BUSINESSEUROPE

POSITION PAPER

9 July 2013

SIMPLIFYING EU MERGER PROCEDURES

1. INTRODUCTION

The European Commission has launched a public consultation on a proposal to simplify notification procedures under the EU Merger Regulation.

BUSINESSEUROPE welcomes the possibility to comment on the proposal. We fully support the Commission's objective to make EU merger control more business-friendly by cutting red tape and streamlining procedures.

We also appreciate the proposal to expand the scope of the simplified procedure, allowing companies to use a shorter notification form for certain categories of mergers that are generally unlikely to raise competition problems.

2. OUR COMMENTS

The Commission is proposing to update and streamline the merger notification forms. In particular, in cases that do not fall under the simplified procedure, according to the proposal merging firms would only have to submit detailed information for those markets where their market share actually exceeds the threshold for applying the simplified procedure.

However, BUSINESSEUROPE would like to raise some concerns in this context.

While the simplification objective is laudable, the Commission is proposing changes to the Form CO that would not actually be helpful to the parties. This is the case for the proposed section regarding the production to the Commission of internal sensitive documents, which has been vastly expanded to include documents that potentially have no relevance to the deal in question.

In particular, para 5 (4) requests that copies of all board documents, including those of the 'board management', are submitted. Reading this in conjunction with the following points 5(4)(i) to (iv), it appears that this includes inter alia documents like:

- Full minutes of the meetings at which the transaction has been discussed, not redacted to exclude matters which may (and most likely will) be highly sensitive but which may have no relevance to the notified deal;

- Presentations analysing different acquisitions options, including but not limited to the notified concentration: this appears to be over-reaching, as it is not even limited to acquisitions in the relevant market, and may require disclosure of share

price sensitive matters when deals were considered but not pursued – or where share price sensitive matters are under consideration but have no relevance to the notified deal. Also, this requirement does not seem to be limited in time.

This provision in practice comprises wide categories of documents related to the vague notion of "board management", regardless of their relevance for the merger at hand. Hence it is far too open-ended (both in scope and time) and risks producing, at great costs, huge amounts of documents that will not be helpful at all for the assessment of the case.

If maintained, it will constitute a considerable burden on the parties, but also on the Commission, which would need to go through all the submitted information. For the parties it will be essential to get waivers, but that may have undesirable ripple effects on the pre-notification procedure (further complication, delays etc). On the other hand, the Commission may often need additional time, thereby undermining the time-frames laid down in the Regulation.

In conclusion, BUSINESSEUROPE strongly highlights the need to apply a criterion of relevance, and better categorization of documents. The vague term "board management" should not be used, at least not without a clear definition. It is absolutely essential that filing parties can understand up-front what kind of documents are required, so as to minimize the risk of having the form declared incomplete at some later stage.

Additionally, we underline that the same requirement is reflected in the Short Form CO (Section 5.3), which is supposed to provide an instrument of simplification. While as mentioned we support the proposal to apply the simplified procedure to more cases, this potential improvement should not be nullified by adding this extensive information requirement whose purpose is questionable.

We have some concerns with other proposals related to the use in section 6.3 of the Form CO of the concept of "all plausible relevant product and geographic markets" (and "all plausible alternative market definitions").

While this may have some justification when using the Short Form CO, given the absence of a market test, for precisely that reason we believe it is unnecessary to apply this under the full Form CO. In these cases, the process will clarify any reasonable alternative market definition(s). This concept brings unnecessary complication and uncertainty. Even under the Short Form CO the word "plausible" is not acceptable as it may cover purely theoretical or speculative definitions. It should be clarified that only definitions that are based on economic realities are required.

On other more general aspects, we note that the Commission is recommending the parties to provide the list of outside EEA jurisdictions, where a legal clearance is required. This recommendation is made on the basis that such a list would facilitate coordination with other jurisdictions. Multiple filing can be a severe problem and business has been calling for solutions and particularly for better coordination of various aspects. However, such a list in itself is not sufficient to alleviate the problem of multiple filing, and the Commission should adopt solutions leading to better coordination with other authorities.

Also, while the current Commission Notice relies on safeguards and exclusions to establish when the Commission can reserve itself the right to opt for a full procedure (instead of the simplified track), the new proposal widens this discretion establishing the full procedure as an option for any concentration. Since this makes the availability of the

simplified procedure less predictable, we recommend the proposed text stick to the current wording of the Commission notice.

In addition, BUSINESSEUROPE opposes the proposed lowering from 25 to 20 % of the threshold for affected markets where parties are potential competitors, as the proposal is not presented with facts justifying it.

Finally, we call for better guidance on the pre-notification procedure, and in particular we stress the need for structured advice on information requirements and waivers, and timeline targets.

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