EUROPEAN COMPETITION LAWYERS FORUM

Response to the European Commission’s consultation on merger control in the EU - further simplification of procedures

June 18 2021
Practical Considerations of the Proposed Simplification of EU Merger Control Procedure

1. Introduction

1.1 The European Competition Lawyers Forum (the “ECLF”) \(^1\) is grateful for the opportunity to respond to the European Commission’s (the “Commission”) consultation on the proposed simplification of the EU merger control procedure. This response has been compiled the ECLF Working Group and does not purport to reflect the views of all ECLF members or of their law firms (or their clients). Also, while the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group.

1.2 On March 26, 2021, the Commission launched a public consultation seeking views on how to improve the EU merger control procedure. The consultation proposes policy options for a possible revision of the Notice on Simplified Procedure (the “Notice”)\(^2\) and the Implementing Regulation,\(^3\) with a view to: (i) better targeting the types of transactions that merit a full review; and (ii) reducing the range of administrative costs and burdens of EU merger review borne by both the Commission and the notifying parties.

1.3 The ECLF Working Group welcomes the opportunity to take part in the consultation and comment on the suggested simplification options. However, in order to not lose the efficiencies associated with simplifying the simplified procedure, the ECLF also advocates for the establishment of a centralized and clear mechanism concerning the Commission’s recently published Guidance on Article 22 referrals.\(^4\) To this end, the ECLF will follow up with a separate Position Paper, which will assesses why the “one-stop-shop” principle and ex ante control, which have been hallmarks of EU merger preview, should not be replaced by a 27-stop-shop process for (potentially) an appreciable number of mergers, including transactions that have been consummated already.

1.4 This Paper provides observations on: (i) pre-notification contacts; (ii) the introduction of the proposed “flexibility clause” and new categories of simplified cases; (iii) streamlining the review of simplified cases; and (iv) electronic notifications;

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1 The European Competition Lawyers Forum is a group of leading practitioners in competition law from firms across the European Union. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1.


4 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, March 26, 2021, C(2021) 1959.
followed by (iv) conclusions and recommendations on how best to achieve the Commission’s stated objectives.

2. **Preliminary observations on pre-notification contacts**

2.1 At the outset, the ECLF appreciates the Commission’s acknowledgement that “there still remain some practical constraints to shortening the pre-notification phase further and to making full use of the invitation made in the 2013 Simplification Package to notify certain categories of cases directly without pre-notification.” The ECLF confirms that pre-notification contacts (even in supposedly simple cases) are sometimes unnecessarily lengthy, impeding the efficiency of the simplified procedure.

2.2 In our experience, in a significant number of cases, the Commission sends detailed requests for information (“RFIs”) and seeks information and market share data about market segmentations and alternative hypothetical market definitions, even where such segmentations have not been analyzed in previous decisions. This places a significant burden on notifying party(-ies), because they do not always have extensive information and data about markets at their disposal, especially concerning markets in which they have low market shares. Such requests are common, notwithstanding the prescribed “voluntary” nature of pre-notification contacts under paragraph 22 of the Notice.

2.3 There is a widespread perception among merger practitioners that the Commission displays excessive institutional caution in green-lighting a formal filing until the notifying party(-ies) have exhausted all market segment permutations in the submitted market share data. This may be unnecessary given the notifying parties’ obligation to provide complete and accurate information, the legal risks created by an incomplete notification (including a nullity of the clearance decision), and the Commission’s stepped-up enforcement against providing incorrect or misleading information.

2.4 The Commission staff, including the Chief Economist’s Team, have over the years accumulated in-depth expertise and information, which should allow them to quickly evaluate the credibility and completeness of the market analysis presented by the notifying parties. The ECLF would propose to replace the current system (for simple transactions), which is based on an open-ended pre-notification period, with a process that is premised on the assumption that Short Form COs are generally complete, in particular in cases that concern markets that have been previously assessed by the

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5 European Commission Questionnaire, Public Consultation on the EU merger control procedure, B.2 Streamlining the review of simplified cases.

6 Examples include requests for detailed market share information for a joint venture operating exclusively in Malaysia without any effects in the EEA territory; a request for detailed description of acquisition vehicles and interim supply agreements in a transaction where an entire business was sold to a financial investor without any horizontal or vertical overlaps; requests for additional details of the nature of transactions between the joint venture and its parent companies when their value did not exceed €1,000 over a three-year-period.
Commission. Such an approach should, of course, be subject to the possibility (which should be the exception, not the norm as currently is the case) of the Commission requiring additional information and, where necessary, stopping the clock or declaring the filing incomplete.

2.5 Thus, in order to make pre-notification contacts “extremely valuable to both the notifying parties and the Commission” that, “in the majority of cases, will result in a significant reduction of the information required,” the ECLF recommends:

- removing the expectation to engage in pre-notification contacts for all categories of simplified cases as set out in paragraphs 5 and 6 of the Notice, including the newly proposed categories –not just for those falling under paragraph 5(b)– and
- starting the clock immediately upon submission of the complete notification or stopping the clock exceptionally in case of material omissions.

2.6 Furthermore, the inability to submit a formal filing unless a Case Team Allocation Request (“CTAR”) has been submitted and approved is unparalleled in the practice of other jurisdictions. It adds another level of formality that prolongs the (non-) simplified procedure, and could thus be removed or merged with the submission date of the actual filing (which could be made on any business day). Alternatively, CTARs could be processed on a daily basis. Under the current practice, regardless of when during the week a CTAR is submitted by Friday midday, the Commission authorizes a formal filing only by the following Monday. This often unnecessarily delays the process, since businesses usually need to wait up to one week simply in order to obtain approval for the CTAR.

2.7 On balance, practice has shown that pre-notification discussions usually extend to at least c. 3–4 weeks (and beyond), which means that the 25-day Phase I statutory time limit would only start running at least one month after the parties successfully obtained approval for their CTAR and Short Form notification. EU notifications,

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7 Notice, paras. 22-23.


9 To illustrate this point, ECLF members have previously submitted a CTAR at 1pm on a Friday, thereby slightly missing the midday deadline, and then nonetheless being required to wait for six business days to obtain a case team approval.

10 It has been the ECLF’s experience that the option of referring a transaction to the Commission via the mechanism set out in Article 4(5) of the EU Merger Control Regulation No 139/2004 of January 20,
irrespective of involving no-issue cases, therefore regrettably generate significant private and public expenditures. For businesses, the consequences of notifying in the EU are twofold: (i) transactional costs are increased (including legal costs) and (ii) deal closings can be delayed unpredictably despite the supposedly predictable 25-working day deadline for Phase I cases. This can pose serious problems in urgent cases (e.g., tenders or financially stressed targets). Given that the Commission’s merger regime tends to serve as a model for many other jurisdictions, delays in the EU tend to hold up merger review in other jurisdictions. As a result, the EU merger control process often slows down the overall M&A deal timeline, while leading to sub-optimal use of the resources of the Commission and the notifying party(-ies).

2.8 We acknowledge that defining the relevant market (and possible further segmentations), as well as computing market shares are case-specific, highly factual, and often not straightforward exercises, especially when conducted in relation to emerging and dynamic products and services. However, given the Commission’s accumulated expertise, potential critical follow-up questions can be fielded quickly at the start of Phase I (not in pre-notification), as is customary in other merger control regimes (e.g., Austria, Canada, Estonia, Germany, and the U.S.). For instance, initial Hart-Scott-Rodino (“HSR”) filings in the U.S. can be relatively short documents, and the US agencies proceed to screen transactions before conducting complex information-gathering exercises. This would generate substantial efficiency gains for “users” of the EU merger control system, while also increasing predictability and removing the burden and costs associated with collecting all potentially relevant information upfront.

2.9 By way of example, the merger control regimes in Austria, Estonia, Germany, and the Netherlands do not require nor expect pre-notification engagement (in non-complex cases) and effectively allow for merger control clearances within one month of the first contact with the respective authorities (and often within three weeks in Estonia). The ECLF is convinced that sending more targeted information requests post-notification, based on the information received in the initial filing, would be more efficient and would reduce the information-gathering process to what is genuinely necessary to evaluate simple transactions. The ECLF is aware that this may require more pro-active engagement on the part of the case-team in order to screen efficiently Short Form COs. It may also require more detailed “best-practice” guidelines for simplified filings, setting out (i) categories of information that should be provided in more detail and (ii) the consequences of incomplete filings. Alternatively, setting a maximum deadline of c. 1-2 weeks for the pre-notification phase within which a decision must be made as to whether or not the case qualifies for the simplified

2004 (“EUMR”) is in certain cases not used – precisely because of this unpredictability associated with pre-notification talks. Our proposed new system (see paragraph 2.4 above) would thus also optimize usage of Article 4(5) EUMR (i.e., for transactions without EU dimension but notifiable in at least three Member States), which according to paragraph 21 of the Notice also benefits from the simplified procedure.
procedure would also allow notifying parties to have much-needed visibility on the antitrust timeline. However, such a deadline should not be used by the Commission staff to push simplified filings into the full length process where such a move is not warranted by the substantive effects of the transaction.

3. Recommendations on the proposed “flexibility clause” and new categories of simplified cases

3.1 Flexibility clause. The proposed “flexibility clause” referred to in the Notice would confer upon the Commission discretion to treat certain concentrations under the simplified procedure (e.g., if the current market share thresholds of the Notice are exceeded only slightly or in cases of joint ventures that have the total value of turnover or assets in the EEA slightly exceeding €100 million but which raise no competition concerns).

3.2 At the outset, the ECLF recognizes the need for pre-notification discussions for borderline cases, i.e., those transactions that are slightly above the thresholds for the simplified procedure. The ECLF also agrees that the introduction of such a “flexibility clause” would appreciably help capture only cases that are generally unproblematic and should equally apply across all industries. Nevertheless, the ECLF is concerned that the underlying purpose of the “flexibility clause” would effectively be defeated if the case team applied it only upon receiving extensive information from the parties in response to detailed RFIs. This would risk imposing on the parties the same onerous obligations that apply in a traditional Phase I setting. Therefore, the ECLF would see value in introducing the “flexibility clause” approach only if:

- the Commission were to apply it in a sufficiently transparent and uniform manner (i.e., in all cases where the market shares are within a 5% corridor of the thresholds set out in paragraph 5 of the Notice and in the newly proposed categories of simplified cases); and

- it does not unduly prolong pre-notification contacts, which could be achieved by providing upfront guidance on the type of information required in these cases, giving parties the possibility to avoid lengthy follow-up RFIs.

3.3 As regards the €100 million EEA turnover/asset threshold for joint ventures under paragraph 5(a) of the Notice, the ECLF believes that increasing the threshold to €150 million will have a fairly limited impact on overall merger filing numbers. We instead suggest following the approach recently taken by the Austrian and German competition authorities. That is, to raise the €100 million turnover/asset threshold to

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11 The ECLF believes that this clause would only affect a small number of cases.

12 See Bundeskartellamt (German Competition Authority) and Bundeswettbewerbsbehörde (Austrian Competition Authority), Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), July 2018, available at:
(at least) the €400 million threshold, as adopted in Germany (for the transaction value). We propose that an upper maximum limit of €450 million should be introduced as part of the “flexibility clause” approach. The ECLF submits that this would more adequately help focus attention on transactions that may have an actual effect on competition in the EEA. In addition, the ECLF believes that the Commission should reduce, to the maximum possible extent, the review burden for full-function joint ventures that primarily involve assets and operations outside the EEA (without discernible effects within the EEA).\textsuperscript{13}

3.4 \textit{New categories of simplified cases}. The Commission’s three proposed new categories of simplified cases for certain vertical relationships are as follows:

1) cases with highly asymmetric market positions upstream and downstream, with low market shares in one of the markets (\textit{e.g.}, <5\%) and a maximum market share in the other market (\textit{e.g.}, <40\%);

2) cases with an upstream sales share beneath the current threshold (<30\%), a low downstream purchasing share (\textit{e.g.}, <5\% or <10\%) and maximum downstream sales shares (\textit{e.g.}, <50\%);

3) cases with limited increments to a pre-existing situation of vertical integration, for instance, by aligning vertical cases with horizontal cases under paragraph 6 of the Notice on Simplified Procedure.

3.5 Since the coming into force of the Notice in 2014, on average 76\% of Phase I clearances were rendered under the simplified procedure.\textsuperscript{14} The ECLF anticipates, based on the practical experience of its members, that a material number of the remaining 24\% of Phase I clearances could also have benefitted from the simplified procedure.

3.6 The introduction of each of the proposed new categories of simplified cases would help capture cases that are generally unproblematic. Therefore, the ECLF welcomes the extension of the simplified procedure to the three categories of cases that give rise to marginal vertical relationships,\textsuperscript{15} by way of incorporating these alongside the

\textsuperscript{13} In this regard, the ECLF references the Commission’s 2014 White Paper proposal to amend the EU Merger Regulation to exclude such joint ventures from its jurisdiction (European Commission White Paper towards more effective EU merger control, July 9, 2014, COM(2014) 449, paragraph 77).


\textsuperscript{15} Also, further categories of mergers with marginal horizontal overlaps could be moved from paragraph 6 (\textit{i.e.}, from categories to which the Commission “\textit{may also apply the simplified procedure}”) to paragraph 5 of the Notice (categories to which the Commission “\textit{will in principle apply the simplified procedure}”). For example, transactions that give rise to a combined market share of 30\% and an increment of 2\%, which translates into an HHI increase by around 112 points, are currently governed
“flexibility clause” process, to be reflected in a revised Notice. Such direct guidance from the Commission would also have a beneficial impact on the development of national merger control regimes across the EU, specifically in smaller Member States.

3.7 To reduce the regulatory burden associated with gathering market share data for the calculation of the Herfindahl–Hirschman Index ("HHI") test, the Commission could consider adopting a rule of thumb. One such rule of thumb could apply where the parties’ market shares in vertically affected markets do not exceed 20% and there is prima facie evidence of significant competition (for example, more than three competitors, low entry or expansion barriers, or strong buyers in each of such vertically affected markets). The Commission could otherwise consider introducing a de minimis clause where the market size of the vertically affected markets falls below a certain threshold.

4. Streamlining the review of simplified cases (via a “tick-the-box” format)

4.1 The ECLF is in favor of reducing the burden associated with the non-simplified procedure. However, the burden (and timing) in EU merger review processes is often not necessarily driven by the notification form itself but rather the length (and detail) of pre-notification contacts. In our view the two options presented by the Commission do not materially alter what is already achievable under the current notification form in that: (i) parties are free to add advocacy summaries in their document as seen helpful; and (ii) discuss waivers or provided limited responses to certain aspects of the Form CO (particularly its Section 8). And it would be unwelcome if identifying specific “opt-out” sections meant reduced flexibility in relation to those not identified (rather flexibility should be shown in all aspects depending on the substantive assessment of the case).

4.2 Beyond the notification form we would invite the Commission to look at ways to streamline and improve the merger review process overall. Some improvements could relate to (i) agreeing a transparent work-plan and timetable with the merger parties up-front; (ii) a commitment to limit follow-up RFIs only to new content and information to ensure that sections get closed quickly; (iii) only request documents that serve an identified and clearly explained purpose; and (iv) introducing more opportunities for dialogue with transaction parties to focus on substantive issues.

by paragraph 6 of the Notice. Such a change could increase the number of cases that by default could be reviewed in simplified procedure while preserving the Commission’s ability to revert to a normal first phase merger procedure as per the safeguards provided in paragraph 9 of the Notice.
4.3 **Notification form.** As to Form CO itself, in ECLF members’ experience, it is often unnecessary to require the type of information listed below in relation to transactions that are subject to the simplified procedure:16

- **Duplication of information.** Details of the concentration, ownership, and control under Section 3 and activities of the target if there are no reportable markets under Section 8 of the Short Form CO. This information is already provided in a truncated form in the part describing the Executive Summary of the concentration (Section 1).

  Information on sales in value and volume, as well as an estimate of market shares, of each of the parties to the concentration for each of the last three years sought in Section 7.2.2, as this type of information duplicates to a large extent the details furnished under Sections 7.1.2 and 7.13 of the Short Form CO.

- **Unnecessary formalities.** The original written proof that each authorized external representative is authorized to act (Section 2.1.3.2) and instead only require a scanned copy of the original hardcopy or a Power of Attorney verified by digital signature(s);

  Supporting documentation, *e.g.*, transaction agreement, annual reports, management presentations (entire Section 5), especially where the facts reveal that there can be no impact on competition within the EEA (*e.g.*, joint venture without activity in the EEA; oftentimes such transaction documents are not available in an EEA language);17

- **Superfluous market definition information in cases with no substantive issues.** Information on all plausible alternative relevant product and geographic markets (Section 6.2)18;

  A vertical relationship analysis, when there is no existing supplier–customer relationship between the parties to the concentration (Section 6.2(b));

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16 After all, parties must have low market shares to qualify for the simplified procedure. And the Commission may always require the parties to provide a Long Form notification on the basis of paragraphs 8 and 9 of the Notice.

17 We suggest that there should be no expectation that the parties will provide supporting documentation with the revised Short Form CO (*e.g.*, presentations on the transaction, or details to support market definition). As per our proposed new system in paragraph 2.4 above, this would, of course, be subject to the possibility of the Commission requesting such evidence, should a case merits so.

18 Alternatively, the ECLF recommends clarifying and reasonably narrowing down the scope of “plausible alternative relevant markets” to those markets that are, *e.g.*, “generally held to be economically realistic in the industry under review”.


An estimate of the market share in value (and where appropriate, volume) of the three largest competitors (indicating the basis for the estimates) (Section 7.1.4) and competitor contact details (Annex 3);

An explanation of why a joint venture with no actual or foreseen activities within the territory of the EEA would not have any effect, directly or indirectly, on markets within the EEA (Section 8.2.2.2), for the response is implied in the question raised;

Information on cooperative effects of a joint venture (Section 9), as certain information is duplicative (e.g., the turnover of each parent, the market shares of the parents), as parties should arguably not need to be obliged to provide an Article 101 TFEU analysis for a case with no substantive competition concerns.

4.4 “Tick-the-box”. The ECLF welcomes the introduction of a tick-the-box format in particular for Sections 1-4 of the Short Form CO20, with an option to provide more detailed input on the remaining sections separately – provided that the information requirements for the Short Form CO are streamlined as per our suggestion in paragraph 4.1 above. For Section 4, we propose to remove the need for a Member State revenue breakdown, instead requiring only a “Yes/No” answer as to whether thresholds are met. This would be particularly useful in circumstances where parties face significant obstacles in obtaining turnover information from the entire group – especially when involving companies belonging to an investment fund that controls multiple loosely controlled businesses or state-owned enterprise(s) (“SOE“) that are centrally managed by the State.21

4.5 As an alternative to removing the need for the information listed in paragraph 4.1 above, the ECLF would welcome the proposal of concrete criteria and rules that specify the type of information that will not be mandatory in certain circumstances. This could be done in the format of a “best practices” document as mentioned in paragraph 2.9 above.

19 Alternatively, the question could be reformatted into a “Yes/No” tick-the-box format.

20 The Commission could also consider introducing a tick-the-box approach for the sections on the competitive assessment, by including comment boxes where the parties can explain why a certain box has been ticked. This would act as a safeguard to ensure that relevant information is not excluded.

21 From experience, SOEs tend to invoke “State secrecy” as a reason for not providing the relevant information. Reference is made to the Commission’s precedent in EDF/CGN/NNB Group of Companies, Case M.7850 (2016) 1596, which establishes the need to attribute the turnover from Chinese SOEs also controlled by the State-owned Assets Supervision and Administration Commission (“SASAC”) to the Chinese SOE that is party to the transaction. There is also the practical difficulty that a relevant “group” of SOEs (active in the same industry) sometimes includes actual competitors, so that the relevant information may not even be provided through the party itself.
5. Electronic notifications

5.1 The ECLF supports the introduction of a fully electronic notification format that can be verified by digital signature (for all filings). The Commission already largely dispenses with the requirement to provide paper copies of most documents that form part of the filing package, with paper copies typically required for Powers of Attorneys and the signed original of the notification form itself. Nevertheless full digitalization is welcome and it can be readily supported in today’s digital-friendly environment, removing logistical burdens and costs and reducing the environmental impact. Indeed, the Commission’s new RFI system via eTrustEX already provides the necessary IT infrastructure for providing electronic submissions. As previously mentioned, the ECLF also recommends removing the need for an original copy of a Power of Attorney (as is the case with several national competition authorities already, e.g., Austria and Germany), which in cases of doubt, could always be requested by the Commission at a later date. Alternatively, parties should be able to file Powers of Attorneys with relevant digital signatures.

6. Conclusion

6.1 The ECLF recognizes the difficulty in striking an appropriate balance between effective merger control procedures and truncated investigation timelines. We welcome the Commission’s initiative to further streamline and simplify the process in respect of simple transactions that are inherently unlikely to raise competition concerns.

6.2 In brief, the ECLF supports:

- **removing** both the formality of CTAR submission and approval in advance of notification and the automatic expectation to engage in open-ended pre-notification contacts (for categories of simplified cases under the Notice and the newly proposed three categories);

- **introducing** a strictly pre-defined “flexibility clause” process and the three proposed new categories of simplified cases involving vertical links, by way of a revised Notice;

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22 The Commission may for instance consider adopting certain standards rules: (i) specifying whether only qualified electronic signatures (“QES”) are accepted or also advanced electronic signatures (“AdES”), (ii) clarifying what encryption methods are accepted, and (iii) adding fallback solutions in case of IT failures.

23 With reference to non-simplified cases, the ECLF would welcome an upgrade to the Commission’s case management system to raise the maximum size limits on electronic submissions (from their current level of 4GB per submission, 500 files per submission, and 100MB per document) – because experience has shown that these sizes are sometimes far below the levels required for more complex cases.
- **removing** the requirement for certain types of information in the Short Form CO, as listed in paragraph 3.2 above, and partly (or possibly entirely) reverting to a user-friendly tick-the-box form; and

- **generalizing** the use of fully electronic notifications, which would mark a substantial step forward in both the targeting and the streamlining of the simplified merger control procedure.
Annex 1: Members of the ECLF working group

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