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CLIENT ALERT

Profiteering in the U.K. and the Pandemic: Navigating Fluctuating Markets and Erratic Supply Chains

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Introduction

We are in extraordinary times.

Businesses are having to adapt, fire-fight and problem-solve like never before. Markets are fluctuating in ways that were totally unforeseeable six months ago and sometimes only days ago. Most companies are now operating in an entirely new world of demand behaviours, supply chain constraints and pricing practices.

This changed environment inevitably leads to new approaches, and we are seeing some for the greater good, but others less so. For example, a light is increasingly being shone on profiteering or "price gouging" – the practice of charging excessive prices for products and services during an emergency situation or extreme market conditions.

The Law

Price gouging and similar behaviours are primarily regulated in the U.K. by the Competition and Markets Authority (**CMA**), which enforces competition and consumer protection law. (For businesses operating in the U.S., see our update here.)

In particular, section 18(2) of Chapter II of the Competition Act 1998 specifically prohibits the imposition of unfair prices or other unfair trading conditions by entities with significant market power (which can be as small as 40% of a particular market in a part of the U.K. – and what is a particular market can be a complex issue in itself). Case law provides tests for assessing whether particular pricing behaviours will be abusive, including as follows – which the CMA has decided to apply in its cases:

1. *Is the difference between costs actually incurred and the price actually charged excessive? And, if yes:*
2. *Has a price been imposed which is either unfair in itself or when compared to competing products?*

The Risks

The Competition Act gives the CMA extensive powers to investigate and take enforcement action against price gouging practices, including: making directions requiring an entity to modify or cease particular conduct; applying to the courts for enforcement orders; and imposing financial penalties.

In response to the current crisis and the sadly inevitable recent increases in price gouging practices, the CMA has launched a new COVID-19 taskforce dedicated to:

- Monitoring market developments and scrutinising harmful pricing practices.

- Proceeding with enforcement action where businesses have breached competition or consumer protection law.
- Advising Government on emergency legislation to extend existing powers, including potential direct action to regulate prices.

Breaches of the law can be serious in other ways too – agreements can be held unenforceable, directors can be disqualified, and criminal sanctions can be imposed for particularly serious abuses; be in no doubt that this is a serious issue.

Potential Claims including Class Actions

Entities may also expose themselves to third party claims, for example, in damages and for other relief including injunctions (where brought by counterparties who can demonstrate that they have been harmed by anti-competitive behaviour). There may even be the possibility of fraud claims, if a party can demonstrate that it relied upon a fraudulent misrepresentation regarding pricing which caused a loss and that could create personal liability for directors or employees that make those representations.

Notably the CMA has confirmed that U.K. courts may take its recent guidance into account when deciding any corresponding cases – which might pave the way for a stricter approach being seen in the courts in the near future.

For competition claims, the main cause of action is typically breach of statutory duty, although economic torts may also be relevant (e.g. conspiracy to use unlawful means – although note that this involves a requirement for the defendant to have intended to cause injury to the claimant). These claims may be brought on a stand-alone or follow-on basis. The former is where a claimant alleges an infringement separate to any CMA investigation or decision, and the latter is where liability has already been established by the regulator.

Civil claims can be brought in the High Court or the Competition Appeal Tribunal (**CAT**) and if a number of individuals have suffered at the hands of one entity then class actions are potentially possible too (although only in the CAT). Under the Consumer Rights Act 2015, the CAT has the power to determine certain class action competition claims on either an opt-in (where each claimant actively signs up to be included) or opt-out (where individuals are automatically included unless they specifically request to be excluded) basis. Note that opt-out provisions only apply to U.K. entities, but non-U.K. entities may opt-in.

Issues and Risks in the Current Climate

A number of issues are pertinent for businesses: ranging from how to react to supplier price increases on products or services that are critical for ongoing operations; to how to introduce necessary increases to their own prices, in response to constraints up or downstream in their supply chains or the increased cost of doing business in this environment; to how to seek recourse if they have suffered at the hands of unlawful price gouging or other market abuse.

Many businesses are likely to be genuinely under pressure to adapt to new market constraints, and helpfully the CMA has recognised that certain competition law enforcement could impede necessary cooperation between businesses to deal with the current crisis. As part of their expanded remit they will also be advising Government on preserving market stability and not prohibiting legitimate commercial practices which may help bolster supply chains and public health needs.

Actions

So what practical steps can clients take to enable them to react nimbly to these changing circumstances?

- Businesses would be wise to keep abreast of developments, as the CMA's approach may be increasingly robust. For example, particular scrutiny is being placed on the pharmaceutical and food and drink industries already. The CMA has published an open letter to businesses operating in these markets, warning of increased monitoring of bad behaviours.
- Check your contractual framework. There may already be mechanisms in place to help with agreeing changes to pricing structures or performance obligations that protect all project parties.
- If the position is unclear, take advice before making reactive decisions on pricing. The CMA has made it clear that some price rises are inevitable due to unavoidable economic pressures, but it is asking businesses to inform it of suspected bad practice.

We expect this issue to present new legal challenges so we will be monitoring developments in this area, including any significant action from the new CMA taskforce. However, as mentioned above, the prohibition contained in Chapter II of the Competition Act is triggered only where an entity has "significant market power". Businesses that are confident that they do not have significant market power should be able to charge what they think people will be prepared to pay. That said, it remains to be seen whether the new CMA taskforce will be interpreting the definition more loosely – particularly in the current climate.

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