

March 19, 2020

U.S., European Merger Review Adapts to COVID-19 Crisis

Agencies Working Remotely, Modified Timelines Expected

SUMMARY

In light of the COVID-19 crisis, the European Commission (“*EC*”), the Antitrust Division of the U.S. Department of Justice (“*DOJ*”), and the U.S. Federal Trade Commission (“*FTC*”) have announced new procedures that will impact the process and timing of merger reviews. While each agency remains operational, merging parties should expect delays in the review process and prepare accordingly. This may include assessing whether existing “drop dead” dates are likely to be met and whether the parties wish to negotiate extensions. To the extent one or both parties to an M&A transaction is in financial distress or the transaction has implications for economic conditions in one or more countries, the agencies may take into account these special circumstances and expedite review, as they have in previous times of crisis.

The modified review processes represent the agencies’ efforts to cope with rapidly changing circumstances. It is possible that as developments continue to unfold the agencies will make additional modifications, some of which may further impact the timing of planned transactions.

COMMENT: U.S. SITUATION

Like many government agencies and other employers, the FTC and DOJ announced new procedures this week that are designed to address the challenges of operating during the COVID-19 crisis. Both agencies are taking steps to continue their core operations and have vowed not to compromise the quality of their merger review activity despite significant disruptions in the workplace.

The newly-announced measures are intended in part to give merging parties comfort there will be continuity in the merger review process, although reviews may be slower and less efficient for the duration of these significant workplace disruptions. Extended reviews could have a range of implications for pending

SULLIVAN & CROMWELL LLP

transactions. For instance, they may call into question whether “drop dead” dates that were consistent with the regulatory process under more normal conditions remain realistic. Parties should consider whether they wish to negotiate to extend “drop dead” dates now to account for potential delays, though such efforts may lead to tension or controversy between the parties. Similarly, parties should take these timing considerations into account when entering into new transactions. However, to the extent that one or both parties to a transaction is in financial distress or the transaction has implications for economic conditions in one or more countries, the transaction may receive special consideration. Both U.S. and European authorities granted expedited clearance of a number of such transactions in the aftermath of the 2008 financial crisis.

The agencies’ operating models are changing in a number of ways as described below. We are actively monitoring the situation and preparing to respond on behalf of clients to additional changes as the COVID-19 crisis continues to evolve.

Agency business will be conducted remotely

Virtually all FTC and DOJ employees have transitioned to remote working. As a result, internal and external meetings will be conducted exclusively via telephone or videoconference, including merging parties’ meetings with the Front Office and FTC Commissioners. The agencies have also imposed strict travel restrictions on all personnel. Staff may travel only in “compelling circumstances” and only with the permission of the Front Office. Travel restrictions will have implications for a range of regular agency activities, including depositions and other litigation-related appearances. DOJ has announced that all scheduled depositions will be postponed and rescheduled using videoconferencing capabilities.

Agency staff will assess timing on a matter-by-matter basis and will likely seek extensions

The agencies are requesting additional time to investigate currently pending mergers and those that may be subject to review in the coming days while operations remain disrupted. FTC Bureau Director Ian Connor announced that the FTC is “conducting a matter-by-matter review of our investigations and litigations to consider appropriate modifications of statutory and agreed-to timing.” The agencies are requesting that merging parties extend existing timing agreements by 30 days. To the extent that the circumstances of a particular investigation so require, the agencies have reserved the right to revisit timing agreements with merging parties more broadly. The FTC acknowledged that “some proposed modifications may be inconvenient and that parties may be reluctant to agree to them,” but went on to say that, “as always, we will take affirmative action to protect consumers when necessary, including when an unmodified time period does not allow us to address competitive concerns.” It is not yet clear what the agencies will do if merging parties decline to extend investigatory timing.

Electronic filing system implemented; early terminations will not be granted

As of Tuesday, March 17, 2020, DOJ and the FTC have put in place a temporary e-filing system for Hart-Scott-Rodino Act premerger notifications and will no longer accept hard-copy filings. For as long as the

SULLIVAN & CROMWELL LLP

temporary filing system is in effect, the agencies will not grant early termination to any transaction (that is, clearance of all notified transactions will have to wait until the initial 30-day waiting period has lapsed).

Agency capacity is being reallocated to support core operations; non-enforcement activities are likely to come to a halt

As the agencies shift resources to compensate for the new challenges they are facing, their capacity for non-enforcement matters will be diminished. Workshops and certain outreach work have already been halted. For example, the FTC canceled its planned March 18, 2020 workshop on the draft Vertical Merger Guidelines. These activities are unlikely to resume until the COVID-19 crisis has passed and agency operations have normalized.

COMMENT: EU SITUATION

On March 12, 2020, the EC announced a number of policies in response to COVID-19. To ensure continuity in the enforcement of the EU Merger Regulation and to meet statutory merger review deadlines amid extensive COVID-19-related disruptions in Europe, it has put in place a number of measures. Much like the state of affairs in the U.S., EC merger review will continue but is likely to be slower in the near future. Merging parties therefore should expect and prepare for delays. As noted above, however, the EC may afford special consideration and expedited review to transactions that implicate a company's ongoing viability, or the overall economic recovery in one or more countries, as it did in the wake of the 2008 financial crisis.

Agency staff working remotely or in shifts

Similar to the U.S. agencies, the EC has implemented remote working measures for most staff. Officials performing critical functions will continue to work on-site, though will do so in shifts. The Commission will decide whether to maintain meetings with external parties (limited to five external visitors) on a case-by-case basis, but in-person meetings seem unlikely to continue as a general matter.

EC encourages merging parties to delay notifications

To cope with challenges to its operations, the EC is encouraging merging companies to delay merger notifications until further notice to free up bandwidth for staff to deal with urgent notifications. In addition, delaying merger notifications will provide relief to case teams struggling with COVID-19-related challenges to their normal investigative activities. In particular, staff is likely to face challenges related to (1) collection of necessary information from third parties, such as customers, competitors and suppliers, and (2) limited access to EC information and databases and coordination within the EC hierarchy as a result of working remotely. The EC is expected to prioritize its resource allocation towards mergers and state aid cases.

SULLIVAN & CROMWELL LLP

EC accepting electronic submissions

While the EC plans to continue accepting paper submissions, it will temporarily also accept all submissions in digital format, either electronically by e-mail or through its document exchange system, eTrustEx. Nonetheless, the Commission will still require notifying parties to deliver paper originals at a later date.

* * *

Copyright © Sullivan & Cromwell LLP 2020

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Werner F. Ahlers	+1-212-558-1623	ahlersw@sullcrom.com
Francis J. Aquila	+1-212-558-4048	aquilaf@sullcrom.com
Audra D. Cohen	+1-212-558-3275	cohenad@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Scott B. Crofton	+1-212-558-4682	croftons@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
John Evangelakos	+1-212-558-4260	evangelakosj@sullcrom.com
Sergio J. Galvis	+1-212-558-4740	galviss@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Matthew B. Goodman	+1-212-558-4995	goodmanm@sullcrom.com
Dustin F. Guzior	+1-212-558-4482	guziord@sullcrom.com
Brian E. Hamilton	+1-212-558-4801	hamiltonb@sullcrom.com
Steven L. Holley	+1-212-558-4737	holleys@sullcrom.com
Matthew G. Hurd	+1-212-558-3122	hurdm@sullcrom.com
Stephen M. Kotran	+1-212-558-4963	kotrans@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Scott D. Miller	+1-212-558-3109	millersc@sullcrom.com
Keith A. Pagnani	+1-212-558-4397	pagnanik@sullcrom.com
Richard C. Pepperman II	+1-212-558-3493	peppermanr@sullcrom.com
Richard A. Pollack	+1-212-558-3497	pollackr@sullcrom.com
George J. Sampas	+1-212-558-4945	sampasg@sullcrom.com
Melissa Sawyer	+1-212-558-4243	sawyerem@sullcrom.com

SULLIVAN & CROMWELL LLP

Alan J. Sinsheimer	+1-212-558-3738	sinsheimera@sullcrom.com
Benjamin R. Walker	+1-212-558-7393	walkerb@sullcrom.com
Krishna Veeraraghavan	+1-212-558-7931	veeraraghavank@sullcrom.com

Washington, D.C.

Amanda F. Davidoff	+1-202-956-7570	davidoffa@sullcrom.com
Renata B. Hesse	+1-202-956-7575	hesser@sullcrom.com
Joseph J. Matelisi	+1-202-956-7610	matelisi@sullcrom.com
Robert S. Risoleo	+1-202-956-7510	risoleor@sullcrom.com

Los Angeles

Eric M. Krautheimer	+1-310-712-6678	krautheimere@sullcrom.com
Rita-Anne O'Neill	+1-310-712-6698	oneillr@sullcrom.com
Adam S. Paris	+1-310-712-6663	parisa@sullcrom.com
Alison S. Ressler	+1-310-712-6630	resslera@sullcrom.com
Robert A. Sacks	+1-310-712-6640	sacksr@sullcrom.com

Palo Alto

Brendan P. Cullen	+1-650-461-5650	cullenb@sullcrom.com
Scott D. Miller	+1-650-461-5620	miller-sc@sullcrom.com
Sarah P. Payne	+1-650-461-5669	paynesa@sullcrom.com

London

John Horsfield-Bradbury	+44-20-7959-8491	horsfieldbradburyj@sullcrom.com
Jeremy B. Kutner	+44-20-7959-8484	kutnerj@sullcrom.com
Ben Perry	+44-20-7959-8477	perryb@sullcrom.com
Richard A. Pollack	+44-20-7959-8404	pollackr@sullcrom.com
Juan Rodriguez	+44-20-7959-8499	rodriguezja@sullcrom.com
Evan S. Simpson	+44-20-7959-8426	simpsons@sullcrom.com

Paris

Olivier de Vilморin	+33-1-7304-5895	devilmorino@sullcrom.com
---------------------	-----------------	--

Frankfurt

Carsten Berrar	+49-69-4272-5506	berrarc@sullcrom.com
Krystian Czerniecki	+49-69-4272-5525	czernieckik@sullcrom.com
York Schnorbus	+49-69-4272-5517	schnorbusy@sullcrom.com

Brussels

Michael Rosenthal	+32-2896-8001	rosenthalm@sullcrom.com
-------------------	---------------	--

Melbourne

Waldo D. Jones Jr.	+61-3-9535-1508	jonesw@sullcrom.com
--------------------	-----------------	--

Sydney

Waldo D. Jones Jr.	+61-2-8227-6702	jonesw@sullcrom.com
--------------------	-----------------	--

SULLIVAN & CROMWELL LLP

Tokyo

Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com
--------------	-----------------	--

Hong Kong

Garth W. Bray	+852-2826-8691	brayg@sullcrom.com
---------------	----------------	--

Kay Ian Ng	+852-2826-8601	ngki@sullcrom.com
------------	----------------	--

Beijing

Gwen Wong	+86-10-5923-5967	wonggw@sullcrom.com
-----------	------------------	--
