

CCPC's expected enforcement approach in light of the ECN Joint Statement on the Application of Competition Law during Covid-19

On 25 March 2020, in light of the ongoing Covid-19 pandemic, the Irish Competition and Consumer Protection Commission (“**CCPC**”) published the Joint statement by the European Competition Network (“**ECN**”) on the application of competition law during the Corona crisis (ECN Joint Statement) on its website that the ECN had issued a couple of days prior on 23 March 2020. The publication of the ECN Joint Statement by the CCPC – which participates in the ECN along with the European Commission and the competition authorities of the 26 other Member States – confirms that the principles contained in the statement will serve as the CCPC's starting point in assessing the legality in accordance with the Irish and EU competition rules of coordinated activity between firms that aims to address the commercial consequences of the current Covid-19 crisis, in particular security of supply and other supply chain issues that businesses across industries are facing.



Key principles from the ECN Joint Statement

While the EU Joint Statement does not establish any new legal principles or novel application of the existing EU competition rules, the statement helpfully sets out the ECN's common position on how the existing EU competition rules will apply in the current circumstances. The key points arising from the ECN Joint Statement (see full text [here](#)) may be summarised as follows:

- While the EU competition authorities must continue to ensure a level playing field even in the current period of crisis, there is flexibility within the EU competition law rules – in particular, the prohibition on anti-competitive agreements under Article 101 of the Treaty on the Functioning of the European Union (“**TFEU**”) – to take account of market and economic developments such as the social and economic consequences triggered by the Covid-19 pandemic, where appropriate and necessary.
- In the current circumstances, companies may need to cooperate in order to ensure the fair distribution of scarce products to all consumers and so ECN members will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. Nonetheless, such measures are unlikely to be problematic, either because they do not amount to a restriction of competition under Article 101(1) TFEU or because they generate economic efficiencies under Article 101(3) TFEU that outweigh the potentially negative effects of any such restriction. In case of doubts, companies may seek informal guidance from any ECN member (ie the European Commission or a national competition authority such as the CCPC).
- At the same time, it is critical that products considered essential to protect the health of consumers in the current situation (eg, face masks and sanitising gel) remain available at competitive prices and so ECN members will not hesitate to take action against companies taking advantage of the current situation either by coordinating their conduct without any economic efficiency gains or by unilaterally abusing a dominant position.
- In this regard, the existing rules allowing manufacturers to set maximum prices for their products could prove useful to limit unjustified price increase at the distribution level.



CCPC enforcement action against coordinated activity arising from Covid-19

In accordance with the ECN Joint Statement, it is clear that the CCPC – either alone or in conjunction with the European Commission – will continue to enforce the Irish and EU competition rules with the same rigour against companies doing business in Ireland. Cartel behaviour between competitors that are active in the same market in Ireland will continue to fall foul of the Irish and EU competition rules and carry significant sanctions including financial penalties (up to the greater of €5 million or 10% of worldwide turnover), individual sanctions (eg, up to 10 years' imprisonment) and the possibility of follow-on damages claims from affected third parties (eg, customers). This includes price-fixing, market or customer allocation and the exchange of competitively sensitive information such as future pricing or planned business strategies. Thus, businesses will not be allowed to exploit the current crisis as a cover for “non-essential” collusion. The same sentiment has been expressed in similar announcements by the US Department of Justice and the Canadian Competition Bureau. Investigations have already been opened by some authorities – for example, in Hong Kong – into suspected cartel conduct arising from the Covid-19 crisis.

While the Irish and EU competition rules will continue to be enforced with the same rigour, in publishing the ECN Joint Statement on 25 March, the CCPC has confirmed that it will take a sympathetic view towards necessary cooperation between competitors in the current crisis to ensure overall business continuity and minimise supply chain disruption – in particular, the security of supply for essential inputs where shortages are likely – in light of the principles set out in the ECN's statement. Thus, the CCPC is unlikely to actively intervene against such measures in terms of its enforcement priorities. This is on the basis that such measures do not amount to a restriction of competition – because neither the objective nor the effect of the measures restricts competition in the relevant market – or the measures generate sufficient economic efficiencies that outweigh their otherwise restrictive effects.

Companies and their legal advisors will nonetheless need to carefully consider the potentially restrictive effects and the possible efficiency justifications of any measures in contemplation with other market players in the current environment. In evaluating efficiency justifications in particular, the key criteria to be considered are whether the measures improve the production or distribution of goods or services and allow customers a fair share of the resulting efficiencies, whilst ensuring that any restrictions imposed on the companies involved are indispensable and that competition in respect of a substantial part of the companies' businesses is maintained. In carrying out this assessment, regard should be had to the general guidelines at the EU level – in particular, the European Commission's Guidelines on the application of Article 101(3) TFEU. Specific guidance on the application of the competition rules during the current Covid-19 crisis that has been published by other authorities will also prove useful. For example, the UK Competition and Markets Authority has published helpful guidance which suggests that temporary and proportionate measures ensuring security of supply of goods, the fair distribution of scarce products, the continuity of essential services or the provision of new services such as food delivery to vulnerable consumers are likely to generate sufficient economic efficiencies that would outweigh the potentially restrictive effects of the measures and would therefore be compatible with the competition rules.

Within this context, it remains to be seen whether the Government will introduce legislation to exempt specific types of cooperation that aim to deal with the challenges brought out by the current circumstances from the application of the Irish and EU competition rules. For example, the UK Government has temporarily relaxed the application of the UK competition rules in the groceries sector to allow retailers to share data on stock levels, cooperate to keep shops open and share distribution depots and delivery vans to ensure continuity of supply. Similar measures have been adopted in Germany and the Netherlands. One word of caution in this regard is that, short of specific legislation providing for specific exemptions, general government encouragement to cooperate may not be a sufficient justification, where the cooperation is otherwise found to constitute a restriction of competition without any efficiency justification, as occurred in the case of the Irish BIDS crisis cartel in the beef industry.



CCPC's continued approach to other types of problematic activity – abuse of dominant position and consumer protection

In accordance with the ECN Joint Statement, the CCPC will also remain vigilant in relation to potentially abusive conduct by companies that are viewed to be in a “dominant” position such as excessive pricing, refusal to supply or tying or bundling practices. Investigations have already been initiated against such practices that have arisen in the context of the Covid-19 crisis in Italy, Poland and South Korea. In Ireland, such practices carry the risk of financial penalties (up to the greater of €5 million or 10% of worldwide turnover) and the possibility of follow-on damages claims from affected third parties (eg, customers).

The CCPC will also continue to police for potential breaches of consumer protection laws, eg misleading advertising, and has already issued one warning against one online supplier of hand sanitiser products.



Advice to businesses

The ECN Joint Statement provides welcome guidance on how the CCPC and the European Commission will apply the competition rules to Irish businesses that may be considering certain types of cooperation with other players in their sector to respond to the challenges brought about by the Covid-19 crisis. While the CCPC and the European Commission can be expected to continue to rigorously enforce the competition rules against cartel behaviour and abusive conduct by dominant companies, the authorities are likely to take a more sympathetic approach to necessary cooperation between competitors in response to the current crisis. Companies and their legal advisors will, however, need to carefully consider the compatibility of any such cooperation with the competition rules. Informal engagement with the CCPC and/or the European Commission remains an option and may be advisable depending on the nature and scale of the cooperation in contemplation.

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