Hogan Lovells

EU merger control in times of COVID-19

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The current COVID-19 pandemic is posing unprecedented challenges on our public health systems and communities. It is also heavily impacting economic activity, including for companies in the midst of M&A or joint venture transactions. Deals that are subject to merger control review in the European Union (EU) are likely to find that the process is disrupted, with a reduced prospect of early clearance even in "no issues" cases under review. More complex cases may be delayed significantly. But what is clear is that EU merger control enforcement is not in quarantine. As the COVID-19 outbreak continues to unfold, here is what companies involved in deals need to be aware of during these times of crisis.

The European Commission's immediate response to the outbreak

On 13 March 2020, the Directorate-General for Competition at the European Commission announced that companies were "encouraged" to delay new merger notifications until further notice, highlighting the "complexities and disruptions" caused by the current COVID-19 crisis. The Commission noted that, while it had put in place a number of measures to ensure business continuity in its enforcement operations, it anticipated "difficulties in collecting information from third parties, such as customers, competitors and suppliers, in the coming weeks". In addition, following the containment measures imposed by the Government in Belgium, all Commission staff in "non-critical" roles, including case handlers, moved to remote working as of 16 March 2020, with thus fewer opportunities for face-to-face engagement with notifying parties. The Commission also expressed a preference for electronic submissions during this time.

Similar measures have also been taken at Member State level since the COVID-19 outbreak.[1]

Impact on already filed transactions

For transactions that have already been filed and are currently under review, delays are now unavoidable. Market testing of proposed transactions forms a crucial part of merger investigations and the Commission recognises the difficulties of its staff in accessing and

[1] See our recent publication. In addition, some Governments have issued special legislation to address the impact of COVID-19 on current competition cases, e.g. in France, the Government Order No. 2020-306 of 26 March 2020 allows the Competition Authority until 24 June 2020 to exceed the ordinary time limits for examining mergers, including the Phase 1 period of 25 working days; in Spain, the Royal Decree 463/2020 of 14 March 2020 suspends all administrative proceedings and deadlines (including for merger control) until 12 April 2020, with further extensions likely to be approved; and in Italy, pursuant to Article 103 of Law Decree No. 18 of 17 March 2020 (the so-called "Cura Italia" Decree), any and all deadlines relating to administrative proceedings, including merger control proceedings commenced before the Italian Competition Authority after 23 February 2020, are stayed until 15 April 2020, except for urgent cases, also on the basis of reasoned requests filed by the parties concerned. In other jurisdictions, like Germany and the UK, deadlines are running normally, although merging parties have been asked to consider delaying their notifications.

collecting the pertinent information in the current circumstances. With several EU countries as well as third countries on lockdown, third parties such as competitors, customers or suppliers, have other priorities before them. Yet, with insufficient market information, it will be difficult for the Commission to form a robust assessment about the transaction.

In addition, even for straightforward cases without substantive competition concerns, the Commission may need additional time. As the Commission is bound by the 25 working day review period, it might discuss with the parties issuing additional requests for information before deciding to "stop the clock". As a last resort, the Commission could also invite the parties to withdraw their notifications unilaterally and refile at a later date ("pull and refile").

Impact on transactions signed, but not yet filed

In principle, the merging parties are free to determine when to notify their transactions to the Commission, subject to pre-notification discussions and provided that closing is suspended until clearance is received. But in the context of the current pandemic, for transactions not yet filed, the Commission is urging parties to "delay notifications" which are not considered urgent. This implies that it will nevertheless progress merger notifications where the merging parties can make the case as to why timing is a critical issue in their case.

The delay in merger review (and very likely extended pre-notification period) could lead to a significant backlog of cases, inevitably adding weeks if not months to the envisaged commercial deadlines.

Impact on transactions not yet signed

Parties to future transactions should pay close attention to include realistic long-stop dates in their transaction agreements that take account of the current delays due to COVID-19. The risk of delays will likely persist beyond the outbreak itself as competition authorities including the Commission process a backlog of cases. Companies should take this into account in their contractual efforts clauses with regard to the deadline for filing in order to avoid any unrealistic or rigid filing periods.

In the light of this, parties that are currently negotiating a transaction may wish to consider realistic long-stop dates and other merger control-related provisions such as realistic efforts clauses.

Beware of "gun jumping" during COVID-19

Despite the impact of the COVID-19 crisis on timelines and procedures, companies are still bound by the notification and standstill obligations laid down in the EU Merger Regulation. Under these rules, and in the absence of a specific derogation from the Commission, companies cannot implement a transaction, unless it has been notified to and cleared by the Commission.

The COVID-19 crisis has neither suspended nor relaxed these rules. Gun jumping occurs if the buyer prematurely exercises control over the target business regardless of whether the parties are competitors. If merging parties are competitors and co-ordinate their competitive conduct (e.g. by sharing of competitively sensitive information) prior to the permitted closing of the transaction, that will constitute both gun jumping and an offence under Article 101 TFEU.

Gun jumping can lead to significant fines (of up to 10% of the group revenues of the companies concerned). In recent years, the Commission, with support of the European Courts, has strictly

enforced gun jumping prohibitions.[2] Therefore, despite the special challenges posed by the COVID-19 crisis, companies should not forget that competition law is not in quarantine, in particular with respect to gun jumping prohibitions.

Legal standard in times of crisis

Although the COVID-19 crisis has already significantly impacted the economy and the Commission's working system, there is no indication that companies can expect a shift in the substantive analysis of notified mergers. The legal standard will not change, i.e. whether the proposed transaction would significantly impede effective competition.

That said, the dynamics at play in the affected markets and the identity and strength of the remaining participants may be impacted by the effects of COVID-19 on the economy. For example, in a horizontal merger, the assessment whether the merging parties will be able to hinder expansion of competitors, or whether the customers of the merging firms will have limited possibilities of switching to other suppliers, may be impacted by market deterioration and countervailing buyer power becoming less effective. Similarly, arguments suggesting a high likelihood of new entry may be scrutinised more carefully.

Merger reviews are forward-looking. A key question will therefore be the time horizon against which to assess the possible coordinated or non-coordinated effects arising from the merger. It is also too early to tell if the COVID-19 crisis will affect all markets in the same way, or indeed, at all.

"Failing Firm" defence for COVID-19?

The commercial repercussions of COVID-19 remain uncertain but an increase in distressed M&A activity as a result of the crisis is anticipated. Albeit rarely used and applied in normal times, the failing firm defence may allow businesses to obtain merger clearance even where the parties would otherwise face significant competition hurdles.

The Horizontal Merger Guidelines provide for this option as a defence: "*The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm.*"[3] The Guidelines set out three cumulative, but non-exhaustive, criteria for applying this defence: (i) the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another undertaking; (ii) there is no less anti-competitive alternative purchase than the notified merger; and (iii) in the absence of a merger, the assets of the failing firm would inevitably exit the market.

In order to deploy the failing firm defence, the parties would need to argue successfully that the only alternative would be bankruptcy and exit of the target business which would be more harmful to competition than the proposed acquisition. In other words, the acquisition is presented as a rescue merger which is the least adverse outcome as against the counterfactual of exit of the target. Should the COVID-19 crisis deepen, an increase in the deployment of failing firm defence can be anticipated. This will in turn require the Commission to assess whether a more flexible approach is warranted.

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2 The Court of Justice of the EU recently (4 March 2020) rejected an appeal against a decision by which the Commission imposed two separate fines of €10 million each for (i) failure to notify a transaction and (ii) implementing that transaction prior to clearance in breach of the standstill obligation.

3 Section VIII, paragraph 89.

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