

8 June 2021

B.2 Streamlining the review of simplified cases

The evaluation showed that, while the Simplification Package overall contributed to reducing the prenotification phase in simplified cases, there still remain some practical constraints to shortening the prenotification 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. Clarifying certain information requirements could be useful in that respect, for instance by standardising simplified notifications further through tick-the-box forms that require fewer descriptions and allow for faster processing by the Commission. Furthermore, the Commission's assessment could be further streamlined by relying on statements of fact made by the merging parties under Article 4 of the EU Merger Regulation, without a need for further explanations or underlying evidence, in particular with respect to the assessment of jurisdictional questions in simplified cases and of the competitive assessment in cases without overlaps.

The following policy options are considered (the options could in principle be introduced cumulatively; options 2 and 3 would entail limiting certain information requirements and would therefore constitute an alternative to option 1 for certain parts of the notification forms):

Option 1: Maintaining the current information requirements but replacing the current notification form ("short Form CO") by a streamlined tick-the-box form, in full or in part.

Option 2: Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on questions of jurisdiction.

Option 3: Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on the assessment.

2.1 Are the current information requirements and format of the Short Form CO adequate and proportionate for the analysis of simplified cases?

Yes

No, the information requirements are excessive/less information should be requested in the Short Form CO

No, the information requirements are insufficient/more information should be requested in the Short Form CO

X *No, the current format (mainly descriptive text as opposed to a tick the box form) of the Short Form CO is neither adequate nor proportionate*

No opinion

2.2 If you answered “No” to the previous question, and as applicable, please explain (i) which information request(s) could be excluded from the Short Form CO or (ii) which additional information would be required in your view or (iii) how the format of the Short Form CO should be changed.

In our view, descriptive text addressing information relevant for jurisdictional assessment supplemented by underlying evidence isn’t necessary and could easily be replaced with a tick-the-box list of statements of basic relevant facts. Requiring descriptive text supplemented by underlying evidence not only takes additional time to prepare, but also takes additional time to review, which is critically important in commercial transactions. This change could be adopted without jeopardizing the effective enforcement of merger control rules.

2.3 Is the Short Form CO template easy to fill out, clear and user friendly?

Yes

No

X *No opinion*

2.4 Would you replace the current Short Form CO by a tick-the-box form?

X *Yes, in full*

Yes, but only for some parts

No

2.7. Would the following options entail any risk for effective enforcement of merger control rules (e.g. the Commission may not receive sufficient information to assess whether a transaction should be reviewed under the simplified procedure or not) or any other risk?

	Yes, it would entail such risks	No, it would not	No opinion
Maintaining the current information requirements but replacing the short Form CO by a streamlined tick-the-box form			X
Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements		X	

on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence			
Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence			X

2.9 What would be the effect in terms of reducing information requirements for businesses of introducing each of the following options? Please fill in the table indicating the scope of such effect.

	Significant reduction	Moderate reduction	No or negligible reduction
Maintaining the current information requirements but replacing the current notification form ("short Form CO") by a streamlined tick-the-box form, in full or in part.			X
Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements	X		

on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on questions of jurisdiction.			
Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on the assessment			X
All of the above introduced together	X		

2.10 Please provide reasons for your answer if you consider it appropriate.

Reducing or removing the need for pre-notification contacts on questions of jurisdiction should significantly speed-up the time needed for review of transactions, which is critically important in commercial practice. Where two partners in a co-investment are large enough, filing and review are nearly always advised and preparation of the submission, review and receipt of clearance can often take 8 to 10 weeks. This is a critically long time period in a competitive commercial environment and often prevents transactions that do not raise any competitive concerns from being able to be completed in time.

2.11 What would be the effect in terms of reducing the average time needed to obtain a clearance decision in unproblematic cases of introducing each of the following options? Please fill in the table indicating the scope of such effect.

	Significant reduction	Moderate reduction	No or negligible reduction
Maintaining the current information requirements but replacing the current notification form ("short Form CO") by a streamlined tick-the-box form			X
Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on questions of jurisdiction	X		
Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-the-box list of statements on the basic facts relevant for the assessment, without			X

the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on the assessment			
All of the above introduced together	X		

2.12 Please provide reasons for your answer if you consider it appropriate.

In co-investments in a commercially competitive market, time is nearly always of the essence. The delay in preparing and filing for review – in particular the pre-notification period of engagement with the European Commission – and receipt of approval is often a serious if not fatal impediment to successfully closing transactions and negatively impacts the position of joint buyers as opposed to single buyers. Ironically, by obstructing co-investment, the process actually encourages large investors to invest alone, increasing market concentration.

2.13 Do you consider that additional measures not included in the Commission's current options should be introduced to further streamline the treatment of simplified cases?

X Yes

No

No opinion

2.14 If yes, please explain which additional measures should be introduced and, if applicable, which additional safeguards should be introduced with them to ensure effective merger control enforcement.

Although we have previously advocated the introduction of an exemption or self-assessment approach, which we still strongly support, in the current context of simplification of certain procedural aspects of EU merger control, we would encourage consideration and adoption the following additional measures:

- ***Adoption of a notification procedure that would not have a suspensory effect for co-investment where markets concerned are only local and either there are no horizontal and vertical links between the object of control and the acquirers of control or, if there are such links, they are below the current thresholds set for qualification for the Simplified Procedure such that the concentration cannot impact competition at an EU (or any other) level, in place of the current review and approval process;***
- ***Adoption of a special regime for investment/asset managers compared to real corporates in order to simplify exactly what information should be submitted;***

- *Provision of more clarity regarding calculation of ‘turnover’ for asset managers, insurance companies, pension funds and sovereign wealth funds;*
- *Limiting the period (e.g., to ten days) or completely eliminating the standstill obligations for all cases that observe requirements for simplified treatment;*
- *Provision of more clarity regarding how ‘full-functionality’ is assessed and when the criteria are applied;*
- *Provision of more clarity on the circumstances in which a real estate asset will amount to an ‘undertaking’; and*
- *Further limiting the information that is required to be provided during reviews for joint ventures and consortia investing in real assets that have no nexus to the EEA.*

B.4 Introducing electronic notifications

The Commission is currently allowing businesses to notify their merger cases electronically due to the Covid-19 restrictions. It would be beneficial to clarify the notification rules permanently in this respect to ensure safe, reliable and cost-efficient document transmissions.

Option 2: Introducing fully digital notifications, including digital signatures

4.1 Would you use electronic notifications, either followed by originals in papers or fully electronic notifications?

	Yes, I would use this system	No, I would not make use of this possibility	No opinion
Electronic notifications followed by originals on paper			
Fully electronic notifications, including digital signatures	X		

4.3 Please explain the main advantages/disadvantages of both options

	Advantages	Disadvantages
Electronic notifications followed by originals on paper		<i>Electronic notifications that require originals on paper thereafter waste time without adding any real regulatory advantage. In addition, the printing on paper, physical shipment of documents and storage of paper files all run counter to the goals of the EU's Green Agenda.</i>
Fully electronic notifications, including digital signatures	<i>Fully electronic notifications, including digital signatures, should significantly reduce the time needed for review of the potential competitive impact of notified investments. Although speed to closure is critically important in these time-sensitive investments, a great deal of time is spent simply obtaining paper signatures and notarisations. The Covid crisis has taught us they can be replaced by digital substitutes without a loss of regulatory oversight.</i>	

5.4 Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

Yes

No