

FTC and EC Announce Temporary Procedures for Hart-Scott-Rodino and EU Premerger Notification Filings During COVID-19 Coronavirus Pandemic

March 16, 2020

Key Points

- As of March 17, 2020, the FTC and DOJ will accept **only** electronic submissions of HSR notifications (no filings accepted March 16, 2020).
- Early termination of the HSR waiting period will **not** be granted for any HSR filing during this period.
- The EC is accepting digital submission of documents and has encouraged merging parties to delay filing new transactions until further notice, as other antitrust authorities worldwide introduce temporary measures.
- Transactions currently in the pre-notification EC process will be subject to delay until further notice.
- Acquirers/merging parties are advised to build additional time into their transaction timetables.

Due to the COVID-19 (coronavirus) pandemic, the Federal Trade Commission (FTC) **announced** on March 13, 2020, implementation of emergency procedures for the submission of premerger notification filings under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, as amended, Section 7A of the Clayton Act, 15 U.S.C. § 18a (the “HSR Act”). The HSR Act requires parties to proposed transactions that meet transaction size and other tests to file premerger notification forms with both the FTC and the Department of Justice Antitrust Division (DOJ) and to observe a mandatory waiting period prior to closing. The minimum HSR transaction size threshold for 2020 is \$94 million.

The FTC and DOJ announced on Friday, March 13, 2020, that they will be implementing a temporary electronic filing system starting March 17, 2020, and will not accept hard copy or DVD HSR filings until further notice. This is the first time the FTC and DOJ have implemented an electronic HSR filing system, having previously required hard copies be delivered to each agency. The FTC and DOJ attorneys that

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review HSR filings will largely be working remotely during this period. As such, there may be technical difficulties in the antitrust agencies' implementation and use of the emergency e-filing process, and parties should expect potential delays in review of HSR filings. To that end, the agencies have announced that no granting of early termination for any HSR filings will occur until further notice. Parties should also expect that the FTC and DOJ may need to issue Second Requests in situations where parties would not otherwise have received them in order to extend time for review of filed mergers or transactions.

Outside the U.S., at close of business on March 13, 2020, the European Commission (EC) published a **notice** stating that, while it had put in place a number of measures to ensure business continuity in EU merger control enforcement, "due to the complexities and disruptions caused by the Coronavirus" companies are encouraged to delay merger notifications until further notice "where possible." The notice attributes this to (i) the risk of the EC having difficulties in collecting information from third parties (including customers, competitors and suppliers) in the coming weeks and (ii) the fact that EC officials may themselves face certain difficulties due to a remote working policy beginning on Monday, March 16, applying to all but mission critical officials. The notice states that the EC is also temporarily accepting (and indeed, is actively encouraging) digital submissions of documents, including by email copied to the relevant case team. The notice did not comment on the impact on ongoing investigations, although formally notified transactions will continue to be investigated in accordance with the statutory deadlines, notwithstanding any difficulties officials may face with accessing information from the merging or third parties. That said, there could be more suspensions of time over the coming weeks.

Other antitrust authorities around the world have announced that they are varying their approach to merger control procedures:

- The *Bundeswettbewerbsbehörde* in **Austria** has announced that it will be closed to the public as of March 16, 2020, and has requested that no merger filings are made until (provisionally) March 20, 2020, while it works on providing an option to make filings electronically.
- The **Philippine** Competition Commission has suspended the acceptance of new merger notifications until April 14, 2020 (or until the general community quarantine of Manila is lifted), as well as having stopped the clock on those reviews that are already under way.
- The **Finnish** Competition and Consumer Authority has also requested that notifications of new transactions are postponed where possible.

Elsewhere, at the time of writing, formal procedural changes due to the virus outbreak are not widespread—although this may well change in the coming days. For example, the Competition and Markets Authority in the **U.K.** has indicated that it expects to make an announcement either today or tomorrow (March 17, 2020).

Even those authorities that do not introduce formal changes to their procedures are still likely to alter their working practices. For example, the Comisión Federal de Competencia Económica in **Mexico** has indicated informally that it will not hold in-person meetings; the Hellenic Competition Commission in **Greece** has reduced its opening hours; and the authorities in places such as **Austria, Germany** and **Taiwan** either already have their employees working from home or are expected to introduce

this imminently. Transactions notified to the State Administration for Market Regulation in **China** have been subject to delays for several months, but there are signs of improvement as the epicenter has moved to Europe.

Parties contemplating merger and acquisition activity are strongly encouraged to consult antitrust counsel to determine whether premerger notification is required and to learn about developments regarding the temporary procedures under the HSR and elsewhere.

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