



Between Speed, Flexibility & Vigilance: European Antitrust Agencies' Nuanced Responses to the Coronavirus Crisis

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European antitrust agencies have been swift to respond to the crisis triggered by the Coronavirus (COVID-19). The European Commission (the Commission) and national antitrust agencies published a number of communications over the last days and weeks regarding the continued operation of merger control proceedings and their vigilance around business practices that could infringe EU antitrust rules particularly in the current crisis. At EU level, there has also been a specific focus on State aid, given the need for major bail-out packages from governments across the EU. Our executive summary provides a high-level overview of the current landscape regarding each of these topics. Additional details are set out further below.

Impact on merger control proceedings and timelines

- The Commission has requested companies to refrain to the extent possible from submitting EU merger control filings for the moment. A number of national agencies have made similar announcements, asking businesses for example to delay merger control notifications of non-urgent transactions.
- The timelines of ongoing proceedings may also be impacted. The Commission, for example, could avail itself of various tools to delay the review process of transactions that have already been notified.
- Spain has taken measures to restrict acquisitions in strategic industries by investors from outside the European Economic Area (EU, Norway, Iceland and Liechtenstein).
- Businesses planning transactions that require merger control filings in Europe should carefully consider the appropriate timing of such notifications. Depending on the urgency of the project, it may be advisable in some cases to prepare the filings but to postpone their actual submission.

Agencies remain vigilant in respect of anticompetitive business practices, in particular excessive price hikes

- National antitrust agencies across Europe have provided guidance or issued warnings to companies to remind them to avoid, especially in the current circumstances, engaging in conduct that could potentially fall foul of EU antitrust rules that prohibit anticompetitive agreements or abusive conduct by dominant firms.
- In particular, several agencies have stated that they are monitoring and are ready to intervene, if necessary, against excessive price hikes related to, for example, essential products that are currently in high demand, such as hygiene products or protective medical equipment (some have already launched investigations). Similarly, agencies have cautioned businesses against engaging in cartel conduct or resale price maintenance. Authorities are also focusing on misleading claims, for example regarding the efficacy of products under consumer protection rules.

- Businesses should not believe that they will be ‘forgiven’ for anticompetitive conduct in the current circumstances – in fact, antitrust agencies are at a heightened state of alert. Companies should therefore carefully review the compliance of their business practices with EU antitrust rules, in particular as regards pricing practices.

Guidance on EU State aid enforcement in record time

- The Commission has been assisting national governments in their efforts to mitigate the economic consequences of the current COVID-19 crisis. As EU Member States are preparing to roll out measures worth billions in support of sectors and companies that are struggling due to the huge economic fall-out of COVID-19, the Commission has provided guidance in record time on the legal framework under which it will assess such measures from an EU State aid perspective.
- Given the extraordinary circumstances associated with the pandemic, the Commission has highlighted its willingness to use the maximum flexibility permitted under EU State aid rules to approve aid. In addition, it has signalled that it stands ready to act very fast and work with governments to ensure that State aid requiring prior notification can be approved and put in place in a timely manner, as demonstrated by a first clearance decision adopted within 24 hours of the notification.
- Nevertheless, this speed and flexibility should not lead to the belief that the Commission will turn a blind eye to State support or waive through such aid merely because it is linked to COVID-19. The Commission is expected to remain vigilant with a view to ascertaining, in particular, that aid is effective and proportionate, and does not lead to undue distortions between Member States which undermine the EU Internal Market.
- It is therefore crucial that businesses which benefit from State aid measures review them carefully to ensure that such measures comply with EU State aid rules with a view to avoiding any challenges or even potential reimbursement obligations further down the road.

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COVID-19 IMPACTS MERGER CONTROL PROCEEDINGS AND TIMELINES

The Commission and a number of national antitrust agencies in Europe have issued announcements to inform companies about the impact of the pandemic on upcoming merger notifications and ongoing merger proceedings. Given more limited agency resources for merger review during this time, challenges posed by remote working and impact on the agencies’ ability to conduct efficient market investigations, companies will need to consider more carefully than ever, the timing of their notifications. Some agencies are discouraging filings but clearly delay will not be possible for all deals and ultimately companies will need to make the judgement call on timing, knowing that the agencies have tools at their disposal to delay the statutory review timelines if they need more time.

Commission actions

The Commission has [encouraged](#) companies to defer merger control notifications to the extent possible, highlighting that its services are likely to face difficulties in collecting information from third parties, as well as other limitations in terms of access to information and databases and challenges arising from remote working. Companies are also encouraged to submit their notifications in digital format.

With respect to ongoing investigations, the EU Merger Regulation (EUMR) provides the Commission with various tools to deal with the consequences of the emergency measures associated with COVID-19. More specifically, the Commission can take the following actions in order to delay the ongoing review of transactions:

- Adopt 'stop-the-clock' decisions (Art. 11(3) EUMR) suspending the review period until the notifying parties provide the requested information. Such decisions have already been issued for two ongoing Phase II cases.ⁱ According to the Commission's normal practice, 'stop-the-clock' decisions have so far been limited to Phase II (in-depth) investigations, but the Commission could extend this practice also to Phase I cases.
- Declare a notification incomplete (Art. 5(2) EUMR) and request the parties to refile once they incorporate the 'missing' information into the filing. This power has been used rarely but in the current circumstances where pre-notification contacts with merging parties and with competitors and customers may be less productive, the Commission could resort to broader use although given the impact, hopefully only as a measure of last resort.
- Request the parties (unofficially) to unilaterally withdraw their filing and refile when the emergency measures are lifted.
- In 'no-issues' deals that do not raise any doubts as to their compatibility with the EUMR, make use of Art. 10(6) EUMR, pursuant to which a merger is automatically declared compatible upon the expiry of the statutory review period and absent any decision from the Commission.

Examples of actions by national agencies

The French antitrust authority has [announced](#) that it will not be able to guarantee the usual timeline for merger notifications and asked companies to delay their non-urgent merger plans. The timeline and procedure for the assessment of ongoing cases and upcoming notifications will likely be affected and may be adapted in the coming weeks in light of the current exceptional circumstances.

In Germany, the Federal Cartel Office (FCO) [stated](#) that although its operating capacity is currently ensured, personal visits to the FCO are not possible until further notice. Further, in view of the challenging circumstances, it invited businesses to consider in each individual case whether merger control notifications could possibly be delayed.

For the time being, the UK Competition and Markets Authority (CMA) has not specifically encouraged merging parties to delay notifications. It has, however, [announced](#) that it will continue to monitor timetables including "*extending statutory timeframes where necessary*". The CMA has the power to extend Phase II merger reviews (once only) by up to eight weeks if it considers that there are 'special reasons' why a final decision cannot be prepared and published within the statutory deadline. The CMA is required to publish the reasons for any such extension.

While not specifically related to merger control enforcement by antitrust authorities, it is also noteworthy that the Spanish government, as part of its response to the current crisis, has adopted a decree which restricts acquisitions in strategic industries by investors from outside the European Economic Area (EU, Norway, Iceland and Liechtenstein). The Italian government is also reported to be considering introducing similar measures.

EUROPEAN ANTITRUST AGENCIES REMAIN VIGILANT WITH REGARD TO ANTICOMPETITIVE CONDUCT DURING THE CURRENT COVID-19 CRISIS

A number of antitrust agencies in Europe have cautioned businesses against engaging in conduct that could fall foul of EU antitrust rules (they prohibit anticompetitive agreements and abusive conduct by dominant firms), despite or *especially* in the current circumstances where COVID-19 has already caused a great degree of harm to consumers and the economy as a whole. These warnings have focused on pricing practices, in particular excessive pricing practices related to essential products that are currently in high demand, such as hygiene products or protective medical equipment. For example:

- The [UK](#), [Italian](#) and [Latvian](#) antitrust agencies have issued warnings or even initiated investigative steps in relation to certain pricing practices in connection with the COVID-19 crisis. For example, the UK CMA announced that it would look into any evidence of companies breaking the competition rules by charging excessive prices (emphasizing that this position also applies to resellers of goods, e.g., on online marketplaces). The CMA has also added that it may assess whether it should advise the UK government to consider taking steps to regulate prices. In Italy, the competition and consumer agency sent an information request to the main online sales platforms in connection with, amongst other things, allegations of unjustified and significant increases in the prices of hand sanitizers and disposable respiratory protection masks.ⁱⁱ
- The [Portuguese](#) and [Greek](#) antitrust agencies have issued press releases in relation to conduct that could infringe rules prohibiting anticompetitive agreements, be it collaboration between competitors or distribution agreements. The Portuguese agency indicated that it would remain particularly vigilant in relation to possible anticompetitive practices that exploit the current situation to the detriment of citizens and the economy, such as price fixing or market sharing. The Greek agency published a communication which, in essence, summarizes the conditions under which suppliers may set maximum resale prices or recommended resale prices.

There have been some [calls](#) for greater flexibility in the application of EU antitrust rules in the current situation, in particular in relation to cooperation between supermarkets with a view to ensuring supplies and deliveries. The UK government has temporarily relaxed the competition laws to allow supermarkets to work together on their contingency plans and share resources ([UK press release](#)) and the Commission is following up on this question through an information request sent to EuroCommerce, which seeks to ascertain, in particular, which information retailers would like to share. However, for the moment, no clear guidance has been issued in this regard, and it remains to be seen which additional steps European antitrust agencies will take in this regard to provide assurances to businesses in relation to permissible forms of cooperation.

THE COMMISSION PROVIDES GUIDANCE IN RECORD TIME ON STATE AID RELATED TO COVID-19

In addition to the dramatic immediate impact on human life and health, COVID-19 has also had severe economic consequences for numerous citizens and businesses, which in many cases may continue to be felt for months. This includes substantial falls in revenue for companies, lack of liquidity, job losses and bankruptcies, etc. Against that background, EU Member States are [rolling out](#) massive aid programmes to support citizens, companies, entire sectors and even economies that suffer financially as a result of the crisis triggered by COVID-19.

Why do EU State aid rules matter in this context?

Support measures intended to alleviate the economic consequences of COVID-19 will frequently be classified as State aidⁱⁱⁱ and, unless they benefit from a specific exemption, they will typically have to be notified to the Commission for prior approval before they can be implemented. Where this ‘standstill obligation’ is not complied with, any aid put into effect is deemed unlawful and can be challenged by the Commission or by third parties through the national courts. There is also the risk that the aid is subsequently found to be incompatible with the State aid rules, and that recipient companies will have to repay it with interest. These risks also concern aid granted by the UK.^{iv}

What action has the Commission taken so far?

The Commission has moved swiftly to issue EU State aid guidance specifically related to the COVID-19 crisis. In a series of documents (mostly published on 13 March 2020 – see, in particular [coordinated response](#) and [statement](#)), it summarized different types of aid measures that Member States could adopt and explained the legal framework under which it will assess such measures from an EU State aid perspective. The Commission made clear, in particular, that it was ready to make full use

of the flexibility of EU State aid rules to allow Member States to support their economies swiftly and effectively in order to mitigate the consequences of the pandemic. On the other hand, it also noted that it is important to ascertain that State aid is effective in reaching those companies that are in need and that harmful subsidy races are avoided.

Further, the Commission has announced that it stands ready to work with all Member States to ensure that possible national support measures to tackle the outbreak of COVID-19 virus can be put in place in a timely manner. Accordingly, it has put in place a specific [webpage](#) and set up a dedicated mailbox and telephone number, available seven days a week, to assist Member States with any queries they may have or measures they would like to discuss. In fact, the Commission has already [approved](#) the first State aid scheme notified in connection with COVID-19 in a record time of 24 hours from notification.

We summarize the guidance provided by the Commission below:

- **First**, there are various measures that do not constitute State aid and can therefore be implemented without prior notification. This includes, for example, (i) financial support from EU or national funds granted to health services or other public services to tackle the COVID-19 situation; (ii) financial support granted directly to consumers, for example for cancelled services or tickets that are not reimbursed by the operators concerned; (iii) support measures that apply to all businesses throughout the economy, including wage subsidies and relief on taxes and social contributions, as such measures are of general application and therefore do not meet the requisite criterion of 'selectivity', a key requirement for a measure to constitute State aid; and (iv) loans or guarantees provided at market rates, as such support measures do not entail an advantage.
- **Second**, there is a range of measures which, although they may amount to State aid, do not require prior notification, because they can benefit from relevant (automatic) exemptions, in particular *de minimis* exemption rules and the General Block Exemption Regulation (GBER).
- **Third**, Member States may compensate companies for harm directly caused by exceptional occurrences, subject to prior notification and approval by the Commission.^v The Commission has recognized that COVID-19 qualifies as such an exceptional occurrence and suggested that governments can rely upon this rule to support sectors that are hit especially hard by COVID-19, such as tourism, transport, hotels and restaurants. It has also indicated that it is already working with governments to put in place such schemes and [published](#) a guidance document on 17 March 2020 setting out, in particular, the information that Member States should provide as part of notifications. A first example is the decision adopted on 12 March 2020 clearing a Danish scheme to compensate harm caused by cancellations of large events due to COVID-19.
- **Fourth**, Member States may help companies that have to cope with liquidity shortages and need urgent rescue aid, subject to prior notification and approval by the Commission.^{vi} Member States can, for example, put in place dedicated schemes for SMEs including loans or guarantees to cover their operating cash-flow shortfalls for up to 18 months. A number of Member States already have this type of scheme in place. For large undertakings, the rules are generally less permissive (measures may involve loans or guarantees to cover operating cash-flow shortfalls for up to six months), and an individual notification is normally required.
- **Fifth**, the Commission may approve additional national support measures to remedy a serious disturbance to the economy of a Member State.^{vii} The Commission has acknowledged that, currently, the impact of COVID-19 in Italy is of a nature and scale that allows the use of that provision and has noted that it would take a similar approach for other Member States. The Commission has also prepared a special legal framework that sets out the conditions under which such additional aid can be granted, drawing on its experience with a similar framework adopted in connection with the 2008 financial crisis. A draft proposal was sent to Member States on 16 March 2020 and the final version was [adopted](#) on 19 March 2020.^{viii}

What is going to happen now?

For the moment, based on publicly available information, the Danish compensation scheme for large events cancellations is the only State aid notification that has been made in connection with COVID-19. However, it is likely that many more State aid notifications will follow within the next weeks and months. Based on its reaction so far, the Commission can be anticipated to act in a manner that is both fast and flexible (it has [promised](#) to approve measures notified to it “within days”). Nevertheless, governments and businesses should not expect the Commission to waive through any kind of measure simply because it is linked to COVID-19 and turn a blind eye to potentially distortive measures. Therefore, a careful assessment is still required to avoid any potential reimbursement further down the road.

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The Baker Botts [Brussels Antitrust & Competition Law](#) team is continuing to monitor, on a daily basis, European antitrust developments relevant to our clients. We will provide further guidance to our clients as major developments occur. If you have any questions on these or other developments, please contact any member of Baker Botts’ [Antitrust & Competition Law practice](#) team.

ⁱ Cases M.9569 - *EssilorLuxotica/Grandvision* and M.9097 – *Boeing/Embraer*.

ⁱⁱ While the press releases provide few concrete details, it appears that this enforcement action is based on both consumer protection law and antitrust law.

ⁱⁱⁱ The concept of State aid is very broad in scope. In particular, it is not limited to subsidies, but may encompass any form of support that mitigates costs normally included in the accounts of an undertaking including, for example, tax exemptions. Moreover, it captures not only measures adopted at national level, but also at regional or even at local level.

^{iv} Although it is no longer an EU Member State, the UK remains subject to EU State aid rules until the end of the transition period on 31 December 2020. This period can be extended by one to two years with the agreement of the EU and the UK.

^v Article 107(2)(b) TFEU.

^{vi} The compatibility of such liquidity support is assessed on the basis of Article 107(3)(c) TFEU and the Commission’s Rescue & Restructuring Guidelines. The Commission published a chart summarizing the different types of liquidity support ([chart](#)).

^{vii} Article 107(3)(b) TFEU.

^{viii} The Temporary Framework provides for five types of aid: (i) direct grants, selective tax advantages and advance payments; (ii) State guarantees for loans taken by companies from banks; (iii) subsidized public loans to companies; (iv) safeguards for banks that channel State aid to the real economy; and (v) short-term export credit insurance.