

Competition Law the Acceleration of Trade Digitalization

Overview of recent developments

amid Covid-19 pandemic

Introduction

This note seeks to provide an overview of some of the key recent developments in the area of competition law with regards to the challenges brought about by the Covid-19 pandemic (“the pandemic”) and the disruption induced by digitalization and online marketplaces.

Legal basis

Competition law aims to ensure that firms operating in a free-market economy do not prevent the market from functioning optimally by acting anti-competitively.ⁱ Competition laws are intended to prevent agreements between firms which have anti-competitive consequences, deal with oligopolistic markets or abuse of power of dominant firms and prevent mergers leading to a highly concentrated market.ⁱⁱ Competition law in Cyprus primarily stems from EU Competition law provisions and is governed by the Treaty of the Functioning of the EU (hereinafter “TFEU”) and by the Protection of Competition Laws 2008 and 2014.

The key provisions are Article 101 TFEU and Article 102 TFEU. Article 101 prohibits agreements, decisions and concerted practices that restrict competition in a substantial part of the EU, while Article 102 TFEU prohibits any practice that amounts to abuse by any undertaking(s) with a dominant position in the market. Examples of such practices include limiting supply, fixing prices, either directly or indirectly, and applying dissimilar conditions to equivalent transactions.

The Response to the Pandemic

Following the EU’s initial package of Covid-19 measures on 13 March 2020, the EU’s Directorate-General for Competition (DG COMP) moved quickly to update its EU competition policy enforcement, including issuing a communication on the antitrust assessment of cooperative arrangements responding to the crisis, creating a dedicated webpageⁱⁱⁱ and email for companies seeking guidance on proposed cooperation agreements and implementing a speedy approval process for Covid-19-related State aid.

The general message, however, has been clear at the outset; competition law continues to apply, but should not prevent steps necessary to alleviate urgent situations with regards to the pandemic. On 23 March 2020, the European Commission Network (“ECN”) issued a joint statement that its members will not actively intervene against “necessary and temporary” measures put in place in order to avoid a shortage of supply,^{iv} thereby indirectly granting companies immunity to cooperate in ways that would otherwise violate antitrust laws. This is particularly so where such collaboration is undertaken to address specific supply chain or other logistical challenges or seeks to respond to health and safety issues arising as a result of the pandemic, giving rise to clear consumer benefits.

Businesses, however, have not been given a free pass^v and should be aware that anti-competitive behaviors or businesses taking advantage of the situation and using the pandemic as a ‘cover’ for non-essential collusion will not be tolerated. For example, investigations into excessive pricing practices have already been opened in a number of jurisdictions, including Italy (relating to the marketing of hand sanitizers and disposable masks)^{vi} and Poland (in relation to the supply of personal protective equipment to hospitals).^{vii}

Any cooperation between competitors should be linked to the duration of the pandemic and demonstrate clear consumer benefits. Any such restrictions should not go beyond what is reasonably necessary to achieve such consumer benefits, and cost or pricing information should not be disclosed or exchanged with a competitor or made available via any other way, unless it is absolutely clear that this is indispensable to achieve the consumer benefits.

Under these circumstances, digital markets pose fundamental challenges for competition authorities and legislatures alike due to their rapidly evolving nature and characteristics. It is thus no surprising that, during the last few years, they have been a priority under existing EU competition policy and the magnitude and their importance has only been exacerbated by the pandemic.

The Consequences to the market

At a domestic level (i.e. in Cyprus), due to lockdown measures imposed by the government, brick and mortar stores and the hospitality industry in general were forced to shut their physical operations temporarily. Only delivery and some take-away services were allowed. Consequently, restaurants and cafes that did not have their own delivery services had to find other means to survive. As a result, online shops and online platforms found themselves in an unprecedentedly advantageous position. Contracting, for example with food delivery apps, it has been a solution for businesses to partially continue their operations if they did not or could not offer their own delivery services. This created an environment where the potential for abuse of

market power by major digital platforms^{viii} was great and digital platforms allegedly found it easy to take advantage of the situation and selectively contract with certain restaurants, while leaving others exposed.

The Role of the Member States

State mechanisms used to deal with the serious health and financial problems created by the pandemic could also raise competition law concerns. Article 107 of the TFEU prohibits member states from granting State aid that distorts competition and trade in the EU. It is important to note that State aid can be in any form. However, during a crisis, the State aid framework can act as an unintended brake on swift public action. Hence, Article 107(3)(b) of the TFEU enables the EU to approve additional national support measures to remedy a serious disturbance to the whole economy of a member state. In the 2008 financial crisis, for example, the EU adopted a number of short-term measures to address the economic crisis, including the adoption of a temporary framework on State aid to provide safe approval criteria for aid comprising guarantees, subsidised interest rates, and credit and capital measures.

The pandemic had led to a similar response.^{ix} On 19 March 2020, the EU adopted a Temporary Framework for State Aid^x measures (“Temporary Framework”) to support the economy. The Temporary Framework sets out the compatibility conditions applied to the aid granted by member states under Article 107(3)(b) of the TFEU. Member states must show that the State aid measures notified to the Commission under the Framework are necessary, appropriate and

proportionate to remedy a serious disturbance in the economy of the member state concerned and that all the conditions of the Framework are fully respected.^{xi} An example of such State aid in Cyprus is the governmental grant amounting to 86,6 million EURO to the Tourism sector on 12 January 2021.

This type of State aid, however, can prove quite controversial like in the case of 120 million EURO granted by the Greek government to Aegean Airlines as damages due to losses suffered by the company due to the pandemic. State support should be based on objective criteria and, when possible, applied to all businesses in an industry to maintain a level-playing field. One could argue that the temporary suspension of operations of some retail shops in Cyprus for specific periods of time during the past year, whilst other stores with

the same dimensions remained open, created distortion of competition in the market and amounted to an indirect, illegal form of State aid with the potential of violating Article 107 of the TFEU.

Conclusion

Competition law and policy continues being crucial in steering the healthy and fair recovery of businesses from Covid-19. The rapid and in some cases instant switch from partial to complete digitalization, delivery apps and online marketplaces, has brought forward a series of new challenges for the competition authorities. These challenges need to be addressed properly, minimizing the risk of negative market distortions in the EU.

Our Team



Dr Charis
Savvides



Menelaos
Kesisoglou



Chloe
Americanou



Arianna
Mouskou

12 Dimostheni Severi Avenue,
6th floor, office 601,
1080 Nicosia, Cyprus
Tel: +35722465500
E-mail: info@americanoslaw.com



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ⁱ A. Jones, B. Sufrin, *EU Competition Law* (6th edn, Oxford University Press 2016) 1-2.

ⁱⁱ *Ibid.*

ⁱⁱⁱ <https://ec.europa.eu/competition/antitrust/coronavirus.html>

^{iv} Joint Statement by the European Competition Network (ECN) published on 23 March 2020 on the application of competition law during the pandemic.

^v COVID-19: Competition law implications of the coronavirus crisis by Practical Law Competition.

^{vi} Decision No. 28446/2020 of the Italian Antitrust Authority. A company was sanctioned with a fine of 550,000 Euros for engaged in the on-line sale of masks without the CE mark for unfair commercial practices. The Authority pointed out that the selling prices applied by the company were significantly higher than those of the pre-pandemic period and that the company invited the public to purchase the relevant products as soon as possible in order to ensure a rapid delivery. In addition to the lack of the CE mark and the excessive pricing, the Authority resolved that the promise of delivery in 24/48 hours was also unfair, being it suitable to alter the decision-making capacity of the consumer on the basis of “a deceptive and ambiguous representation of reality, based on the exploitation of the health emergency situation, with possible risks for the health and safety of consumers”. (https://globalcompliancencnews.com/italy-covid-19-online-sale-of-masks-sanctions-by-the-italian-antitrust-authority-for-unfair-commercial-practices150121/?utm_source=rss&utm_medium=rss&utm_campaign=italy-covid-19-online-sale-of-masks-sanctions-by-the-italian-antitrust-authority-for-unfair-commercial-practices150121#page=1)

^{vii} The Polish Competition Authority has initiated proceedings on the conduct of wholesalers supplying personal protecting equipment to hospitals to examine whether it constitutes abuse of dominance or results from price fixing. The President of UOKiK, Tomasz Chróstny, initiated proceedings on unfair conduct of wholesalers supplying personal protective equipment to hospitals (https://www.uokik.gov.pl/news.php?news_id=16277).

^{viii} Competition and antitrust in the digital age by Baker McKenzie (2017).

^{ix} COVID-19: Competition law implications of the coronavirus crisis by Practical Law Competition.

^x OJ 2020 C911/1.

^{xi} COVID-19: Competition law implications of the coronavirus crisis by Practical Law Competition.