
COVID-19: a 'material adverse change' for merger remedies?

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Instead of blocking a merger, competition authorities across Europe and beyond may ask for commitments to address competition concerns with the concentration. In these cases, writes Oxera Partner Maurice de Valois Turk, the merger approval is conditional on the (implementation of) the commitments, and thus one could argue that the commitments (together with the approval) form a contract between the authority and the notifying firms.

As the COVID-19 crisis progresses, questions are being asked about whether the economic effects of the pandemic constitute a material adverse change that enables firms to change or end their contracts. We ask: can firms request changes to their existing merger remedies with reference to COVID-19?



A temporary waiver from merger remedies

On 26 March, the Austrian competition authority (Bundeswettbewerbsbehörde, BWB) announced its decision to temporarily waive the obligations on ProSiebenSat.1 Puls4 (P7S1) arising from the commitments in its acquisition of ATV Privat GmbH and ATV Privat GmbH & Co KG (collectively: ATV Privat).¹

P7S1, part of the European media group ProSiebenSat.1, announced that it planned to acquire ATV Privat, which operated TV stations in Austria, in February 2017.² The BWB approved the acquisition on 9 March 2017, subject to conditions.³ The commitments included a number of measures aimed at safeguarding the editorial and commercial independence of ATV from P7S1's existing TV channels in Austria.

On 16 March, P7S1 applied to the BWB for a waiver of the commitments relating to news provision. The waiver was granted by the BWB, which allowed the merged firms 'to be able to react to the difficult conditions caused by corona (Covid-19) in the production of news'.⁴

A closer look at the European Commission review clause

Releasing its decision, the BWB referred to an EU review clause that allows an authority to reassess commitments in the light of new developments.

Review clauses are commonly incorporated in commitments throughout Europe. Whereas commitments have sometimes been adopted as part of state aid and antitrust decisions, most of the guidance relates to merger divestiture remedies. The most notable example is the European Commission's model text for divestiture commitments, which relates to remedies that are in the process of being implemented.⁵ The model text sets out the following:

43. The Commission may extend the time periods foreseen in the Commitments in response to a request from [X] or, in appropriate cases, on its own initiative. Where [X] requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. [...]

44. The Commission may further, in response to a reasoned request from the Notifying Parties showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. [...]

It is worth pointing out that the two paragraphs above refer to different aspects

of commitments, and that the relevant test is materially different. The first paragraph does not relate to changes in the commitment itself, but to the process for implementation. For the extension of divestiture timelines, the model text sets out a requirement to show 'good cause'. The current note focuses on the second paragraph, which relates to a modification of the waiver of commitments itself. Here, the requirement for a change in the commitments refers to 'exceptional circumstances'.

The Commission's Remedies Notice contains further guidance and also confirms that a review clause may equally apply to behavioural commitments:⁶

A waiver, modification or substitution of commitments may be more relevant for non-divestiture commitments, such as access commitments, which may be ongoing for a number of years and for which not all contingencies can be predicted at the time of the adoption of the Commission decision. [...] Second, exceptional circumstances [justifying a waiver, modification or substitution] may also be present if the parties can show that the experience gained in the application of the remedy demonstrates that the objective pursued with the remedy will be better achieved if modalities of the commitment are changed. For any waiver, modification or substitution of commitments, the Commission will also take into account the view of third parties and the impact a modification may have on the position of third parties and thereby on the overall effectiveness of the remedy. In this regard, the Commission will also consider whether modifications affect the right already acquired by third parties after implementation of the remedy.

Commitments without deadlines

In some jurisdictions, there appears to be a practice of adopting commitments without a deadline and thus relying on an application under the review clause to terminate these. A notable case is the cinema merger in Belgium that created Kinopolis. The Belgian Competition Authority, the Belgische Mededingingsautoriteit (BMA), approved the merger, subject to conditions, in November 1997. The firm's two previous requests to modify the commitments have since seen extensive litigation. The BMA's most recent decision considering a request for changes to the commitments dates from March 2019, and covers more than 299 pages.⁷

Application in practice

Given the economic effects of the COVID-19 pandemic, there are a number of potential challenges for merged firms. First, the authority may choose to extend divestiture timelines or amendments to the divestiture package in response to changed market

1. Bundeswettbewerbsbehörde (2020), 'Verpflichtungszusagen im Bereich „Nachrichten und Information“ des Zusammenschlusses

2. ProSiebenSat.1Puls 4/ATV bis 30.4.2020 aufgrund Corona (Covid-19) eingeschränkt', 26 March, https://www.bwb.gv.at/news/detail/news/verpflichtungszusagen_im_bereich_nachrichten_und_information_des_zusammenschlusses_prosiebensat1p/.

3. ProSiebenSat.1 (2017), 'Puls 4 to acquire Austrian TV station ATV', press release, 7 February, <https://www.prosiebensat1.com/en/press/puls-4-to-acquire-austrian-tv-station-atv>. Bundeswettbewerbsbehörde (2017), 'Z-3373 Zusammenschluss ProSiebenSat.1Puls 4 GmbH; ATV Privat TV GmbH; ATV Privat TV GmbH & Co KG - mit Auflagen in Phase 1 freigegeben', 9 March, https://www.bwb.gv.at/news/news_2017/detail/news/z_3373_zusammenschluss_prosiebensat1puls_4_gmbh_atv_privat_tv_gmbh_atv_privat_tv_gmbh_co_kg_m/; and Bundeswettbewerbsbehörde (2017), 'Nicht-vertrauliche Fassung', https://www.bwb.gv.at/fileadmin/user_upload/News/PDFs_News/Erga_nzte_Auflagen_nicht-vertrauliche_Fassung_Finale_Fassung_II.pdf.

4. Bundeswettbewerbsbehörde (2020), 'Verpflichtungszusagen im Bereich „Nachrichten und Information“ des Zusammenschlusses ProSiebenSat.1Puls 4/ATV bis 30.4.2020 aufgrund Corona (Covid-19) eingeschränkt', 26 March, https://www.bwb.gv.at/news/detail/news/verpflichtungszusagen_im_bereich_nachrichten_und_information_des_zusammenschlusses_prosiebensat1p/.

5. European Commission, 'Legislation: best practice guidelines', https://ec.europa.eu/competition/mergers/legislation/legislation.html#best_practices; and European Commission, 'Commitments to the European Commission', template, https://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf.

6. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, <https://eur-lex.europa.eu/legal-content/EN/>

7. BMA decision of 25 March 2019, BMA-2019-C/C-13. This extreme example raises the question of whether the effects of selecting an incorrect effective period for commitments can outweigh the costs incurred in dealing with repeated requests to waive the commitments.

conditions. Second, the authority may agree to waive certain commitments. Examples of Commission decisions that relate to these scenarios are given below.⁸ The examples discussed are grouped into cases where a waiver of the commitments was requested, and where there was a modification of the commitments.

Waiver of commitments

There are multiple cases documenting a waiver of commitments.

In case M.3280 – *Air France/KLM*, the Commission agreed in 2019 to waive the commitments, as it concluded that a subsequent antitrust commitment that had been given meant that the earlier merger commitment no longer had an effect.⁹

Another request was made by the airline Lufthansa in 2016, relating to its acquisition of Swiss.¹⁰ Lufthansa requested a waiver of the commitments for two specific routes—Zurich–Stockholm and Zurich–Warsaw—citing changed market conditions on these routes that led it to conclude that its market position was weaker than at the time of the merger. When the Commission rejected the request, Lufthansa successfully appealed this decision before the General Court.¹¹ Note that this case deals with airport slot remedies (time slots that can be used for either take-off or landing), which are open-ended in nature and have no (target) end date. In such cases, firms rely on the review clause to petition authorities to end the obligations under the remedies, and the request to waive commitments has a different background.¹²

In another recent case, the Commission was asked to consider a request to waive commitments in view of the owner's lack of control of the business activities covered by the commitments following financial hardship and the involvement of business rescue practitioners. In this case, the mining company Evraz asked the Commission to waive some of the commitments relating to its acquisition of Highveld. The Commission accepted this request.¹³

As such, there appears to be no recent precedent at the level of the European Commission that directly cites the financial condition of the firm in waiving commitments. However, examples involving national competition authorities do exist.

One of these relates to the lifting of the commitments by the Dutch competition authority, the ACM, in a merger between two regional newspapers. In 2000, the ACM approved a merger between *Limburgs Dagblad* and *De Limburger*, subject to conditions.¹⁴ Subsequently, the ACM considered and approved a petition for waiving the commitments to reflect changing economic conditions. In 2005, the authority allowed the new owner, *De Telegraaf*, to lift

measures aimed at ensuring commercial and editorial independence of the two newspapers.¹⁵ In its release, the ACM refers to negative operating results. The release also mentions that an earlier application had been denied due to lack of information on the financial impact, which suggests that the ACM did indeed review the claims by *De Telegraaf*.

Modification of commitments

As mentioned above, one aspect of the review clause that is frequently called on is to request an extension to the timelines for divestiture. These decisions are not made public by the Commission. Based on my personal experience as a monitoring trustee, it is clear that such extensions are regularly sought and provided.

Furthermore, there is a group of decisions documenting the Commission's agreement to amendments of the divestiture package, including to key personnel and other assets.¹⁶ One case where the Commission accepted amendments to the commitments in view of the financial situation of the divestiture business relates to the merger of the life sciences businesses of Hoechst and Rhône Poulenc in 1999.¹⁷ As part of the commitments, Hoechst was required to sell its full share interest in the chemicals company Rhodia.

By 2004, the deteriorating performance and share price of Rhodia meant that Hoechst had not yet been able to sell the final 15% share interest, so it continued to remain the largest individual shareholder in Rhodia. The Commission agreed to a modification of the commitments, citing in its press release the 'dire financial situation of Rhodia and the urgent need to remove uncertainty over the capital structure of Rhodia so as to facilitate its restructuring'.¹⁸

The substantive test and COVID-19

It is already possible to begin to document the exceptional circumstances of COVID-19 and its financial effect on firms. However, there will be additional considerations before an authority will agree to a modification or waiver of commitments.

For instance, the commitment to maintain a divestment business and procure a sale will now have a different meaning in an industry facing sharp demand reduction and share prices. A number of these issues may well be resolved by extending deadlines.

Another possibility might be that relatively well-funded investment firms will be considered more attractive purchasers of divestiture businesses, as they can more easily inject funds in the short term to support long-term competitiveness.

The Remedies Notice clearly states that the Commission will investigate whether

8. This note cannot give a complete overview. A search of the Commission's website suggests that 12 decisions exist where the Commission has adopted subsequent decisions classified as 'Decisions under the review clause' or 'Decisions under the implementation of the commitments'. However, a number of these relate to viability assessments under slot remedies, which are broadly equivalent to purchaser reviews. The earliest re-quest dates from 2016. Earlier cases are documented in Lindsay, A. and Berridge, A. (2012), *The EU Merger Regulation: Substantive Issues*, fourth edition, Sweet & Maxwell; Hoeg, D. (2013), *European Merger Remedies: Law and Policy*, Hart Publishing; and Breuvar, C. and Chassaing, E. (2014), 'Post-clearance modification and waiver of EU merger remedies: When the hardest may be yet to come', *Concurrences*, 3, pp. 54–67.

9. Commission decision of 6 February 2019 in case M.3280 – *Air France/KLM*.

10. Commission decision of 4 July 2007 in case M.3770 – *Lufthansa/Swiss*.

11. Judgment of General Court of 16 May 2018 in case T-712/16.

12. Another example of open ended-remedies is the Kinopolis cinema merger discussed above.

13. Commission decision of 24 September 2019 in case M.4494 – *Evraz/Highveld*.

14. Authority for Consumers and Markets (2002), 'NMa Approves De Telegraaf's Plans for the Limburg Daily Newspapers', 1 October, <https://www.acm.nl/en/publications/publication/5958/NMa-Approves-De-Telegraafs-Plans-for-the-Limburg-Daily-Newspapers>.

15. Authority for Consumers and Markets (2005), 'NMa Lifts Licensing Condition De Telegraaf – De Limburger', 8 December, <https://www.acm.nl/en/publications/publication/6096/NMa-Lifts-Licensing-Condition-De-Telegraaf-De-Limburger>.

16. For example, see Commission decision of 24 February 2016 in case M.7278 – *General Electric / Alstom (Thermal Power - Renewable Power & Grid Business)*; Commission decision of 22 April 2016 in case M.7377 – *Honeywell/Elster*; Commission decision of 25 May 2018 in case M.8084 – *Bayer/Monsanto*; or Commission decision of 13 December 2018 in case M.8440 – *Dupont/FMC (Health And Nutrition Business)*.

17. See Commission decision of 9 August 1999 in case M.1340 – *Hoechst/Rhône Poulenc*.

18. See European Commission (2004), 'Commission agrees to modify Rhodia commitment in Hoechst/Rhône-Poulenc decision', press release IP/04/135, 30 January.

alternative measures can achieve the same effects. Furthermore, it sets out that the views of third parties will be sought. The latter point appears to confirm that the test for modifying or waiving commitments will go beyond specifying that the COVID-19 pandemic has made the execution of commitments more challenging. Competitors will be facing similar conditions, so a decision to modify or waive commitments may be construed as conferring a 'selective advantage' that distorts competition. Any reasoned proposal from a firm therefor needs to take a market-wide perspective to present any effects of a modification or waiver of commitments.

Given the recent downturn in Mergers and Acquisitions activity, one option may be to replace divestiture commitments with behavioural commitments, on either a temporary or a permanent basis. Regarding alternative measures, the state aid decisions adopted by the Commission in the aftermath of the 2008 financial crisis contain a range of (mostly behavioural) commitments aimed at limiting the market power of banks and insurance companies in selected markets. There is an intuitive parallel here, in that these commitments were aimed at limiting the benefit that financial institutions experienced from the selective advantage conferred through the financial aid received.

Commitments adopted in these state aid decisions include acquisition bans and various pricing-related commitments, to limit the firm's ability to expand its market position through lower pricing.¹⁹

The Commission appears to be reluctant to adopt commitments that link directly to pricing behaviour.²⁰ Empirical economic research exists that suggests that the implementation of pricing-related commitments with multiple firms in a relevant market may facilitate tacit collusion, illustrating the concern identified in the Remedies Notice.²¹

There is no simple formula, and firms and authorities will need to reflect on the wider competitive process to find solutions.

Conclusion

It is clear from the examples above that the review clause in merger remedies can accommodate exceptional changes. Now that the first temporary modification has been granted with reference to COVID-19, and with the economic effects of the pandemic becoming more visible, we are likely to see more applications in the coming months.

19. Examples of state aid decisions where such commitments were adopted are Commission decision of 11 May 2012 in case SA.28855 (N 373/2009) (ex C 10/2009 and ex N528/2008) – *ING*; and Commission decision of 5 April 2011 in case SA.26674 – *ABN AMRO Group*.

20. See Remedies Notice, para. 17 and footnote 3.

21. For example, see Dijkstra, M.A. and Schinkel, M.P. (2019), 'State-aided Price Coordination in the Dutch Mortgage Market', Tinbergen Institute Discussion paper TI 2019-014/VII.

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