

Antitrust & COVID-19

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I. INTRODUCTION

The COVID-19 pandemic presents unprecedented issues for businesses and we recognize that antitrust is unlikely to be your most important concern at this time. However, some forethought may mitigate risk of future exposure, and position your business as well as possible in this dynamic environment.

This memo supplements the materials available on our [Resource Center](#), and provides an initial overview of antitrust-related issues that businesses may confront in the coming days, weeks, and months. Some are specific to this crisis; others may be more analogous to previous times of economic difficulty.

- **Antitrust.** Dealing with the outbreak could raise various antitrust issues in the near term: short-term shortages of certain products could lead to allegations of price gouging or excessive pricing, or the discriminatory allocation of scarce supplies; rivals may want to cooperate on medical developments or to ensure the ongoing supply of important goods; and companies may attempt to limit supplies between countries, or need to comply with state action requiring them to do so. Longer term, there may be increasing calls to loosen antitrust rules to allow for behavior that would ordinarily fall foul of competition policy, and various agencies have already issued short-term exemptions dealing with industry-specific issues.
- **Merger control.** It may be more challenging to push through merger review processes as quickly as normal, while some statutory timetables are suspended and in other cases agency staff work from home with imperfect access to IT infrastructure. Looking further ahead, the economic consequences of the pandemic may result in industrial combinations that raise challenging antitrust issues.

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- **State aid.** Most public expenses related to the crisis are likely to be funded by national budgets, so may be subject to the State aid rules of the European Union. As was the case in the financial crisis, the European Commission has already indicated a willingness to relax these rules, and has moved fast to adopt rules to support the economy.
- **Compliance.** Finally, the economic consequences of the pandemic combined with extensive work-from-home policies may put strain on existing compliance policies, significantly increasing the risk of antitrust violations.

We are here to help with these issues. If you have any question, please get in touch with your usual contact or any of the lawyers listed below.

II. ANTITRUST

As COVID-19 creates social and economic upheaval, many businesses may experience exceptional commercial pressures, including demand spikes, excess capacity, and liquidity concerns. Many agencies are setting up task forces to respond to these other issues.¹ Meanwhile, an overview of potential challenges that could arise is set out below.

A. Cooperation between rivals

Antitrust law does not ordinarily permit rivals to exchange competitively sensitive information or to

coordinate on capacity, customers, or markets. The outbreak may put pressure on firms to coordinate their response to novel challenges, and various trade bodies have already urged agencies to waive normal rules: businesses may want to work together to tackle supply shortages; they might wish to establish common operating procedures to maintain the smooth delivery of services; and sectors with surplus capacity may want to agree on asset mothballing to spread the pain.

For now, there is no clear basis to depart from established antitrust rules, other than where agencies have granted specific dispensations.

The European Competition Network has announced it will not actively intervene against necessary and temporary measures put in place to avoid shortages of supply.² At a national level, the UK Government has relaxed certain elements of competition law to allow supermarkets to cooperate in ensuring security of supplies of essential goods and services; the UK Competition and Markets Authority endorsed this, by pledging to refrain from enforcement action against arrangements necessary to protect consumers.³ Iceland's regulator has temporarily allowed travel agents, hotels and tour operators to collaborate on ways to reduce customer cancellations and increase demand for Icelandic tourism, while warning against discussing pricing or business terms.⁴ The Norwegian government has granted the transport sector a three

¹ See, e.g., UK Competition and Markets Authority, CMA launches COVID-19 taskforce, March 20, 2020, available at: <https://www.gov.uk/government/news/cma-launches-covid-19-taskforce>; Poland Office of Competition and Consumer Protection, High prices. March 20, 2020, available at: https://www.uokik.gov.pl/news.php?news_id=16332.

² European Competition Network press release, March 23, 2020, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

³ UK Competition and Markets Authority, COVID-19: CMA approach to essential

business cooperation, March 19, 2020, available at: <https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation>.

⁴ Icelandic Competition Authority, Decision No. 9/2020 on exemption for tourism organizations due to the COVID-19 outbreak (March 4, 2020), available at: <https://www.samkeppni.is/media/akvardanir-2020/9-2020.pdf>. The authority has pledged to review exemption application related to the COVID-19 outbreak within 48 hours. See Iceland Competition Authority, Beiting samkeppnisreglna og samkeppniseftirlits í

month exemption, citing the need for SAS and Norwegian to collaborate on minimum flight services.⁵ And South Africa has introduced an exemption for agreements and practices in the healthcare sector.⁶

In the U.S., the executive branch has historically intervened in antitrust enforcement under unusual circumstances.⁷ Additionally, the Defense Production Act (DPA) provides the President with authority to “provide for the making . . . of voluntary agreements . . . to help provide for the national defense.”⁸ Agreements made under the Act are available as a defense against any civil action under the antitrust laws. However, the implementation of the DPA involves significant administrative complexities that may cause delays and/or inefficiencies, including oversight by the DOJ or FTC and the promulgation of rules incorporating standards and procedures around the agreements.

Otherwise, at least for the time being, it would be prudent for businesses to proceed on the understanding that normal antitrust rules continue to apply, as has been the case in previous periods of economic distress.⁹

- It may be justifiable for rivals to cooperate on logistics and other supply arrangements to ensure the smooth flow of goods where this would result in consumer benefits that outweigh any marginal reduction in competition.
- Competitors should be able to cooperate in the development of vaccines and therapeutic treatments, provided the activity is consistent with guidance from the European Commission and U.S. agencies that is applicable for any competitor collaborations.¹⁰ Indeed, absent action taken in bad faith, we assume the risk of enforcement

efnahagserfiðleikum vegna COVID-19, available at:

<https://www.samkeppni.is/utgafa/i-brennidepli/upplýsingasida-vegna-covid-19>.

⁵ Norwegian Government, Regulation on temporary exemptions from Section 10 of the Competition Act for cooperation in the transport sector (March 19, 2020), available at: <https://www.regjeringen.no/no/aktuelt/flyselsk-apene-gis-klarsignal-til-a-samarbeide/id2693957/>.

⁶ South Africa Department of Trade and Industry, COVID-19 Block Exemption for the Healthcare Sector, March 19, 2020, available at: https://www.gov.za/sites/default/files/gcis_document/202003/4311419-3dti.pdf.

⁷ During World War II, the Secretary of Interior helped coordinate American oil companies on production, and sought an exemption from the DOJ. See Daniel Yergin, *The Prize: The Epic Quest For Oil, Money & Power* (1990). Similarly, during the Iranian oil crisis, President Truman asked the Department of Justice to drop a criminal investigation against the oil companies and pursue only a civil

investigation. See Burton I. Kaufman, *Oil and Antitrust: The Oil Cartel Case and the Cold War*, *BUS. HIST. REV.*, Vol. 51, No. 1 (Spring, 1977), at 35, available at: <https://www.jstor.org/stable/3112920>.

⁸ 50 U.S.C. § 4558 (2018).

⁹ In *Irish Beef*, for example, the European Court of Justice found that a scheme by ten beef producers to reduce industry capacity restricted competition by object, stating it was irrelevant that the parties intended to remedy the effects of a crisis in their sector (Case C-209/07 *Beef Industry Development and Barry Brothers* ECLI:EU:C:2008:643). While the Court was not asked to consider if the agreement should be exempted due to pro-competitive benefits, the Commission has opined that this was unlikely (see EU Contribution to OECD Global Forum on Competition, “Crisis Cartels,” January 27, 2011, available at https://ec.europa.eu/competition/international/multilateral/2011_feb_crisis_cartels.pdf).

¹⁰ See Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the

action in this area is very low to the extent the cooperation relates to COVID-19.

- Conversely, there is no broad basis under currently-established antitrust principles for businesses to exchange competitively sensitive information, or to cooperate on areas of strategic uncertainty.

Looking forward, we anticipate a broader discussion of whether these principles are fit for purpose under the circumstances. Specifically, we expect there will be discussion on whether “crisis cartels” may be justified to ensure the survival of firms and services in crucial industries. We look forward to participating in those discussions, but for present purposes we would not recommend predicating a business strategy on conduct that falls outside of established principles, except in response to a specific agency exception or following detailed consultation with counsel (*e.g.*, based on the premise that long-term competition may be safeguarded by short-run co-operation, through Article 101(3) TFEU, an inapplicability finding under Article 10 of Regulation 1/2003, and/or analogous provisions under other laws).

European Union to horizontal co-operation agreements, paras. 111 *et seq.* R&D agreements may also benefit from an automatic exemption under certain conditions (*see* Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements); U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for Collaboration Among Competitors (April 2000).

¹¹ Case C-27/76 *United Brands v Commission*, ECLI:EU:C:1978:22.

¹² California Office of the Governor, “Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of COVID-19” (March 4, 2020), available at [https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-](https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/)

B. Excessive pricing and price gouging

The COVID-19 outbreak is leading to extreme demand for certain goods, along with price volatility. Agencies are acutely aware of the potential for price gouging in this climate and we could envision action in this area based on several instruments:

- **Excessive pricing.** Under European law and equivalent provisions of national competition laws, dominant firms can be sanctioned for charging excessive prices (typically characterized as those that have no reasonable relation to the economic value of the relevant product).¹¹ Exploitative abuses of this nature are not illegal in every jurisdiction, but there are complementary price gouging rules elsewhere. Notably, while there is no relevant federal law in the United States, several states have rules that prohibit price gouging, including California, New York, and Washington. California, Connecticut, Florida, Kentucky, and Washington, D.C. have each declared states of emergency,¹² which trigger price gouging regulations in those states.

[state-prepare-for-broader-spread-of-covid-19](#); Connecticut Office of the Attorney General, “Attorney General Tong Provides Update on Coronavirus Price Gouging Complaints” (March 17, 2020), available at <https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Attorney-General-Tong-Provides-Update-on-Coronavirus-Price-Gouging-Complaints>; Florida Office of the Governor, “Governor Ron DeSantis Leading Coordinated Response to Threat of COVID-19 in Florida” (March 6, 2020), available at <https://www.flgov.com/2020/03/06/governor-ron-desantis-leading-coordinated-response-to-threat-of-covid-19-in-florida>; Kentucky Office of the Attorney General, “Attorney General Cameron Announces New Online Form to Report Price Gouging During COVID-19 Pandemic” (March 18, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=881>; Washington, D.C. Office of the Attorney

- **Consumer protection rules.** Consumer laws in many countries offer protections against unjustified price increases and misleading claims. Indeed, the UK and Australian authorities have already issued statements alerting consumers of their rights.¹³

We anticipate this may be one of the leading areas for enforcement in the coming months. Several agencies have already started investigations: the competition bureau of the French Ministry for the Economy recently surveyed 3,000 online and physical stores to monitor the pricing and availability of hand gels;¹⁴ the Italian competition authority has opened cases against Amazon and eBay for price increases and misleading

claims concerning face masks and hand sanitizer on their platforms;¹⁵ the Polish agency is investigating two face mask wholesalers for allegedly cancelling existing contracts to re-sign them at higher prices;¹⁶ the Chinese authority is closely monitoring prices of face masks and other protective equipment, and has launched a campaign together with other governmental departments to crack down illegal practices (including price gauging and collusion) to guarantee the supply of such products;¹⁷ and the Korean agency has conducted dawn raids investigating unfair trade practices in relation to gratuitous face masks as promotion campaign.¹⁸

General, “AG Racine to Enforce New Emergency Protections for District Residents” (March 17, 2020), available at <https://oag.dc.gov/release/ag-racine-enforce-new-emergency-protections>.

- ¹³ UK Competition and Markets Authority, “Statement on sales and pricing practices during Coronavirus outbreak” (March 5, 2020), available at: <https://www.gov.uk/government/news/cma-statement-on-sales-and-pricing-practices-during-coronavirus-outbreak>; Australian Competition and Consumer Commission website, “COVID-19 (coronavirus) information for consumers,” available at: <https://www.accc.gov.au/consumers/consumer-rights-guarantees/covid-19-coronavirus-information-for-consumers>.
- ¹⁴ French Ministry for the Economy, Directorate-General for Competition, Consumption and Anti-Fraud Action, “Control of prices for hydroalcoholic gels – FAQs” (March 11, 2020), available at: <https://www.economie.gouv.fr/dgccrf/encadrement-des-prix-pour-les-gels-hydroalcooliq-voir-la-faq>. On March 5, 2020, the French government also introduced price controls on hand gels.
- ¹⁵ Italian Competition Authority, “Coronavirus, the Authority intervenes in the sale of sanitizing products and masks” (February 27,

2020), available at:

<https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-intervenies-in-the-sale-of-sanitizing-products-and-masks>.

- ¹⁶ Poland Office of Competition and Consumer Protection, “UOKiK’s proceedings on wholesalers’ unfair conduct towards hospitals,” March 4, 2020, available at: https://www.uokik.gov.pl/news.php?news_id=16277.
- ¹⁷ State Administration for Market Regulation (Price Supervision and Inspection and Anti-Unfair Competition Bureau), “Emergency Notice: Crack Down on Illegal Pricing Behaviour Regarding Masks and Other Protective Equipment,” February 6, 2020, available at http://gkml.samr.gov.cn/nsjg/jjjzj/202002/t20200206_311104.html; State Administration for Market Regulation (Law Enforcement Inspection Bureau), “Emergency Notice: SAMR and Eight Other Departments Launch Campaign to Crack Down Illegal Behaviour Regarding Manufacturing and Sales of Masks and Other Protective Equipment,” February 13, 2020, available at http://gkml.samr.gov.cn/nsjg/zfjcj/202002/t2020213_311554.html.
- ¹⁸ Press Release, Korea Fair Trade Commission, “Site Visits and Inspection on Gratuitous

In the United States, the Washington State and Illinois State Attorney Generals have already announced investigations into price gouging relating to COVID-19, though have not yet identified the targets of these investigations.¹⁹ The Federal Trade Commission has begun taking action to combat consumer deception, including against companies that claim to be able to treat or prevent the virus.²⁰ While the Department of Justice's Antitrust Division has yet to take any enforcement action, it issued a statement cautioning business against violating antitrust laws in the public health product industry in light of COVID-19.²¹

It would, therefore, be prudent for businesses to ensure pricing decisions are made as they would in the ordinary course, and with reference to ordinary levels of competition. As increasing volumes of commerce shift online, businesses should also pay careful attention to their use of pricing algorithms, to avoid being implicated in unintended price spikes.

C. Other abuses

As noted, we anticipate particular enforcement activity in the area of excessive pricing. However, dominant firms should be mindful of several areas of potential exposure (and businesses should be cognizant of the risk of being considered temporarily dominant in circumstances where their rivals are incapacitated). Two notable examples include the following, though the full range of potential abuses continues to apply.

- **Allocation of scarce resources.** Faced with supply shortages, dominant companies should exercise extra caution when deciding which orders to honor. European law prohibits the application by dominant of “*dissimilar conditions to equivalent transactions with other trading parties [that place] them at a competitive disadvantage.*”²² Accordingly, suppliers with a strong market positions (even temporarily) may consider distributing their limited stock among existing customers as equitably as possible,²³ and

Supply of Masks,” March 2, 2020, available at www.ftc.gov/pressroom/2020/03/20200317b.html.

¹⁹ Washington State Office of the Attorney General, “AG Ferguson Statement on Price Gouging in Public-Health Emergency” (March 4, 2020), available at <https://www.atg.wa.gov/news/news-releases/ag-ferguson-statement-price-gouging-public-health-emergency>; Illinois Office of the Attorney General, “Attorney General Raoul Will Take Action to Stop Price Gouging on Items Related to the Coronavirus” (March 17, 2020), available at https://illinoisattorneygeneral.gov/pressroom/2020_03/20200317b.html.

²⁰ See, e.g., United States Federal Trade Commission, “FTC, FDA Send Warning Letters to Seven Companies about Unsupported Claims that Products Can Treat or Prevent Coronavirus” (March 9, 2020), available at: <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-fda-send-warning-letters-seven-companies-about->

[unsupported](#); Washington State Office of the Attorney General.

²¹ Press Release, Department of Justice, “Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products” (March 9, 2020), available at: (<https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>).

²² Article 102(c) TFEU.

²³ Case IV/28.841 *ABG oil companies operating in the Netherlands*, Commission decision of April 19, 1977. The European Court of Justice overturned the decision on appeal, finding that ABG was an occasional and not a contractual customer at the time of the crisis, but did not disagree with the principle that in periods of shortage a dominant undertaking must distribute available quantities “fairly,” unless objective reasons justified different treatment

(in the absence of objective commercial concerns such as a history of non-payment) refrain from giving preference to one customer over another.

- **Predatory pricing and loyalty payments.** Firms may be tempted to increase pressure on weakened rivals through below-cost pricing or other financial incentives. Agencies may be particularly receptive to allegations of this nature at the present time.

D. Territorial restrictions

Finally, businesses may come under governmental or media pressure to restrict supplies outside their jurisdiction (or to seek to prevent their customers from doing so). Under European law, this behavior can be viewed as a serious competition infringement as it recreates internal barriers within the single market. Although it can be exempted if shown to be indispensable to improving the distribution of goods or comes as a result of governmental obligation,²⁴ both criteria are applied stringently and suppliers will bear the burden of proof.

III. MERGER CONTROL

A. Merger control agency disruption

Government measures to slow transmission of the COVID-19 virus are affecting the operation of antitrust agencies around the world. In many cases, the disruption is limited to staff teleworking, a shift to electronic filings, and informal requests that merging parties delay merger notifications where possible. In other cases, national states of emergency have been

declared, resulting in the suspension of statutory review timetables.

As a consequence of these issues (tracked in our regularly updated chart, which is available [here](#)), merging parties may be confronted with several issues in the coming weeks.

1. Suspended review timelines for submitted notifications

Currently, only a few jurisdictions have suspended statutory deadlines for merger control review. However, more may follow suit as governments ramp up their containment measures. This can raise significant issues for merging parties who need approvals from the relevant agencies to avoid infringing gun-jumping rules and/or to satisfy contractual conditions precedent.

In this circumstance, merging parties could consider the following options:

- **Proactive engagement with agencies.** In the first instance, it may be useful to engage transparently with the relevant agency. This may foster goodwill, which could facilitate the amicable resolution of the situation, especially for no-issue transactions or transactions that mitigate the effects of the crisis.²⁵ For example, agency staff may be able to unilaterally terminate reviews or grant derogations from the relevant standstill obligations, despite the suspension of statutory timetables. In addition, this may predispose the agency not to make use of any available sanctions

(Case 77/77 – *BP v Commission* ECLI:EU:C:1978:141). It bears mention that the Commission found the relevant oil companies to be temporarily dominant, as their customers were “*completely dependent*” on them for scarce products, and, given the general shortage, they were unable to compete with each other by supplying a rival’s customers.

²⁴ See, e.g., Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, para. 80.

²⁵ For example, in announcing the suspension of the review deadlines in light of the state of emergency introduced in Spain, the Spanish competition agency invited parties to request the review of their notification along the usual timeline if the deal is urgent. CNMC, “CoVid-19- Announcement from the CNMC on the timelines for administrative procedures,” March 19, 2020, available at https://www.cnmc.es/plazos_administrativos.

if the parties ultimately need to complete before formal approval.

- **Carve out the relevant jurisdiction from completion.** Where the transaction structure and rationale permit, the parties may consider excluding the target’s business activities and/or legal entities in the relevant jurisdiction, either temporarily (until approval can be obtained) or permanently. That said, agencies have varying views on the legality of route (especially as regards temporary carve-outs), and it would be prudent to consult local counsel in advance.
- **Complete despite the lack of approval.** Ultimately, merging parties may choose to complete the transaction as planned, notwithstanding one or more outstanding merger control approvals. This could lead to the imposition of financial fines and reputational issues (criminal sanctions are rare, though do exist in certain jurisdictions), though it may be possible to mitigate those risks through open engagement with the relevant agency.
- **Renegotiate long-stop dates.** Merging parties could push out their long-stop dates to accommodate delays in regulatory timetables.
- **Force majeure.** Finally, parties may consider whether the force majeure provisions of the M&A agreement may allow them to mitigate the risks associated with extended review timelines, which will of course need to be assessed in light of the relevant transaction documents and applicable governing law.²⁶

2. Requests from agencies to postpone filings

An increasing number of agencies are asking merging parties to delay merger control notifications where possible. Although many of these measures are non-

binding, submitting a filing against the recommendation of the relevant agency or refusing to cooperate on a timing agreement does entail certain risks. First, the parties may undermine their working relationship with the agency, which is typically a valuable asset in merger control proceedings (especially under current circumstances). Second, moderately complex cases may face an increased risk of prolonged investigations (either through referral to second phase review, or use of stop-the-clock powers) if the agency does not have the necessary resources to deal with the matter in the standard Phase I process. Finally, agencies may look for ways to consider filings incomplete and return them to the notifying parties.

Notwithstanding these risks, parties may be compelled to proceed in this manner (*e.g.*, because of ticking fees in financing arrangements, contractual filing deadlines, and/or commercial imperatives). In those circumstances, parties may consider the following migration steps:

- **Convey the urgency to the agency.** Again, the goodwill of the agency staff may be important. Merging parties may, therefore, want to explain the commercial context to the agency in as clear and compelling a manner as possible. In doing so, they might look to explain (where appropriate) why the transaction does not raise competition concerns, to provide comfort to case managers who may be concerned about their ability to devote resources to the matter.
- **Consider whether the submission of a draft notification discharges any contractual duty to file.** Notifying parties may want to consider whether a contractual filing obligation is only discharged by formal notification, or might arguably be satisfied through the submission of a draft filing. In moderately-complex deals, this strategy is anyway often deployed to allow agency staff more time to engage on the substance of the

²⁶ For a discussion of force majeure clauses in the context of the COVID-19 outbreak, *see* Coronavirus – Force Majeure or Frustration?, February 20, 2020, available at:

<https://www.clearygottlieb.com/news-and-insights/publication-listing/coronavirus-force-majeure-or-frustration>.

case, reducing the risk of an extended Phase II review. (Alternatively, parties may consider whether their counterparties are willing to waive or amend the relevant filing date under their contract.)

- **Force majeure.** Again, parties may consider whether the force majeure provisions of the M&A agreement may allow them to mitigate the risks associated with extended review timelines.

3. Negotiating new transactions

Finally, parties may want to take these issues into account when negotiating new M&A agreements:

- **Closing and long-stop dates.** Parties should be realistic about setting closing date and long-stop dates, as antitrust review timelines may be extended or even suspended in multiple jurisdictions.
- **Filing deadlines.** In setting filing deadlines, parties should bear in mind that a significant number of agencies have asked for new filings to be deferred where possible.
- **Force majeure and material adverse change clauses.** Businesses should carefully consider how force majeure and material adverse change clauses may apply in the current circumstances, both in terms of their ability to avoid contractual obligations (including the obligation to close a transaction) and that of their counterparty.

B. Substantive issues

The pandemic is already having a profound effect on multiple industries. There may be several

waves of consolidation that follow, including transactions that raise challenging antitrust issues.

We would recommend engaging with counsel at an early stage of planning to work through antitrust issues that potential combinations may raise. Leaving aside arguments on the merits, the following tools would be worth considering:

- **Remedies.** Parties may consider whether they are able to achieve their commercial goals while resolving any antitrust issues through divestment (or, exceptionally, behavioral solutions). Modifying the transaction perimeter at the outset or pre-arranging the sale of problematic parts of the target, can greatly simplify antitrust review and curtail merger control timetables.
- **“Failing firm” defense.** Merging parties might seek to rely on “failing firm” defense arguments to persuade agencies that an otherwise anti-competitive transaction is preferable to the target assets exiting the market.²⁷ These arguments have been advanced in a significant number of cases, generally without success, but with some notable exceptions in the aftermath of the 2008 financial crisis.²⁸ It is conceivable that agencies will take a more flexible approach to this in the coming months and years (subject to the economic context) and we would recommend careful consideration of this option.
- **Industrial policy considerations.** There has been increased discussion of public interest considerations in merger control. Again, some of the more-established agencies have tended to take a restrictive approach to this issue, but it is worth considering the receptiveness of particular

²⁷ See para. 89, Commission Communication, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 31, 05.02.2004, p. 5-18); and U.S. Horizontal Merger Guidelines, §11.

²⁸ See Case COMP/M.6360, *Nynas/Shell/Harburg Refinery*, Commission decision of September 2, 2013; Case COMP/M.6796, *Aegean/Olympic II*, Commission decision of October 9, 2013.

agencies in the current context, depending on the jurisdictions concerned.

IV. STATE AID

Given the limited size of the EU budget (around 1% of the EU's GDP), most public expenses related to the COVID-19 crisis are likely to be funded by national budgets and may, therefore, be subject to the strict State aid rules of the European Union. Nevertheless, as was the case in the 2008 financial crisis, the European Commission has already indicated a willingness to relax its approach to these rules, while maintaining a degree of control over public support initiatives.

Notably, the Commission has adopted a temporary “legal framework” for the implementation of less stringent State aid rules in order to support the economy in the context of the COVID-19 outbreak.²⁹ This framework enables Member States to (i) set up schemes granting each individual company up to €800,000 in direct grants, repayable advances or tax advantages for urgent liquidity needs, (ii) give subsidized State guarantees on bank loans or set up guarantee schemes supporting bank loans taken out by companies, (iii) enable public loans with subsidized interest rates, and (iv) provide short term export credit insurance. Finally, the framework recognizes the important role of the banking sector to deal with the economic effects of the COVID-19 outbreak, namely to channel aid to final customers, in particular small and medium-sized enterprises. Importantly, any support granted on this basis would be considered as

direct aid to the banks' customers, not to the banks themselves, and would not qualify as extraordinary public financial support, which means that it would not trigger placement in resolution of the banks.³⁰

In addition, Member States have several existing tools at their disposal to tackle the effects of the COVID-19 outbreak, including the following:³¹

- **Measures that do not qualify as State aid**, such as non-selective wage subsidies or suspensions of taxes, social security contributions, or aid to consumers (*e.g.*, for cancelled services).
- **Tools that do not require prior approval from the European Commission**, such as the *de minimis* exemption regulation for small amounts of aid (a maximum of 200,000 euros, with lower thresholds for road freight and agricultural sectors) or the General Block Exemption Regulation.
- **Rescue aid for companies in difficulty**. The European Commission is ready to approve the provision of urgent liquidity aid through guarantees or loans of a maximum of six months to aid to companies in difficulty (but require prior Commission approval). In this respect, the European Commission is also willing to relax the “one time, last time principle.”³²
- **Aid granted as compensation for the damage directly caused by the virus outbreak**. The European Commission has already classified COVID-19 as an “exceptional occurrence,” which provides that “*aid to make good the damage caused by natural disasters or exceptional*

²⁹ See Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, available at https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf.

³⁰ For additional information on this topic, see State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Outbreak, March 20, 2020, available on our [Resource Center](#).

³¹ For additional information on this topic, see Europe's Economic Response to the COVID-19 Crisis – the European Commission Steps In, March 16, 2020, available at: <https://www.clearygottlieb.com/news-and-insights/publication-listing/europes-economic-response-to-the-covid-19-crisis-the-european-commission-steps-in>.

³² An established rule that prevented companies that had received this type of aid in the 10 previous years to receive additional support.

occurrences” is compatible with the internal market.³³ On March 11, the European Commission applied this legal basis for the first time to the current crisis, approving within 24 hours of notification a COVID-19 related measure in Denmark that aimed at compensating event organizers for losses caused by cancellations. Other approval decisions are likely to follow, although it remains to be seen how far the European Commission will be ready to take the causality link in order to justify clearances.³⁴

V. COMPLIANCE

Finally, the outbreak may exert significant strain on businesses’ compliance policies. Requirements to work remotely may distract employees from regulatory matters, while increased uncertainty as regards job security could promote overzealous efforts that go beyond the limits of antitrust principles. To mitigate this risk, businesses might consider the following steps:

- **Remind employees that antitrust policies remain in force, and the situation does not provide an excuse for antitrust violations.** This may be particularly important given pressure from stakeholders and speculation about softening of antitrust rules.
- **Take stock of antitrust developments and communicate any changes to your compliance policy clearly to the relevant staff.** As noted above, there may be an increasing number of specific exemptions that are available for businesses in specific industries, which may make the application of antitrust laws more complex. Agencies may also alter their focus at this time,

which could alter businesses’ conventional risk calculus.

- **Maintain visibility over staff.** With shifts to teleworking, sales staff and other critical employees may transition to using new means of communications (*e.g.*, personal IM software), which could escape your businesses’ surveillance tools. In these circumstances, you might consider re-iterating the importance of using prescribed means of communication and/or assess the risk of employee communications being outside the reach of internal investigations.

VI. CONCLUSION

We recognize the COVID-19 outbreak may give rise to a plethora of challenging issues, and the situation is likely to develop as countries introduce new containment measures, offer aid to support the economy, relax competition rules for distressed industries, and take action to ensure security of supply of essential products.

Nevertheless, patience and planning may help to mitigate the disruption to your business. We will continue to monitor developments in our [Resource Center](#), and are here to help.

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CLEARY GOTTlieb

³³ An important limitation is the requirement of a direct causal link between the aid, the level of the damage, and the exceptional occurrence.

³⁴ The European Commission has published a notification template indicating the information that should be provided for

notifications of aid under Article 107(2)(b) – exceptional occurrence framework, available at https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf.

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