Alerts & Publications

Temporary Merger Control Measures in the EU, US, and China in Response to COVID-19

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The European Commission (the "EC") has updated its practical guidance to merging parties "encouraging companies to delay merger notifications originally planned until further notice, where possible."

The unprecedented move comes in response to the expanding crisis management measures that antitrust regulators and companies around the world are implementing in order to help contain the Coronavirus pandemic. With staff and employees staying at home or working remotely, it will be difficult to conduct a merger control review process, which typically involves extensive coordination and communication between various stakeholders, in-person meetings, as well as the exchange and processing of large amounts of information and data. Managing these processes within the strict procedural merger control deadlines is a challenge at the best of times, and it is, therefore, no surprise that the EC and other jurisdictions are instituting temporary changes to merger notification and review procedures with the aim of limiting the need for physical contact between the regulators and stakeholders as much as possible and of easing timing constraints.

On March 13, the US Federal Trade Commission (the "FTC") and Department of Justice (the "DOJ") implemented temporary merger policies in response to the COVID-19 outbreak. Like the EC, where notifications typically require the filing of hard-copy submissions, the FTC and DOJ are temporarily suspending in-person filing obligations in favor of an electronic notification regime. The FTC, on behalf of both US agencies, will not grant requests for early termination of the waiting period while its temporary e-filing system is in effect. Moreover, a significant number of FTC's and DOJ's employees are now working remotely, which means that all meetings—including meetings with the FTC Front Office or its Commissioners or with DOJ leadership—will likely be conducted by telephone or videoconference rather than in person. Likewise, on March 17, the DOJ stated that all scheduled depositions will be temporarily postponed and will be rescheduled using secure videoconferencing capabilities.

The FTC also indicated that it will undertake a matter-by-matter review of its investigations and litigations to consider appropriate modifications of statutory or agreed-to timing. Parties and their counsel should expect that the FTC will contact them to discuss proposed modifications. The FTC noted that it realizes that some proposed modifications may be inconvenient for parties, who may be reluctant to agree to them as a result, but asked that parties be flexible and

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reasonable. For its part, the DOJ is requesting that parties (to both pending mergers and mergers that may be proposed) provide the agency with an additional 30 days to timing agreements so that the DOJ may complete its review of transactions after the parties have complied with document requests. The DOJ also indicated that it may further revisit timing agreements with merging parties in light of further developments.

These moves follow similar actions by the State Administration for Market Regulation (SAMR), China's antitrust authority. On February 6, SAMR issued a formal statement laying out revised procedures for merger filings, prohibiting face-to-face meetings and requiring parties to submit pre-merger notifications online or through the mail, obviating the need for in-person physical filings. SAMR's communications with filing parties are now principally occurring by fax, email, and phone. Together, the moves are meant to ensure SAMR efficiently reviews merger notifications, a goal it has largely met. SAMR's statistics indicate that it has completed at least 45 merger reviews since February 3. Those approvals included one transaction subject to divestiture remedies and a number of deals—including those in which O'Melveny acted as global counsel—cleared through SAMR's simple case mechanism.

While the American and European agencies' requests and recommendations are non-binding, companies are well-advised to pay heed to the recommendations from the EC, FTC, and DOJ. As these regulators struggle to perform their statutory tasks of comprehensively assessing transactions in order to ward off harm to competition, there is a real risk that in times of strained resources, these agencies will err on the side of caution and prohibit a merger unless they can overcome their doubts about a transaction's impact on competition. The EC is particularly likely to follow such course of action considering that—unlike the FTC and DOJ—the EC does not need to go to court to seek an injunction to block a transaction.

Short of a prohibition decision, there are other negative consequences that companies risk by pressing ahead. If nothing else, a regulator's failure to consult with third party stakeholders in a timely and effective manner (for example, as part of a market test exercise aimed at collecting views about a transaction's impact on customers, suppliers, and competitors) is bound to substantially delay the merger clearance process as regulators may be forced to 'stop the clock' in light of non-forthcoming information (most recently the EC has made use of this power by suspending its ongoing Phase II review of the *Boeing/Embraer*, the *EssilorLuxottica/Grand Vision,* and the *Fincantieri/Chantiers de l'Atlantique* transactions on February 24 and March 2 and 13, respectively); parties may be encouraged to "pull and refile" their notifications in order to side-step the statutory review periods and afford the agency additional time to investigate; the EC could declare filings incomplete; or have recourse to demanding requests for information to gain time if the parties insist on filing. Even though such an approach may eventually secure a clearance decision, a protracted process puts companies into limbo, raising uncertainty among employees and trading partners. A delay in a transaction's schedule may also infringe obligations under the deal agreement, potentially triggering contractual penalties and undermining deal security.

At O'Melveny, our antitrust lawyers have significant experience in appraising and managing such risks. Our in-depth understanding of how the EC, the FTC, the DOJ's Antitrust Division, SAMR, and other agencies around the world work and our established relationships with these agencies' staff enable us to help our clients navigate the challenges that the COVID-19 crisis poses to their transactional ambitions. Should your company be contemplating a transaction, do reach out to us so we can assist you in devising the best antitrust strategy and timeline.
