COVID-19: TAKING EXTRAORDINARY MEASURES AT TIMES OF CRISIS- COVID-19 AND THE BOUNDARIES OF COOPERATION UNDER EUROPEAN COMPETITION LAW

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Antitrust, Competition, and Trade Regulation Alert

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Competition law is not, and probably should not be, high on the agenda of businesses that are already tremendously busy dealing with safety measures, cash flow issues, employee engagement, supply/customer relationships, etc. However, because of the unprecedented nature and scope of the COVID-19 breakout, many companies may start to feel that the solution to some of these problems may lie in closer cooperation with competitors that under normal circumstances could be perceived as creating some level of risk with regard to existing competition restrictions.

Given the heavy penalties applicable to competition law infringements, the question arises as to whether some of these forms of cooperation might be legal in the current environment. Is there scope to temporarily suspend the current rules or are there ways of seeking comfort on how competitor collaborations may be viewed in the present situation? Given the novelty of these issues, specialist advice should always be sought and in some cases a discussion with competition authorities may also be needed.

COOPERATION MEASURES

Given the fluid and fast moving nature of the COVID-19 outbreak, in order to properly address and manage the increasing risks and issues, some industries may find it necessary to engage in cooperation that could raise competition law concerns. Indeed, many companies are experiencing unusual trends in consumer demand at the same time as a severely curtailed workforce, issues with late deliveries, inventory levels and meeting customer requirements, etc. This is further complicated by the fact that the geographic spread of the COVID-19 outbreak is staggered, with some countries being weeks ahead of others. This means that there are resellers in some countries that have higher or excess inventories while those located in areas more affected by COVID-19 are already experiencing shortages. Managing supply chains in order to prevent such shortages and to ensure product availability will be crucial in the coming weeks.

Competing businesses in various markets and industries may therefore feel the need to work more closely

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together in order to address logistical and product availability issues, as well as increasing consumer needs. Examples of collaborations that competing businesses may be contemplating in order to address COVID-19 issues include:

- Supermarkets cooperating on the most efficient way of allocating time slots for home deliveries;
- Pharmaceutical companies and manufacturers of medical products collaborating to ensure there are no shortages of basic care products;
- Private hospitals working together to make sure staff, resources and bed availabilities are managed efficiently;
- Airlines cooperating on schedules and sharing and managing landing slots;
- Clinical phase R&D companies cooperating to develop cures more quickly;
- Rail companies working together to manage risk and address demand by collaborating on frequencies, staff, tickets, etc.;
- Utility providers collaborating to ensure continued and uninterrupted supply of basic utilities, as well as to coordinate on consumer-friendly measures that are temporarily put in place to manage the crisis.

There are many other examples of industries and sectors that will be prone to similar cooperation. Such strategies, although they may appear necessary and consumer-focused, are likely to increase market transparency and be associated with exchanges of commercially sensitive information. Such factors and effects of the collaborative measures could be seen as anticompetitive and, under normal market conditions, could well lead to fines.

POTENTIAL SOLUTIONS

Some industries may be tempted to approach governments to seek a temporary waiver from competition laws. For example:

- The Norwegian Competition Authority granted a 3-month waiver from competition law to SAS and Norwegian;
- The UK government announced on 19 March 2020 that it will be introducing temporary legislative changes to relax certain elements of UK competition law to allow supermarkets to work more closely together (e.g. sharing data on stock levels and pooling staff together);
- Peter Altmaier, the German Federal Minister for Economic Affairs and Energy, called for a relaxation of competition rules in order to facilitate closer collaboration in the food and retail industry during the pandemic;
- The European Competition Network (ECN) issued a joint statement on 23 March 2020 acknowledging the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products,

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and noting that the ECN will not actively intervene against temporary measures put in place in order to avoid a shortage of supply.

A second approach is to consider, working together with competition counsel, whether the proposed cooperation may in fact be in line with existing competition laws, given the benefits to the consumer of an ongoing, accessible supply of groceries, pharmaceutical products etc. For example, UK businesses may feel more encouraged to rely on the less frequently used Competition and Markets Authority's Short Form Opinion procedure. Under this process, the UK authority can provide (non-binding) guidance in response to specific questions asked by businesses with regard to the compatibility of a prospective measure/agreement with competition law. This is similar to the European Commission's Notice on Informal Guidance, whereby companies can ask the EU's top competition law regulator for a guidance letter on novel issues of interpretation of EU competition law. Furthermore, where there are exceptional and compelling reasons of public policy to do so, the UK Secretary of State also has the power to issue a legally binding order excluding certain agreements from the application of UK competition law. This power was used in 2012 to address the UK fuel crisis.

CONCLUDING REMARKS

Our Global Antitrust, Competition and Trade Regulation team specialises in supply chain management strategies worldwide, including in the EU, UK, US, Australia and Asia. We therefore have a deep understanding of the challenges brands are facing, including in particular as regards their pricing models and policies, and we pride ourselves in designing highly tailored, creative and pragmatic solutions to these issues. We remain committed and available to provide prompt and relevant assistance to our clients who face such challenging market conditions.

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