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## COVID-19: An Overview of the European Commission's developments in Merger Control, State Aid and Antitrust

By Melanie Bruneau, Antoine de Rohan Chabot & Antonia Rountou

The COVID-19 outbreak has raised significant challenges relating to the application of rules in the regulatory landscape of competition and antitrust. In these exceptional circumstances created by the COVID-19 crisis, the European Commission is coordinating a common European response and has taken measures to provide guidance and to ensure a targeted and proportionate application of its merger control, state aid and antitrust rules.

### Merger control: Specific procedural adaptations ahead of mergers' review

The COVID-19 outbreak affected merger control on a global scale. Competition authorities have reacted by adapting their procedures to respond to the disturbances caused to merger transactions' notifications and assessment. At the EU level, this has had an impact on the relevant procedures and timelines set out in the EU Merger Regulation.

In particular, the European Commission acknowledged that it is currently facing issues to collect information from the notifying parties and third parties, including their customers, competitors and suppliers and that, in some cases, the conduct of detailed Phase 2 investigations is subject to additional constraints.

Having regard to the current economic conditions, the European Commission has adapted certain procedural aspects of merger control review. The European Commission's Directorate General for Competition (DG COMP) has encouraged notifying parties to discuss with the relevant case team the timing transactions and possibly delay their merger control notifications. The European Commission has also temporarily accepted electronic submissions of merger notifications, as well as communications via video conference, in order to address the reduced presence of officials in DG COMP's premises.

## REGARDING THE SUBSTANTIVE ASSESSMENT OF MERGERS, THERE IS NO INDICATION THAT THE EUROPEAN COMMISSION HAS LOWERED ITS STANDARD OF REVIEW.



Aside from specific procedural aspects, the European Commission has not announced any major or structural change in its approach to merger control, including regarding the interpretation of its long-standing practice on "failing firm defence".

Regarding the substantive assessment of mergers, there is no indication that the European Commission has lowered its standard of review. This position is similar to the one adopted during the 2008 global financial crisis, in which it had affirmed its position that the EU Merger Regulation provides enough flexibility in the assessment of transactions.

### State aid: European Commission publishes a temporary framework for state aid

On 19 March 2020, the European Commission published a new Temporary Framework for state aid (Temporary Framework) allowing Member States to take national support measures to help address the liquidity needs of affected undertakings during the COVID-19 outbreak. The Temporary Framework lays down concrete possibilities for Member States to ensure liquidity and access to finance for undertakings.

As such, it covers various forms of aid granted as of 1 February 2020 and is addressed to companies that were not in difficulty on 31 December 2019. A section of this Temporary Framework also provides for potential indirect aid to financial institutions and intermediaries, as they are a significant channel of liquidity to markets and companies.

On 3 April 2020, the European Commission adopted

an amendment to the Temporary Framework, which introduced additional possibilities for public support, including towards research and development (R&D), construction and upscaling of testing facilities, production of products relevant to tackle the COVID-19 outbreak, targeted deferrals of payment of taxes and social security contributions, as well as wage subsidies for employees. A few days later, on 9 April 2020, the European Commission proposed to further extend the scope of the Temporary Framework in order to allow Member States to provide recapitalisations to companies in need.

To complement the Temporary Framework's measures, Member States can also introduce other state aid measures, which would fall either under Article 107(2)(b) or Article 107(3)(b) or (c) of the Treaty on the Functioning of the European Union (TFEU). On the basis of Article 107(2)(b) TFEU, Member States can notify to the European Commission measures to compensate undertakings for direct damage suffered as a result of the COVID-19 outbreak. Pursuant to Article 107(3)(b) TFEU, the European Commission may also declare compatible with the internal market aid "to remedy a serious disturbance in the economy of a Member State". In addition, Member States can also notify to the European Commission aid schemes in accordance with Article 107(3)(c) TFEU and as further specified in the Rescue and Restructuring State Aid Guidelines.

Provided that the State Aid Temporary Framework will be in place until the end of December 2020, up until now, many Member States have already used it to grant aid and to support companies and sectors having suffered from the Covid-19 pandemic.



### Antitrust: Guidance on specific cooperation initiatives with an EU dimension

The COVID-19 outbreak has also brought evolutions in the antitrust approach. The main challenge identified by the European Commission relates to the emerging need for companies to cooperate with each other in order to overcome the COVID-19 crisis.

As a result, on 23 March 2020, the European Competition Network (ECN) issued a joint statement on the application of antitrust rules, explaining that it will not actively intervene against measures put in place in order to avoid a shortage of supply, provided that such measures are temporary, necessary, and proportionate. On 8 April 2020, the International Competition Network (ICN) issued a similar statement.

To provide further guidance to companies and associations, the European Commission adopted on 8 April 2020 a Temporary Framework Communication regarding business cooperation between competitors (Temporary Scheme), setting out the main criteria that it will follow when assessing projects aimed at addressing a shortage affecting supply of essential products and services during the COVID-19 outbreak. This Temporary Scheme has no end date. Thus, it remains applicable until its withdrawal by the European Commission. However, it is limited in scope, covering only specific cooperation projects that are meant to address or avoid a shortage of supply of essential goods and services.

For these projects, the European Commission may provide companies with written comfort, via ad hoc "comfort letters". On this basis, the European Commission has issued on 8 April 2020 a comfort letter to "Medicines for Europe", an association of pharmaceutical manufacturers, and participating firms with respect to a voluntary cooperation project aimed to address the risk of shortages of critical hospital medicines for the treatment of COVID-19 patients. Additional comfort letters may follow in the future as companies can request guidance from the European Commission on the compatibility of such cooperation initiatives with EU competition law.



### Post COVID-19: Towards a revised version of "business as usual"?

Confronted with an exceptional situation engaging private and public actors, competition authorities at national and EU level have chosen a revised version of "business as usual" in order to mitigate the effects of the COVID-19 outbreak.

Notwithstanding the significant implications for ongoing cases and projects, the European Commission's response on ways to tackle the COVID-19 crisis has taken the form of various measures pursuing different objectives.

As the COVID-19 pandemic implications are yet to unfold, further developments are expected regarding the application of EU merger control, state aid and antitrust rules. The European Commission's guidance and enforcement actions to follow will provide valuable insight into the steps needed to be undertaken by Member States and companies to anticipate and mitigate similar challenges that could arise in the future.

