EU Merger Control and Implications from the Effects of the Coronavirus Crisis

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What is the current situation as at 20 March 2020?

The Commission has re-set, its staff are working remotely. In the past week, the Commission approved three simplified procedure cases, two midterm procedures, and eight Protocol Against Anticipated Actions in the German Aerospace companies’ Lufthansa/Condor case. However, Brexit, contacts and EU/US staff performance have been hampered by the stopping of face-to-face staff.

Normal service continues, therefore but at a greatly reduced scale. Apparently, the situation is improving. As critical staff are asked to work longer, however, and the merger control staff are being asked to stand alone to deal with cases on their own, this may reduce the resources available to merger control case managers.

In addition, on 16 March 2020, the Commission published its “Special Measures due to Coronavirus (COVID-19)” and is exercising them.

Ostensibly, these initial measures were to “ensure business continuity in the enforcement of the EU Merger Regulation”. However, “owing to the complexities and disruptions caused by the coronavirus”, the Commission encouraged companies to delay merger notifications originally planned “until further notice, where possible”. This measure will be to delay the timing of the Easter holidays and will introduce 90-period.

What are the implications today for pre-filing parties?

In effect, the Commission currently has a policy of not accepting filings, except possibly in expert cases. This was confirmed by a case manager in a recent case yesterday. This means that all parties continue in pre-notification discussions, and parties who wished to finally appeal the Commission in the near future, should expect delay in any filing timeline.

All notifications filed on the Normal Procedure “long form” (i.e. 30 days) will be particularly impacted. These cases represent approximately 30% of all EUMR notifications in 2019. The Commission is likely being subjected to quite a high volume of queries and requests for information.

The Normal Procedure Form CO cases require the notifying parties to provide third party contact details to facilitate a market investigation. The Commission’s case managers and hierarchy are likely to be keen classes in the current climate. The Commission has inherent concerns about adopting reasoned decisions based on insufficient evidence.

As business focus is on the changes to the coronavirus, and the effects of lockdown, requesting to the Commission’s technical requests for information, or even attending conference calls, are likely to be lower priorities. The Commission will be reluctant to react to any additional requests for information by formal decision under Article 11(6) EUMR in this climate. The preference will be to delay. The timing of the Easter holiday will introduce 90-period.

What can pre-filing parties do today to strategize the timing risk?

Notifying parties, at the filing preparation or pre-notification stage, should now strategize how to deal with this timing risk.

Here are the options:

1. Check the longstop date in the relevant transaction documentation. Is it sufficiently time for the agreement to be closed under the agreement to be closed under a scenario, where the Commission’s staff are working remotely? The longstop date may be a strong commercial pressure, “going right” until filings are accepted again may not be possible.
2. Check the potential delay of the deal. This longstop date does not necessarily mean that the deal will be delayed. Check whether a waiver can be negotiated. Parties will need to work together on the final day of a signed deal, but a shortening of this current circumstances would be impossible.
3. The new measures may impact on the terms of any financing put in place, thereby creating further.

2. Negotiate on electronic filing procedures with the Commission in case of urgent urgency.

At the crisis deepens, new businesses will become distressed. The sector requires of mergers and divestitive control may be required. In an urgent scenario, the notifying parties will need to act quickly to provide the necessary evidence to the Commission. This may involve approving an urgent case (resulting in a “Cabinet of Ministers” approval) to provide the necessary information to the Commission.

As the crisis deepens, the staff are likely to be focused on providing information to the Commission. The Commission’s hierarchy will be under pressure to provide the necessary evidence. The Commission’s case managers and hierarchy are likely to be keen classes in the current climate. The Commission has inherent concerns about adopting reasoned decisions based on insufficient evidence.

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What are the implications for filing hurdles and the Spring and Summer?

As noted above, current Commission policy is not to accept filings, absent urgency. However, the 16 March 2020 measures can be seen as a guide to what the Merger Control Policy may look like in the future.

Approximately 7% of cases are filed in the South America and the Latin American market (i.e. 30 days) and do not involve any withholding. Therefore, accepting Commission staff from the resources and capacity to handle cases, this would appear to be a realistic solution for the most of these cases in this time frame. This would allow filings to be accepted for a minority of cases (i.e. 7% of total number of notifications, as it is very likely that the overall number of notifications filed is on trend, because of the crisis). In the absence of serious disadvantages in these cases, the Commission could even set a 30-day deadline of 16 March 2020, allowing the transition to “short-run”, with the safe assumptions being demand to be comparable with the EWM, which may be a source of concern.

However, the handling of “long form” Normal Procedure cases that require a market investigation will continue to be restrained.

So-called “simplified cases” will continue to be different, difficult. Approximately 5% of all notified cases in 2019 resulted in an investigation (including withdrawal cases), of which there were 12 in 2019. These are cases that resulted in increased in the second time frame or as an urgent expedite.

It is difficult to see how the Commission will handle simplified cases effectively due to the current concerns. Therefore, it is prudent to have a clear, compelling evidence that there is no serious risk to the market. If it were not for the Commission’s approach, the threshold may be seen as being higher than the EWM, without any source of concern.

In the past week, the Commission indicated that it will temporarily accept submissions in digital format.

1. Make a request for a derogation from the suspension obligation under Article 11(6) EUMR

Case by case combination with point 2. The EWM may be a suspension obligation for the purposes of the EUMR. It must be seen the objection to the suspension obligation against the threat to cooperation posed to the case. The Commission will approve a written request quickly. In the case of the OJ, in September 2020, the Commission granted a derogation to bypass the suspension of the OJ.

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One would expect the remaining one-Normal Procedure cases to be a priority for the functioning case teams within the Commission. This is because these cases will require the Commission to undertake a market analysis which will be an important element of the formal decision. Much will depend on whether each of these cases is in the 25 or 35 working day process.

If a Phase I case is near the end of the review process, this may be easier to manage if a case team has completed its investigation, needing only to finalize an approval decision, the case team could potentially complete their process in a streamlined basis.

If, however, a Phase I case is in the early or middle stage of the review process, cases may arise as flagged above about market testing of the substance, particularly if there are meaningful overlaps, credible potential licenses of new or third party competitors. Going to Phase II would require the case team to have serious decisions, and to prepare a detailed Article 6(1)(a)(III) decision. Proceeding with the Normal Procedure may not be advisable or even possible.

In such cases, a delay in the case, the Commission may either:
(i) reverse its internal policy not to "stop the clock" in Phase I cases and park the investigation until normal
(ii) ask the notifying parties to unilaterally withdraw their filings and re-file when the crisis is over and the
Commission can ensure itself that a satisfactory review process can be undertaken.

Conversely if parties in this situation are likely to be already in dialogue with their respective case teams to discuss timing and next steps.

**Will we see a return of failing firm/division cases?**

As noted above, as the crisis deepens, more bankruptcies will become widespread. The Commission is likely to be approached by parties requesting that the target of a failing business or division (potentially also making use of the derogation for mergers not affecting competition).”

Approval decisions for failing firm/division cases must satisfy a three-limb test, which was successfully argued in Aegean/Olympic II[5].

- The allegedly failing firm or division would not meet the market due to financial difficulties, if not taken over by another undertaking;
- There is no less onerous alternative both in terms of financial and non-financial aspects;
- The Commission is going to be sympathetic to parties in real distress. However, the Commission will want to adopt an approval decision based on the extensive evidence, typically following a Phase II investigation.

If parties are considering a failing firm/division approach, they must be very well-prepared. It would be prudent to ensure that clear, convincing and compelling data and evidence, particularly on the various counterfactuals, are available. In addition, and following its increasing reliance on internal documents, parties should ensure that all internal documents (including emails) must be consistent with the failing firm or division thesis. In particular, a strong and credible narrative on each of the following aspects needs to be created:

- The financial situation of the target;
- The lack of incentives to support the target going forward;
- The financial situation of the target;
- The assets leaving the market absent the deal.

Concluding remarks

Coronavirus presents the biggest challenge to our way of life since 1945. It is affecting the operation of the EU merger control regime, and it will continue to do so.

Inevitably, the crisis will have a material, and long-lasting impact on how we all, including the Commission, operate. This may be an opportunity for further improve or update certain procedural aspects of the EUMR system.

In the meantime, notifying parties in non-urgent cases would be well-advised to strategize the timetable for

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**The Klein Competition Law Blog is closely following the impact of COVID-19 on global antitrust law, both practically and substantively. All relevant coverage can be found here.**