

Merger Review Procedures Undergo Global Modifications

Skadden

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The global spread of the novel coronavirus has disrupted everyday life all over the world and imposed significant difficulties on the business community. Antitrust merger reviews — and the authorities who conduct those reviews — are not exempt from the challenges raised by this unprecedented crisis. This client alert summarizes the modifications competition authorities across the globe have made to their merger review procedures to date and what clients can expect in the coming weeks and months as the impact of the pandemic plays out. In short, although antitrust authorities are working remotely, virtually all will continue to accept merger filings, investigate deals and apply materially the same substantive analysis of transactions, but parties should expect potentially significant delays in merger reviews and factor that into their overall deal timing and calculus.

General Implications for Merger Control

Most merger review procedures continue to apply across the globe, although authorities have announced that they are facing delays because officials need to work remotely. Only a limited number of countries' (Austria, Argentina, Colombia, Denmark, Ecuador, France, India, Indonesia, Malaysia, Moldova, Philippines, Saudi Arabia and Spain) competition authorities have suspended activities, closed or announced an automatic suspension of review deadlines. However, additional authorities will likely introduce formal suspension measures as the crisis continues.

Therefore, even absent formal announcement, clients should expect delays in the antitrust review of notified transactions and material extension of prenotification reviews, with some non-U.S. agencies refusing to accept formal notifications. Little indication exists thus far that authorities are willing to take into account changed economic conditions in (or to otherwise change) their substantive assessment of transactions. Assuming the crisis conditions persist, we expect this could change depending on the industry and company specifics. For example, in Austria, the competition authority granted a request to amend parts of the commitments in the ProSiebenSat.1Puls 4/ATV transaction until the official lockdown is lifted, to ensure newsroom operations are maintained during that time.

Skadden will continue to update clients on changes to merger control processes until the COVID-19 crisis is resolved.

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Implications for Merger Control in the United States

The Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) remain open and active with essentially all staff and management working remotely. Both agencies continue to actively investigate mergers and have been issuing Second Requests and third-party civil investigative demands in merger reviews over the last few weeks — with no expectation that this would change going forward. Officials will handle all meetings by telephone or video conference.

The FTC's Premerger Notification Office (PNO) is continuing to accept new Hart Scott Rodino (HSR) filings, but new filings must be made electronically. After temporarily suspending the processing of requests to grant early termination, the FTC announced on March 27, 2020, that on March 30, 2020, it will resume granting early termination of HSR waiting periods when both agencies have determined that no enforcement action will be taken during the waiting period. For deals currently under review, the DOJ has requested that parties add 30 days to existing timing agreements. The FTC has not publicly made the same request, but likely will raise similar extensions directly with merging parties. According to media speculation, Congress could mandate temporary extensions of the statutory HSR waiting periods (*e.g.*, extending the initial 30-day period to 45 days). Neither agency has publicly commented on whether coronavirus will impact or influence its substantive review, but lessons from the financial crisis era would suggest that the FTC and the DOJ would reject ideas to change their analytical framework in the face of a short-term crisis.

Implications for Merger Control in Europe

The European Commission (the Commission) has issued a press release asking parties to postpone formal notifications, as it is facing significant challenges in conducting a formal Phase I or Phase II review process. The Commission stated that it is adopting every measure to ensure business continuity but, at this stage, is likely to prioritize its resources toward open, ongoing merger investigations. This is partly based on the technical challenges that remote working is presenting to the case teams reviewing mergers. Additionally, the Commission is concerned that third parties will not respond to market tests.

In practice, this means that submitting draft notifications and conducting the usual informal/confidential prenotification process with the Commission is possible. However, parties should expect delays in the Commission's response time. In terms of formal notifications, for cases that do not on their face present any potential substantive antitrust concerns and especially if they are candidates for a "simplified procedure," the Directorate-General for Competition (DG Comp) tends to accept formal notifications relatively

easily. For cases that present potential substantive antitrust concerns, compelling and case-specific arguments are necessary to convince DG Comp to accept the formal notification. However, typically DG Comp officials will warn parties that if third parties do not respond to the market test to allow confirmation of case arguments, a prolonged Phase II may be necessary.

Cases currently in Phase I that present potential substantive antitrust concerns face an increased risk of proceeding to Phase II or receiving a request to pull the notification. For example, the Commission just opened a Phase II investigation in the Johnson & Johnson/Tachosil/Takeda transaction. For most cases currently in Phase II, DG Comp has issued large document requests and suspended review while parties respond. However, despite ongoing adjustments and apparent standstill in a numerous cases, the Commission recently announced the approval of a purchaser in Danaher/GE Healthcare and has restarted the clock in its ongoing in-depth review of EssilorLuxottica/GrandVision.

Implications for Merger Control in China

In response to the coronavirus outbreak, the State Administration for Market Regulation (SAMR) of China issued a formal announcement on February 6, 2020, laying out temporary taskforce arrangement and logistical measures for merger filings, allowing parties to avoid any in-person contact with SAMR and enabling electronic document submission and teleconference meetings. In accordance with the announcement, companies have submitted and delivered merger-related documents via email, courier or fax, while the Administrative Center of SAMR — which ordinarily receives and delivers physical submissions and decisions — has temporarily closed. SAMR has generally canceled or postponed face-to-face meetings and continued essential meetings by both teleconference and video conference.

With these procedures in operation for nearly two months, SAMR appears to have continued working effectively and efficiently throughout the coronavirus outbreak. No significant or general delays have been observed relating to China's merger review process, and in the four weeks following the announcement, SAMR published 39 unconditional approvals and one conditional approval (on par with its review pace prior to the outbreak). To accomplish this, SAMR has adopted a work shift mechanism whereby each day one group of case handlers work in the office while the remainder work from home. Additionally, although some delays have arisen in receiving third-party comments from other Chinese stakeholders and Ministries, after some slowdown in February, even these comments are now generally being provided on a usual basis. Seemingly SAMR's flexibility has allowed it to continue progressing merger reviews at its usual pace.

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Implications for Merger Control in the United Kingdom

The Competition and Markets Authority (CMA) continues to review mergers to the usual statutory timetables and remains active in monitoring the press and complaints for transactions of potential interest. Reports indicate, however, that the authority has asked companies with mergers yet to be closed to delay formal filing of their deals with the CMA. The CMA also has publicly announced that it may seek extensions of statutory timetables. Staff are working remotely and holding meetings

by telephone or videoconference, including issues meetings. The CMA is showing a limited degree of additional flexibility in holding separate orders to allow the acquirer to check the financial health of the target while held separate. The CMA is not relaxing its usual analytical framework, but may offer opportunities to argue for counterfactuals that take into account the impact of the coronavirus outbreak on affected industry sectors.

Associate **Brendan T. Lum** contributed to this article.