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EUROPEAN COMPETITION REGULATORS PUBLISH GUIDANCE ON COVID-19 ENFORCEMENT POLICIES AND UK AMENDS COMPETITION LEGISLATION

To Our Clients and Friends:

The Corona virus crisis will undoubtedly have an impact on competition enforcement, as companies face seismic shocks to their industries in light of mass lockdowns and supply chain issues. Co-operation between companies in certain industries is expected to increase significantly in order to address the challenges they, their suppliers and their customers face. Competition regulators across Europe have issued their initial responses to this unprecedented situation. Whilst the UK has, so far, taken more specific action than EU regulators to allow for increased co-operation, the overall message from both is that the competition rules will continue to be enforced during the Corona virus crisis.

The European Competition Network (ECN)

The ECN has released a statement giving guidance as to how it intends to apply the competition rules during the Corona crisis (https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf). The ECN is made up of the European Commission, the EFTA Surveillance Authority (ESA), and the national competition authorities of the EU/EEA Member States. It therefore covers the antitrust enforcement activities of the European Union, the twenty-seven Member States of the EU and the three countries which participate in the ESA.

By way of reminder, the European Commission is competent to apply EU competition law if the agreement or behaviour concerned has anticompetitive effects in the EU and where “it must be possible to foresee with a sufficient degree of probability [...] that the practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”. The ESA and the national competition authorities operate under the same rules.

The guidance issued by the ECN emphasises that the competition rules in their jurisdictions are flexible enough to cope with severe shocks to the economy and that actual administrative enforcement will be sensitive to these difficult times. In addition, it makes the following concrete points:

- The ECN will not intervene in cases of co-operation which is necessary to ensure the supply and fair distribution of scarce products to all consumers, provided the co-operation is temporary.
- In case of doubt about the legality of any given co-operation, the members of the ECN are available to give informal guidance.

- The members of the ECN are concerned about excessive pricing, where this is a result of horizontal price fixing or the abuse of a dominant position.
- The ECN reminds manufacturers that the existing rules allow them to include maximum prices in their contractual arrangements.

This guidance is not earth shattering - but is a helpful and straightforward reminder that European competition law is flexible enough to take into account both the purpose of measures which might otherwise be considered to be restrictive of competition, as well as the broadness of potential efficiencies justifying those measures. The offer of informal guidance is also welcome - although companies and their advisers will need to tread carefully to ensure that they limit their requests to questions where the facts are clear but the law is uncertain.

It is important to remember that the guidance is limited to administrative enforcement and does not bind the courts. Moreover, it is limited to antitrust enforcement falling within the scope of Articles 101 and 102 of the Treaty on the Functioning of the European Union (and their equivalents for the ESA and national competition authorities) and does not cover mergers or State aids (both of which have been the subject of previous Gibson Dunn Client Alerts).

The UK Competition and Markets Authority (CMA)

The UK is addressing the impact of the Corona crisis on food supply by amending the Competition Act 1998 to provide a “temporary relaxation” of the UK competition rules as they apply to grocery retailers in order to allow them to co-operate to deliver more food to retail outlets and customers. According to the UK government, the amended rules will allow retailers to share data with each other on stock levels, co-operate to keep shops open, or share distribution depots and delivery vans. They will also allow retailers to pool staff with one another to help meet demand. The UK government has made it clear that the relaxation is a very specific measure designed to deal with the extraordinary circumstances, noting that it will allow retailers “*to keep their shops staffed, their shelves stocked, and the nation fed*”.

However, it is clear that the temporary measures for groceries do not signal a wider intention to relax the enforcement of the competition rules during the Corona crisis. The CMA stated that whilst co-operation may be necessary to ensure the security of supplies of essential products and services, such as groceries, “*the CMA will not tolerate unscrupulous businesses exploiting the crisis as a ‘cover’ for non-essential collusion. This includes exchanging information on longer-term pricing or business strategies, where this is not necessary to meet the needs of the current situation*”.

More generally, the CMA has established a COVID-19 TaskForce to “*to tackle negative impacts within its remit of the COVID-19 pandemic*”. The TaskForce will scrutinise market developments to identify harmful sales and pricing practices as they emerge and take enforcement action as needed. The CMA has not ruled out seeking emergency powers from the government if it considers this necessary to address negative impacts on consumers, particularly the most vulnerable. In a public statement on its COVID-19 response, the CMA provided a specific form to be used to report concerns about business practices during the crisis. It should be borne in mind that the CMA has responsibilities to apply UK consumer protection laws as well as UK competition laws.

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The CMA is also building flexibility into its working practices to allow it to address issues as they arise. For example, it is monitoring timetables in ongoing cases including, as permitted, extending statutory timeframes, and is reallocating resources to focus on the most urgent and critical workstreams. As a result, there will be some impact on less urgent projects – for example, the CMA’s planned “State of Competition” report will now be delayed and is not likely to be published until Spring 2021, as the CMA focuses its resources on merger control and critical advisory and monitoring work.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

*The following Gibson Dunn lawyers prepared this client update: David Wood, Deirdre Taylor and Lena Sandberg. Gibson Dunn lawyers regularly counsel clients on issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the **Antitrust and Competition Practice Group**:*

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