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COVID-19 and Competition Law: *Initial impressions and lasting consequences*

Focus on
COVID-19
Coronavirus

As the Coronavirus moves east to west around the world, like the orbiting of the sun, it is useful to survey what its early impact has been on competition law and practice internationally.

The COVID-19 Crisis (the "Crisis") has already altered many aspects of the *practice* of competition law in ways that no other crisis has ever done. Moreover, it has done so at a faster pace and on a wider scale than the changes in competition and State aid law brought about by either the Financial Crisis or the consequences of 9/11. However, while this Crisis has altered the practice of competition law, the Crisis has (so far) largely left the substantive rules untouched.

While it is too early to identify with precision all of the consequences, it is possible to form some initial impressions knowing that there will be long-term implications.

Before examining the impressions in particular areas, it is useful to consider some general impressions about the impact of the virus on competition law and practice.

Overall impressions

It is comforting that the pre-existing substantive competition law rules proved malleable enough to deal with many of the issues generated by the Crisis. There has not been a rush internationally to enact new legislation or adopt new rules.

While collaboration has been allowed in ways which were unimaginable before the Crisis, the aperture which has been opened in the rules to allow collaboration is a narrow one with all the substantive rules on collaboration remaining intact. Equally, rules such as abuse of dominance remain entirely unaffected but may well come into play later with cases on, for example, refusal to supply and allocating supplies in the case of shortages becoming more prominent given the shutdown of businesses across the globe with the consequential disruption of supply chains.

The unleashing of a deluge of State aid by individual States across almost every sector of the economy could store up several difficulties for the future. Unlike the Financial Crisis where State aid was largely confined to financial institutions or the 9/11 Crisis where State aid was largely confined to airlines, in this current Crisis, the aid is being provided across almost every economic sector and in very large quantities.

It would be one thing if the State aid was spread evenly across countries but the bumpy and lumpy nature of the State aid – even within the European Union (**EU**) – will mean a divergence in outcomes post-Crisis. Even where the European Commission is approving individual notifications of proposed State aid, the Commission is approving it at great speed and without being able to see the overall final holistic picture – but the Commission has no other choice because otherwise it would be delaying unduly intervention by the Member States until a time when it would be too late.

Before moving onto the specifics, it is worth noting that there is a definitively individualistic approach to dealing with many of the issues generated by the Crisis despite the commonality of issues globally. The absence of an integrated coherent approach among states will lead to

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difficulties in terms of outcomes post-Crisis which cannot yet be understood fully. For example, in one single approval decision alone on 21 March 2020, the European Commission approved three French measures which mobilised €300bn of liquidity support for companies[1] while, by contrast, some of the other measures by other EU Member States were decidedly smaller. This means that, for example, beneficiaries of that French aid (to take just one example) will be better off than recipients of aid from some other EU Member States.

Having set out some general impressions, it is useful to now examine some of the more specific consequences.

Substantive Competition Law rules remain intact

It would be wrong to assume that competition law has been killed off by the Coronavirus. Competition law is still alive and reasonably well.

The substantive rules have remained largely the same in the EU, the UK, the US and most states worldwide. It is the *practice* which has been affected by the virus. This is reassuring because it demonstrates that the rules have been malleable enough to address the issues generated by the Crisis.

The substantive rules on price-fixing, market sharing, bid-rigging and so on are all intact. However, it would be reasonable to assume that any breach during the Crisis of those rules would be punished very severely – for example, the bid-rigging of COVID-19-related products would be punished very severely given the fact that lives were probably put at stake and scarce financial resources were used up to pay higher prices.

While the fundamental rules have not altered, various agencies have adopted particular frameworks or "soft laws" which are not laws at all. For example, it is very welcome that the European Commission has the ability to adopt a "temporary framework" to deal with State aid during the Crisis. It also adopted a Framework in the Financial Crisis. In this Crisis, it adopted the Temporary Framework on 19 March 2020 and even amended it soon after - on 3 April 2020 – to deal with evolving issues. The Framework was further amended on 8 May 2020. The COVID-19 Framework was adopted more swiftly than its Banking Crisis counterpart. A Framework becomes the North Star by which State aid decisions are navigated. However, it is a little unsettling that the Commission alone can adopt such an informal document and then use it to make its own decisions. It would be better if Frameworks such as the one on COVID-19 State aid would have to be converted into legislative form after a period of time (say, three months) rather than remaining as "soft law". Critics might say that this would add rigidity to the regime but the primary Treaty rules (which have been largely unchanged in six decades) were flexible enough to deal with this Crisis so that argument does not withstand scrutiny. It would have to be legislation adopted by the Commission itself because it would not be feasible to have the Council or the Parliament involved in designing the rules which would ultimately control the ability of States to provide State aid. So the counter-argument might be that adopting the Framework as legislation might be window-dressing but again that argument does not withstand scrutiny because it does mean that the document is scrutinised more closely when it is being adopted as legislation. It seems less than desirable that decisions relating to millions and, indeed, billions of euro could be based on documents which have not even reached the status of legislation.

Agencies' reaction and response

Agencies have reacted very quickly and impressively to the Crisis.

First, officials and agencies have said that they will remain vigilant notwithstanding the Crisis. US Attorney General William Barr warned that the US "Department of Justice stands ready to make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time" and that he was "committed to ensuring that the department's resources are available to combat any wrongdoing and protect the public".[2] Agencies have also signalled their vigilance – the US' Federal Trade Commission (**FTC**) and Department of Justice (**DOJ**) have stated that the Crisis does not provide a reason to tolerate anti-competitive behaviour.[3] The Swiss Competition Commission (**ComCo**) issued a statement to the same effect.[4]

[1] See European Commission press release IP/20/503.

[2] US Department of Justice, "Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products", 9 March 2020 (source: https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing).

[3] DOJ and FTC, "Joint Antitrust Statement regarding COVID-19 and Competition in Labor Markets", 13 April 2020 (source: https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf?utm_source=govdelivery).

[4] https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-78586.html

Secondly, agencies have said that they will move quickly. The European Commission has moved very quickly and has approved State aid decisions in days instead of months. The Advisory Opinions from the FTC and the Business Review Letters from the DOJ's Antitrust Division are all to be issued more expeditiously. What is interesting is that there are certain timelines used by agencies which cannot be altered because they are laid down in legislation (e.g., the timelines in the EU's Merger Control Regulation) which means that, for example, decision-making under the EUMR cannot be accelerated or delayed without legislation would be required from the European Parliament and the Council of Ministers which would take time. By contrast, France was able to amend its timelines for merger review because of general legislation enacted by the French Parliament.[5] Perhaps there is a longer-term lesson for all jurisdictions in terms of building in some emergency accelerator or brake-type clauses into legislation which could be triggered in these types of emergencies.

Thirdly, agencies have been responsive and willing to give guidance. The European Commission has established a dedicated mailbox to receive queries.[6] Undertakings and associations of undertakings are asked to provide upfront as much detail as possible on the initiative, including:

i. the firm(s), product(s) or service(s) concerned
ii. the scope and set-up of the cooperation
iii. the aspects that may raise concerns under EU antitrust law and
iv. the benefits that the cooperation seeks to achieve, and an explanation of why the cooperation is necessary and proportionate to achieve those benefits in the current circumstances.[7]

The European Commission has revived (in part) its comfort letter model to give guidance to businesses on novel issues.

Little institutional change

While unusual, some countries have even established new agencies to deal with the Crisis. For example, on 26 March 2020, Colombia used emergency powers[8] to create a new temporary agency[9] to help protect the transport sector and has eased some of the competition law rules for the sector. The agency would have the power to approve:

i. arrangements to create synergies in logistics
ii. arrangements between competitors in the transport sector where such arrangements create synergies.

However, this move was unusual and most countries have relied on pre-existing institutions and agencies.

Collaboration

Competition agencies have generally allowed businesses to collaborate to deal with the Crisis in ways which would have been unimaginable before the outbreak of the virus.

It is useful to study the European Competition Network (the "ECN")'s response.[10] The ECN Statement recognised that the Crisis "may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers". The ECN said it would not intervene where it is "necessary and temporary measures put in place in order to avoid a shortage of supply." So some cooperation but not all cooperation is permitted. The cooperation must meet a particular need and must be short term in duration (i.e., confined to the Crisis). The cooperation cannot be used to cure historical or other problems. The problem must be one caused by the Crisis. The ECN Statement changed no substantive rules – a mere statement could not do so – but instead focussed on an abstinence of enforcement in various respects. The ECN Statement said, at its heart, that the ECN competition agencies "will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply" caused by COVID-19. The ECN Statement is also interesting from the perspective of what is missing. It did not disapply or switch-off EU or national competition law – no statement alone could disapply treaty, secondary EU law or national law. It does not change the substantive rules of competition law – it could not do so. It does not speak at all about abuse of dominance – not even COVID-19 would permit an abuse of dominance. Instead, it refers to an abstinence from enforcement where appropriate to do so. One could liken to the ECN Statement to the

[5] Ordinance No.2020-306 of 25 March 2020.

[6] https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html

[7] https://ec.europa.eu/competition/antitrust/coronavirus.html

[8] Decree 482 on March 26, 2020.

[9] The Center for Logistics and Transportation (*Centro de Logística y Transporte*).

[10] https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

following: it would be like road traffic speed limits still applying but the police having decided not to pull over certain speeding cars which are taking patients to hospitals urgently because there is a shortage of ambulances but the police are still willing to pull over joyriders and may legitimately do so because the speed limits still apply.

Globally, competition law still applies. However, it might not be applied as much as one would have imagined. In some cases, such as in the UK, some competition rules have been temporarily switched off (e.g., in regard to aspects of ferry services[11] and groceries[12]). These disapplication initiatives have proven exceptional. They create a dilemma for everyone concerned: it is one thing to switch off the competition rules, it is quite another to have to decide when to switch them back on.

So, any attempt by undertakings to engage in anything not warranted by the small aperture in the rules opened by the competition agencies due to the Crisis would be punished. Investigations have opened in different jurisdictions including, at least in the public domain, investigations into the distribution and sale of face masks, sanitizing gel and other key medical supplies.

Information exchange

While information exchange may not be a breach of competition law in its own right, such an exchange is often evidence of a breach of competition law. Information exchange is likely to be a real issue during, and particularly after, this Crisis. There are situations in this Crisis when governments around the world have called together representatives of various sectors to exchange information and discuss contingency plans at a sectoral level. It is often necessary to ensure continuity of supplies. It is possible however that there could be exchanges of information in such forums which could give rise to competition law issues and while competition agencies might choose not to investigate now, there could be longer term implications. First, once information is learned, it is difficult to unlearn it so it could be applied by businesses for reasons other than the Crisis. Secondly, when competitors get together to deal with crises (often brought together by governments), they can form habits and contacts which would be difficult to shake in the longer term post-Crisis. As Governments bring competitors together into the one room to share experiences and plan for recovery, those competitors could end up sharing competitively sensitive information. Indeed, post-crisis, the relationships which are formed during a crisis could lead to closer collaboration on other issues which could prove dangerous. There are some suggestions that increased contacts between some airlines and banks during various earlier crises and challenges which those sectors faced led to unfortunate collaboration later because the barriers had been broken down.

Merger control

In terms of the merger control process, the Crisis has meant some changes.

It is quite possible that there could be, paradoxically, both an acceleration and a slowing-down of deals. First, some deals (e.g., rescue deals) will be needed which might have never happened but for the Crisis. Some will be motivated by the value on offer (e.g., distressed assets) and some by the need to merge to achieve synergies. Secondly, there could also be a slowing down of conventional/non-emergency deals during the early phases of the Crisis as executives turn to saving their own businesses rather than acquiring others.

Various competition agencies around the world have reasonably requested parties to delay, where possible, the filing of notifications. Examples include the Competition and Consumer Protection Commission in Ireland.[13]

Agencies have started to accept electronic versions of notifications without insisting on paper versions. Examples include the European Commission.[14] This change could endure post-Crisis.

Agencies have said that they expect that it will be more difficult to collect evidence and data from third parties because both the staff of the agencies and the staff of the third parties would probably be working from home. Equally, staff in third parties could be unable to get the data necessary to answer the questions because they are away from their offices. This could lead to longer decision-making processes.

[11] https://www.gov.uk/government/news/government-to-suspend-competition-law-to-support-isle-of-wight-ferry-routes

[12] https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation

[13] https://www.ccpc.ie/business/covid-19-temporary-merger-notifications-process/

[14] https://ec.europa.eu/competition/mergers/covid_19.html

Agencies have said that they will not be relaxing or easing the existing rules. This makes sense because some decisions made now in haste could have longer term negative implications. The Crisis will not be an excuse to clear all problematical deals. However, in time, one would expect to see the Failing Firm Defence (which is part of the existing regime in many jurisdictions) to become more prominent in some decisions.

EU State aid

Around the world, State aid is a central part of the response to the Crisis. Almost every economic sector has been affected in ways which would be almost impossible to repair without the firepower of State resources. The Crisis is simply too enormous to be addressed by arrangements and practices involving private undertakings. Hence, State intervention is needed.

The European Commission moved quickly[15] to adopt a Temporary Framework which it has already amended.[16] The process of adopting a temporary framework during the Financial Crisis took much longer. The State Aid Temporary Framework relaxed the rules somewhat to enable more State aid to be provided by Member States.

There are some observations about the first tranche of State aid measures. Many Member States have moved quickly to notify but the European Commission has moved as quickly to respond with affirmative final decisions. However, not all Member States have notified State aid. The European Commission has not insisted on restructuring measures in the same way that was done in the Financial Crisis. Many of the measures involve loans rather than grants. The speed at which matters are moving is interesting and impressive because the Commission is publishing a daily list of State aid approvals.[17] Businesses will have to be careful that Member States do not provide undesirable State aid in the rush and enthusiasm of some States to react to the situation. However, the bigger problem is that Member States are giving aid in differing amounts meaning that the effects could be uneven and discriminatory over time.

Pricing

Price gouging could well be an issue in emergencies such as this one. South Africa's Competition Commission had received over 500 complaints of excessive pricing within the first two weeks of the emergency and it has already achieved some successful outcomes.[18]

Many (but not all) of the States in the US have price gouging laws but they have reported mixed results. One of the fundamental problems with price gouging laws which refer to the price at which products were sold before the emergency (e.g., in the six weeks before the emergency) is that some of the relevant products in this Crisis (e.g., COVID-19 testing kits) were never on sale so there is no reference price.

The EU does not have price gouging legislation as such. The rules on excessive pricing by dominant undertakings could be relevant but price gouging can be practised by non-dominant undertakings too so relying solely on the abuse of dominance rules would not be enough.

One of the consequences of this Crisis could be that there would be greater support both nationally and internationally for price gouging legislation.

Enforcement

Competition agencies could have practical difficulties in enforcement during the Crisis. Therefore enforcement is curtailed but only in certain limited areas. Dawn raids are more difficult and probably less than efficient because offices are largely unoccupied and travel is more difficult. (The Czech Office for Protection of Competition (**UOHS**) even announced the suspension of all dawn raids because of the Crisis.) Nonetheless, competition agencies may still issue written requests and expect responses from businesses. So, as EU Competition Commissioner Margrethe Vestager stated emphatically a "crisis is not a shield against competition law enforcement."[19]

[15] https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html

[16] For an unofficial consolidation, see https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_as_amended_3_april_and_8_may_2020_en.pdf

[17] https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2_b_and_107_3_b.pdf

[18] http://www.compcom.co.za/

[19] https://twitter.com/lewis_crofts/status/1243480366800912386

What if there is a dawn-raid or inspection on commercial premises and the staff are not there or not all the staff are present? There is no obligation on the staff to be present so the inspection may proceed even though it might well be less productive at one level.

Undertakings engaged in cooperation now need to be careful that they do not have problems later. The temporary lull in enforcement is no defence and should not serve as any form of encouragement to breach the rules. Enforcement will continue to happen where inappropriate conduct occurs. Moreover, competition agencies will not hesitate to follow up post-Crisis with businesses where the agencies suspect that the businesses breached the rules during the Crisis.

Compliance

Compliance is more difficult during the Crisis. Working remotely brings its own challenges. Employees of undertakings will have to consciously reach out to legal teams and compliance officers when they have any queries. While there will be less physical contact between competitors, there could be more electronic contact and ironically, electronic contacts will make investigation easier for the agencies later.

Consumer Law

The interconnectivity between competition law and consumer law has come to the fore. The Portuguese competition agency, the Autoridade da Concorrência (**AdC**), announced that it would pay particular attention to detecting any anti-competitive practices that exploited the Crisis and would focus particularly on practices hurting families and businesses.[20] The Italian agency, the Autorità Garante della Concorrenza e del Mercato (**AGCM**), also focussed on online sales platforms (including alleged price increases) and its marketing hand sanitizers and masks.[21] Others, such as the Hellenic Competition Commission (**HCC**) and Poland's Office of Competition and Consumer Protection have been investigating supplies of goods associated with dealing with the virus. It has probably proven easier for those countries which have had a combined competition and consumer agency to investigate consumer-related matters because the issues can be addressed in-house.

Abuse of dominance rules remain intact and enforced

The rules on abuse of dominance have not been changed. It is quite possible that as factories and businesses have been closed for several weeks across the world that there could be "refusal to supply" claims arising in the future. What if a dominant supplier has a limited supply of products and needs to ration them among customers? Cases from the oil crises in 1973 and 1978 could suddenly become relevant again.[22]

Delays

Some developments will be delayed. To take one example, on 3 April 2020, the UK's Competition and Markets Authority (**CMA**) published an update on the work of the digital markets task force. It is to report to Government by September 2020.[23] Given the pressures the COVID-19 crisis is placing on various stakeholders, the CMA has decided (somewhat understandably) not to

a. publish a formal consultation seeking views and evidence on different aspects of its work or

b. proceed with plans for extensive stakeholder engagement at this time

However, stakeholders wishing to provide views or evidence may email the Digital Task Force or engage in discussions with the group. There could be other delays including, at the EU level, the Vertical Block Exemption Regulation and Horizontal Guidelines.

Brexit

The world's worries over Brexit until early 2020 can now be seen as almost quaint by comparison with the fear associated with the COVID-19 virus. Nonetheless the Crisis has not eased the difficulties with finding agreement over the relationship agreement between the EU and the UK after the current Withdrawal Agreement expires on 31 December 2020.[24] Given the fact the politicians have been so consumed by the Crisis, it would seem logical that the current transition period would be extended to allow a sensible agreement to be concluded and there is no doubt that competition law should be part of that agreement (particularly, State aid law).

[20] http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_202003.aspx

[21] https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-intervenes-in-the-sale-of-sanitizing-products-and-masks

[22] E.g., Case 77/77 *BP v Commission* [1978] ECR 1513, ECLI:EU:C:1978:141.

[23] https://www.gov.uk/cma-cases/digital-markets-taskforce

[24] https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en

Conclusions

The strength (or weakness) of a regime is clear from how it reacts in moments of crisis. The competition law regime has proved responsive to the Crisis in that it has moved quickly and shown flexibility. Competition law alone will not be able to resolve the Crisis but history will decide whether it has helped or hindered in its own small way.

There will be significant challenges ahead for competition law in this climate. Globalisation was already under threat. The responses to COVID-19 Crisis have been largely individualistic and nationalistic rather than collective so that threat could well be sustained unless globalisation and international cooperation was seen to be helpful to solving the Crisis.

So the survey of the first few weeks would indicate that the substantive rules of competition law have remained largely the same; temporary rules have been adopted and implemented but they should be given more permanent standing; enforcement is curtailed but only in certain limited areas; collaboration is now possible which would have been unthinkable before the Crisis but the rules have not been extended very far; enforcement will continue where inappropriate conduct is occurring; competition agencies could have practical difficulties in trying to enforce the rules right now; however, competition agencies will not hesitate to follow up post-Crisis with businesses going too far; undertakings engaged in cooperation now need to be careful that they do not have problems later; and the rules on abuse of dominance have not been changed. The value of State aid provided during the Financial Crisis was enormous but it may be dwarfed by the scale and breadth of the aid eventually provided in this Crisis. Businesses should maintain competition law vigilance. To date, at least, the impact has been more on practice than substance. However, the long-term implications will be significant and, as yet, unknown.

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