Overview

For additional guidance, please refer to Steptoe’s COVID-19 Resource Center.

If it wasn’t so serious, these times might feel like Alice in Wonderland, where the world as we know it is upside down and topsy turvy…and unpredictable. Normal rules of commercial engagement have gone by the board and market forces have become frightening and potentially destructive of economies, livelihoods and lives themselves. In the current conditions, regulators have been scrambling to respond in ways which sustain business continuity and survival, limit market distortions and bear down on opportunistic exploitation.

Competition law is one field where the rules have had to be adjusted to reflect the economic realities, and our team addresses below a number of key areas which are relevant to businesses struggling to respond to the COVID-19 pandemic and stay compliant.

In this Alert we examine how the European Commission and national regulatory authorities are responding to the pandemic in addressing:

- Collaboration between competitors in times of economic crisis, sometimes referred to as ‘crisis cartels’;
- Changes to the state aid rules;
- Protective changes to some national merger rules; and
- Measures to protect against exploitative pricing.

International businesses which are supplying goods or services for the EU markets should be aware that they need to ensure compliance with measures introduced in their home jurisdiction as well as in the EU and its Member States, which in some cases, especially when the national interest clauses may be evoked, may need careful assessment.

Collaboration Between Competitors in Times of Crisis

It is important to remember that as businesses struggle in these times to cope with issues like distribution, sourcing ingredients, components and other resources, they may look to collaborate with rivals. In fact, many businesses have been doing exactly that. Collaboration between competitors can be perfectly benign and may no anti-competitive effects (for example, in setting standards, lobbying efforts). However, competition rules do apply and coordination of prices, market sharing, cost allocation, coordinated output reductions or sharing competitive sensitive information, would be prohibited. Some restrictions are regarded as ‘hard core’ and rarely worthy of exemption (price fixing, customer and market allocations and quantity restrictions). Penalties for infringement could lead to significant fines and possible private damages litigation.

In the EEA, agreements where the pro-competitive benefits outweigh the restrictive effects, are exempt from the prohibition in the competition rules. But collaboration between competitors is not generally subject to individual clearance by the European Commission or by national competition authorities: companies must self-assess their arrangements to see if they meet the criteria for exemption and this carries significant risk.

In these COVID-19 times, what practical steps can a company take to ensure so far as possible that its activities comply with the competition rules? The sorts of issues which we have seen emerging in these times of crisis which are steering rivals towards collaboration with each other include:
• Steeply falling demand and revenues, with escalating costs which threaten the very existence of the business;
• Systemic supply chain disruption with access to ingredients and components becoming severely constrained or cut off; and
• Threats to business continuity, employee issues.

Issues can be seen to arise in pharma as companies seek to cooperate in finding a vaccine for the virus; seeking approval to extend ‘Sell By’ dates and in collaboration to switch manufacture to the manufacture of ventilators. This can prompt a number of collaborative behaviours, many of which would be regarded in normal times as in breach of competition laws: capacity reductions, agreeing on the prioritisation of certain customer groups (e.g., healthcare customers or the aged), rationing of components, coordination of distribution.

There are several steps which can be taken:

• Guidance from public authorities: there are mechanisms which are not often used, through which guidance may be sought. Reviewing the criteria and circumstances of relaxations in other sectors, can be informative parties. For example:
  1. The UK’s Competition and Markets Authority (CMA) has issued a statement to the effect that it does not intend to take action against cooperation which is necessary to protect consumers (e.g., ensuring security of supplies);
  2. In the UK, supermarkets have been given permission to work together to share stock data, distribution depots, deliveries. The circumstances were exceptional and compelling in the interests of public policy;
  3. Norway, Germany, the Netherlands and Iceland, to name a few, have relaxed the competition rules for collaboration in various sectors. Parties may review the rationale for these individual decisions; and
  4. The European Commission has indicated that it will issue guidance.

• Be narrow in focus: concentrate only on those collaborative activities which are:
  1. Focussed only on solving the COVID-19 emergency being faced;
  2. Narrowly defined and go no further than necessary to deal with the emergency;
  3. Temporary in nature: such collaboration must come to an end as soon as practicable after the end of the crisis;
  4. Clear and specific;
  5. Do not cloud such emergency collaboration with other extraneous items; and
  6. Never include any terms relating to price or markets.

• Document it: record discussions, meetings, and outcomes. Consider having counsel participate in the meetings.
• Be public: do not engage in emergency collaboration activities in secret.
• Consider carefully how you communicate with the market and ensure messaging is in line with competition rules, checked by counsel.

It is important to bear in mind that risks are not just short term ones associated with the time of the COVID-19 virus. Risks can be longer term, as an investigation might not be started for many years after the end of the pandemic.

The European Competition Network has issued a joint statement on March 23, 2020, which may be found here. The European Commission stated: “Companies that need further guidance are encouraged to contact either the national competition authorities, the Commission or the EFTA Surveillance Authority for further guidance in individual cases.” In the absence of specific dispensation from a competition authority, there are risks, but these steps should help minimise them. Even with permissive guidance from a competition authority, there is still a risk of private litigation but one would hope that complying with official guidance would put off such claims from being brought.

Even if it may look too early now to look ahead, it is important to safeguard the current collaboration in a defined framework to ensure that when the situation normalises, any temporary arrangements can be untangled in a clear way, and an external audit is conducted to confirm the companies have not, inadvertently, set out on a path for collusion.

In addition, it is worth bearing in mind that the Commission has embarked on a broad examination of collaboration between competitors in its Horizontal Guidelines review, which includes a review of the R&D and Specialisation Block Exemptions. After the pandemic is over, we will likely see the Commission’s experience of dealing with the pandemic informs its approach to the drafting of updated guidelines. It will be an opportunity for businesses and trade associations to provide input from practical experiences.

Changes to State Aid Rules
In these extraordinary times, economies around the World including Member States are pumping money into their economies. Businesses and whole sectors are crying out for special support. State support in the EEA above a low de minimis threshold is subject to strict state aid rules which requires pre-clearance by the European Commission under strict conditions. Illegally granted state aid can be required to be clawed back. In the context of Brexit, the UK remains bound by the EU state aid rules during the transition period up to the end of December 2020. The Commission has until the end of March 2020 to file challenges to aid granted by the UK. The shape of post-Brexit UK subsidies is unknown.

The Commission has granted speedy clearance to certain state aid applications by a number of member states, including Denmark, Germany, Italy, Portugal and France. It adopted on March 19, 2020 a Temporary Framework for State Aid measures to support the economy during the COVID-19 crisis. It will expire on December 31, 2020. It is focussed on businesses which face difficulties as a result of the pandemic but which were not in trouble on December 31, 2019.

This Temporary Framework is considered in more detail in our State Aid Alert which can be accessed here.

Changes to Merger Rules

At the EU level, Competition staff have adapted to working from home but are aware of the challenges in dealing with tight timeframes presented by merger notifications (including securing meaningful input from industry participants which may be affected by a transaction). The Commission has therefore issued an appeal to request parties to delay merger filings as much as possible. Other authorities have indicated that review timeframes may be extended. Some practical points to note would include:

- Parties in transaction discussions should take likely timetable delays and postponements into account when negotiating terms, including longstop dates and break fees. If the longstop date won’t accommodate the delay, the perhaps a waiver extension would work (without risking re-opening the terms of the deal);
- A merger which is notifiable to the European Commission cannot be implemented until it has been notified and cleared by the Commission. It may be possible to seek a waiver of the suspension in certain urgent situations;
- We may see an increase in attempts to rely on the “failing firm defence” in circumstances where a consolidating merger would otherwise be challenged. There is a three part test: the target will shortly be forced out of the market through financial distress; there is no other less anti-competitive alternative to the proposed merger; and that absent the merger the assets will inevitably exit the market. The bar is a high one and would likely involve a full Phase II review;
- Some Member States have adjusted their rules to empower the blocking of takeover of domestic companies which may have become enfeebled by the economic consequences of the pandemic. This should be checked as part of merger due diligence; and
- Guidelines have been issued by the European Commission on March 26, 2020 in response to concerns expressed by member states that parts of their industries, especially critical health infrastructure, were becoming vulnerable to predatory takeovers. The stated purpose of the Guidelines is to support member states to “protect critical European companies” from takeovers or influence that could “undermine security and public order,” and to preserve economic sovereignty, Commission President Von der Leyen said. The Guidelines can be found here.

Measures to Protect Against Predatory Conduct

Perhaps the first authority to warn about the perceived risks, the UK’s CMA issued a warning on March 6, 2020 to traders about taking advantage of the COVID-19 pandemic. CMA chief executive Andrea Coscelli said: “We urge retailers to behave responsibly throughout the coronavirus outbreak and not to make misleading claims or charge vastly inflated prices. We also remind members of the public that these obligations may apply to them too if they resell goods, for example on online marketplaces.” This warning was triggered by the rising cost of hand sanitisers. The CMA went on to warn that it would take enforcement action against those suspected of such conduct and, if necessary, would also consider requesting the Government to introduce price controls. It has created a taskforce to monitor market behaviour during the crisis. Details about the Taskforce, its mandate and how to lodge complaints can be found here.

Under “normal” competition laws, charging excessive prices is behaviour associated with a dominant market position and difficult and time-consuming to prosecute. Some competition authorities, including the CMA, combine antitrust powers with consumer protection powers. The CMA intends to use its consumer protection powers and if necessary to request that the Government introduce emergency time-limited powers of enforcement in relation to conduct which would not rise to level of abuse of dominance. By way of example, Amazon earlier in March took steps to ban over one million products which claimed to provide a cure for the COVID-19 virus.

Other Member States, including Italy and Poland, have also taken action to intervene in the pharma sector (e.g., healthcare products, excessive prices for personal protective equipment supplies to hospitals).

See also Steptoe commentary on the US regulatory and criminal risks associated with unfair price increases in a crisis.
Some practical steps you as a business can take include:

- Monitoring the prices of inputs you face;
- Monitor claims by rivals to see if they are misleading;
- Monitor your own sales and marketing activities to ensure appropriate behavior; and
- Document concerns and report them promptly to authorities such as the CMA or other national authorities who can take enforcement action.

Practices
Antitrust/Competition

Antitrust Mergers, Acquisitions, & Joint Ventures

EU Competition