
CRAVATH, SWAINE & MOORE LLP

COVID-19 Antitrust Insights: Merger Review Updates

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Merger Review Updates

- **Both the Federal Trade Commission (FTC) and Department of Justice (DOJ) have implemented new processes for Hart-Scott-Rodino (HSR) filings and merger reviews that will remain in place until further notice. Further changes to merger review procedures may be implemented in the coming weeks**
- ***Changes to early termination procedures:***
 - While the agencies initially suspended granting early termination in connection with the implementation of their new procedures, the FTC recently announced that the agencies will resume processing early termination requests effective March 30th, but that for the duration of the pandemic, early termination will be granted on a more limited basis than has historically been the case, and more slowly¹
- ***No changes to initial waiting period for now:***
 - Under the HSR Act, the initial waiting period is 30 calendar days for most transactions, and 15 calendar days for cash tender offers and bankruptcies. The length of the initial waiting period can be modified only by an act of Congress
 - While there were reports that DOJ had asked that Congress include a provision in the COVID-19 aid bill that would give the agencies the power to extend the initial HSR waiting period by 15 days during national emergencies, the bill was passed without any HSR extensions.² It remains to be seen whether an extension will be included in subsequent legislation
- ***E-filings and telework procedures:***
 - Under the new procedures, all HSR filings must be made using a cloud-based electronic filing system. The agencies are no longer accepting paper or disc filings³
 - Both agencies have implemented telework policies and travel restrictions on agency personnel. Any meetings with parties and counsel will be conducted by telephone or teleconference, and the DOJ has mandated that any scheduled depositions will be postponed and rescheduled using videoconferencing⁴

Merger Review Updates

▪ ***Changes to negotiated timing agreements:***

- The DOJ has requested changes to negotiated timing agreements for pending or future transactions that are subject to a Second Request
- After the issuance of a Second Request, the reviewing agency may ask the parties to enter a timing agreement under which the parties agree to delay closing for a certain period of time, typically 60 to 90 days, after complying with the Second Request
- Under the new policy, DOJ will ask that parties agree to extend this period by an additional 30 days⁵
- The FTC has not made any changes to its timing agreement policies at this time, but announced that it is conducting a “matter-by-matter review of [its] investigations and litigations to consider appropriate modifications to statutory or agreed-to timing”⁶

▪ ***International merger reviews:***

- Merger reviews by foreign antitrust regulators are also likely to experience delays as a result of measures and policy changes implemented in response to the crisis, and given the difficulty of conducting market tests—an important element of the merger review process for many antitrust regulators—with companies focused on the health and safety of their workers and continuity of their operations
- In Europe, the Directorate-General for Competition is encouraging companies “to delay merger notifications originally planned until further notice, where possible” and has indicated that parties should anticipate delays in merger investigations⁷
- In the UK, the Competition and Markets Authority announced that it will extend statutory timeframes for reviews, as permitted, if the need arises⁸
- Other national competition regulators have made similar pronouncements⁹

References

- [1] Press Release, Fed. Trade Comm'n, FTC to Resume Processing HSR Early Termination Requests on March 30, March 27 2020
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- [3] Press Release, Fed. Trade Comm'n, Premerger Notification Office Implements Temporary e-Filing System, March 13, 2020
- [4] Press Release, Fed. Trade Comm'n, FTC Outlines Agency's Response to Coronavirus Challenges, March 17, 2020; Press Release, Dep't of Justice, Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event, March 17, 2020
- [5] Press Release, Dep't of Justice, Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event, March 17, 2020
- [6] Ian Conner, Bureau of Competition, Fed. Trade Comm'n, Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic, March 16, 2020
- [7] European Comm'n Notice, *available at* <https://ec.europa.eu/competition/mergers/news.html>
- [8] News Story, COVID-19: CMA Working Arrangements, March 19, 2020, *available at* <https://www.gov.uk/government/news/covid-19-cma-working-arrangements>
- [9] *E.g.*, Press Release, Communication with the Bundeskartellamt (Coronavirus measures), March 17, 2020, *available at* www.bundeskartellamt.de/SharedDocs/Meldung/DE/Meldungen%20News%20Karussell/2020/17_03_2020_Erreichbarkeit_Bundeskartellamt.html

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Partners

John W. White
Evan R. Chesler
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Sharonmoyee Goswami
C. Daniel Haaren
Evan Mehran Norris
Lauren M. Rosenberg

LONDON

Partners

Philip J. Boeckman
George A. Stephanakis
Alyssa K. Caples

CRAVATH

Worldwide Plaza

825 Eighth Avenue
New York, NY 10019-7475
+1-212-474-1000 Phone
+1-212-474-3700 Fax

CityPoint

One Ropemaker Street
London EC2Y 9HR England
+44-20-7453-1000 Phone
+44-20-7860-1150 Fax
