

COVID-19: Competition law

Insights - 06/05/2020

The Channel Islands Competition and Regulatory Authorities (CICRA) have reminded businesses that competition law remains in force despite the COVID-19 pandemic although they have confirmed that the approach to enforcement will be pragmatic. Whilst it remains to be seen if the separation of CICRA from 1 July 2020 impacts the approaches taken, it may now be more important than ever for business to reconsider the requirements of the Channel Islands' competition laws.

Anti-competitive arrangements

- Anti-competitive agreements are prohibited in both Guernsey and Jersey, very much in summary, where the object or the effect of the agreement is to hinder or prevent competition to an appreciable extent. Regulators will continue to investigate alleged breaches of the law and will not allow businesses to exploit the crisis as a pretence for non-essential collusion.
- In the usual way, businesses should be mindful of entering into or continuing with anti-competitive arrangements and remain alive to any high risk practices that may fall foul of the law including for example: price fixing, market sharing and imposing minimum resale prices.
- CICRA have, however, confirmed that no competition law enforcement action will be taken against cooperation between businesses or rationing of products in light of the COVID-19 pandemic to the extent that this is necessary to protect consumers, for example arrangements to avoid a shortage of supplies.
- If your business is entering into such an agreement, consider:
 - whether the agreement is in the interests of consumers; and

- if it goes beyond what is necessary to alleviate the urgent circumstances of the pandemic.

- Seek legal advice on the nature of the agreement or comfort from the regulator if you are unsure of the status of a proposed agreement.

Considerations for dominant businesses

- If your business holds a dominant position, continue to guard against abusive practices including for example: excessively high pricing, refusals to supply, price discrimination, setting discounts at predatory levels or in a manner aimed at foreclosing the market.
- Is your business operating in new markets or markets with limited competition? If so, consider whether it may have a newly conferred dominant status.
- A dominant status occurs normally, although not always, where a business persistently holds a share above 50% in the market place and is less likely to occur where a business holds a share of less than 40% (unless there is wider evidence of dominance). However, dominance needs to be considered on a case by case basis.
- Do not assume that abusive conduct will be exonerated because the interests of your business are in alignment with government policies or are in aid of the "greater good" throughout the COVID-19 pandemic.
- Pay particular attention to business pricing strategies; regulators are likely to be particularly alert to allegations of unfair pricing.
- Be able to objectively justify any conduct which may be perceived as abusive and demonstrate that it goes no further than is necessary to achieve a legitimate aim. For example, be able to justify why your business is supplying one type of customer with scarce resources instead of another.

Mergers and Acquisitions

- The regulators have not announced any plans to halt their consideration of mergers, though they have indicated that the adoption of a pragmatic approach to supervision during the COVID-19 pandemic means that there may be delays to the consideration of these applications. Parties to a merger should therefore notify the relevant regulator (or both) where pre-approval for a merger is mandatory under the law. The regulators will continue to only approve mergers that do not "substantially lessen" competition.

- In Guernsey, parties to a merger must also demonstrate that the merger does not prejudice consumers, the public interest or the economic development and well-being of the Bailiwick.
- If your business is party to a proposed merger:
 - consider the timetable for the merger as a whole – there may be potential delays in the merger process as many businesses will face challenges as a result of the crisis;
 - where pre-approval is required under Channel Islands' competition law, consider whether the proposed merger will pass the "substantially lessen test", considering that there may be less competition by nature of the current climate;
 - if your business faces a delay in obtaining approval, do not engage in any conduct with the other parties in the pre-approval stage which may contravene competition law and lead to financial penalties, including formulating contingency plans; the approval of the regulator will not exonerate pre-approval misconduct.

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