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COMPETITION LAW CONSIDERATIONS

20 March 2020

This briefing covers the key competition law considerations that may be relevant as businesses grapple with the COVID-19 pandemic, such as the application of competition law to collaborations between competitors and other commercial conduct, the implications for merger reviews, and the application of EU State aid rules to government interventions to support national economies.

Disaster management: boundaries to competitor collaborations

Many businesses are facing huge challenges, including collapsing demand, disturbances in supply and distribution chains, managing employee relations and resource constraints. Collaborating with competitors may be one of the ways in which firms seek to move forward – for example in relation to the distribution of goods to ensure consumer demand is met, or regarding employment policies such as those relating to sick pay.

While collaborations between competitors may have entirely legitimate aims, it is important to remember that competition laws continue to apply, prohibiting agreements between competitors on sales or purchase prices, employee salaries or benefits, market allocation, output reduction and sharing competitively sensitive information. Failure to comply with the rules exposes those involved to significant penalties and potential litigation.

Nevertheless, the EU, UK, and many other competition law regimes exempt agreements between competitors whose benefits outweigh their negative effects on competition. Collaboration arrangements between firms to deal with the COVID-19 pandemic may be able to benefit. For instance, European Commission guidelines recognise that information sharing which allows suppliers to better forecast demand patterns may benefit from exemption provided the information sharing is limited to what is necessary to correct a market failure.

The basic position is that firms will need to self-assess whether their proposed arrangements meet the criteria for exemption. This may prove difficult where the collaboration is novel, particularly given the considerable uncertainty inherent in the COVID-19 pandemic. For instance, it is not clear that the exemption is available for collaborations which produce benefits for society at large, as distinct from benefits to the direct consumers of the products or services of the businesses concerned.

In the EU and UK at least there is no formal pre-approval mechanism for agreements between competitors, but there are ways for firms to seek comfort that their proposed collaborations will not be challenged under competition rules. Processes exist both at EU level and in the UK for firms to seek guidance on the compatibility of their proposed arrangements with competition laws. These processes are rarely used but we may see that change: indeed the Commission has signalled a willingness to provide guidance in the current circumstances. The UK competition agency - the Competition and Markets Authority (CMA) – has gone a step further and issued a statement assuring

businesses that it does not intend to take action against cooperation that is necessary to protect consumers (for instance by ensuring security of supplies), but has equally clarified that it will not tolerate exploitation of the crisis as a 'cover' for non-essential collusion. It is worth noting that positive guidance, or the CMA assurance, would not preclude private litigation, although it may deter any such claims.

In the UK context, industry participants could also seek formal dispensation from the Government, which can be granted where there are exceptional and compelling reasons of public policy why the competition rules should not apply to particular types of agreements. The Government has already used these exceptional powers on 19 March 2020 to allow supermarkets to work together in response to the COVID-19 chaos. The temporary relaxation of rules will allow retailers to share data with each other on stock levels, cooperate to keep shops open, share distribution depots and delivery vans and to pool staff with one another to help meet demand. We may well see these powers being used again in the context of the COVID-19 pandemic. Some other national governments are also issuing ad hoc decisions of this nature to mitigate the impact of COVID-19.[1]

Re-assess pricing and contractual conduct in the current context

On 5 March 2020 the CMA issued a statement on sales and pricing practices during the COVID-19 outbreak, stating its intention to ensure that traders do not exploit the current situation and forewarning that, if necessary, it will consider asking the Government to introduce price controls. 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 that it could use a multi-pronged approach, using powers available to it under its competition and consumer protection functions to prevent unscrupulous conduct. It has created a taskforce that will scrutinise market developments to identify harmful sales and pricing practices and is working with the Government to advise where extra time-limited legal powers, exercisable on an emergency basis, may be needed for it to intervene quickly and effectively.

We see this trend outside the UK too, with Italy's competition authority looking into excessive prices of healthcare products on online platforms and the Polish competition authority investigating wholesalers that terminated contracts with hospitals in order to subsequently sell protective equipment at disproportionately high prices.

In the circumstances, while changing consumption patterns mean prices for nearly everything could see significant movement, companies should ensure that their pricing is not only determined unilaterally but is also rational, reasonable and justified. For critical products (to be interpreted in light of current healthcare requirements) pricing needs to be dictated not just by demand patterns but also policy considerations.

Impact on M&A scrutiny

For transactions currently undergoing scrutiny, the COVID-19 pandemic means extended review timelines are highly likely. Competition authorities are adapting to remote working but fear that they will not get appropriate levels of engagement from industry participants in providing market feedback on particular transactions. The Commission has accordingly strongly encouraged parties to consider delaying merger filings. The CMA has so far not indicated any delay in merger reviews but

[1] The Norwegian government has exempted SAS and Norwegian airlines for 3 months, allowing them to coordinate their schedules to maintain minimum services for citizens – an arrangement that could otherwise breach competition rules.

has noted that, where possible and required, it could apply for extension of statutory timeframes. This is therefore a good time to revisit longstop dates in ongoing transactions subject to merger scrutiny and agree waivers or alternate arrangements.

Going forward, we might also expect to see increased M&A activity, with parties relying on 'flailing firm' arguments to try to achieve consolidation that may otherwise raise red flags with competition agencies. In the aftermath of the 2008 financial crisis, despite a recommendation from the Office of Fair Trading to refer the transaction for an in-depth competition review, the Government cleared Lloyds' acquisition of HBOS on the grounds that any competition issues were outweighed by the public interest in preserving the stability of the financial system. It is possible we will see similar interventions in the wake of the COVID-19 pandemic, in order to preserve key businesses and services vital for the economy.

It remains to be seen whether there might also be a relaxation of foreign investment rules, as the need for financial stimulus and investment is felt across the globe. In any event, on a practical note we can presumably expect to see a delay in the implementation of the UK's proposed foreign investment regime.

Potential for bailouts: revised State aid rules

A number of countries, the UK included, are already implementing measures intended to help vulnerable sectors weather the economic turmoil caused by the pandemic.

In Europe of course, many such measures must comply with the State aid rules.[2] In that regard, the Commission on 19 March 2020 adopted a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak. This is effective immediately and will cease to apply on 31 December 2020. Aid under this framework can only be granted to companies that are not in difficulty, or that were not in difficulty on 31 December 2019 (i.e. prior to the COVID-19 outbreak), but that face or have faced difficulties as a result of the pandemic. The framework envisages aid measures in the form of direct grants, selective tax advantages, advance payments, State guarantees for loans taken by companies from banks, subsidised public loans to companies and provision of short-term export credit insurance.

As long as Member States can show compliance with the conditions in the framework for the aid measure in question, the Commission will consider the aid to be compatible with the State aid rules. The aid will still need to be notified by the Member State concerned but the Commission expects to be able to approve it very rapidly upon notification.[3]

[2] During the Brexit implementation period, the UK Government remains bound by the EU State aid rules, but the shape of any future UK subsidy regime beyond 31 December 2020 is not yet known.

[3] The Commission has set up a hotline to field calls from governments with urgent State aid programmes and on 12 March 2020 approved - within just 24 hours - State aid from the Danish government to organisers of public events that were forced to cancel due to the pandemic.

Conclusion

Clearly there is tremendous political and public will to do the best to mitigate the effects of this pandemic to the extent possible. Even as we learn to deal with the public health implications, a necessary next step will be to revive the struggling global economy. Where the business response involves collaboration between competitors, firms must remain compliant with competition law. They must also ensure their conduct does not attract scrutiny under powers to deal with exploitative commercial behaviour. Achievability of ongoing M&A transactions within currently defined timelines may also need to be reassessed.

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