

# Global Merger Clearance: The First Week of the New Normal

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Antitrust agencies around the world are adjusting to the policies and procedures they quickly implemented in response to the outbreak of the coronavirus disease (“COVID-19”), as detailed in [White & Case’s March 16<sup>th</sup> alert](#). In the week since, antitrust agencies have provided additional clarity, and parties are adapting to working with antitrust agencies during the COVID-19 crisis. The common response of global agencies has been to call for slower reviews and, in many cases, to request that parties delay their merger filings. This will present challenges to merging parties and may result in slower reviews for companies facing increasing financial difficulties with each passing day.

Antitrust agencies might also have to spend more time analyzing the changing counterfactuals, which could slow down the reviews. Given the financial strain of the COVID-19 crisis, there is a chance that one of the parties to a transaction becomes a failing firm, which would present antitrust agencies with a new defense to evaluate mid-transaction.

The US antitrust agencies continue to review mergers, but new teleworking and timing arrangements in response to COVID-19 are expected to slow the review of transactions.

The European Commission (“EC”) continues to ask that parties postpone merger notifications, except in exceptional circumstances.

The United Kingdom’s Competition and Markets Authority (“CMA”) will, if necessary, extend statutory time limits on an *ad hoc* basis where possible.

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## US, EU, and UK Policy Updates

### US Merger Review & Enforcement COVID-19 Policy Updates

Nearly all US Federal Trade Commission (“FTC”) employees are now working remotely and conducting all meetings (both internal and external) via telephone or videoconference. The FTC is curtailing nearly all agency travel, with the FTC Front Office only permitting agency travel in compelling circumstances.<sup>1</sup> The US Department of Justice Antitrust Division (“DOJ”) is also conducting all meetings by telephone or videoconference, except in extraordinary circumstances. All scheduled DOJ depositions are temporarily postponed and will be rescheduled to be conducted via videoconference.<sup>2</sup>

Both the DOJ and FTC claim that these new arrangements will slow the review of all transactions, even those with little likelihood of posing competitive issues. The FTC is currently in the process of reviewing current investigations and litigations to determine whether statutory or agreed upon timing require modification.<sup>3</sup> The FTC expects that parties will agree to its proposed timing modifications, even where inconvenient.<sup>4</sup> If parties themselves wish to modify timing agreements, they are encouraged to reach out directly to the FTC.<sup>5</sup> The DOJ is requesting from merging parties an additional 30 days to timing agreements after compliance with document requests to complete review of transactions.<sup>6</sup> The DOJ will continue to revisit timing agreements as needed.<sup>7</sup>

With the FTC and DOJ only accepting HSR filings via the temporary e-filing system, the agencies are now allowing parties to e-sign certifications and affidavits.<sup>8</sup>

Notably, the FTC sought assistance from Congress to modify the standard HSR timeline. Commissioner Rohit Chopra demanded that Congress pause all current waiting periods, as “[c]orporations shouldn’t be able to slip big mergers through during national emergencies.”<sup>9</sup> Similarly, Commissioner Christine S. Wilson shared that the FTC was “seeking more time to ensure full review of pending deals” and “will not sacrifice thoroughness of investigations that may require information from third parties focused on other priorities.”<sup>10</sup>

While Democrats and Republicans had floated proposals to lengthen the standard HSR waiting period, the Coronavirus Aid, Relief, and Economic Security Act passed by the Senate on March 25 did not include any HSR modifications.

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<sup>1</sup> Ian Conner, *Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic*, FTC – Bureau of Competition (Mar. 16, 2020), [https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus?utm\\_source=govdelivery](https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus?utm_source=govdelivery).

<sup>2</sup> Press Release, DOJ, Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event (Mar. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event>.

<sup>3</sup> Ian Conner, *Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic*, FTC – Bureau of Competition (Mar. 16, 2020), [https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus?utm\\_source=govdelivery](https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus?utm_source=govdelivery).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Press Release, DOJ, Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event (Mar. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event>.

<sup>7</sup> *Id.*

<sup>8</sup> Ian Conner, *Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic*, FTC – Bureau of Competition (Mar. 16, 2020), [https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus?utm\\_source=govdelivery](https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus?utm_source=govdelivery).

<sup>9</sup> Rohit Chopra (@chopraftc), Twitter (Mar. 18, 2020, 7:19 PM), <https://twitter.com/chopraftc/status/1240417656941023234>.

<sup>10</sup> Christine Wilson (@CSWilsonFTC), Twitter (Mar. 19, 2020, 1:29 PM), <https://twitter.com/CSWilsonFTC/status/1240691934684839936>.

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On March 24, the FTC and DOJ announced steps to speed up approvals for companies that are teaming up to produce necessary supplies or provide services related to the COVID-19 outbreak.<sup>11</sup> Parties are to request a staff advisory opinion, with a description of the proposal, and the antitrust agencies will respond to all COVID-19-related requests within seven calendar days.<sup>12</sup> Collaborative arrangements likely to be consistent with antitrust laws include:

- R&D collaborations,
- Sharing of technical know-how (excluding company-specific data on prices, wages, outputs, or costs),
- Development of provider practice parameters (e.g., standards for patient management),
- Most joint purchasing agreements among healthcare providers, and
- Lobbying, including industry meetings with the federal government on responding to COVID-19.

This is a welcome and common sense accommodation for arrangements that should be cleared without undue delay.

Finally, current FTC and DOJ litigations are also being impacted by local district court closures. For example, Northern District of California courthouses are closed to the public until May 1, which could affect *FTC v. Qualcomm* if the case is remanded to the district court.

## EU Merger Review & Enforcement COVID-19 Policy Updates

EC employees performing non-critical functions continue to work remotely, as further detailed in [last week's alert](#).<sup>13</sup> After some initial IT challenges, the EC's remote work now appears to be running more smoothly.

The EC still asks that parties refrain from notifying mergers, except where exceptional circumstances necessitate filing. Such extraordinary circumstances might include an impending long-stop date or financial implications of a delayed filing. For example, EssilorLuxottica will reportedly have to increase the price for its acquisition of GrandVision by 1.5 percent if the transaction, which is currently in Phase II review before the EC, is not completed by the end of July.<sup>14</sup> This perhaps explains why the EC has recently restarted the clock so as to yield a decision by July 23.

While the EC suspended a number of Phase II investigations in high-profile transactions in the past weeks, these are unlikely to be solely linked to the EC's recent COVID-19 measures (but rather to specific challenges of these reviews). Nevertheless, we expect that ongoing reviews will be delayed or even suspended in the future, as the EC staff adjust to working remotely and as merging parties work to respond to requests in the face of disrupted workplaces and competing priorities.

## UK Merger Review & Enforcement COVID-19 Policy Updates

CMA staff is currently working remotely and conducting all meetings via telephone or videoconference. The CMA will also conduct all hearings remotely. Statutory time limits will be extended, if necessary, on an *ad hoc* basis where possible, and CMA staff will prioritize critical work (including merger reviews) in the reallocation of agency resources as the CMA endeavors to "continue progressing its cases, making decisions and meeting deadlines."<sup>15</sup> Parties should be prepared for more time to pass between notification and the initiation of a formal investigation (which starts the 40 working day time period for a Phase 1 decision) than would typically

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<sup>11</sup> Joint Statement Regarding COVID-19, DOJ & FTC (Mar. 24, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1569593/statement\\_on\\_coronavirus\\_ftc-doj\\_3-24-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj_3-24-20.pdf).

<sup>12</sup> *Id.*

<sup>13</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).

<sup>14</sup> Javier Espinoza and Kate Beioley, *Big Mergers Face Delays as Regulators Adapt to Pandemic*, *Financial Times* (Mar. 19, 2020), <https://www.ft.com/content/5faba594-687f-11ea-800d-da70cff6e4d3>.

<sup>15</sup> COVID-19: CMA Working Arrangements, CMA (Mar. 19, 2020), <https://www.gov.uk/government/news/covid-19-cma-working-arrangements>.

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be expected. Despite a heavy workload, the CMA is still making decisions and not routinely stopping the clock.

## Merger Review & Enforcement COVID-19 Policies in Practice

Despite the challenges of changing COVID-19 policies and timing, merging parties can work to stay on track for closing. In the week since the implementation of these policies:

- The FTC staff reached a settlement on a major pharmaceutical deal that is expected to close in the near future.
- Parties continue to submit productions electronically to the agencies.
- The DOJ is moving forward with conduct investigations.
- Both US agencies continue to issue Second Requests.
- The EC continues to actively investigate mergers and issue substantive requests in pre-notification phases.
- Today, the CMA issued an “invitation to comment” in two cases<sup>16</sup> showing that, to the extent possible it is business as usual for mergers.

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<sup>16</sup> The anticipated acquisitions of: (i) the Osumnia business of Elanco Animal Health by Dechra Pharmaceuticals; and (ii) OverDrive Holdings by Aragorn.