Top Five Takeaways in Navigating European Regulatory Approvals for M&A Amid Disruption and Economic Fall-Out

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In this challenging environment, we are seeing knock-on effects on the timely antitrust assessment of transactions as merger control authorities in Europe struggle to keep pace. At the same time, the European Commission ("Commission") is strongly encouraging Member States to enforce existing Foreign Direct Investment ("FDI") laws and introduce new laws, to protect EU companies from "*predatory buying of strategic assets by foreign investors*", while the UK has already moved to strengthen its FDI laws.

The current crisis is also fueling what was already mounting political pressure on the EU, to avoid what some leading politicians perceive as merger control damaging efforts to protect European industry. Looking forward, the economic shock from the global pandemic will likely see some changes in approach to the substantive antitrust assessment of deals and these will need to be factored in to evaluating transactions which on their face raise antitrust issues. While the merger control rule book will not be thrown out of the window, investors need to consider, for example, the potential increased scope under EU and certain national laws to invoke the 'failing firm defense' to allow deals that might otherwise be considered anticompetitive – particularly acquisitions of distressed assets. Merging parties may also have more leeway, particularly for deals subject to review at national level, to put forward arguments around job-savings/job-creation and other benefits to help secure approvals for a deal which would otherwise be considered to damage competition. The Commission may also be more open to the so-called "efficiencies defense" in the current economic climate.

The Commission and certain national authorities are also continuing to look at whether and how they should adapt their assessment criteria for mergers, including the approach to definition of the relevant product and geographic markets, as well as the timeframe for a forward-looking assessment and the standard applied to evaluating the impact of potential competition. This may give greater scope for arguments that any reduction in competition in Europe would be offset by competition from players outside the EU. At the same time, traditional indicators of market power, such as combined market shares held over the last 3-5 years, may hold less weight depending on the economic impact of the current crisis on the companies involved. A realistic evaluation of whether a deal eliminates a strong actual or potential competitor needs to factor in the impact of the economic crisis on a company's ability to retain or expand its market position.

Against this background, we provide Top Takeaways companies should consider in navigating European regulatory approvals for M&A.

1. ***Develop as early as possible a strategy for timing of filings, depending on the jurisdictions where merger filings are required and the antitrust complexity of your deal***. While this is a normal part of planning a transaction, in the current circumstances, companies need to factor in unavoidable delays in certain jurisdictions and develop a strategy around how to minimize those delays. While some authorities in Europe have stated that it is 'business as usual', the Commission and several national authorities – e.g. Germany and the UK – are asking parties to delay filings where possible. That said, the Commission has continued to accept merger notifications (electronically) and to carry out and complete merger reviews. Some other authorities, including France, Austria and Spain, have suspended their statutory timelines so that while they will continue to accept filings, the normal deadlines for merger review are frozen for a

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temporary period (in the case of France, for example, until one month after the end of the *"sanitary state of emergency"* currently in place). Delays are more likely to affect deals that raise complex issues – authorities including the EU and UK have expressed concerns about their ability to conduct market investigations and get input from competitors and customers of the merging parties, as well as their ability to market test any remedies. Authorities will make a case-by-case assessment on timing. Once deals are filed and subject to a tight statutory review timeline, companies should anticipate that the EU and other authorities will make greater use of powers to suspend the timeline where needed through requests for information, "stop the clock," and "pull and refile".

a. ***Engage early with the Commission and other reviewing authorities in pre-notification discussions on timing for formal filing and triggering of the statutory review period.*** While pre-notification discussions are the norm in many jurisdictions, the issue of timing, and when the authority will accept a formal filing triggering a statutory timeline for a decision, needs to be considered well in advance. Several authorities have put out statements encouraging early engagement to allow them to anticipate timing challenges. For example, in conducting a case-by-case assessment of potential timing issues, the Commission is engaging in pre-filing calls with market players in order to anticipate any difficulties in conducting market investigations during the formal review period. Even in those jurisdictions where pre-notification is not traditionally part of the process (Germany, for example), it would be prudent to engage early with the authority to help anticipate any potential delay.

b. ***Develop short and compelling arguments for why review of your deal should not be delayed, backed by supporting documents.*** In its guidance of 7 April the Commission stated that they are ready to accept filings where firms can show *"very compelling reasons to proceed with a merger notification without delay."* While they have not provided an indication of what they consider to be *"very compelling,"* evidence that the target company is in financial distress, or that delay will likely cause deterioration in the business, will help to get your deal "on the clock" for review.

2. ***Consider whether your deal could be eligible for derogation from the usual legal requirement to suspend closing pending EU/national merger approval***. While derogations from the standstill obligation in the EU are granted only exceptionally, they were granted following the 2008 financial crisis, and more recently, where it was shown that the suspension obligation would cause serious damage to the merging parties or to a third party (for example, if there is a risk of imminent financial failure), and where the merger is unlikely to pose a threat to competition. Parties are entitled to request a derogation at any stage, including before formal notification of their deal, allowing parties to sign and close even prior to filing. Some national authorities (e.g. France, Spain) also permit derogations under similar circumstances.

3. ***For acquisitions and investments by non-EU companies in EU-based assets, assess in the early stages of evaluating a transaction potential FDI approvals required from national governments***. On 25 March, the Commission issued guidance to Member States on how to use FDI mechanisms in a time of public health crisis and economic vulnerability. FDI approvals can be required regardless of the size of transaction or amount of revenues generated by the acquiror and target. Minority investments in companies which fall short of giving the acquiror control of the target, can also be subject to FDI approval. The definition of what constitutes "strategic" varies by country but will generally at least include healthcare, critical infrastructure, media, and technologies and inputs considered essential for security or the maintenance of public order. It is not unusual that acquisition or investment in a target that provides even a minor component or raw material used, for example, in transport infrastructure or in the defense sector, will be subject to prior FDI approval. Depending on the jurisdiction and the sensitivity of the sector and nationality of the acquiror, approvals can take several months.

4. ***For a transaction that eliminates a competitor in a concentrated market, and may otherwise be considered anticompetitive, consider whether your deal can benefit from the failing firm defense.*** For deals subject to EU review, this requires an acquirer to demonstrate three specific things: (i) absent the merger, the target company would in the near future be forced out of the market due to financial difficulties; (ii) there is no alternative merger that would give rise to fewer anticompetitive effects; and (iii) in the absence of the merger the assets of the failing firm would inevitably exit the market (i.e. would be unavailable for a third party to snap up and continue to put the assets to use). Such defenses have been invoked in the past, and have succeeded in rare cases, at least one of which was in the context of a general economic crisis. The evidentiary burden is high and an acquirer of a failing firm would need to have strong evidence of serious financial distress of the target company and the lack of any viable alternative for the target business/assets. For example, documentation showing the target lacks access to any financial backing and/or unsuccessful attempts at restructuring would be important, as well as evidence that no alternative buyers had expressed an interest in the target (or that an acquisition by any alternative buyer would not produce less anticompetitive effects).

5. ***Emphasize efficiencies***. Merging parties are encouraged to include in their merger notifications details of any claimed efficiencies from the transaction that would benefit consumers, such as prospective synergies in their operations leading to cost savings or improvements in choice and quality of products. However, so far, at least at EU level, the so-called 'efficiency defense' has not succeeded in fending off a prohibition decision for a deal which gives rise to substantial anticompetitive effects. The EU's prohibition of the *Siemens-Alstom* merger in February 2019 raised the pressure on the Commission to give greater weight to efficiencies - including calls from senior Government ministers in Germany and France for the Commission to pay more heed to efficiencies brought about by mergers, for example in the form of employment benefits and positive contribution to European strategic industrial policies. This type of weighing of industrial policy against competition concerns would require changes to existing EU merger rules. Nonetheless, there may be more openness in the current environment to give greater weight to efficiencies as a defense within the limits of the current rules if, for example, absent the merger, financial pressure would reduce a target company's innovation, product quality or range. At a national level, some countries governments (e.g. Germany and France) can overrule prohibition decisions by their competition authorities, for example, on grounds of local job creation or enhanced environmental benefits.

In general, the immediate disruption to the workings of administrations and business as well as the economic fall-out from the current pandemic will impact the merger control assessment of deals, whether from a procedural or substantive perspective. This must be factored into the up-front evaluation of deals, their timing and the arguments advanced by the parties in seeking merger approval.

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