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Consequences of Covid on Competition and Distribution Law

IRELAND

The Irish competition regulator, the Competition and Consumer Protection Commission (CCPC) has indicated that it will follow the European Commission's approach on the relaxation of the competition law rules to facilitate the distribution of essential medical supplies in the fight against Covid-19.

The Commission guidance comes in the form of a temporary framework to assist businesses in assessing competition issues where the cooperation is aimed at ensuring the supply and distribution of essential and scarce medical supplies. It acknowledges that exchanges of information, which in normal circumstances would be prohibited, may be required where it is necessary to efficiently spread production, stock management and potentially distribution between companies. However, any measures must be:

- Designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services used to treat Covid-19 patients;
- Temporary in nature and apply only as long as there is a risk of shortage; and
- Not exceed what is strictly necessary to

ISRAEL

The Israeli Competition Authority (the "ICA") published in March 2020 leniencies that would be granted by it in light of the "Corona Crisis" for the duration of the crisis. The main leniency concerns collaboration between competitors for business survival or business continuity during the crisis. An additional leniency addresses the process of evaluating and approving mergers between companies.

Collaboration Between Competitors for Business Survival or Continuity

The Israeli Joint Venture Group Exemption of 2011 (as extended) allows, under specified conditions and restrictions, for collaboration between competitors, even if it is considered or may be considered a "cartel" in accordance with the broad definition of "cartel" under Israeli Competition Law, without the need of obtaining an "exemption" or "permission" from the competition law enforcement. The ICA clarified that it recognizes that during the "Corona Crisis", collaboration between business entities, even if they are competitors, does not necessarily limit or restrict competition, rather it may contribute to future com-

petition and secures the continuity of effective competition and survival of businesses in the mid and long term.

Therefore, the ICA clarified that cooperation between competitors will not be considered as a "cartel" or prohibited collaborations that are intended to reduce and prevent competition, and will not be disqualified on this basis solely, if they are necessary in order to allow businesses to deal with the distress that stems from the "Corona Crisis"; *provided however*, that they comply with all other (regular) conditions of the Israeli Joint Venture Group Exemption of 2011 (i.e., that it is not a 'naked restraint' and that it does not include an unnecessary 'ancillary restraint' etc.).

Examples of cooperation that may benefit from the above leniency are unified distribution lines of goods of competing companies during the crisis; joint purchase of raw materials needed to maintain the continuation of businesses etc. The ICA specifically declared that such cooperation, though between competitors, will be evaluated more leniently during the period of the crisis.

Internally, the level of Covid related CCPC enforcement may result, at least in the short term, in the re-allocation of resources within the CCPC. On 5 June 2020, the CCPC announced that it would not be taking further

action in its investigation of anti-competitive behaviour in the beef sector as it did not have;

"tangible proof of an agreement between competitors to coordinate their activity, such as written agreements between competitors to fix prices to show that a cartel exists. Information showing that beef processors charge similar prices does not, in itself, constitute evidence that a cartel is in existence."

The CCPC received a significant number of complaints about the beef sector in 2019 including complaints related to the similarity in base price per kilo offered by processors to beef farmers and the quantitative criteria applied to bonuses by beef processors.

While no substantive changes have been made to the competition law rules in Ireland in response to the pandemic, Covid-19 is likely to impact the enforcement of competition law and the distribution chain in certain sectors.

by Joanne Finn and Elaine Davis


DAC BEACHCROFT

Under Israeli Competition Law a merger occurs only after approval of the Competition Commissioner of the merger. The procedure for obtaining merger approval takes time during which the merger request is reviewed by the Competition Commissioner. The ICA clarified, that due to the crisis, in the event the entities requesting to merge may suffer irreparable damages during the waiting period for merger approval (for example, in the event of an immediate need of cash flow from the acquiring company to the acquired company to ensure its survival), the ICA will allow solutions and leniencies for the waiting period until the time it decides regarding the merger request.

Last, the ICA sent a message of warning that during the "Corona Crisis" it will focus on the enforcement of the prohibition to charge excessive prices by monopolies, who may try to exploit the crisis and unjustifiably raise prices.

by Tzahi I. Yagur

PEARL COHEN

Promoting Procedures for Merger Transactions

ROMANIA

Strong enforcement of competition rules

As the Covid-19 crisis was unravelling, the Romanian Competition Council (“RCC”) was quick to announce that it is closely monitoring the companies’ conduct on the market. Despite the public health emergency, at all times RCC position was in favor of strong enforcement against undertakings that engage in cartel-type practices or which abuse their dominant position. In particular, the authority was focused on excessive pricing for essential goods. Partially motivated by public policy reasons, this was also in line with the concerns of the Romanian public authorities which analyzed the possibility of capping the maximum price for goods of interests during the Covid-19 crisis (e.g. face masks, medical equipment, food supplies). In terms of public enforcement, the RCC has recently launched an investigation into price increases for protective face masks. In addition, the authority announced that administrators of online marketplaces may impose measures to limit unjustified price increases for basic products and services. To wrap up, competition enforcement remains strong even in times of crisis and this trend is expected to continue in the near future as well.

Sufficient flexibility of competition rules in addressing consumer needs

UNITED KINGDOM

The UK’s Competition and Markets Authority (CMA) has taken a number of steps in relation to the COVID-19 crisis, and formed a taskforce to facilitate its response.

A key aspect in its response has been the development of guidance to businesses on its approach to business cooperation – with a clear signal that enforcement activity will not be taken in relation to essential business cooperation and other steps necessary to mitigate negative impacts on consumers during the crisis. This essentially sets out the CMA’s interpretation of existing competition law in the context of the crisis. On the other hand, the CMA has made it clear that it will not tolerate behaviours that seek to exploit consumers during the crisis – particularly using COVID-19 as a cover to eliminate price competition.

Additionally, the UK has introduced specific legislation to provide legal cover for certain sectors – notably groceries businesses (and the supply chain), maritime and health sectors. These laws essentially relax competition law for certain agreements among businesses which might normally be considered anticompetitive, provided they are notified to the UK Government and limited in scope. So far, the majority of

However, given the change in customers’ behavior and needs in times of crisis, the COVID-19 outbreak has brought some flexibility to the competition rules. To address the issue of a potential acute shortage of supply and to support consumer welfare, the RCC has announced a (limited) relaxation of the competition rules. Specifically, given the likely significant customer benefit, the RCC allowed for forms of cooperation that could entail a high risk of infringement, such as:

- Retailers can coordinate transport to ensure the supply of essential products/ home delivery for people not able to leave their homes;
- Pharmaceutical companies can coordinate in terms of production, stock management and medicines distribution, to ensure that not all focus is on one or more medicines thereby neglecting other medicines that would remain below the optimum level of production.

Following the same consumer welfare rationale, the RCC has also encouraged companies to take measures designed to prevent such potentially anticompetitive practices:

- Owners of online platforms may impose measures to limit the unjustified increase of prices for basic products and services;
- Producers can set a maximum price, which might be useful to limit unjustified price increases at distribution level.

such agreements have been among the major supermarkets. In the long run, business cooperation in some areas such as distribution, may well disclose various efficiencies in supply chains – which it might be attractive to continue into a post-COVID world. On the other hand, this period of ‘coordination through crisis’ could well encourage anti-competitive behaviour, and cause the CMA to make good on its threat to be tough on businesses who seek to exploit the crisis.

The CMA has placed its consumer protection mission at the front and centre of its response. It has issued a range of guidance on consumer issues including guidance on consumer contracts, the treatment of cancellations and refunds for consumers. It has encouraged consumers to make reports on business behaviour directly to it and has received 60,000 complaints between March and May.

We can see the CMA continuing to develop its consumer interest functions in the aftermath of the crisis. If anything, the effect might be to accelerate this process, which had already started early last year.

In February 2019, the CMA’s Chair published a letter to the UK Secretary of State for Business, Energy and Industrial Strategy, setting out a wide ranging set of proposals which if implemented would radically alter the competition law land-

Guidance in avoiding competition infringements

The RCC has stated on a number of occasions that it is willing to offer guidance for companies in order to ensure compliance with the competition rules. In times of great uncertainty this type of input can help companies in ensuring access to essential goods and also preventing any exposure to sanctions. This is in addition to the public statements and position documents issued by the authority. The RCC is in line with the other competition authorities and in particular adhered to the joint statement issued by the European Competition Network and the Commission Communication (Communication from the Commission Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak 2020). From this perspective, the authority has been very active in providing assistance to the business sector.

by Alexandru Sotropa and Oana Popescu



scape in the UK. The proposals envisage the enhancement of the CMA’s consumer interest enforcement – and the creation of an overriding ‘consumer interest’ duty for the CMA and the courts – although there has yet to be any reform to the existing law.

Already, the proposals started to introduce concepts which were not focussed on ‘traditional’ competition law concepts, grounded in economic theory and practice. Again, we can see that the crisis has if anything continued this theme – with the CMA seeking to address issues such as price gouging (or excessive/exploitative pricing), while still acknowledging the limits of its powers under the existing legal framework. One possible outcome could be direct action to regulate prices for certain products (to combat negative consumer perceptions of ‘profiteering’), although we have yet to see evidence of this kind of step being taken. However, we do think that the crisis has put the CMA’s consumer protection role into sharp focus, and the authority could well secure an increased remit and legal powers in this area.

by Scott Rodger and Ellie Gannon



GREECE

The competition law enforcement field in Greece has not been left unaffected amidst the Covid-19 pandemic. The HCC has undertaken several actions over the past three months to ensure the proper functioning of free competition in the context of the current situation. In particular, the HCC has adopted - *inter alia* - the following measures (a) it announced, on 7 March 2020, that it will examine as a priority any cases of potential pursuit of increase/ maintenance of profit by undertakings or of passing of financial burdens on to consumers through illegal collusions or abusive practices by dominant undertakings, (b) it announced, on 16 March 2020, that it will not take

action against practices of imposition of maximum or recommended resale prices in supply and distribution agreements, (c) it formed, on 20 March 2020, a special task force in order to address potential distortions of competition due to the Covid-19 pandemic, and immediately launched an investigation into the healthcare equipment market by sending questionnaires to 3,859 producers and retailers of healthcare products, (d) it conducted, on 15 April 2020, several dawn raids in undertakings active in sectors where the authority identified potential competition problems such as undertakings in the food sector (e.g., animal feed, milk, eggs and chicken), (e) it issued a press release, on 15 May 2020, on

initiatives undertaken by the authority with regard to the Covid-19 healthcare crisis, relating to the application of the free competition rules in major sectors of the country's economy. Finally, during the same period and although not absolutely related to its Covid-19 actions, the HCC also launched sector inquiries in the areas of e-commerce and Fintech.

by Marina Androulakakis and Tania Patsalia

BERNITSAS

EUROPE

From the beginning of the Covid-19 crisis, the European Commission has been markedly rapid in its response to fight the pandemic which has brought the world economy to a standstill. The measures taken, which affect both substance and procedure, concern competition law in all its components (antitrust, merger control, State aid).

It is usually in times of crisis that the strict application of antitrust law is questioned, and Covid-19 has been no exception. Some see the strict application of competition law as an obstacle to overcoming the crisis. On the contrary, the European Competition Network recalled in its statement of 23 March 2020 in the need to maintain the application of competition law for the protection of consumers against companies attempting to take advantage of the crisis to weaken the market. However, rather than a purely mechanical application of competition law or a permissive approach, the Commission has opted for pragmatism. Upstream, the Commission's aims was to analyze "possible forms of cooperation between undertakings in order to ensure the supply and adequate distribution of essential scarce products and services during the COVID-19 outbreak" (Communication of 8 April 2020) and where necessary provide comfort letters to the undertakings con-

cerned (e.g. letter provided to Medicines for Europe association on 8 April 2020). This refers in particular to medical products and equipment, but the Commission did not intend to limit itself to that sector. It also published an exemption regulation on 5 March 2020 authorizing agreements and decisions on the planning of production in the milk and milk products sector for 6 months applicable retroactively from 1 April 2020. Downstream, the situation may also call for a more flexible approach to individual exemptions of horizontal agreements (such as market-sharing agreements in the medical equipment sector) and to the sanctions policy (again taking account of the crisis situation).

Merger control – The Commission has encouraged companies to postpone notifications of operation and has extended paperless exchanges to all stages of the procedure and some hope that e-filing will continue after the end of the crisis. Other questions have also been raised: should the theory of the failing undertaking be relaxed? Is it necessary to maintain control over strategic sectors highlighted by the crisis? The Commission has already urged Member States to apply Regulation No 2019/452 on the screening of foreign direct investment.

State aid – State aid law has adapted very quickly to the global pandemic. On 20 March 2020 the Commission ad-

opted a temporary framework allowing Member States to take emergency measures (Communication No 2020/C 91/01) to support their respective economies. The framework allows direct subsidies, guarantees on loans taken out with banks, State loans, export credit insurance and guarantees for banks that channel aid to the real economy. In view of the urgency of the matter and in the interests of efficiency, the Commission is endeavoring to reply to Member States within 48 hours. By 16 June 2020, 140 State aid measures had been approved.

Beyond the scope of this framework, some States have preferred to apply TFEU Articles 107(2)(b) (aid to make good the damage caused by natural disasters or exceptional occurrences) and 107(3) b) (aid to remedy a serious disturbance in the economy of a Member State). The Commission has thus recognized Covid-19 as an exceptional occurrence and a serious disturbance to the economy of a Member State.

by Louis Vogel and Joseph Vogel

FRANCE

Following the lead of the European Commission, the French Competition Authority has also been very responsive and flexible, particularly in terms of procedure.

Before discussing the measures taken by the Authority, mention should be made of government intervention in the free play of competition. By Decree No 2020-197 of 5 March 2020, the Ministry of the Economy put a cap on the price of hydroalcoholic gel (hand sanitizer) derogating from the freedom to set prices (Article L. 410-2 of the Commercial Code.) to protect consumers against the risks of inflation.

Following the adoption of the Law of 23 March 2020 on the health emergency (Article 11 of which specifically refers to independent administrative authorities), the Authority issued a statement on 27 March 2020 announcing that it would relax the procedural rules in the area of anticompetitive practices. Indeed, during the crisis the Authority has advocated electronic exchanges for leniency applications and procedural acts (referrals, sending of Statements of Objection, observations in response to Statements of Objections, reports, statements in response to a report, applications for business secrecy, downgrading of confidential information, communication of decisions). Deadlines

have also been extended. In application of the Ordinance of 25 March 2020, the Authority decided to extend the two-month period for replying to a Statement of Objections or a report: the deadline was suspended on 17 March 2020 and started to run again from the end of the lockdown period in France, i.e. 12 May 2020. Limitation periods and time-limits for appeal may be extended for two months from the end of the legally protected period, i.e. two months from 24 June 2020, as provided for in Article 1, 1^o, a) of Ordinance No. 2020-560 of 13 May 2020.

In addition, the means of action available to the Authority (in particular search and seizure operations) were limited during the lockdown. This did not, however, prevent the Authority from pooling market surveillance work internally and, if appropriate, ruling on the compliance of certain practices. For example, it announced on 6 April 2020 that it had ensured that the distribution of artificial ventilation masks in French Guiana was not contrary to the provisions of the Lurel Law (prohibition of exclusive import agreements in French overseas territories). In its press release of 6 April, the Authority proposes to assist businesses by validating, through informal consultations, temporary cooperation initiatives where they aim to “guarantee the production and fair distribution of essential products”. The Rassemblement des opticiens de France (French opticians’ association) approached

the Authority because it wanted to support its members in their dealings with property companies concerning commercial rents. Even though the association’s approach goes beyond the scope of the 6 April press release, the Authority validated its intervention in a press release dated 22 April 2020, considering that it did not pose competition problems. In effect, it was limited to a request for a benevolent examination of tenants’ requests for legal advice without going as far as recommending the amount of rent or the rates of reduction requested.

With regard to mergers, the health crisis has had an impact on procedures before the Authority and its ability to deal with cases within the usual and imperative deadlines (particularly market tests). Since 17 March 2020 parties have been asked to postpone the notification of transactions and to favor electronic exchanges, but only for Phase I. This has made it possible to clear more than 25 concentrations during the lockdown period. The legal deadlines for adopting decisions were also extended: they were suspended as of 12 March 2020 and started again from 24 June 2020 (Ordinance No 2020-560 of 13 May 2020).

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