

COMPETITION LAW ENFORCEMENT IN A TIME OF CRISIS: KEY MESSAGES FROM THE EUROPEAN COMMISSION

17 April 2020

With EU Member States adopting different strategies to address the COVID-19 outbreak, this update considers the guidance issued by the European Commission (the "**Commission**") on competition law enforcement in the current crisis,^[1] which broadly aligns with the COVID-19-related enforcement approaches of national competition authorities in Europe,^[2] including the UK's Competition and Markets Authority (the "**CMA**").^[3]

In view of these enforcement approaches during the COVID-19 outbreak, businesses with activities in the EU and/or the UK should:

- carefully assess whether any planned COVID-19-related cooperation with their competitors (whether directly, or indirectly - e.g. via a trade association) is compatible with EU and national competition law, having regard to the guidance issued by the Commission and national competition authorities;
- seek informal guidance where there is genuine uncertainty as to whether a planned cooperation is compatible with competition law;
- ensure that pro-competitive cooperation with competitors in response to the current outbreak is clearly and accurately documented (e.g. so that this documentation may be provided to the Commission upon request); and
- continue to comply with EU and national competition law, including ensuring that any increases in prices charged during the COVID-19 outbreak are objectively justified (and permissible under applicable consumer protection laws).

Guidance from the Commission: Assessing

competition law issues relating to business cooperation in response to the COVID-19 outbreak

On 8 April, the Commission issued guidance in the form of a Temporary Framework, which outlines the main criteria to be considered by the Commission when (i) assessing EU competition law issues relating to business cooperation to avoid shortages of essential scarce products and services during the COVID-19 outbreak; and (ii) setting its enforcement priorities.

Key messages from the Temporary Framework are:

Competitors may need to cooperate in response to the COVID-19 outbreak

- Competitors may need to cooperate to respond to emergencies arising from the current crisis, and the extent of the cooperation required (and the resulting level of any competition law concerns) will vary depending upon each scenario.
- The Commission's pre-COVID-19 guidance enables businesses to assess whether certain arrangements are compatible with Article 101 TFEU, with the Commission's guidelines on cooperating with competitors^[4] already outlining specific "safe harbours" for certain types of cooperation.
- However, given the current crisis, measures that under normal circumstances would be problematic under Article 101 TFEU (e.g. exchanging competitively sensitive information with competitors to coordinate production of essential products) either will not give rise to concerns, or will not be an enforcement priority for the Commission, where such measures:
 - are objectively necessary to increase output in the most efficient way, and address or avoid shortages of essential products or services (e.g. those products used to treat COVID-19 patients);
 - are temporary in nature (e.g. are applied only as long as there is a risk of shortage during the COVID-19 outbreak); and
 - do not exceed what is strictly necessary to address or avoid the shortage of supply.
- In this context, businesses should document all exchanges and arrangements with competitors, and make this information available to the Commission upon request.

- Where cooperation between competitors is not regarded as an enforcement priority by the Commission, this would not prevent third parties taking action against these activities (e.g. in private actions before courts). However, third parties may face significant legal and reputational challenges in doing so, particularly if the cooperation obviously delivers clear benefits to consumers.

The role of public authorities in any cooperation will be considered

- If a public authority encourages and/or coordinates cooperation between competitors, this is a relevant factor to be taken into account by the Commission to conclude that the cooperation either does not give rise to competition law concerns, or is not an enforcement priority.
- Where a public authority instructs competitors to cooperate temporarily to respond to COVID-19-related emergencies (e.g. to organise production to meet an urgent need to maintain care for COVID-19 patients), the Commission will consider this cooperation to be permitted.

Possibility of seeking informal guidance

- In these exceptional circumstances, the Commission is willing to provide informal guidance at its discretion (including in the form of a "comfort letter")^[5] to businesses and trade associations where there is uncertainty as to whether measures are compatible with EU competition law.^[6]
- National competition authorities in Europe, including the CMA, have also confirmed their willingness to provide informal guidance at their discretion.

Competition law enforcement in a time of crisis

- The Commission (and national competition authorities) will continue to monitor market developments to identify breaches of competition law, including where businesses use the COVID-19 outbreak as cover for:
 - engaging in anti-competitive collusive activities with competitors (e.g. arranging to reduce output in order to increase prices); or

- abusing a dominant position, including a dominant position that has been conferred by the crisis itself (e.g. by charging unfair prices to customers).

Unfair pricing during the current crisis

From the guidance issued to date, it is clear that allegations of unfair pricing, and in particular "price gouging",^[7] may be expected to attract scrutiny from the Commission, as well as national competition authorities within Europe.^[8]

For example, within the UK, the CMA has established a dedicated COVID-19 taskforce, which is responsible for aspects including:

- identifying harmful pricing practices;
- issuing warnings, and subsequently using competition or consumer protection law to take action against firms suspected of charging unjustifiable prices; and
- enabling the CMA to advise the UK government on emergency legislation if there are negative impacts for consumers which cannot be addressed through existing powers.

The CMA has written an open letter to the pharmaceutical and food and drink sectors outlining concerns regarding reports of "a minority of firms ...seeking to capitalise on the current situation by charging unjustifiably high prices for essential goods".^[9] In addition, the CMA has confirmed that it has contacted traders and platforms regarding the excessive pricing of hand sanitiser.^[10]

Businesses and consumers can use an online reporting service to inform the CMA's COVID-19 taskforce of allegations of unfair conduct by businesses,^[11] including unfair price increases, with increases in the prices of the following categories of products being most frequently reported: (i) food products; (ii) hygiene and personal care products; and (iii) medical products.

Against this background, businesses should take care to ensure that any increases in the prices they charge are objectively justified, and permissible under EU and national competition law, as well as applicable consumer protection laws.

Footnotes

[1] As outlined in the [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](#), 8 April 2020

[2] As outlined in the [Joint statement by the European Competition Network \(ECN\) on](#)

application of competition law during the Corona crisis, 25 March 2020 (the "ECN Joint Statement")

[3] As outlined in CMA 118, CMA approach to business cooperation in response to COVID-19, 25 March 2020

[4] Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, 14 January 2011

[5] See, Commission press release "IP/20/618 Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak", 8 April 2020, which provides that "[t]he comfort letter addresses a specific voluntary cooperation project ... In the current circumstances, this temporary cooperation appears indeed justifiable under EU antitrust law, in view of its objective and the safeguards put in place to avoid anticompetitive concerns and as long as it remains within the scope communicated to the Commission"

[6] The Commission has set up a webpage dedicated to EU competition law and the COVID-19 outbreak, as well as a specific mailbox which can be used to seek informal guidance (COMP-COVID-ANTITRUST@ec.europa.eu)

[7] For example, charging prices above normal competitive levels in order to profit from the current crisis.

[8] See, the ECN Joint Statement, which provides that "...it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices. The ECN will therefore not hesitate to take action against companies taking advantage of the current situation by cartelising or abusing their dominant position".

[9] See, An open letter to the pharmaceutical and food and drink industries, 20 March 2020

[10] See, "CMA launches COVID-19 taskforce", 20 March 2020

[11] See, Report a business behaving unfairly during the COVID-19 outbreak

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