

ANTITRUST & COMPETITION IN THE TIME OF COVID-19: PRACTICAL GUIDANCE

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This note sets out some of the key impacts that the COVID-19 pandemic impact is having – and may have – on competition law enforcement and practice globally.

This note is only intended to provide a broad overview of some of the key issues that may arise. Competition agencies and governments in different countries will have different approaches, and accordingly advice should always be taken in relation to specific matters and in relation to specific jurisdictions. Our global Antitrust & Competition team remains available to assist clients on questions they have in relation to specific conduct or matters in specific countries.

MERGER CONTROL & FOREIGN INVESTMENT

In the wake of the coronavirus pandemic, competition agencies across the globe have been required to adjust their work patterns and re-allocate resources to the most urgent aspects of their work. Large numbers of staff are working remotely, and many competition agencies have closed their offices. At the same time, widespread lockdowns around the world mean businesses are not operating like normal and, as such, there may be difficulties in carrying out market testing and other important aspects of merger control.

The key impacts we have seen, and expect to see, on merger control around the world are:



Delays in Filings

Given difficulties associated with carrying out their work during this period, many competition agencies (including the European Commission and many EU Member States) have **specifically requested that parties delay notifications where possible**.



Pre-Notification

Many countries request a draft filing be provided and agreed before it is formally accepted and the official review timeline begins. We would expect to see agencies **delaying their acceptance of a draft as final**, and thereby delaying the formal clock beginning, until they are more confident of being able to effectively carry out their review.



Timelines

As a general rule, absent any change in laws, **formal timelines will continue to apply** and competition agencies must issue decisions within those timelines. However, we would expect to see fewer instances of agencies issuing decisions before timelines expire (the US agencies have, for example, said they will not provide for early termination of the mandatory waiting periods under US merger control legislation).



Stop the Clock

Many agencies have an ability to **“stop the clock”** on formal review timelines if they do not receive responses in specified time periods. We expect agencies to use these mechanisms to ease the burden during this period.



Greater Procedural Risks

If parties do decide to go ahead and formally notify transactions during this period, they may face a **greater risk of being referred to an in-depth “Phase Two” investigation** if the agency is unable to carry out an effective review in Phase One.



Foreign Investment

Some jurisdictions (including the EU and Australia) have implemented stricter foreign direct investment rules and guidelines to protect local companies from hostile foreign takeovers.

ANTITRUST & ANTI-COMPETITIVE PRACTICES

Working Together for the Greater Good

Although the COVID-19 pandemic is an unprecedented global crisis, competition law continues to apply. The default position should be that companies continue to operate independently of competitors, and take their own decisions. At the same time, however, competition agencies and governments may recognise that in some exceptional circumstances competitors may need to work together for the greater good. To that end, we have already seen instances of competition agencies saying they do not intend to take enforcement action in certain circumstances, as well as governments putting in place specific exemptions.

Key considerations in relation to cooperating with competitors during this time include:



Competition Law Still Applies

The default position is that **competition law continues to apply** during the crisis. Accordingly, absent special circumstances (see below) and legal advice, companies should continue to operate as they did before the crisis. In particular:

- Companies should continue to act independently of their competitors.
- All business decisions (e.g. pricing, trading partners, trading terms) should be made solely by the company concerned.
- No competitively sensitive information (e.g. current or future pricing, cost bases) should be shared between competitors.
- Competitors should not discuss or agree joint approaches to suppliers or customers.



Enforcement Statements

Competition agencies recognise that there may be a need for competitors to work together on a limited basis in order to ensure stability of supply of essential goods and services such as food, medical supplies and air travel.

Accordingly, many competition agencies (such as those of EU Member States and the UK) have made it clear that **they will not take enforcement action against competitors whose cooperation is necessary to protect consumers during the crisis** for example by guaranteeing the supply of essential goods and services (e.g. by supermarkets or airlines).

It cannot however be guaranteed that all competition agencies will take this approach, and this is **not** a “green light” for competitors to coordinate more widely. Accordingly:

- Before any coordination with competitors, companies should take advice as to the position of the competition agencies where the company does business and the risks associated with cooperation.
- To the extent that cooperation takes place, it should be the **minimum**

necessary to protect consumers during the crisis.

- Under no circumstances should cooperation with competitors go beyond what is necessary in order to ensure security of supply (e.g. it should **never** include agreements on prices).

Companies should also remember that the fact that a competition agency does not bring enforcement action does **not prevent private litigation**. Private litigants would, however, need to demonstrate that cooperation is actually a breach of competition law and they have suffered loss as a result of the cooperation.



Specific Exemptions

Some governments have gone further and announced specific exemptions from competition law for specific forms of cooperation – for example, the UK Government has announced that supermarkets will have an exemption to allow them to work together to ensure supplies reach customers, and the Norwegian Government has allowed an exemption for airlines to coordinate their routes.

Again, these are **narrow exemptions** to ensure the greater good during this period, and any cooperation that goes beyond specific exemptions will risk competition law sanctions.

Exploiting the Crisis

On the flipside, some traders may look to exploit the COVID-19 crisis for their own financial gain. Competition agencies have been clear that they will not tolerate such exploitation and, where competition law is able to intervene, they will not hesitate to take action.



Price Gouging

Some companies – for example sellers of hygiene products like hand sanitiser or other medical products – may exploit the increased demand by increasing prices. Competition agencies have been clear they have an eye on such conduct, and will not hesitate to take action where laws allow them to.

Depending on the specific jurisdiction, such conduct may fall foul of laws prohibiting **excessive pricing by dominant companies, price gouging laws or other consumer protection laws**.



Maximum Resale Pricing

It is worth noting that competition law does not generally prohibit a manufacturer setting a **maximum resale price** for its goods (unless that price becomes a focal point at which retail sales end up taking place).

Manufacturers and wholesalers may therefore be able to assist in the prevention of price gouging by imposing such maximum resale prices.



Cartel Conduct

As noted, competition agencies and governments may ease competition enforcement to allow competitors to coordinate supply chains and other aspects of their businesses to ensure supplies of crucial goods (food, medical supplies etc) reach customers. This is, however, not *carte blanche* for competitors to work together and anything that goes beyond what is strictly necessary or

expressly allowed will likely be prosecuted.

For example, coordinating pricing or conduct in relation to “non-essential” products is highly unlikely to be seen as necessary and will lead to significant competition law risks.



Watch Your Supply Chain

Companies should also be vigilant, and keep an eye out for potential competition violations by their trading partners. For example, if companies see abnormally high pricing by trading partners, or stable pricing across bidders, this could be an indication that the company is the victim of a competition law violation. Companies should seek advice on their potential recourse in such circumstances.

STATE AID

The COVID-19 crisis, and the mandatory lockdowns and general drop in business faced by companies across the world, will see many businesses – small and large – face significant financial issues.

In the EU, the state aid rules prohibit “selective” financial aid measures being granted by governments to businesses. Recognising that the exceptional circumstances surrounding the current pandemic will mean financial support is needed in various ways, the European Commission has announced a number of specific measures to ease its state aid rules.

Companies that are facing financial issues during the outbreak should consider whether any financial benefits are available to them from relevant authorities.

Key considerations in respect of state aid include:



Temporary Framework

A Temporary Framework to allow certain measures has been approved by EU Member States. The Temporary Framework:

- Allows grants, selective tax advantages, advance payments and equity funding worth up to €800,000 to address companies’ urgent liquidity needs.
- Permits Member States to give 100% guarantees on bank loans.
- Allows Member States to grant public loans with a 0% interest rate.
- Makes clear that, if Member States channel aid to the economy via banks, then this will be direct aid to customers rather than to the banks themselves.
- Enables Member States to provide short-term export credit insurance.
- Allows Member States to provide direct grants, repayable advances or tax advantages for COVID-19 and other relevant antiviral R&D.
- Allows Member States to provide direct grants, tax advantages, repayable advances and 100% guarantees to support investments enabling the rapid production of products useful to tackle COVID-19 or the construction or upscaling of infrastructures needed to develop and test

such products.

- Permits Member States to grant targeted deferrals of tax payments and of social security contributions in those sectors, regions or for types of companies that are hit the hardest by the outbreak.
- Enables Member States to contribute to the wage costs of those companies in sectors or regions that have suffered most from the outbreak, and would otherwise have had to lay off personnel.

Not all State subsidies are illegal State Aid



State aid rules only prohibit *selective* aid. Measures (such as wage subsidies and tax relief) that are available to *all* companies are not state aid.



Compensation for exceptional occurrences

State aid rules allow Member States to compensate companies for damage directly caused by exceptional occurrences.



Quick Approvals

The Commission has put in place procedures to swiftly approve Member States' support measures and has to date approved a number of schemes within 48 hours of notification.

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Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.