Kluwer Competition Law Blog

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

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The global coronavirus pandemic impacts all aspects of life. The operation of the EU merger control regime is no exception. This situation will likely continue for some considerable period, potentially over several months. The inevitable resulting disruption will have negative effects on the M&A process for many companies.

This post considers the effects of the coronavirus crisis, and the near-global lockdown, on the operation of the European Commission (the ***Commission***) and the EU merger control regime. It provides some practical guidance on how to manage these challenges in the best interests of stakeholders.

What is the current situation (as at 20 March 2020)?

The Commission is not closed; its staff are working remotely. In the past week, the Commission approved three Simplified Procedure cases, one Normal Procedure case, and adopted a Purchaser Approval decision in the *Danaher/GE Healthcare Life Sciences Biopharma* case.[1] However, illness, connectivity and IT system performance issues have hampered the teleworking efforts of the staff.

Normal service continues, therefore, but at a greatly reduced level. Apparently, the situation is improving. As critical State aid cases ramp up, however, antitrust and merger control staff may be pulled across to deal with those cases as priority.[2] This may reduce the resources available to merger control case managers.

In addition, on 16 March 2020, the Commission published "*Special Measures due to Coronavirus / COVID-19*" on its website.[3]

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 itself will therefore inevitably disrupt business continuity.

What are the implications today for pre-filing parties?

In effect, the Commission currently has a policy of not accepting filings, except possibly in urgent cases. This was confirmed by a case manager on a pending case only yesterday. This means that all parties currently in pre-notification discussions, and parties who would expect to informally approach the Commission in the near future, should expect a delay in their filing timetable.

All concentrations filed on the Normal Procedure "*long form*" Form CO will be particularly impacted. These cases represented approximately 26% of all EUMR notifications in 2019. The Commission is very likely for the foreseeable future to resist parties' requests to file these cases, absent exceptional circumstances.

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 have concerns that the near-global lockdown effects will create difficulties in collecting information from third parties, such as customers, competitors and suppliers. The Commission has inherent concerns about adopting reasoned decisions based on insufficient evidence.

As business people focus on the challenges of the coronavirus, and the effects of lockdown, responding to the Commission's informal requests for information, or even attending conference calls, are likely to be lower priorities. The Commission will be reluctant to resort to adopting requests for information by formal decision under Article 11(3) EUMR in this climate. The preference will be to delay. The timing of the Easter holidays will reinforce this preference.

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 there sufficient time under the agreement's terms to allow a normal procedure once operations resume? Whilst avoiding delay may be the strong commercial preference, "*sitting tight*" until filings are accepted again may be the only option.[4]
2. **Amend the terms of the deal.** If the longstop date does not accommodate a delay, check whether a waiver/extension is possible. Parties will want to avoid "*re-opening*" the terms of a signed deal, but a waiver/extension in the current circumstances would appear to be reasonable. This may, however, impact on the terms of any financing put in place by purchasers, creating further issues.
3. **Negotiate an electronic filing greenlight with the Commission for cases involving urgency.** As the crisis deepens, more businesses will become distressed. The urgent injection of resources and strategic control by new owners will become critical. Case managers and the hierarchy are not unsympathetic towards cases involving financial distress. The staff recognise that critical transactions may be important to the stability of markets and the global economy. Inevitably, discussions of this nature will need to be elevated to the Deputy Director-General for Mergers (currently Cecilio Madero Villarejo). A well-prepared request, based on clear, convincing evidence showing the urgency (e.g. financial distress to the target) may be accepted in the

discretion of the hierarchy. In the measures adopted on 16 March 2020, the Commission indicated that it will temporarily accept submissions in digital format.

4. **Make a request for a derogation from the suspension obligation under Article 7(3) EUMR (can be in combination with point 3).** The EUMR imposes a suspensory notification regime for notifiable concentrations where the relevant thresholds are met. A transaction cannot close until it has been notified to, and approved by, the Commission. It is a barrier to critical transactions. However, the Commission can issue a derogation from the suspension obligation under Article 7(3) EUMR. It must consider the effects of the suspension obligation against the threat to competition posed by the deal. The Commission can approve well-prepared requests quickly. In the course of one Sunday in September 2008, the Commission granted a derogation to Santander for the acquisition of the Bradford & Bingley assets.[5] The current crisis threatens the stability of the world's economy. The benefits to stakeholders, and to the stability of the markets, of critical transactions are likely to outweigh any competition detriment arising from them. Derogation requests are likely to be accepted by the Commission in the same spirit as in 2008.

What are the options if the lockdown effects continue into the Spring and Summer?

As noted above, current Commission policy is not to accept filings, absent urgency. However, the 16 March 2020 measures contemplate the electronic filing of merger notifications (with the delivery of hard copies being arranged at a later date). Going all-electronic would be an option. This may in fact pave the way for the full "*electronification*" of the EUMR procedure for the future.

Approximately 74% of cases are filed on the Short Form "Simplified Procedure" Form CO, and do not involve any market investigation. Therefore, assuming Commission staff have the resources and capacity to handle cases, this would appear to be a workable solution for at least those non-issue cases. This would allow filings to resume for a majority of cases (and it may be that the overall number of notifications falls in any event because of the crisis). In the absence of serious doubts in these cases, the Commission could even seek to rely on Article 10(6) EUMR, allowing the clock to "*time out*", with the notified concentration being deemed to be compatible with the EUMR (i.e. without a Simplified Procedure decision).

However, the handling of "*long form*" Normal Procedure cases that require a market investigation will continue to raise concerns.

So-called "*intervention cases*" will raise particular difficulties. Approximately 5% of all notified cases in 2019 resulted in intervention (not including withdrawn cases, of which there were 12 in 2019). These are cases that resulted in remedies in either Phase I or Phase II, or outright prohibition.

It is difficult in the current climate to see how the Commission could satisfy itself that it has conducted an appropriate and wide-reaching market investigation in such cases, and particularly in remedy consultation cases.

Other critical steps in the procedure, such as site visits and physical state-of-play meetings with case staff, the hierarchy and even the Commissioner herself, are unthinkable in the current circumstances. Traditional oral hearings in Phase II cases (even if requested by the parties), would be impossible. The same would apply to consultations with the Hearing Officer, triangular

meetings and meetings of the Advisory Committee.

No doubt, our collective future is paperless and increasingly virtual. A clearly articulated, virtual procedure process, using the best-in-class technologies, would be required as a start.

In the present circumstances, and with the uncertainty around the duration and the effects of the crisis, it is difficult to see how the Commission will handle intervention cases satisfactorily with its current process. Naturally, it will be concerned that its decisions may be exposed to a higher risk of legal challenge to the Court in Luxembourg. This is particularly the case if active third party complainants feel that the market investigation, data gathering or evidence relied on is insufficient, incomplete or inaccurate.

Further guidance from the Commission on these practical challenges will be welcome if the crisis continues for a considerable period.

What about cases that have already filed with the Commission?

A number of cases are live with the Commission. At the time of writing, this would appear to include six Phase II investigations.[6] In three of those cases, the Commission has already stopped the clock, and doubts must arise as to whether those clocks will restart before the resumption of normal service post-crisis. Counsel in the three other cases may legitimately have concerns that the clocks will also be stopped in their cases, unless they are sufficiently advanced in their process.

In addition, a quick check reveals that the Commission may have approximately 27 Phase I cases before it now. Of those, 18 cases appear to be Simplified Procedure cases. Of the remaining nine Normal Procedure cases, at least one case is in the remedy testing phase (*Gategroup/LSG European Business*).[7]

Presumably, not much resource will be required to manage the pending but filed Simplified Procedure cases. Ordinarily, these are closed well within the ordinary 25 working day deadline with a pro forma two-page electronic decision. The key resources used to adopt the formal decisions will typically be the internal administration and secretariat functions.

One would expect the remaining nine 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 investigation, and critically, to adopt a reasoned formal decision. Much will depend on where each of those cases are in the 25 or 35 working day process.

If a Phase I case is near the end of the review process, this may be easy to manage. If a case team has completed its investigation, needing only to finalise an approval decision, the case team could presumably complete their process on a teleworking basis.

If, however, a Phase I case is in the early or mid-stage of the review process, concerns may arise as flagged above about market testing of the substance, particularly if there are meaningful overlaps, credible potential theories of harm or third party complaints. Going to Phase II would require the case team to have serious doubts, and to prepare a detailed Article 6(1)(c) EUMR decision. Proceeding with the Normal Procedure may not be advisable or even possible.

In such cases, absent a change in the law, the Commission may either:

(i) reverse its internal policy not to "*stop the clock*" in Phase I cases and park the investigation until normal service can be resumed; or

(ii) ask the notifying parties to unilaterally withdraw their filing and refile when the crisis is over and the Commission can assure itself that a satisfactory review process can be undertaken.

Counsel to 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 businesses will become distressed. The Commission is likely to be approached by parties claiming that the target is a failing business or division (potentially also making use of the derogation request mentioned above).

Approval decisions for failing firm/division cases must satisfy a three-limb test, which was successfully argued in *Aegean/Olympic II*:[8]

(i) the allegedly failing firm or division 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 purchase than the notified merger;

(iii) in the absence of a merger, the assets of the failing firm would inevitably exit the market.

The Commission is going to be sympathetic to parties in real distress. However, the Commission will want to adopt any 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 corporate 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 lack of an alternative credible buyer; and
– 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 to 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 their transaction, with the engagement of the relevant case teams if already allocated. For cases of urgency and financial distress, well-prepared, proactive and upfront engagement with case managers (and the hierarchy if necessary) is advisable to explore the filing and derogation options.

Stay safe everyone.

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[1] See, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9331.

[2] See, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_496.

[3] See, https://ec.europa.eu/competition/mergers/information_en.html.

[4] For guidance on force majeure issues in international commercial contracts, see https://www.bakermckenzie.com/en/insight/publications/2020/03/coronavirus-outbreak-global-guide.

[5] See, https://ec.europa.eu/competition/mergers/cases/decisions/m5363_21_2.pdf.

[6] These appear to be M.9569 – *ESSILORLUXOTTICA/GRANDVISION* (clock stopped), M.9409 – *AURUBIS/METALLO GROUP HOLDING* (provisional deadline 7 May 2020), M.9343 – *HYUNDAI HEAVY INDUSTRIES HOLDINGS/DAEWOO SHIPBUILDING & MARINE ENGINEERING* (provisional deadline 9 July 2020), M.9162 – *FINCANTIERI/CHANTIERS DE L'ATLANTIQUE* (clock stopped), M.9097 – *BOEING/EMBRAER* (clock stopped) and M.9014 – *PKN ORLEN/GRUPA LOTOS* (provisional deadline 30 June 2020).

[7] See, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9546. The remedy package in this case was submitted on 13 March 2020. This is likely to have been at a time when the Commission new the measures and lockdown would be coming into effect. This may signal that the parties are advanced in their discussions with the Commission, and that input from third parties has already been obtained in the case, such that the Commission may be capable of adopting a conditional approval decision in the ordinary course.

[8] See, https://ec.europa.eu/competition/mergers/cases/decisions/m6796_20131009_20682_4044023_EN.pdf. For transparency, the author represented Aegean Airlines in that case.

The Kluwer Competition Law Blog is closely following the impact of COVID-19 on global antitrust law, both practically and substantively. We wish our global readers continued health and success during this difficult time. All relevant coverage can be found here.

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