

COMPETITION AND REGULATED MARKETS

COVID-19: Practical Considerations: Have Competition/Antitrust Laws Been Relaxed So Businesses Can Cooperate during the Crisis?

15 April 2020

The COVID-19 outbreak and the restrictive measures taken by governments in response are presenting immense challenges to businesses.

There is a demand shock caused by a sharp decline in consumer demand for many products and services and at the same time a steep increase in demand for some products and services, in particular relating to the health sector. There is also a supply shock resulting from the disruption of supply chains. Nobody yet knows how long the crisis will last. These are very challenging times for businesses across all sectors and there have been calls for governments and competition authorities to relax competition/antitrust laws to help businesses deal with the fall-out.

In this briefing, we consider the following questions:

- Have competition/antitrust laws been relaxed in the context of the crisis?
- How far can competitors go in cooperating to address the impact of the crisis?
- What behaviour is likely to prompt enforcement action by competition authorities?
- Are there additional considerations for firms that hold a dominant position?

OVERVIEW OF THE LEGAL FRAMEWORK

Irish and EU competition law both prohibit agreements between undertakings which have as their object or effect the restriction of competition. This generally requires competitors to operate on the market independently of each other. However, cooperation is permissible in limited circumstances where it can be demonstrated that the arrangement fulfils certain so-called 'efficiency conditions' such that the resulting efficiencies and consumer benefits can be shown to outweigh any restriction on competition. In essence, applying the efficiency conditions involves a balancing test: if it can be shown that an arrangement has pro-competitive effects which outweigh its restrictive effects on competition, the arrangement may be permissible.

The European Competition Network (ECN)¹ and the European Commission have recently published guidance on how they will apply this legal framework in the context of the crisis.

ECN JOINT STATEMENT

On 23 March 2020 the ECN issued a joint statement clarifying how competition rules apply in the context of the crisis.² On 25 March 2020, the Competition and Consumer Protection Commission of Ireland (CCPC) published the ECN joint statement on its website, signaling that it will approach competition enforcement in the context of the crisis in line with the principles set out in the joint statement.³

In its joint statement, the ECN acknowledges that the extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers and states that, in the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.⁴

The ECN goes on to state that it will not hesitate to take action against companies that might attempt to take advantage of the current circumstances by profiteering. It is clear that competition authorities will act on this. For example, investigations

¹ The ECN is a network of competition authorities including the European Commission, the EFTA Surveillance Authority and the 27 national competition authorities across the EU, including the Competition and Consumer Protection Commission of Ireland.

² See ECN Joint Statement on the application of competition law during the Corona crisis, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

³ See CCPC Press Release on ECN joint statement, available at <https://www.ccpc.ie/consumers/2020/03/25/covid-19-european-competition-law-joint-statement/>

⁴ See ECN Joint Statement on the application of competition law during the Corona crisis, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

COVID-19: Practical Considerations: Have Competition/Antitrust Laws Been Relaxed So Businesses Can Cooperate during the Crisis?

have been launched in some countries including in Italy and Greece in respect of alleged price hikes. In the UK, the Competition and Markets Authority has written to entities in the pharmaceutical and food & drink sectors about reported price rises as a result of the outbreak. Some countries, including France, Norway and Romania, have introduced price control measures in respect of certain goods and services in the context of the crisis.

EUROPEAN COMMISSION TEMPORARY ANTITRUST FRAMEWORK

On 8 April 2020, the European Commission published a Temporary Antitrust Framework in which it sets out further guidance on how it will assess antitrust issues related to certain business cooperation in response to the COVID-19 outbreak.⁵ The guidance is focused on cooperation to address the shortage of essential scarce products and services during the COVID-19 outbreak, in particular medicines and medical equipment.

The Temporary Framework also notes that the Commission has introduced (on an exceptional and temporary basis) a procedure under which it will provide guidance on specific cooperation projects aimed at addressing the shortage of essential products and services during the outbreak.⁶

GOVERNMENT MEASURES

In light of the difficulties arising from the crisis, the UK Government has recently taken a further step and temporarily relaxed the application of the UK competition rules in the groceries sector to allow supermarkets to share data on stock levels, cooperate to keep shops open and share distribution depots and delivery vans to ensure continuity of supply. Similar measures have been adopted in Germany and the Netherlands. It remains to be seen whether the Irish Government will introduce a similar measure.

It is important to bear in mind that government encouragement to cooperate (rather than a legal requirement to do so, or a legal exemption that applies to cooperation) is not a full defence for a

competition law infringement. However, the Commission has stated in the Temporary Antitrust Framework that the fact that cooperation is encouraged and/or coordinated by a public authority is a relevant factor to be taken into account in assessing whether the cooperation is problematic under EU competition rules.

PRACTICAL TAKEAWAYS

It is important to note that the ECN statement and the European Commission's Temporary Antitrust Framework do not represent a relaxation of competition rules or a general exemption from their application. However, they do provide some helpful clarification on how the European Commission and other members of the ECN will apply the 'efficiency conditions' under the existing legal framework to take account of the current circumstances in assessing whether cooperation between businesses is problematic and deciding whether to take enforcement action.

While this clarification is to be welcomed, it is important to note that it does not provide a blanket exemption from the application of competition rules and each case needs to be assessed on an individual basis on its merits. Therefore, businesses should exercise caution when considering whether to engage in cooperation with other businesses in response to the impact of the crisis.

As a guiding principle, unless specific circumstances apply, businesses should assume that competition rules continue to apply to arrangements between competitors, suppliers and customers in the normal way.

A wide range of cooperation may give rise to competition concerns. For example, certain so-called 'hard core restrictions' such as price fixing, output limitation and market sharing are unlikely to fulfil the efficiency conditions.

In addition, the exchange of non-public commercially sensitive information (including information on pricing, costs, customers, sales, quantities, capacities, risks, investments, HR matters, marketing plans, R&D and aspects of commercial strategy) between competitors is also generally prohibited. In this regard, the European Commission's Temporary Antitrust Framework clarifies that,

while the exchange of aggregated production, capacity and supply gap information necessary to ensure the supply of essential scarce health products or services may be permissible in certain circumstances, the exchange of information relating to individual competitors is likely to be problematic.

Whether cooperation between competitors to address supply shortages falls within the scope of the permissible "necessary and temporary measures" outlined by the ECN will be fact and context specific. Competition authorities have been clear that any COVID-19 related cooperation between businesses should be limited to what is strictly necessary in scope and time to ensure the provision of essential services and the continued supply of scarce products. It is recommended to seek legal advice to ensure that a proposed cooperation arrangement is designed so that it either does not restrict competition or meets the efficiency conditions in the circumstances.

Other forms of cooperation outside of these parameters, including agreements to manage supply and demand, reduce capacity or mitigate the financial impact of the crisis or the risk of business failure, should be assessed carefully in advance to ensure they do not infringe competition law.

Companies that hold a dominant position also need to be mindful of avoiding conduct that could be considered abusive in the circumstances. In particular, it is clear from the ECN joint statement that competition authorities are focused on ensuring that businesses do not take advantage of the circumstances to charge unjustifiably high prices.

FURTHER GUIDANCE

The economic environment is changing rapidly and the regulatory landscape is evolving on an ongoing basis in response. Our Competition and Regulated Markets team is available to help you ensure that in this context the steps you take to handle the impact of the crisis do not give rise to competition law risks.

Please contact a member of the team for further guidance.

⁵ Communication from the European Commission on a Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, C(2020) 3200, available at https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf

⁶ For example, The Commission has provided a "comfort letter" to Medicines for Europe, an association representing generics and biosimilars companies across Europe. The press release, is available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618

COVID-19: Practical Considerations: Have Competition/Antitrust Laws Been Relaxed So Businesses Can Cooperate during the Crisis?

KEY CONTACTS



Richard Ryan
Partner
+353 1 920 1240
richard.ryan@arthurcox.com



Patrick Horan
Partner
+353 1 920 1063
Patrick.Horan@arthurcox.com



Helen Leonard
Associate
+353 1 920 1236
helen.leonard@arthurcox.com



Simon Breen
Associate
+353 1 920 1971
Simon.Breen@arthurcox.com



Emma Wallace
Associate
+353 1 920 1896
Emma.Wallace@arthurcox.com



Edel O'Connell
Associate
+353 1 920 2112
Edel.Oconnell@arthurcox.com