COMPETITION LAW AND COVID-19 – ALL CHANGE OR NO CHANGE?

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Competition law may affect businesses, whatever their size, whatever they sell. Today's pandemic does not change that, as competition authorities are keen for you to know. But Covid-19 has shifted priorities, changed timescales and is liable to alter behaviour – not just behaviour by competition authorities but behaviour in which businesses may lawfully engage. While these changes are intended to be temporary and strictly limited, the crisis itself is open-ended, and its consequences may be longer-term.

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Change has come fast. At the date of publishing this briefing, we have so far seen:

- **State aid**: although the UK is no longer a member state of the European Union, EU State aid rules continue to apply in the UK during the transition period until 31 December 2020. Last week, the European Commission adopted two measures to provide a framework within which member states and the UK can adopt supportive measures. First, an initial announcement declared the coronavirus crisis to be an exceptional occurrence, paving the way for faster approval of national State aid initiatives in the EU. Decisions can be taken within days of receiving a complete State aid notification from member states. On 12 March 2020, the Commission approved its first coronavirus-related State aid decision, concerning proposed Danish aid to compensate damages caused by cancellations of large public events because of the coronavirus. The aid, totalling DKK91m (€12m), was notified to the Commission on 11 March 2020 and approved within 24 hours. Secondly, the Commission adopted a new Temporary Framework under Article 107(3)(b) of the Treaty on the Functioning of the European Union, to deal with the serious disturbance in the economies of EU member states. To date, in the first week since this framework was adopted on 19th March 2020, the Commission has taken 12 State Aid decisions covering eight member states plus the UK, with a further two decisions relating to coronavirus under Article 107(2)(b). The Temporary Framework cases includes one decision, taken on 25th March 2020, approving two UK schemes for SMEs (a curiosity of the post-Brexit transition period). How successful this will be is open to question. In State aid, there are several moving parts: (a) the Commission must be prepared to authorise aid in certain circumstances; (b) member states must be prepared to ask for it to be authorised; and (c) businesses must be prepared to request it within the permitted limits. The success of State aid policy in the crisis depends on all three and it is too early to tell how effective member states' aid policies will address issues in the real economy.

- **Antitrust/consumer law**: a double-edged change here: on the one hand, early signalling by several authorities that price-gouging or misleading claims would face competition enforcement; on the other hand, an indication by the UK's Competition and Markets Authority (CMA) that some, strictly limited, coordination between competitors, targeted at resolving scarcity, may not face public enforcement, and may be eligible for exemption from the prohibition on anti-competitive agreements. We discuss below some elements of the CMA's policy paper issued on 25th March 2020.

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- **Merger control/free movement of capital**: for M&A transactions currently under scrutiny, Covid-19 is likely to result in an extended review timetable. The European Commission has therefore encouraged parties to consider delaying merger filings. The CMA will continue to progress ongoing merger investigations, including through information requests (with deadlines) to meet statutory deadlines. The CMA has asked some parties engaged in pre-merger notification to delay formal filing given concerns the CMA will be unable to carry out effective market testing (as required) in the present circumstances. The CMA is conducting all meetings remotely and all CMA staff are working remotely if possible. This is therefore a good time to revisit longstop dates in ongoing transactions subject to merger scrutiny and to agree waivers or alternative arrangements. We also await to see how the authorities will treat transactions, which, in normal times, might be expected to substantially lessen competition/significantly impede effective competition, but which in current times involve firms that are – purely because of the Covid-19 crisis – somewhere between "failing" and "flailing". Another important aspect – in line with recent, apparently de-globalising, trends, was the issue, on 25th March, of a European Commission Communication giving guidance to EU Member States on foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the coming into force of the EU FDI Screening Regulation EU 2019/452. This Commission paper elaborates the EU's policy on FDI screening during a public health emergency. Its goal: to encourage EU Member States to prevent a sell-off to third countries of those European businesses active in supplying European needs e.g. for producing medical or protective equipment or research (vaccine) establishments.

- **Procurement:** where contracting authorities must procure certain goods on a very urgent basis, there is flexibility in the rules to allow, for example, direct awards for extreme urgency (e.g. Regulation 32(2)(c) of the Public Contracts Regulations 2015) or for absence of competition under Regulation 32(2). See also the UK Government's Procurement Policy Note – Responding to COVID-19 PPN 01/20, issued in March 2020 by the Cabinet Office. An interesting feature has been the Commission's use of coordinated joint procurement, e.g. on 17th March, the Commission launched a call for tenders for ventilators, with 25 member states participating; the next day, a further call for tenders for testing supplies (testing kits, reagents and hardware) with 19 member states participating.

COMPETITION LAW HAS NOT BEEN SUSPENDED OR MATERIALLY EVEN RELAXED.

COMPETITION COMPLIANCE DURING THE CRISIS

On 25th March 2020, the CMA published its policy document, "CMA approach to business cooperation in response to COVID-19". This discusses two inter-linked features of competition law enforcement: "prioritisation", that is, what business behaviour the CMA chooses to act against; and "exemption criteria", that is, when the CMA will consider a collusive arrangement to be exempt from the competition law prohibition on anti-competitive agreements.

The key compliance messages are:

- ***Competition law still applies***: competition law has not been suspended or materially even relaxed; the focus on "prioritisation" refers only to what the CMA will devote resources to investigating, but an arrangement that does not meet the CMA's prioritisation criteria might still provoke European Commission involvement if it is liable to affect trade into or among EU Member States, and might still be attacked by third parties through private litigation in the courts.
- ***This is a limited exception***: the exception has been created to deal with a perception that the threat of competition law enforcement might impede co-operation between competitors that would be necessary to address the scarcity of essential goods and services during the Covid-19 crisis. However, the exception, such as it is, is limited in both scope and time:
  - ***Scope***: it is focussed on activity, primarily relevant to the prohibition on restrictive agreements, relevant to addressing supply needs arising from the Covid-19 crisis (e.g. the supply and distribution of food or medical equipment.) It does not apply to any other conduct outside Covid-19, whether during the crisis or after it; and
  - ***Time*****:** the policy document will be withdrawn when the CMA considers it is no longer necessary. What businesses do to collude during this crisis must be temporary (whatever 'temporary' comes to mean in this context, see below).
- ***Exploitative behaviour is an enforcement target****:* the CMA says it is "of the utmost importance" to ensure the prices of products or services considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) are not artificially inflated by "unscrupulous businesses seeking to take advantage of the current situation by colluding to keep prices high or, if they have a dominant position in the market, by unilaterally exploiting that position." Interestingly, the CMA suggests manufacturers have a role (but, legally, this is not an obligation) to help combat price gouging or excessive pricing, through the permitted device of setting maximum prices at which retailers may sell products (provided such maxima are not a disguise for of fixed or minimum price) provided the vertical agreements block exemption market share limits are not exceeded. Under the current legal framework, cases of excessive pricing are difficult to pursue for competition authorities. However, tough times call for tough measures and the CMA has cautioned it could use a multi-pronged approach, using powers available to it under its competition and consumer protection functions to prevent unscrupulous conduct.

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CMA ENFORCEMENT PRIORITIES

The CMA accepts that this extraordinary situation requires extraordinary effort, to ensure essential goods and services reach consumers, and to ensure key workers can perform their functions. This may, therefore, require coordination between competing businesses. The CMA indicates it will not enforce where temporary measures to coordinate action:

- Are appropriate and necessary to avoid a shortage, or ensure security of supply;
- Are clearly in the public interest;
- Contribute to the benefit or wellbeing of consumers;
- Deal with critical issues that arise from the Covid-19 pandemic; and
- Last no longer than necessary.

By contrast, using Covid-19 as a cover for unnecessary coordination will be a target e.g. exchanging commercially sensitive information on future pricing or business strategies, where not necessary to meet the needs of the current situation, or retailers excluding smaller rivals from co-operation efforts designed to achieve security of supply, or denying rivals access to supplies or services. Other targeted behaviour includes dominant businesses setting excessive prices, or business collusion designed to mitigate a fall in demand by artificially raising prices, or coordination in relation to goods and services not affected by Covid-19.

The European Competition Network, which consists of the European Commission and the competition authorities of the EU member states, also issued a joint statement on the application of competition law during the Covid-19 crisis, indicating it will not intervene in necessary and temporary co-operation between businesses aimed at ensuring the supply and fair distribution of essential products and services.

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QUESTIONS TO ASK WHEN CONSIDERING CO-OPERATION WITH COMPETITORS DURING COVID-19

The following questions may assist businesses undertaking self-assessment of competition law risk:

- Are the goods/services in question clearly "essential" to meeting the needs of consumers, key workers and vulnerable consumers during the crisis?
- Is there a danger of scarcity in these goods or services, whether from a lack of total supply, or insufficient means to ensure they are fairly-distributed?
- Is there an opportunity to develop new products or new services, such as food delivery to vulnerable consumers?
- Is the proposed co-operation reasonably necessary (in the circumstances and the time available to consider courses of action) to improve the situation (scarcity or distribution, or creation of new products/services)?
- Does the proposed co-operation do more than is strictly necessary (whether in scope or in time) to achieve the benefits?
- Specifically, what indicia of competition can still be maintained even as some are reduced – e.g. if it is necessary to share capacity information, is it strictly necessary to share price information too? If the coordination can achieve a positive effect for consumers in one region, must it necessarily be extended to another region where it will not produce that effect?
- What provision can you make to ensure the collusive arrangement is terminated as soon as it is no longer necessary to achieve the benefits, and in any case by the time the CMA's policy is withdrawn?

In competition law, dominant companies have a special responsibility not to conduct themselves in a way that further damages competition or exploits consumers. If a business is dominant already, or – because of the special circumstances of Covid-19 – may become temporarily dominant – what controls are in place to ensure conduct does not amount to abuse, for example, through excessive pricing or refusal to supply?

OUTSTANDING ISSUES

Temporary or perhaps recurrent?

The CMA policy is stated to be temporary, but it is open-ended. It may be relevant only for a few weeks, or many months. It may be withdrawn; equally, the CMA may thereafter have to reintroduce it during a hypothetical future second wave of Covid-19, or a new pandemic. Businesses that may be affected by this policy should remain alert to policy as it develops.

Borderline issues

There are obvious areas where the policy will apply: e.g. food and medical equipment supply. Businesses minded to test the outer limits of the policy will need to take extra care to carry out a thorough self-assessment of competition risk in advance and to tailor co-operation within the limits of what can be strictly justified.

Long-term effects

The Covid-19 crisis has so far shown competition authorities taking a positive, proactive and dynamic role in taking decisions, communicating policy, managing workload and stakeholder expectations, and addressing tangible issues arising in the economy. When the world economy emerges from Covid-19, perhaps in a permanently-altered form in some sectors, competition law will need to reflect that new reality.

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