidated. Greater flexibility on the part of the case team in this regard would also contribute to a significant streamlining of the pre-notification process.

BDI would also be in favour of strengthening the "checks and balances" within the Commission, for example by creating a separate team to prepare the decision. In addition, the Commission could, depending on the individual case, focus more on global competition from non-European companies, extend the timeline for reviewing any anticipated potential competition and take greater consideration of efficiency aspects.

The European Commission's proposals submitted for consultation contain many good ideas for actual procedural simplifications. A streamlining of the notification forms through "tick the box" options, the

expansion of the categories of cases to be examined under the simplified procedure or the introduction of a "super-simplified procedure" without pre-notification are welcomed by companies. At the same time, however, the Commission has failed to introduce simplifications in those areas that entail a particularly high burden for companies; this applies in particular to mergers that do not fall under the simplified procedure. The burden imposed on companies in these mergers often no longer complies with the principle of proportionality. For example, the requirement to submit all plausible alternative market definitions as well as the corresponding market data should be deleted or at least significantly reduced. In other places, the Commission has even increased the information obligations of the companies, for example regarding information about pipeline products. In BDI's view, improvements are still necessary here before the final adoption of the documents.

Expanding and clarifying the categories of simplified cases

The extension of the scope of application of the simplified procedure by the inclusion of two further categories and the introduction of flexibility clauses, as proposed by the Commission, is welcomed. The discretionary decision to use the flexibility clauses should lie with the competent case team. However, it should also be ensured that the Commission's examination of the conditions for the use of the flexibility clause does not in practice lead to a significant extension of the pre-notification phase.

The Commission has revised the chapter on safeguards and exclusions in the Notice on the Simplified Procedure and in the Short Form CO. It is helpful that the Commission wants to give companies better explanations on the question of when, in exceptional cases, a proposed concentration that could fall under the simplified procedure will nevertheless be examined under the standard procedure. However, the case groups mentioned in Section 11 of the Short Form CO are too broad and also contain many ambiguities.

For example, the question arises as to what the Commission understands by "important" or "competitively valuable" assets and at what point a party has a "significant" user base or "commercially valuable" data inventories. The same applies to the question of when the parties are considered "important innovators in overlapping markets" or when a pipeline product is considered "important". The scope for discretion here is very wide, which leads to uncertainty among the parties. Also, the question of whether a merger allows the merged entity to gain access to commercially sensitive information about the upstream or downstream activities of competitors cannot be answered without considerable scrutiny by the companies (What business information is considered sensitive? What internal security measures would have to be put in place?). It is also not clear whether the merger will automatically be examined according to the standard procedure if the parties have ticked "yes" to one of the above-mentioned options in Section 11 as a precautionary measure in order to be on the safe side due to the unclear questions, or whether further explanations would then be requested from the companies and a discretionary decision by the Commission would follow. Appropriate clarifications should be made here. In addition, a concrete time frame should be specified within which the case team must decide whether a merger is to be examined in the simplified procedure or in the standard procedure.

The Commission also retains in the revised Notice on the Simplified Procedure (para. 21) the case constellation according to which a change from joint to sole control can exceptionally be examined under the standard procedure if neither the European Commission nor the competent national competition authorities have examined the prior acquisition of joint control over the joint venture in question. This option should be deleted. The absence of a prior assessment should not be taken as an automatic

indication that the transaction is likely to affect competition in a way that precludes assessment under the simplified procedure.

BDI has repeatedly argued that certain proposed concentrations in which there are no horizontal relationships and no significant vertical relationships between the undertakings concerned or where a mere change from joint control to sole control would be the subject of notification would be best exempted from the formal notification requirement altogether or that a short written information to the Commission about the concentration would suffice. With regard to the notification requirements for joint ventures, a local nexus should be provided to ensure that joint venture transactions only give rise to a formal notification requirement to the Commission if the joint venture itself (and not just its parent companies) operates in the EEA or there are firm plans for the joint venture to operate in the EEA in the near future.

Although the Commission does not waive the obligation to notify, it intends to formally establish a "super-simplified" procedure for certain categories of concentrations in para. 26 of the draft Notice on the Simplified Procedure. These include mergers involving joint ventures outside the EEA and all other mergers where there are neither horizontal overlaps nor non-horizontal relationships between the activities of the undertakings concerned. For these concentrations, the pre-notification phase is to be omitted and Sections 8-11 in the Short Form CO can be left out. BDI welcomes the possibility of this "super-simplified treatment" as a clear relief for companies.

Streamlining the review of simplified and non-simplified cases (Form CO and Short Form CO)

BDI had advocated a significant streamlining and more user-friendly design of the application forms as well as more targeted information requests by the case team. We welcome the Commission's intention to shorten the questionnaires by introducing tables and "tick the box" options, to delete certain information requirements altogether, to limit information requirements for markets covered by the flexibility clauses in the case of the Form CO and to provide clearer guidance on possible waivers. An even greater bureaucratic relief for companies could be to discuss together with the Commission in the pre-notification phase which sub-sections in the forms should be completed in the specific case. The companies could then submit the information at the Commission's request and according to the individual case if it is actually relevant for the Commission's decision. Overall, the pre-notification phase should be used to exclude non-critical markets already at this stage and to concentrate the procedure on the remaining critical markets.

However, the Commission has regrettably refrained from deleting certain information requirements in the drafts, which are particularly burdensome for companies and yet often irrelevant for the case decision. Instead, it has even introduced new information requirements. The final version should be significantly improved in this respect so that the intended simplifications are actually felt by the companies. This applies in particular to the fact that data on all plausible alternative markets must still be submitted, which from the company's point of view is one of the main burdens when notifying a merger. Here, information is requested on markets/market shares which often have little to do with the actual merger and therefore cannot contribute to the competitive assessment of the merger. At least certain turnover and market share thresholds should be taken into account. In addition, the period for the data collection should generally only be 1-2 years.

We are particularly critical of the new requirement to provide information on horizontal overlaps and vertical relationships in relation to pipeline products. Accordingly, the companies are to provide

"information on pipeline products of the parties and their competitors (including the stage of their development, an estimate of the projected sales and market shares of the parties to the concentration over the next three to five years)". This change leads to significant new bureaucratic burdens and thwarts the Commission's announcement to simplify merger notifications. For one thing, it is unclear how the Commission defines the term "pipeline product" outside the pharmaceutical industry. For another, there is the practical question of how the parties are to obtain knowledge about the development status of their competitors' pipeline products. In any case, this new information requirement threatens to impose new excessive burdens on companies. The Commission should therefore delete this concept in the Short Form CO and in the Form CO. Alternatively, the information obligations should at least be specified and limited by a narrow interpretation of the "pipeline product", so that only products are covered that actually have significance for the assessment by the European Commission.

We are also critical of the proposed change under point G in the Form CO, according to which companies would in future have to describe in every case the quantitative economic data collected that could be useful for a quantitative economic analysis. Otherwise, the Form CO would not be considered complete. Until now, this requirement depended on the specific case. This would lead to a new bureaucratic burden for companies, which is often unnecessary, as a quantitative economic analysis is not required in every case. Moreover, it is unclear what would fall under the term "quantitative economic data", e.g. whether this also includes publicly available data. Here, the Commission should maintain the current status quo.

Finally, we suggest that, in addition to the tick boxes in the notification forms, optional text boxes should be added to allow the parties to provide explanations for the information submitted. This would not only enable the Commission to make a better assessment, but also reduce the risk for the parties to provide incomplete or misleading information in the notification.

Introducing electronic notifications

The possibility of submitting notifications in digital format, which was temporarily introduced in connection with the Covid19 pandemic, is to be established permanently. In future, the transmission of documents to and from the Commission is to be carried out digitally (Article 22 of the draft revised Implementing Regulation). This also applies to notifications. BDI expressly welcomes this change.

Imprint

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EU-Transparency Register: 1771817758-48

Lobbyregister: R000534

BDI Document Number: D1590