

CLIENT ALERT

Impact of COVID-19 on EU Merger and Antitrust Cases

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Regulators are changing the ways they work during the current pandemic. Like a number of European Member States (**EU Member States**), the European Commission (the **Commission**) went into partial lockdown on Monday 16 March 2020 and instructed all Commission officials, except for those in a 'critical' function, to work remotely for the foreseeable future. This is triggering delays and suspensions of ongoing work streams.

The Commission will need to make some important case prioritisation decisions which will affect less-urgent cases. We are likely to see similar knock-on effects at national level as national competition authorities and sector regulators move to working remotely and face likely high levels of staff absence.

Merger Control

On 12 March 2020, the Commission announced that “*due to the complexities and disruptions caused by the Coronavirus, companies are encouraged to delay merger notifications originally planned until further notice, where possible.*”

Below, we list some of the immediate challenges brought about by the anticipated delays in the merger reviews:

- Following the Commission's request to 'hold-off' on notifying impending mergers, parties which are currently in the pre-notification phase will need to clearly set out the reasons why their transaction ought to be reviewed as a priority; reasons may, for example, include (i) an approaching longstop date (which was reasonable at the time it was agreed); (ii) where delay may cause serious risks to the financial viability of a business or may trigger

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significant penalty payments; or (iii) where the case falls into the EU's simplified procedure and no market testing (i.e. the seeking of third-party views) is required.

- Where deals have already been notified, although the Commission is bound by strict timelines, case teams will be facing delays and complications in collecting evidence from third parties which is vital for assessing transactions. For example, Italian opticians under lockdown are unlikely to all provide answers to the Commission to help it assess the impact of the proposed *EssilorLuxottica / GrandVision*'s merger on the retail market in Italy; in such cases, the EU procedures allow for a suspension of the merger review timetable under so-called 'stop-the-clock' provisions; indeed, the Commission announced earlier today that its review timetable of the *EssilorLuxottica / GrandVision* transaction has been suspended since 2 March 2020, and of the *Boeing / Embraer* transaction since 24 February 2020.

Similar delays are to be expected for transactions notified to the US Department of Justice/Federal Trade Commission (**FTC**). As the Premerger Notification Office of the FTC, like most of the government, will be working remotely during this emergency, it is not accepting any physical submission of HSR filings during the pendency of the emergency. Rather, it has established a temporary e-filing system that went live on 17 March 2020. In addition, no 'early termination' of the HSR waiting period of 30 days will be granted for any HSR filing made after 17 March 2020, or for filings that are currently under review for the foreseeable future. The FTC has also announced that it is assessing timing issues in connection with pending merger investigations and enforcement actions and will be reaching out to the parties to secure extensions as needed.

In the medium term, as companies in financial distress seek buyers, the Commission may be expected to test whether the "failing firm" defence may apply to certain transactions, i.e. where the acquiring firm argues that the acquisition, which would otherwise have given rise to competition concerns, does not result in an adverse impact on competition since the target firm is likely to exit the market regardless. The case law for the failing firm defence is reasonably well developed but is likely to be tested in the coming months.

Antitrust

As part of its response to COVID-19, the Commission has also significantly reduced non-essential travel and meetings. While obvious, it is worth noting that as a result the Commission's incentives and indeed ability to conduct dawn raids will be significantly reduced in the short term.

Despite the current crisis, it is important to recall that there is no general public interest or public health defence for competition law infringements under EU and equivalent national law. However, calls for relaxing some competition rules may gain traction with national competition authorities in the next few weeks. For example, following UK retailers' call to

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allow non-price collaboration in the retail sector¹, competition authorities have been reported to have indicated that they may waive normal competition rules to allow retailers to share information about supplies and for arranging deliveries.

National competition authorities and governments may also facilitate the organisation of ‘crisis cartels’ allowing competitors to coordinate their market conduct to secure continuity of supplies and the financial survival of suppliers and retailers. Such crisis cartels would be limited in time and subject to review according to a specific set of criteria. It is critical that businesses carefully assess their participation in such crisis cartels, in light of any evolving guidance from the government and competition authorities, to ensure that no compliance issues arise.

The UK Competition & Markets Authority recently announced² that it will “*monitor reports of changes to sales and pricing practices during the coronavirus outbreak*” to ensure that companies are not breaking competition rules. While the enforcement focus is likely to be on the charging of excessive and unfair prices by dominant companies or agreements by firms to hike prices, the full range of competition law rules remains applicable. Competition authorities in Italy³ and Poland⁴ have already opened investigations into excessive pricing of sanitizing products and protective equipment, e.g. masks.

Any proposed collaboration, information sharing or benchmarking in relation to companies’ responses to the COVID-19 crisis should therefore be carefully assessed from an antitrust perspective and limited to what is strictly necessary to achieve the legitimate pro-competitive aims of such cooperation proposals.

State Aid

In principle, advantages granted by EU Member States to specific companies require a prior approval by the Commission under Article 107 Treaty on the Functioning of the European Union (**TFEU**). That said, measures for the benefit of individuals (zero-hour compensation, sick pay, etc.) or measures that benefit all companies equally, such as zero interest tax holidays or changes in the insolvency regimes are typically not considered State aid in the sense of Article 107 TFEU. Further, State aid to make good the damage caused by natural disasters or exceptional occurrences, such as the COVID-19 crisis, is compatible with the common market (see Art. 107 (2) (b) TFEU).

A first aid scheme has been approved on that basis, by the Commission, on 12 March 2020, with respect to a €12 million Danish scheme that compensates damages caused by cancellations of large public events due to the COVID-19 crisis.

¹ See Sky News article “[Coronavirus: Supermarkets float competition waiver if crisis deepens](#)” from 9 March 2020 in which UK retailers call for temporarily waiving competition rules to enable supermarkets to work together on deliveries in local areas where one shop has been forced to close because of COVID-19.

² “[CMA Statement on sales and pricing practices during Coronavirus outbreak](#)” dated 5 March 2020.

³ See Italian Competition Authority’s press release “[ICA: Coronavirus, the Authority intervenes in the sale of sanitizing products and masks](#)” dated 27 February 2020.

⁴ See Polish Office of Competition and Consumer Protection’s press release “[UOKiK’s proceedings on wholesalers’ unfair conduct towards hospitals](#)” dated 4 March 2020.

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The Commission has also cited airlines as potential beneficiaries of such measures, specifying that this would be available even if airlines, or other impacted companies, have already received rescue aid over the last ten years (which is normally not possible under the “one time last time” principle). This means that EU Member States are in principle free to take all financial measures that they consider necessary to remedy the pending crisis.

That said, Commission President Ursula von der Leyen and Commission Executive Vice President and Competition Commissioner Margrethe Vestager emphasised on 13 March 2020 that the Commission would *‘[use] the full flexibility of the state aid rules’*⁵ and would *‘deal with new State Aid very fast’*.⁶ As a result, the Commission has circulated a draft temporary framework for the assessment of aid to remedy serious disturbance to the economy in the context of COVID-19 based on Article 107 (3) (b) TFEU⁷ (the **Draft Temporary Framework**). The Draft Temporary Framework contains rules relating to the granting of tax advantages, guarantees, loans, interest and similar advantages, the clarification that aid that is provided via private banks is not considered as State aid for the benefit of the bank and the statement that the framework covers companies that entered into difficulty after 31 December 2019. Furthermore, the Draft Temporary Framework also foresees general transparency obligations.

Some of these Commission’s proposals may be narrower than measures that have already been taken by some EU Member States and this is an area which will require close monitoring in the near future. Given the broad reach of Article 107 (2) (b) TFEU, it remains to be seen, whether similar to during the financial crisis in 2008, the EU Member States will charge the Commission with the monitoring of all or at least some of their financial support measures in the current crisis, or whether they will seek to retain their own full authority in this extraordinary situation.

UK businesses should be aware that under the EU Withdrawal Agreement⁸, the EU’s State aid regime applies to the UK until 31 December 2020.

⁵ Commission press release “[COVID-19: Commission sets out European coordinated response to counter the economic impact of the Coronavirus](#)” dated 13 March 2020.

⁶ Commission press release “[Statement by Executive Vice-President Margrethe Vestager on State aid measures to address the economic impact of COVID-19](#)” dated 13 March 2020.

⁷ Commission press release “[Statement by Executive Vice-President Margrethe Vestager on a draft proposal for a State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak](#)” dated 17 March 2020.

⁸ European Union (Withdrawal Agreement) Act 2020.

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