

# Impact of COVID-19 on US and EU Merger Review and Enforcement

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Last week, in response to the outbreak of the Coronavirus disease (COVID-19), the antitrust agencies in the United States and European Union issued policies that will affect, and may delay, merger filings and reviews.

On March 13, 2020, the US Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) implemented policies in response to COVID-19, including employee teleworking and a Hart-Scott-Rodino (“HSR”) e-filing system. The antitrust agencies will continue to operate, but will only accept HSR filings via a temporary e-filing system and will not grant early termination. The DOJ is currently considering whether to extend by 30-60 days any timing agreements with upcoming deadlines.

On March 12, 2020, the European Commission (“EC”) implemented similar policies, with teleworking for non-critical employees and electronic filing processes. Where possible, the EC encourages parties to delay filings until further notice (which we currently understand would last at least two weeks).

## Key Takeaways

### United States

- On Friday, March 13, the FTC’s Premerger Notification Office (“PNO”) and DOJ suspended the submission of hard copy HSR filings.
- Beginning on Tuesday, March 17, the PNO and DOJ will accept HSR filings via a temporary e-filing system.
- The PNO and DOJ review of HSR filings will continue. FTC employees will be allowed to telework and are encouraged to refrain from in-person meetings.
- The PNO will not grant early termination during the use of the temporary e-filing system.

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## European Union

- While the EC plans to continue accepting paper submissions, it encourages parties to submit them electronically.
- The EC is strongly urging parties in ongoing cases that are at the end of the pre-notification stage to delay merger notifications until further notice (we currently understand that this will last at least two weeks).
- The EC could declare filings incomplete or have recourse to demanding requests for information to gain time, if the parties insist on filing.
- The EC appears to be willing to accept filings in urgent circumstances where not being able to formally notify could result in significant negative consequences for the parties (e.g. impeding long stop date).
- Non-critical EC employees will telework, but appear to be facing IT challenges, which are expected to slow down the pace of work at least in the beginning.

## US and EU Policies

### US Merger Review & Enforcement COVID-19 Policies

While we expect that the DOJ and FTC will endeavor to continue with business as usual, teleworking policies could slow the pace of US merger review for the foreseeable future.

On March 13, 2020, the DOJ and FTC announced policies and systems to mitigate the effect of COVID-19 on the agencies. FTC employees will be allowed to telework, except for those employees who are staffed on matters requiring a physical presence, and, as necessary, FTC employees will conduct phone calls or video conferences in lieu of in-person meetings.<sup>1</sup> The PNO will not accept any HSR filings until 8:30 a.m. on Tuesday, March 17, 2020 when its temporary e-filing system will go live.<sup>2</sup> Thereafter, the PNO will only accept HSR filings via the temporary e-filing system, and the PNO will not grant early termination.<sup>3</sup> Parties should ensure that their antitrust counsel are familiar with the specific protocols and procedures to submit HSR filings via the e-filing system.

The DOJ has been evaluating options related to ongoing investigations, such as requesting that parties with timing agreements extend any upcoming HSR deadlines by 30-60 days.<sup>4</sup>

### EU Merger Review & Enforcement COVID-19 Policies

On March 12, 2020, the EC announced its policies in response to COVID-19. After previously cancelling all non-essential trips, external meetings, and conferences, the EC has now asked its employees with “non-critical” functions to start teleworking as of today. Officials ensuring critical functions will continue to be present at work, working in shifts. The EC will decide whether to maintain meetings with external individual visitors (limited to five external visitors) on a case-by-case basis, but these meetings seem unlikely to continue in merger control proceedings.<sup>5</sup>

The EC’s Directorate General for Competition (“DG COMP”) specifically recommends that merger notifications be delayed until further notice, where possible, because it will likely “face difficulties in collecting information

<sup>1</sup> Victoria Graham, *FTC to Telework, Tweak Merger Reviews Amid Coronavirus (1)*, Bloomberg (Mar. 13, 2020), <https://news.bloomberglaw.com/privacy-and-data-security/ftc-employees-to-telework-amid-coronavirus-outbreak>.

<sup>2</sup> *Premerger Notification Office Implements Temporary e-Filing System*, Federal Trade Commission (Mar. 13, 2020), <https://www.ftc.gov/news-events/press-releases/2020/03/premerger-notification-office-implements-temporary-e-filing>.

<sup>3</sup> *Id.*

<sup>4</sup> Victoria Turner, *US DOJ 'Considering Appropriate Measures' for Antitrust Reviews During Global Pandemic*, PaRR (Mar. 13, 2020).

<sup>5</sup> *Coronavirus: Measures Introduced for Commission Staff*, European Commission (Mar. 12, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_445](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_445). There appears to be no specific list of DG COMP officials considered as performing “critical” functions; we understand that “critical” employees might include officials at management positions and any officials working on cases with a pending legal deadline (as far as necessary).

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from third parties, such as customers, competitors and suppliers” and may “face limitations in terms of access to information and databases” due to remote working measures.<sup>6</sup> DG COMP strongly urges the parties in ongoing cases that are at the end of the pre-notification stage to delay merger notifications until further notice. While the EC will continue to accept paper submissions, it encourages parties to submit them electronically via email or through eTrustEX, its document exchange system.

## Potential for Delay

At the outset, agencies typically investigate mergers by interviewing customers and competitors. If either the agency staff or interviewee is sick or teleworking, the normal back-and-forth may be delayed. Some customers or competitors may also not have robust teleworking infrastructure in place, or have higher priority COVID-19 issues to manage, which could eliminate communication altogether. More developed investigations require senior management approval (or a commissioner vote at the FTC) when key decisions are being made. Such issues can be handled remotely via phone or videoconference, but delays at this stage should also be expected.

## Mitigation Strategies

Even with the impact of COVID-19, parties can still make progress on filings and compile documents and data remotely for merger investigations. To prepare for and minimize the effect of any potential US and EU merger review delays, and depending on the stage of the merger, we suggest the following.

**Be proactive.** Compile as much information and documents about the transaction as possible, as early as possible. Counsel, in turn, can use collected information to prepare summaries or advocacy that will make the merger review easier for the EC, FTC, or DOJ staff.

**Be available.** Ensure that you have a core business team and legal team that will be able to address questions from the agencies and remotely access requested documents or data.

**Prepare filings in advance for flexibility and communicate with staff.** Even with the effect of COVID-19 and potential delays, parties and counsel can prepare all necessary filing information so that a filing can be promptly submitted. Parties may, in some cases, choose to delay filings if there is risk that the agencies will not complete their review within the waiting period and use that time instead to work with staff to do their investigation. Inform staff of any reasons formal filings need to be made under a particular timeframe.

**Pull-and-refile.** In the US, consider providing the agencies with an additional 30 (or 15) days to complete review of the transaction, especially if the agencies need more time to avoid a Second Request. Although parties typically reserve pulling-and-refiling for more highly scrutinized mergers, parties could also use this strategy to provide the DOJ or FTC with review time that was lost because of teleworking or illness.

**Written advocacy.** To aid staff in reviewing transactions, prepare white papers and agenda for any conference calls. Teleworking attorneys and economists may appreciate the materials to speed their review and make conference calls more productive.

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<sup>6</sup> *Practical Information*, European Commission – Competition, [https://ec.europa.eu/competition/mergers/information\\_en.html](https://ec.europa.eu/competition/mergers/information_en.html).

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