

A welcome update from the U.S. antitrust agencies regarding merger review process

31 March 2020

Last week, the U.S. antitrust agencies announced two important updates affecting their review of transactions:

1. The Federal Trade Commission (FTC) announced that effective 30 March 2020 the U.S. antitrust agencies will begin "processing requests for early termination" of the 30 (or 15) calendar day waiting period for filings submitted pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act).
2. The FTC and Antitrust Division of the U.S. Department of Justice (DOJ) announced an expedited review procedure for certain collaborations involving COVID-19 public health projects.

As we discussed in a [prior alert](#), antitrust agencies around the world are taking a variety of measures to respond to the unique burdens on their review processes imposed by the coronavirus pandemic. Parties to transactions should continue to consult with antitrust counsel on the latest developments that may impact deal timing.

Processing requests for early termination of HSR waiting periods begins 30 March 2020

On 27 March 2020 the FTC [announced](#) that, due to the success of the electronic filing system [implemented earlier in the month](#), the FTC and DOJ would resume processing requests for early termination (ET) beginning 30 March 2020 for filings submitted prior to and subsequent to this date. However, given that normal business operations remain disrupted and staff from both the FTC and DOJ are working remotely, processing of ET requests would be subject to certain guidelines:

- As before, ET will only be granted when both the FTC and DOJ conclude they will not take enforcement action against the notified transaction.
- Parties are instructed not to contact staff to request or inquire about ET. Whereas previously parties may have contacted agency staff to advocate for ET, they must now refrain from doing so. Given limited and stressed resources, the agencies are prioritizing the review of filings that may raise competitive concerns and will grant requests for ET only to the extent that time and resources allow. This means parties should expect ET to be granted in fewer cases and more slowly than usual.

- Any doubts about the competitive impact of a transaction will be resolved against granting ET, consistent with the agencies' policy that scrutiny of potentially anticompetitive conduct or transactions will not be relaxed despite disruption to normal business operations. If any doubts or competitive concerns linger, ET will not be granted and the agencies may issue a Second Request to the parties for additional information in order to continue investigating those concerns. In these cases, the parties would not be able to close an investigated transaction until they have substantially complied with the Second Request and observed a second waiting period (or satisfied other agreed-upon timelines set forth in a timing agreement between the parties) unless the antitrust agencies terminate their investigation and the waiting period earlier.

The practical impact of these guidelines is that filing parties should structure their transaction timelines on the assumption that ET will not be granted or, if it is granted, that it may be granted near the end of the 15- or 30-calendar-day statutory waiting period. In addition, we expect ET to be granted primarily to those transactions that obviously pose no competitive concerns at all — e.g., HSR filings made to report exercises of stock options by corporate officers or the vesting of an officer's or director's restricted stock units.

We expect this process to be modified consistent with the agencies' workflow and the scarcity or availability of resources during the pendency of the disruption to normal agency operations. Companies developing a deal timeline should consult counsel for the latest insights into merger review timing.

Expedited review procedure for COVID-19-related collaborations

On 24 March the FTC and DOJ issued a [joint statement](#) implementing an expedited review procedure for certain collaborations involving COVID-19 public health projects in recognition of the fact that timing is of the essence for businesses collaborating on public health initiatives to address the global pandemic. Both the FTC (via its "[Staff Advisory Opinion](#)" procedure) and the DOJ (via its "[Business Review Letter](#)" procedure) receive and respond to inquiries from businesses regarding the legality of certain proposed conduct under the antitrust laws. Although these procedures typically take months from the initial request or inquiry to issuance of the agency's response, under the new expedited procedure, the FTC and DOJ will resolve all COVID-19-related requests regarding public health and safety within seven days of the agencies' receipt of all information necessary to evaluate the proposed conduct.

The agencies stated that they would also expedite the processing of filings under the [National Cooperative Research and Production Act of 1993](#), which applies to standard-setting organizations and other joint ventures to provide flexible treatment to those collaborations under the antitrust laws.

Businesses seeking to avail themselves of this expedited procedure and obtain guidance from the agencies regarding the propriety of proposed conduct should consult counsel to ensure their requests adhere to the instructions and guidelines set forth by the agencies in connection with the expedited process. Counsel also can advise on the agencies' general [Antitrust Guidelines for Collaborations Among Competitors](#), which sets forth the framework applied by the agencies in analyzing whether a collaboration runs afoul of the antitrust laws. The more closely a collaboration comports with these guidelines, the more likely it is to pass antitrust muster upon review by the agencies, providing a modicum of certainty during very uncertain times.

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