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COVID-19: COMPETITION LAW CONSIDERATIONS (UPDATE ON COMPETITOR COLLABORATIONS)

March 2020

In our briefing last week we discussed the key competition law considerations that may be relevant as businesses grapple with the COVID-19 pandemic, such as the application of competition law to collaborations between competitors and other commercial conduct, the implications for merger reviews, and the application of EU State aid rules to government interventions to support national economies.

At the time, the Competition and Markets Authority (CMA) had issued a statement assuring businesses that it does not intend to take action against collaborations that are necessary to protect consumers (for instance by ensuring security of supply). The CMA has on 25 March 2020 issued more detailed guidance on business cooperation in response to COVID-19. In summary it has clarified that it is focussing its efforts on protecting consumers in the particular circumstances of COVID-19. While traditional competition policy aims to protect consumers by ensuring effective competition across relevant parameters, the current circumstances demand that a balancing act may need to be done: for instance when a restriction in choice of variants of a product may be justified by the need to ensure continuity of supply.

The guidance reassures businesses that the CMA will not take enforcement action against coordination between competing businesses provided that the coordination is:

- temporary;
- clearly in the public interest;
- contributes to the benefit or wellbeing of consumers;
- deals with critical issues that arise as a result of the COVID-19 pandemic; and
- lasts no longer than is necessary to deal with these critical issues.

In our previous briefing we had explained that many competition law regimes (UK included) exempt agreements between competitors whose benefits outweigh their negative effects on competition. In the UK, exemptions must be self-assessed by businesses on the basis of four cumulative criteria: (1) whether the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress; (2) whether consumers receive a fair share of the resulting benefit; (3) whether the agreement contains restrictions which are not indispensable to the attainment of the objectives; and (4) whether the agreement affords the possibility of eliminating competition in respect of a substantial part of the products in question. The guidance published yesterday is intended to give businesses more confidence in carrying out their self-assessment of these criteria in the context of COVID-19:

- cooperation to ensure essential goods and services can be made available to the public or an important sub-set of the public (such as key workers / the vulnerable) will be considered efficiency enhancing (i.e. it will satisfy the first criterion);
- if the cooperation prevents / mitigates against significant shortages of a product

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then it will likely give consumers a fair share of the benefits (the second criterion);

- in considering whether the cooperation is indispensable to achieve the objectives, the key factor is whether in the circumstances and limited time available to consider alternatives, the cooperation can reasonably be considered necessary and whether the cooperation is temporary (the third criterion); and
- where possible, competition should be preserved (e.g. on price even where necessary to share capacity information) and restrictions should be limited to particular goods / geographic areas (fourth criterion).

The CMA states that, in sum, coordinated actions to avoid a shortage, or ensure security, of supply, ensure a fair distribution of scarce products, continue essential services or provide new services such as food delivery to vulnerable customers are most likely to be unproblematic in the exceptional circumstances of the COVID-19 pandemic provided that they do not go further than what can reasonably be considered necessary.

However, repeating the warning the CMA gave last week, the guidance makes clear that it is not a licence to ignore competition law during the COVID-19 crisis. The CMA will not tolerate conduct which opportunistically seeks to exploit the crisis and / or uses the crisis as 'cover' for non-essential collusion. For instance:

- the exchange of commercially sensitive information where not necessary to respond to the crisis;
- retailers excluding smaller rivals from cooperation efforts / denying rivals access to supplies or services;
- a business abusing a dominant position in the market (including a dominant position conferred by the crisis) in order to raise prices significantly above normal levels;
- collusion to keep prices high to mitigate the effects of reduced demand to the detriment of consumers; and
- coordination which is wider in scope than what is actually needed to address the critical issue in question.

It is worth noting that the CMA guidance does not preclude private litigation, although it may deter any such claims.

The European Competition Network has provided similar assurances, indicating that the European Commission and other national competition authorities can be expected to take an approach similar to the CMA.

We continue to advise a number of our clients on what these assurances mean for the practical solutions they are exploring vis-à-vis their business and industry. Please get in touch with your usual Slaughter and May contact or the authors below if you need any further guidance or support in this regard.

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