The impact of Covid-19
KEY COMPETITION AND CONSUMER PROTECTION LAW CONSIDERATIONS IN THE EU AND UK

30 March 2020
The impact of Covid-19: key competition and consumer protection law considerations in the EU and UK

INTRODUCTION

As the Coronavirus (Covid-19) emergency worsens, governments, businesses and individuals are scrambling to keep up with a host of unprecedented challenges. This briefing note considers some of the key high level competition law, State aid and consumer protection law considerations associated with the Covid-19 pandemic to help guide you through these unprecedented times.

Whilst it is clear that drastic measures are needed to adjust to the ever changing challenges the pandemic poses, it is important to stay alive to the fact that competition and consumer protection laws continue to apply, and that regulators have already been quick to issue warnings and investigate suspected breaches. For example:

- on 5 March 2020 the UK Competition and Markets Authority published a statement warning "traders [not to]... exploit the current situation to take advantage of people", and, stating that it will consider any evidence that companies may have broken competition or consumer protection laws, for example, by charging excessive prices or making misleading claims about the efficacy of protective equipment. It also said it will take direct enforcement action in appropriate cases; and

- investigations into excessive pricing practices have been opened in Italy (relating to the marketing of hand sanitizers and disposable masks) and Poland (regarding the supply of personal protective equipment to hospitals).

In addition, the governments of numerous jurisdictions around the world are issuing financial aid packages of different forms to businesses in their local economies. Where this aid is issued by EU member states or the UK, EU State aid rules remain relevant during this period. Recent developments in this regard are covered in this note.

This briefing is structured as follows:

- Competition law – anticompetitive agreements and abuse of dominance
- Merger control
- State aid considerations
- Consumer protection law considerations

COMPETITION LAW – ANTIMONOPOLISTIC AGREEMENTS AND ABUSE OF DOMINANCE

Competition law prohibits agreements which have as their object or effect the restriction of competition (Art 101 TFEU and national equivalent). Examples of where this prohibition might be infringed include suppliers (or resellers) of goods or services:

- agreeing prices (including suppliers agreeing resale prices with resellers, although seeking to enforce maximum prices should be acceptable);

- allocating customers or regions between them, even if the objective is to help manage potential supply shortages;

- agreeing to limit production or supply, or to specialise in the production of certain goods (although there is a block exemption in relation to specialisation agreements).
For companies which might be dominant (e.g. market share >40%), the following additional conduct might infringe competition law if there is no objective justification:

- charging excessive prices;
- discriminating between customers (e.g. charging different prices or applying different terms);
- refusing to supply certain customers, although an objective justification in this context might include difficulties in meeting all the demand a supplier faces, and therefore choosing to supply regular customers, and those with existing contracts rather than spot customers;
- making purchase of the products/services in demand conditional on the purchase of other goods/service.

For an overview of EU and UK competition law please see our [Quickguide](#).

**Industry-wide coordination**

It is likely that in some industries companies may wish to hold industry-wide discussions or discuss the implications of the crisis at trade association meetings/forums. Competition law continues to apply to such discussions, as does the usual advice around ensuring there is a written agenda, that minutes are taken, and that a lawyer with competition law experience attends the meetings/discussions. Conversations should be kept away from competitively sensitive information such as prices, costs and customers, as well as the prospect of coordinated conduct without prior advice.

**Exclusions**

Requests or directions from Government bodies for businesses to cooperate with each other will not be a defence to an infringement of competition law, unless competition law has been formally disapplied to such conduct. Whilst procedures for granting such an exclusion do exist, they require exceptional and compelling public policy reasons and have been rarely granted so far, but are already being contemplated in certain sectors.

For example, in the UK:

- the prohibition against anticompetitive agreements and abuse of dominance does not apply to conduct to the extent to which it is made in order to comply with a legal requirement; and
- there are provisions which allow the Government to disapply those prohibitions if “there are exceptional and compelling reasons of public policy”.

In this regard, on 19 March 2020, the UK Government announced that it was "temporarily relaxing elements of competition law" as part of a package of measures to allow supermarkets to work together to reduce the risk of any food shortages. The move allows retailers to:

- share data with each other on stock levels;
- cooperate to keep shops open;
- share distribution depots and delivery vans; and
- pool staff with one another to help meet demand.

However, even when such mechanisms are triggered, businesses should limit cooperation to what is strictly necessary to achieve Government policy and objectives, and to stay within the scope of any exclusion order that is granted. This was reflected by a UK CMA announcement on the same day as the supermarket measures. In that statement it said that where agreements are not covered by that legal relaxation:

- the CMA has no intention of taking competition law enforcement action against cooperation between businesses or rationing of products to the extent that this is necessary to protect consumers - for example, by ensuring security of supplies; but
that it would not tolerate businesses exploiting the crisis as a 'cover' for non-essential collusion - for example exchanging information on longer-term pricing or business strategies, where this is not necessary to meet the needs of the current situation.

**MERGER CONTROL**

Whilst Covid-19 is not expected to lead to changes to the legal principles underpinning merger control regimes, some competition authorities around the world are already starting to announce changes to their procedures that will impact merger control reviews. Amongst the announcements made so far are:

- **EU** – the European Commission ("Commission") is encouraging merging parties to delay notifications. Electronic submissions will be accepted and are being actively encouraged.

- **France** – the French competition authority has warned stakeholders that delays in the instruction of cases may arise and encouraged businesses to postpone notifications to the extent possible.

- **Germany** – although its operating capacity is currently ensured, the Bundeskartellamt is encouraging merging parties to delay notifications where possible.

- **Greece** – the Hellenic Competition Commission has reduced its opening hours, and requested submissions by e-mail.

- **UK** – The CMA intends to continue progressing its cases, making decisions and meeting statutory deadlines. At the same time, it will continue to monitor timetables including, as permitted, extending statutory timeframes where necessary, and is encouraging merging parties to delay notifications.

- **Philippines** – the competition regular has suspended acceptance of new notifications and suspended ongoing investigations. The 30 day notification deadline has also been suspended.

- **United States** – the FTC and DOJ have implemented a temporary e-filing system.

- **China** - SAMR has confirmed that it is completing an average of two merger reviews per day.

For an overview of the EU and UK merger control regimes see our Quickguides ([EU merger control](#), [UK merger control](#)).

**STATE AID CONSIDERATIONS**

Under EU State aid rules, EU Member States are generally prevented from granting financial support to undertakings in a way that distorts competition and inter-state trade within the EU. Measures qualifying as State aid may nonetheless be approved by the Commission if they are found to be compatible with the EU internal market under Article 107(2) and (3) TFEU. For further information on the State aid regime, see our [State aid Quickguide](#).

As a result of the Covid-19 outbreak, several Member States are drawing on the State budget to urgently adopt important measures to support the national economy, public services and individuals.

In this crisis context, the Commission published on 13 March 2020 a [communication](#) which, together with its [annex](#), provide useful guidance on the application of EU State aid rules to national support measures aimed at tackling the Covid-19 outbreak. It recalled that Member States can design ample support measures in accordance with existing state aid rules, some of which do not need to be notified.
to the Commission, while others need to. It also put in place a number of procedural facilitations to ensure a swifter approval process.

Financial support measures which do not need to be notified

A number of measures do not fall under State aid control rules or are exempted and can therefore be put in place by Member States immediately, without prior notification to the Commission. These include:

- public support measures that are available to all companies, e.g. wage subsidies, suspension of payment of corporate and value added taxes or social contributions;
- public aids to health services or other public services;
- public financial support granted directly to consumers, e.g. for cancelled services or tickets that are not reimbursed by the operators concerned;
- public aids which fall under the de minimis Regulation. This can include aid of up to EUR200,000 over three years in most sectors, subsidised loans of up to EUR1 million, and subsidised guarantees for loans of up to EUR1.5 million.
- public aids which fall under the General Block Exemption Regulation ("GBER"). This can include risk finance aid scheme in favour of Small and Medium Enterprises ("SMEs"), up to EUR15 million per eligible undertakings.

Many Member States have already implemented measures which do not need to be reviewed by the Commission. For example:

- tax reliefs for SMEs and self-employed, including tax payment deferrals, no default penalty (e.g. in Belgium, France, Germany, Italy, the Netherlands and Spain);
- solidarity funds for and lump sums granted to small businesses (e.g. in France, Belgium); and
- investments in the health sector (e.g. in Belgium, Spain).

Financial support measures which need to be approved

Subject to the Commission's prior approval, Member States can design a number of other measures which will be considered compatible under EU State aid rules. Depending on the type of measure envisaged, Member States can rely mainly on three different legal basis, namely:

- Article 107(2)(b),
- Article 107(3)(c); and
- the Temporary Framework adopted under Article 107(3)(b) TFEU.

To date, all the national schemes notified to the Commission in the context of Covid-19 have been declared compatible under either Article 107(2)(b) or the Temporary Framework, and within a very short lapse of time (often two or three days).

Compensation for the damage caused by the Covid-19 outbreak (Article 107(2)(b) TFEU)

The Commission has recognised that Covid-19 outbreak qualifies as an 'exceptional occurrence' under Article 107(2)(b) TFEU, as it is an extraordinary, unforeseeable event having a significant economic impact. As a result, Member States can adopt measures to compensate companies in sectors that have been particularly hard hit (e.g. transport, tourism and hospitality) as well as organisers of cancelled events for the damages suffered due to the outbreak.

To be compatible under this provision, any aid must be:

- directly linked to the damage caused by the Covid-19 outbreak; and
- proportionate, i.e. the compensation should not exceed what is necessary to make good the damage.

Where these conditions are satisfied, the Commission has no discretion but to declare the aid compatible with the internal market.
To assist Member States, the Commission published a template setting out the information to be provided in any notification made on this basis. This information aims in particular at:

- precisely assessing the damage; and

ensuring that there is no overcompensation or compensation for difficulties unrelated to Covid-19. In this respect, Member States are expected to make various commitments (including to claw back any payment exceeding the damage suffered; to deduct any amount recovered by insurance, litigation or arbitration; to not cumulate the scheme with other aid for the same eligible costs; to provide a report not later than one year after the Commission's decision).

First case studies—Danish schemes to compensate event organisers and self-employed

On 12 March, the Commission approved a EUR12 million Danish scheme to compensate event organisers for the damage caused by the cancellation and postponement of:

- large events with more than 1000 participants; or
- events targeted at designated risk groups, such as the elderly or vulnerable people (irrespective of the number of participants) due to concerns over the spread of Covid-19.

The scheme was considered proportionate since it only compensates direct income loss (to the exclusion of losses covered by insurance) and does not allow for net profits. Moreover, for deferred events, only additional costs due to cancellation, deferral or change in the conditions of the event organisation are covered. The Danish authorities can also request a report by an authorised accountant to ensure the absence of overcompensation.

On 25 March, the Commission authorised a EUR1.3 billion Danish scheme to compensate self-employed through direct grants. The compensation was considered directly linked to the damage caused by the outbreak and proportionate to the extent it will:

- cover up to 75% of the expected loss of turnover for a period of three months, calculated on the basis of the average monthly turnover in 2019;
- not exceed EUR 3,000 per month and per person.

Any scheme relating to the transport sector (e.g. airlines, airports, rail and bus companies) will be assessed on a case-by-case basis and should include the following additional information:

- identification of the additional costs, foregone revenues and costs not incurred as a result of the Covid-19 outbreak;
- definition of a reference period, when the situation was comparable to the situation that should have prevailed during the period of the spread of the Covid-19;
- reconstitution of damages caused by comparison of the situation during the period of spread of Covid-19 and the reference period (which should factor the change of important parameters such as the fall in price of fuel).

In this sector, Member States can also draw on experience from past practice to determine notably the reference period, proxies to determine economic loss or mechanisms to rule out overcompensation. For example, in the context of the Icelandic volcanic eruption and dust cloud in April 2010, the Commission authorised a support scheme in Slovenia to cover 60 per cent of the economic losses of airlines and airports (compared to a situation where the disaster would not have occurred) in the period following the disaster, until the companies could again operate normally.

Aid to companies facing acute liquidity needs and/or bankruptcy (Article 107(3)(c) TFEU)

Member States can rely on the Rescue Aid and Restructuring Guidelines, which are based on article 107(3)(c) TFEU, to grant urgent and temporary assistance (e.g. in the form of loans or loan guarantees) to companies facing acute liquidity needs or bankruptcy due to the Covid-19 outbreak. Given the unprecedented circumstances, these rules can be applied with flexibility:
the Covid-19 outbreak qualifies as an exceptional and unforeseen circumstance and therefore, companies that are not (yet) in difficulty can also receive support under this framework, if they face acute liquidity needs. Still, any aid measure has to comply with the relevant conditions, notably with regard to the level of remuneration that the beneficiary is required to pay for the State guarantee or loan;

subject to an individual assessment by the Commission, companies that have already received such support in the past 10 years may exceptionally be eligible for further aid.

Under these rules, Member States can notably put in place dedicated support schemes for SMEs including to cover their liquidity needs for a period of up to 18 months. For example, in February 2019, the Commission approved a EUR400 million support scheme in Ireland to cover acute liquidity as well as rescue and restructuring needs of SMEs as a Brexit preparedness measure. The Irish authorities have now repurposed this measure to help companies cope with the Covid-19 outbreak. With respect to approved schemes for SMEs, the Commission announced that:

- Member States do not need to notify budget increases of less than 20% in view of the Covid-19 outbreak; and
- notifications of budget increases of more than 20% benefit from a simplified assessment procedure.

**Aid to remedy a serious disturbance to the economy under the Temporary Framework (Article 107(3)(b) TFEU)**

Article 107(3)(b) enables the Commission to approve national support measures to remedy a serious disturbance to the economy of a Member State. To complement the existing possibilities described above, the Commission adopted on 19 March 2020 a Temporary Framework on this basis. This Temporary Framework, which is similar to the one adopted during the 2008 financial crisis, enables all Member States to ensure that sufficient liquidity remains available to all companies and preserve the continuity of the economic activity during and after the Covid-19 outbreak. It provides for five types of aid:

- **direct grants, selective tax advantages and repayable advance** up to EUR 800,000 to a company (for e.g. the Commission authorised Luxembourg to provide repayable advance to companies and liberal professions, and Italy to provide direct grants and repayable advances to companies which adapt their production for medical devices and person protection equipment production);

- **State guarantees for loans** taken by companies from banks. The Commission already issued several authorisations for State guarantee schemes, sometimes limited to SMEs or to companies active in certain sectors (e.g. in Portugal, Denmark, Italy, the UK), sometimes covering all companies (e.g. in France, Germany, Spain);

- aid in the form of **subsidised interest rates for loans** (e.g. in Germany, Latvia);

- aid in the form of guarantees and loans which is not directly provided by the State but **channelled through banks** (which is the case of most the examples of measures above-mentioned). Such aid is still considered as direct aid to the undertakings, not to the banks themselves and should therefore not be assessed under the State aid rules applicable to the banking sector. To limit undue distortions to competition between banks, these are required, to the largest extent possible, to pass on the advantages of the public guarantee or subsidised interest rates on loans to the final beneficiaries; and

- **short-term export credit insurance.**

The Temporary Framework includes a number of safeguards to limit the negative consequences to the level playing field within the EU internal market. For example:

- it links the subsidised loans or guarantees to businesses to the scale of their economic activity, by reference to their wage bill, turnover, or liquidity needs, and to the use of the public support for working or investment capital;
only companies which were not in difficulty on 31 December 2019 are eligible.

To ensure transparency, Member States will have to publish certain information (including the name of the beneficiary and the aid amount) on each individual aid granted on the basis of schemes approved by the Commission on the State aid website within 12 months from the moment of granting.

Since 19 March, more than a dozen schemes in nine Member States have already been authorised by the Commission under the Temporary Framework. This reveals a must faster speed than during the 2008 crisis. More authorisation decisions are expected in the coming days.

This Framework will be in place at least until the end of December 2020. It is not excluded that it will be adapted on a rolling basis to clarify certain metrics and/or to capture additional support measures envisaged by Member States.

**Procedural facilitations**

To enable a swift approval process, the Commission has put in place all necessary procedural facilitations:

- it committed to decide on State aid notifications relating to Covid-19 within days of receiving a complete State aid notification;
- it set up a dedicated contact point to assist Member States with any queries they have;
- it stands ready to provide Member States with templates based on precedent decisions;
- when notifying schemes, Member States are asked to sign a waiver authorising the Commission to adopt and notify its decisions in English.

More State aid developments to be expected in the near future

Numerous industry associations have called upon Member States to design specific measures for sectors hard hit by the outbreak, including the **aviation, rail and automobile sectors**. National schemes to compensate the damages suffered by companies active in these sectors are very likely to be notified to the Commission in the near future.

Moreover, more targeted measure to certain flagship companies are contemplated, in particular in the airline industry. Most notably:

- Italy adopted a decree allowing the government to nationalise Alitalia, subject to the prior approval of the Commission;
- France and the Netherlands are also carefully following Air-France KLM's situation and do not exclude its nationalisation.

Such measures will undoubtedly require a specific and thorough compatibility assessment by the Commission, taking account of the situation of these companies before the Covid-19 crisis.

Sector specific measures may also likely raise questions of possible discriminations within a particular sector or even between sectors, which may lead to an increased number of complaints to the Commission.

**CONSUMER PROTECTION LAW CONSIDERATIONS**

Suppliers should also be careful to avoid breaching local consumer protection laws, for example:

- **Misleading statements (or omissions)** about their products/services, or adopting aggressive sales tactics; and
- **Using unfair contract terms or notices**, such as: fees and charges hidden in the small print; something that tries to limit consumers' legal rights; disproportionate default charges; and excessive early termination charges.
Authors

**Nigel Parr**
Partner, London
T +44 20 7859 1763
M +44 731 772 526
nigel.parr@ashurst.com

**Alexi Dimitriou**
Counsel, London
T +44 20 7859 1191
M +44 7789 816 477
alexi.dimitriou@ashurst.com

**Donald Slater**
Counsel, Brussels
T +32 2 626 1916
M +32 473 132 473
donald Slater@ashurst.com

**Michaël Cousin**
Partner, Paris
T +33 1 53 53 56 92
M +33 6 03 48 48 19
michael.cousin@ashurst.com

**Gabriele Accardo**
Counsel
Milan
+39 02 85423430
gabriele.accardo@ashurst.com

**Rafael Baena**
Partner
Madrid
+34 91 364 9895
rafael.baena@ashurst.com

**Euan Burrows**
Partner
London
+44 20 7859 2919
euan.burrows@ashurst.com

**Neil Cuninghame**
Partner
London
+44 20 7859 1147
neil.cuninghame@ashurst.com

**Denis Fosselard**
Partner
Brussels
+32 2 641 9976
denis.fosselard@ashurst.com

**Charles Hammon**
Counsel
London
T +44 20 7859 1662
charles.hammon@ashurst.com

**Maria Held**
Counsel
Munich
T +49 89 24 44 21 176
maria.held@ashurst.com

**Michael Holzhäuser**
Partner
Frankfurt
+49 69 97 11 28 50
michael.holzhaeuser@ashurst.com

**Christophe Lemaire**
Partner
Paris
+33 1 53 53 54 62
christophe.lemaire@ashurst.com

**Duncan Liddell**
Partner
London
+44 20 7859 1648
duncan.liddell@ashurst.com

**Alexandre Vandencasteele**
Partner
Brussels
+32 2 641 9962
alexandre.vandencasteele@ashurst.com

**Steven Vaz**
Partner
London
+44 20 7859 2350
steven.vaz@ashurst.com

**Annick Vroninks**
Partner
Brussels
+32 2 641 9971
annick.vroninks@ashurst.com

**Denis Waelbroeck**
Partner
Brussels
+32 2 641 9963
denis.waelbroeck@ashurst.com

**Ute Zinsmeister**
Partner
Munich
+49 89 24 44 21 187
ute.zinsmeister@ashurst.com

Other key contacts

**Gabriele Accardo**
Counsel
Milan
+39 02 85423430

**Neil Cuninghame**
Partner
London
+44 20 7859 1147

**Charles Hammon**
Counsel
London
T +44 20 7859 1662

**Christophe Lemaire**
Partner
Paris
+33 1 53 53 54 62

**Steven Vaz**
Partner
London
+44 20 7859 2350

**Ute Zinsmeister**
Partner
Munich
+49 89 24 44 21 187

**Rafael Baena**
Partner
Madrid
+34 91 364 9895

**Gil Even-Shoshan**
Counsel
Brussels
+32 2 626 1907
ges@ashurst.com

**Maria Held**
Counsel
Munich
T +49 89 24 44 21 176

**Duncan Liddell**
Partner
London
+44 20 7859 1648
duncan.liddell@ashurst.com

**Annick Vroninks**
Partner
Brussels
+32 2 641 9971

**Ute Zinsmeister**
Partner
Munich
+49 89 24 44 21 187

**Euan Burrows**
Partner
London
+44 20 7859 2919
euan.burrows@ashurst.com

**Denis Fosselard**
Partner
Brussels
+32 2 641 9976
denis.fosselard@ashurst.com

**Michael Holzhäuser**
Partner
Frankfurt
+49 69 97 11 28 50
michael.holzhaeuser@ashurst.com

**Alexandre Vandencasteele**
Partner
Brussels
+32 2 641 9962
alexandre.vandencasteele@ashurst.com

**Denis Waelbroeck**
Partner
Brussels
+32 2 641 9963
denis.waelbroeck@ashurst.com

**Nigel Parr**
Partner, London
T +44 20 7859 1763
M +44 731 772 526
nigel.parr@ashurst.com

**Alexi Dimitriou**
Counsel, London
T +44 20 7859 1191
M +44 7789 816 477
alexi.dimitriou@ashurst.com

**Donald Slater**
Counsel, Brussels
T +32 2 626 1916
M +32 473 132 473
donald Slater@ashurst.com

**Michaël Cousin**
Partner, Paris
T +33 1 53 53 56 92
M +33 6 03 48 48 19
michael.cousin@ashurst.com

**Gabriele Accardo**
Counsel
Milan
+39 02 85423430
gabriele.accardo@ashurst.com

**Neil Cuninghame**
Partner
London
+44 20 7859 1147
neil.cuninghame@ashurst.com

**Charles Hammon**
Counsel
London
T +44 20 7859 1662
charles.hammon@ashurst.com

**Christophe Lemaire**
Partner
Paris
+33 1 53 53 54 62
christophe.lemaire@ashurst.com

**Steven Vaz**
Partner
London
+44 20 7859 2350
steven.vaz@ashurst.com

**Ute Zinsmeister**
Partner
Munich
+49 89 24 44 21 187
ute.zinsmeister@ashurst.com

**Rafael Baena**
Partner
Madrid
+34 91 364 9895
rafael.baena@ashurst.com

**Gil Even-Shoshan**
Counsel
Brussels
+32 2 626 1907
ges@ashurst.com

**Maria Held**
Counsel
Munich
T +49 89 24 44 21 176
maria.held@ashurst.com

**Duncan Liddell**
Partner
London
+44 20 7859 1648
duncan.liddell@ashurst.com

**Annick Vroninks**
Partner
Brussels
+32 2 641 9971
annick.vroninks@ashurst.com

**Denis Waelbroeck**
Partner
Brussels
+32 2 641 9963
denis.waelbroeck@ashurst.com

Authors

**Nigel Parr**
Partner, London
T +44 20 7859 1763
M +44 731 772 526
nigel.parr@ashurst.com

**Alexi Dimitriou**
Counsel, London
T +44 20 7859 1191
M +44 7789 816 477
alexi.dimitriou@ashurst.com

**Donald Slater**
Counsel, Brussels
T +32 2 626 1916
M +32 473 132 473
donald Slater@ashurst.com

**Michaël Cousin**
Partner, Paris
T +33 1 53 53 56 92
M +33 6 03 48 48 19
michael.cousin@ashurst.com