

Will COVID-19 Impact Antitrust Review of M&A Deals + How Can Parties Minimize Disruption?

March 23, 2020

Antitrust FAQs for merging parties

What modifications have the FTC and DOJ made for transactions reportable under the Hart-Scott-Rodino Act? Will timing to receive HSR clearance be impacted?

The federal antitrust agencies, the Federal Trade Commission and US Department of Justice (the agencies), are still open for business, but are experiencing significant disruption due to the COVID-19 pandemic. Like many private companies, most federal employees are operating under mandatory work from home (WFH) protocols. The agencies have also announced modifications to their policies and procedures, including putting timing and processes in place for reviewing transactions that are subject to mandatory reporting under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act).

The HSR Act requires that parties to mergers and acquisitions, including acquisitions of voting securities and assets (which may include intellectual property licenses and executive equity compensation), file notifications with the agencies and observe a statutory waiting period, which is typically 30 calendar days, if the acquisition meets specified size-of-transaction (currently \$94 million) and size-of-person (currently \$18.8 million and \$188 million) thresholds and does not fall within an exemption.

During the mandatory waiting period, the agencies analyze whether the transaction may substantially lessen competition, and the notified transaction cannot be consummated until the agencies complete their review. This initial waiting period can be extended for an additional 30 calendar days if the acquirer pulls and refiles its notification. After the initial waiting period, the agencies may issue a second request. This extends the waiting period and prevents the companies from completing their deal until they have substantially complied with the second request and observed a further waiting period, which can often take six to nine months to in excess of a year.

In normal times, the agencies regularly grant early termination of the waiting period if requested. In fact, the vast majority of transactions that are reported under the HSR Act do not present any substantive antitrust issues and receive early termination. In any given year, early termination is granted in about 80% of transactions where it is requested. Due to the challenges of processing HSR filings remotely for agency staff on WFH, the agencies initially announced that no requests for early termination of the waiting period would be granted during the pendency of the COVID-19 crisis. On March 27, 2020, the agencies resumed the practice of granting early termination of the waiting period, given the success of their temporary HSR electronic filing program. However, the agencies have made it clear that early termination “is not a right” and that it will be granted only as time and resources allow. Parties should anticipate that early termination will be granted less frequently than has historically been the case.

The new reality of WFH also creates practical challenges to agency staff’s abilities to carry out their duties. To further alleviate these challenges, the agencies announced the following changes to merger review and investigation processes:

- The agencies will only allow electronic submission of HSR filings

- The agencies will conduct meetings by phone or video conference to the extent possible and absent extenuating circumstances
- All scheduled depositions will be temporarily postponed and rescheduled using secure video conferencing capabilities
- The agencies also requested that parties add 30 days to timing agreements for pending or future mergers subject to second requests, and they may revisit existing timing agreements to provide additional time to review transactions after the parties have complied with documents requests

With the changes implemented by the agencies thus far, timing and logistics for receiving HSR clearance may be more challenging, but it is by no means impossible. There are practical steps that merging parties can take to manage the risk of impact on deal certainty and timing and to best position themselves for a successful HSR review (see below).

Are there additional measures that may further impact antitrust review for merging parties?

Yes, and merging parties should be prepared for these potential changes. Congressional Republicans and Democrats are discussing legislation that would allow the agencies to extend the initial 30-day HSR waiting period during the COVID-19 crisis. Options under consideration range from allowing the agencies to extend the review period for set time periods at their discretion, to automatic extensions of time, to extending the review period for all transactions until the end of the COVID-19 national emergency.

The agencies have raised concerns that they will not have time to thoroughly review transactions under the new working conditions required by COVID-19. One FTC commissioner has said that "Congress should stop the shot clock so public servants have enough time to investigate and sue to block bad deals," and another has said that the FTC is "seeking more time to ensure full review of pending deals. It will not sacrifice thoroughness of investigations that may require information from third parties focused on other priorities."

Reports suggest that there are three proposals on the table:

1. Allowing either the FTC chairman or the DOJ Antitrust Division assistant attorney general to extend the initial waiting period by 15 days, with the option of additional 15-day extensions
2. Allowing a 30-day extension to the waiting period that would be invoked automatically during a national emergency and could be invoked by either agency in their discretion
3. An automatic tolling of all waiting periods until the end of the COVID-19 national emergency, at which point the HSR waiting period would start to run

While no provision was included in the CARES Act, reports indicate Congress may revisit this issue when it returns from its Easter recess, and legislation may even be retroactive and apply to pending HSR filings.

Are there similar issues relating to antitrust review in countries outside the US?

Yes, and merging parties should be prepared for countries to handle matters on a case-by-case basis. More than 100 countries have merger control notification laws similar to the US, and each are adjusting to the realities within their borders. In the EU, for example, the European Commission has implemented WFH procedures for its case teams and invoked a policy of not accepting filings except in urgent cases. This means that merging parties that are currently engaged in pre-notification discussions or that would typically expect to informally approach the commission should expect delays to their filing timelines. Merging parties should be prepared for the commission to discourage requests to file these cases absent exceptional circumstances. While it is unclear how the commission will handle all pending cases, it has already stopped the clock in a few, and questions remain as to whether those clocks will restart prior to the resumption of normal process after the crisis has passed.

What should merging parties do to maximize success under the "new normal" antitrust review process?

Recognizing that every transaction is different and strategies vary depending on the facts and circumstances of each deal, there is no one-size-fits-all answer, but there are steps that parties can take to manage the HSR process. Parties considering transactions that require an HSR filing should consult Cooley antitrust counsel early in the process to set up a strategy and devise a game plan. Options may range from filing early on a letter of intent or term sheet, to pre-notifying agency staff prior to starting the HSR clock, to earlier-than-normal engagement and advocacy to make it easier for reviewing agency staff to reach a conclusion to clear the transaction. Rather than waiting five to 10 business days after signing to submit the filing, which is typical in a normal environment, earlier submission of HSR filings may also expedite the process. Parties should also consider the timing issues in negotiating merger and acquisition agreements, including whether to insert provisions to address the new reality and potential contingencies.

Similarly, early consideration of any filings required outside the US is highly recommended to allow time for consultation with local counsel in other countries about the timeline for potential clearances, which are likely to be included as conditions to closing. Merging parties must also be mindful of this fluid environment in drafting best efforts clauses, termination provisions, closing conditions regarding US and ex-US filing requirements and other related antitrust contractual provisions.

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