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Client Alert Commentary

Latham & Watkins Antitrust & Competition Practice

March 24, 2020 | Number 2648

# Merger Control in Europe Following COVID-19

***Whereas COVID-19 is likely to delay review timelines of many M&A deals, it may also make some approvals easier.***

**Key Points:**

- COVID-19 will undoubtedly impact review timelines of mergers. Competition authorities may ask parties to postpone their notifications and may recourse to "stop the clock" mechanisms to buy additional time, notably where third parties complain and extensive market testing is required.
- Merging parties should put in place strategies to anticipate and mitigate risks of delay such as preparing concise and persuasive draft filings, engaging early with authority officials, and exploring options to obtain derogations to allow closing before clearance.
- The market impact of COVID-19 may also open the door to discussions on theories that would have been otherwise more difficult to successfully argue pre-crisis, notably where the target is in financial distress or when the theory of harm depends on rivals' spare capacity.

The global pandemic has impacted all aspects of life, including the functioning of the EU and national merger regimes in Europe. While the situation is rapidly evolving, this *Client Alert* identifies some of the practical implications for deal makers, both in the short term (for pending deals) and in the medium term (in particular the types of deals that may result from the economic downturn that will follow COVID-19).

## Implications for pending deals: risk of potential delay

While the pandemic will no doubt lead to many companies abandoning contemplated deals, a number of M&A transactions are already agreed and some notified or at pre-notification stage. Review of those transactions will need to deal with a number of practical difficulties, including physical filings where legally required, technical limitations of agency staff working via telecommuting, inability to hold physical meetings or hearings, agency staff being drawn into other priorities (such as State aid control), and difficulties in getting timely feedback through market investigations as market participants face other pressing priorities.

To help manage these difficulties in the short term, the European Commission (EC) has published guidance discouraging companies from making new merger filings "*until further notice, where possible*".[1] Other national competition authorities have been following its lead[2] or going even further by postponing review deadlines for new notifications until a future date.[3] Please see here for Latham & Watkins' tracker highlighting how merger review timelines are impacted by COVID-19 in Europe, the US, and elsewhere. The EC has agreed to temporarily dispense with the need to provide hard copies for filings.[4]

For already notified deals, the EC may have greater recourse to “stopping the clock” by requesting information that cannot be provided in short order, with or without agreement by the notifying parties. Indeed, the EC recently stopped the clock in three of its pending Phase II investigations.[5] Going forward, the EC may also rethink its internal policy not to "stop the clock" in Phase I cases, or increasingly invite notifying parties to “pull and refile” their notifications.

As a result, many companies with deals in the pipeline will likely face delays.

## Strategies to anticipate and mitigate risk of delay

To improve their chances of moving through pre-notification “triage” and getting their deal processed quickly, companies have some options:

- **Concise and persuasive draft filings**. In particular at EU-level, the length of filings has steadily increased in recent years, largely anticipating demands by case teams. The new environment may see a renewed premium on conciseness rather than detail.
- **Compelling case for priority treatment**. Companies should think carefully about how their deal is different from others arguing for priority treatment. The most persuasive arguments will likely focus on potential deterioration of the target’s business and loss of jobs in case of further delay.
- **Early engagement with senior agency leadership**. As internal resources will be under strain, it will be particularly important to engage early with senior agency leadership to ensure that cases are appropriately staffed and prioritised.
- **Temporary measures for sellers or targets in financial distress**. Actions to help alleviate urgent liquidity needs may not necessarily constitute “gun-jumping”. For instance, most competition authorities have accepted that down payments on the purchase price do not constitute gun jumping unless accompanied by the acquisition of shares or control rights.[6] Conversely, “two-step” or “warehousing” structures that involve a transfer of some such rights to the buyer or its mandatee will typically be viewed as a violation of the stand-still provision(see *Canon/Toshiba*).[7] Also, measures to support the target commercially, for instance purchasing capital assets leased to the target, including the target in the buyer’s joint-purchasing arrangements, or seconding management or staff to the target will likely be viewed as partial implementation and thus require derogations from the suspension obligation.
- **Derogations from the standstill provision**. The EU Merger Regulation, as well as most Member State merger regimes, allow the authorities to grant such derogations to avoid hardship situations based on a comprehensive assessment of all relevant aspects, including the threat that the deal poses to competition.
  - Such derogations may be easier to obtain in the absence of material competition problems. For instance, during the height of the financial crisis, the EC sometimes granted derogations within a matter of days to allow the acquisition of failing banks.[8] In somewhat less urgent cases, it may however be quicker (and encouraged by the case team) to notify the transaction under the “simplified procedure”.
  - Derogations will be more difficult to obtain for sales of companies to direct competitors. The EC’s recent practice with respect to airline mergers[9] illustrates how it will likely deal with such situations: granting partial derogations allowing the most urgent commercial support measures, while also attaching conditions to those derogations to increase the chance of finding another buyer for the target in case the deal fails, for instance because the remedies required to address the authority’s concerns undermine the commercial rationale of the deal.[10] Given that in such situations the target’s difficult financial situation will typically not permit the buyer to make its case in a lengthy in-depth investigation, such situations can create complex dynamics, in particular if the authority believes there is an alternative buyer with few(er) competition problems. In all

situations involving distressed targets, early and candid discussions with the competition authority are thus advisable.
- Derogations may also be considered in Phase II cases, where too much time would lapse between signing and closing, while crucial management/business decisions deriving from COVID-19 have to be taken urgently.

### Impact of the pandemic on substantive assessment of mergers

At least in some situations, the pandemic and its economic repercussions may make approval easier:

- The pandemic's impact on demand in many sectors may reduce or eliminate certain theories of harm that the authorities might otherwise have been entertaining, for example that rivals would not have sufficient capacity to constrain the merging parties post-merger.
- Scarce investigatory resources may lead competition authorities to be somewhat less aggressive when it comes to investigating more speculative concerns about how a merger could harm competition.
- Failing firm/division defence. As other merger regimes, the EU Merger Regulation recognises that a transaction may not be the proximate cause of any loss of competition if the target entity would have ceased trading in the absence of the transaction. However, the evidentiary thresholds for such defence are high both in theory and in practice, and the EC has accepted it only in rare cases, and typically only after a Phase II investigation, for instance in *Aegean/Olympic II*[11] *or in Nynas/Shell Harburg Refinery*[12]*.* The notifying party must show that (i) the allegedly failing firm would in the near future be forced out of the market due to financial difficulties if not taken over by another company, (ii) there is no less anti-competitive alternative than the proposed merger, and (iii) in the absence of a merger, the assets of the failing firm would inevitably exit the market. In practice, requirements (ii) and (iii) tend to be the most difficult, as the EC will often believe that there may be an alternative buyer for the target or its assets, even if only at a considerably lower price. The parties should be prepared to show that the seller has run a competitive auction and has duly weighed the prospects of a higher purchase price that a competitor may pay against the likelihood of in-depth scrutiny in the merger review process.

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**Endnotes**

1 European Commission, Special measures due to coronavirus / COVID-19 *available at* https://ec.europa.eu/competition/mergers/information_en.html

2 For example, the Belgian Competition Authority "*invite(s) companies to delay any project of concentration that is not urgent.*" Similarly, for the French Competition Authority "*companies are invited to postpone any plan for economic merger that is not urgent*". The German Bundeskartellamt has also asked merging parties whether their merger notification can ""be submitted at a later date." The Irish Competition Commission too "*is encouraging notifying parties where possible to delay filing planned merger notifications until further notice*".

3 The Austrian Competition Authority has decided that the review periods for transactions notified between 23 March and 30 April 2020 will only run from 1 May 2020.

4 European Commission, Special measures due to coronavirus / COVID-19: "*DG Competition will temporarily also accept and actually encourages all submissions in digital format*" *available at* https://ec.europa.eu/competition/mergers/information_en.html

5 The EC stopped the clock in three in-depth investigations: Boeing/Embraer (M.9097), Fincantieri/Chantiers de l'Atlantique (M.9162) and EssilorLuxottica/GrandVision (M.9569) though the clock has already restarted in the latter.

6 A noticeable exception is Brazil where premature implementation of a transaction can arise from clauses for full or partial payment, non-reimbursable, in advance, in consideration for the target, except in case of (i) typical down payment for business transactions, (ii) deposit in escrow accounts, or (iii) breakup fee clauses (payable if the transaction is not consummated).

7 EC decision of 27 June 2019, Case M.8179 – Canon/Toshiba Medical Systems Corporation *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8179_759_3.pdf

8 For example, in Case M.5363 – Santander/Bradford & Bingley assets, the EC granted a derogation from the suspension obligation on the same day, *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m5363_21_2.pdf.

9 See *e.g.*, M.8633 – Lufthansa/Certain Air Berlin assets *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8633_1376_4.pdf

10 In the Lufthansa/Air Berlin case referred to above, the EC noted that it "*considers it necessary that a derogation from the suspension obligation regarding the Intended Measures is made subject to adequate conditions, which ensure that carrying out the Intended Measures would not result in anti-competitive effects or bring about an irreversible change in the competitive structure of the affected markets. In particular, such conditions need to ensure that the Intended Measures will not negatively affect NIKI and LGW or make it more difficult for those entities to be sold to any other buyers, should this happen in the future*." (paragraph 32). The Intended Measures concerned for example the replacement of Air Berlin by Lufthansa as party to dry lease contracts or the conclusion of wet lease agreements with Lufthansa as wet lessee.

11 Case M.6796 – Aegean/Olympic II, *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m6796_20131009_20682_4044023_EN.pdf.

12 Case M.6360 – Nynas/Shell/Harburg Refinery*available at* https://ec.europa.eu/competition/mergers/cases/decisions/m6360_5463_2.pdf