



ANTITRUST AND COVID-19

The COVID-19 pandemic is requiring governments and companies to put in place extraordinary and unprecedented measures with significant competition law implications. At the same time, competition and consumer protection laws continue to apply even during the current global health crisis. It is now more important than ever that businesses are aware of potential risks and are able to manage them as effectively and nimbly as possible.

In this update, we go through four areas where risks are likely to be most acute:

- I. Cooperation between undertakings
- II. State aid
- III. Merger control
- IV. Consumer law
- V. Update on suspensory measures adopted in Italy

I. COOPERATION BETWEEN COMPETING UNDERTAKINGS

ECN's joint statement on the application of competition law during the COVID-19 pandemic

On 23 March the European Competition Network (“ECN”), consisting of the European Commission and the national competition authorities of all Member States, issued a **joint statement on the application of competition law during the COVID-19 pandemic**.¹

The ECN clarified that the competition rules ensure a level playing field between companies and this objective remains relevant also in time of crisis. Nevertheless, the ECN recognised that the current extraordinary situation may trigger the need for companies to cooperate in order to guarantee the supply and fair distribution of scarce products to all consumers. For example:

- to ensure security of supply of certain products companies might require cooperating with competitors through the **exchange of commercially sensitive information** regarding output, costs and stocks
- producers of certain medical equipment might consider setting up joint logistics and distribution to maximize the supply of emergency equipment

The ECN reassured companies that **it will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply**. It further clarified that such measures are unlikely to be problematic, since they would either not amount to a restriction of competition under Article 101 TFEU (and 53 EEA) or generate efficiencies that would most likely outweigh any such restriction.

¹ Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

At the same time, the ECN highlighted the need to ensure that products considered essential to protect the health of consumers in this situation (e.g. face masks and sanitising gel) remain available at competitive prices. The ECN stressed that it will not hesitate to intervene against companies taking advantage of the present situation by cartelising or abusing their dominant position.

CMA approach to business cooperation in response to COVID-19

In the UK, the Competition and Markets Authority (“CMA”) stated that competition law enforcement could impede necessary cooperation between businesses to deal with the current crisis and ensure security of supplies of essential products and services.

To this end, in its recent **Guidance**,² the CMA pointed out that **it will not take action against coordination activities** between competing businesses provided that such temporary measures of coordination meet the following cumulative conditions:

- (a) are appropriate and necessary to avoid a shortage, or ensure security, of supply
- (b) are clearly in the public interest
- (c) contribute to the benefit or wellbeing of consumers
- (d) deal with critical issues that arise as a result of the COVID-19 pandemic
- (e) last no longer than is necessary to deal with these critical issues

At the same time, the CMA will not tolerate conduct which opportunistically seeks to exploit the crisis. Therefore, its guidance also explains when the CMA will take enforcement action to prevent consumer detriment.

Business risks

Notwithstanding the apparently more permissive stance adopted by the ECN and the CMA, horizontal cooperation between competing undertakings, albeit in good faith, still involves significant competition risks and continues to require a careful assessment in light of all circumstances.

There are several elements to be considered when conducting a risk assessment of horizontal cooperation agreements including, among other, their objective and the reasons that make them necessary, the relevant product and geographic market/s involved, the specific characteristics of the products/services, the companies’ positioning on the relevant market/s and the precise scope of the cooperation, to avoid spillover effects or unintended information exchanges beyond the boundaries of what can reasonably be allowed.

II. STATE AID

European Commission emergency rules for state support to address COVID-19 crisis

State aid rules enable Member States to take swift and effective action to support citizens and companies, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak.

² CMA approach to business cooperation in response to COVID-19, 25 March 2020, CMA118, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_.pdf.

As set out in the **Communication on a Coordinated economic response to the COVID-19 outbreak** of 13 March,³ Member States have ample possibilities to design measures in line with existing EU State aid rules.

They can adopt measures that fall outside the scope of State aid control, such as national funds granted to health services or other public services to tackle the COVID-19. Member States can also immediately act through public support measures that are available to all companies such as wage subsidies, suspension of payments of corporate and value added taxes or social contributions. In addition, Member States can grant financial support directly to consumers, for example for cancelled services or tickets that are not reimbursed by the operators concerned.

In addition, EU State aid rules enable Member States to help companies cope with liquidity shortages and needing urgent rescue aid. Article 107(2)(b) TFEU enables Member States to compensate companies for the damage directly caused by exceptional occurrences, such as the COVID-19 outbreak, including measures in sectors such as aviation and tourism.

To complement these instruments already available to Member States, on March 19 the European Commission adopted a **new State aid Temporary Framework** to support the economy in the context of the Covid-19 outbreak, based on Article 107(3)(b) TFEU.⁴

The Temporary Framework recognises that the entire EU economy is experiencing a serious disturbance. It enables Member States to use the full flexibility foreseen under State aid rules to support the economy, while limiting negative consequences to the level playing field in the Single Market. As an example, companies struggling with the impact of COVID-19 will be able to receive funding of up to € 800,000 from European governments under the new state-aid framework. The Temporary Framework also sets out the terms on which governments can give state guarantees for loans and support banks' lending to the real economy.

The European Commission has also recently adopted an **amendment extending the Temporary Framework**,⁵ to enable Member States to accelerate the research, testing and production of coronavirus relevant products, to protect jobs and to further support the economy in the context of the COVID-19 outbreak.

The European Commission has expanded its emergency rules that permit certain forms of State support for companies affected by the Covid-19 pandemic. Some of the changes clarify how Member States can subsidize research and development and testing facilities to combat COVID-19. Other changes bring tax deferrals and wage subsidies into the

³ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup, Coordinated economic response to the COVID-19 Outbreak, 13.3.2020, COM(2020) 112 final, available at https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf.

⁴ Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 19.3.2020, C(2020) 1863 final, available at https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf.

⁵ Communication from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 3.4.2020, C(2020) 2215 final, available at https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_1st_amendment_temporary_framework_en.pdf.

existing framework. Member States can also give more aid to companies under existing mechanisms: they can now cover 100% of the risk when guaranteeing loans and can provide equity worth € 800,000 to each company.

The framework will be in force until the end of this year.

Italian supporting measure approved under the Temporary Framework

The European Commission approved under the Temporary Framework a €50 million Italian aid scheme to support the manufacturing and supply of medical devices, such as ventilators, and personal protection equipment, such as masks, goggles, gowns, and safety suits.⁶

Furthermore, Italy notified to the European Commission under the Temporary Framework a State guarantee to support a debt moratorium for SMEs, which includes the postponement of repayments of overdraft facilities, bank advances, bullet loans, mortgages, and leasing operations. The measure aims at temporarily easing the financial burden on SMEs that are severely affected by the economic impact of the coronavirus outbreak. The objective of the scheme is to ensure that SMEs have liquidity to help safeguard jobs and continue their activities during the coronavirus outbreak. The European Commission approved the Italian State guarantee.⁷

Business Risks

Companies that consider obtaining COVID-19 associated support measures implemented by a Member State should still satisfy themselves that the aid complies with EU State aid legislation.

Unlawful state aid could lead to significant detrimental consequences for the beneficiaries. Even though it is mainly the responsibility of the Member States to ensure that any aid granted is not unlawful and in line with EU law, if the aid is unlawful, the beneficiaries will be required – among other things – to repay any money or return the value of any benefits granted, plus accrued interest. The ultimate risk is and remains on business, not on the State.

Furthermore, companies can still be damaged either by their exclusion from lawful State aid schemes or by unlawful aid granted to competitors. The COVID-19 emergency should not be a pretext to do even more harm to the economy than the pandemic and the associated “lockdowns” are already causing.

It is, therefore, of the utmost importance that businesses receiving aid and those that are excluded from it understand the risks, liabilities and remedies that may arise, to their detriment or to their benefit.

III. MERGER CONTROL

European Commission and CMA response to merger notifications

⁶ SA.56786 Production of medical equipment and masks.

⁷ SA.56690 State guarantee to support debt moratorium by banks to SME borrowers.

The **European Commission**, while acknowledging that practical difficulties may occur due to the interferences caused by coronavirus outbreak, is continuing to ensure the implementation of the EU Merger Regulation.

On 13 March, the European Commission published a Notice on its website⁸ encouraging firms to delay requests for approval originally planned, where possible, and to use electronic means to notify their concentrations, in view of the disruptions caused by the coronavirus on the activity of investigators and companies alike. The Notice only relates to transactions in the pre-notification phase. The Commission remains bound to strict timelines in cases where the formal clock has started.

Likewise, the **CMA** intends to continue progressing its cases, issuing decisions and meeting deadlines. It will continue to monitor timetables including, where permitted, extending statutory timeframes where necessary. However, the CMA has asked certain companies with yet-to-be-closed mergers to hold off on formally filing notifications of their deals due to concerns that the CMA will be unable to carry out an effective market test in the present circumstances.

Business Risks

Merging parties reporting transactions in the current circumstance might expect competition authorities to use their powers to stop the clock or delay review periods otherwise. Therefore, it is important to structure the transaction so as to anticipate delays in merger proceedings and agree for suitable contractual provisions in this context.

IV. CONSUMER LAW

Stopping scams and tackling unfair business practices on online platforms

On 20 March, the consumer protection (“**CPC**”) authorities of the Member States, with the support of the European Commission, issued CPC Common Position COVID-19 on the most reported scams and unfair practices in this context.⁹

The ICA is continuing to monitor the market focusing its attention on operators active in e-commerce who adopt improper and misleading behaviours.

Over the past two weeks the ICA ordered the shutdown of certain websites which offered several medicinal products for sale as well as the removal of claims that certain products advertised and marketed online were affective to prevent COVID-19.¹⁰

⁸ Practical information regarding merger notifications and updated information are available at https://ec.europa.eu/competition/mergers/covid_19.html.

⁹ Common Position of CPC Authorities, Stopping scams and tackling unfair business practices on online platforms in the context of the Coronavirus outbreak in the EU, available at https://ec.europa.eu/info/sites/info/files/live_work_travel_in_the_eu/consumers/documents/cpc_common_position_covid19.pdf.

¹⁰ PS11727 - ICA: Coronavirus, the shutdown was ordered of the website <http://testcoronavirus.shop/it> that markets a test for COVID-19 self-diagnosis; PS11732 - ICA: coronavirus emergency, the Authority orders the removal of any reference to preventive effectiveness against COVID-19 of the products advertised and marketed on the www.oxystore.it website; PS11733-PS11735 - *Emergenza coronavirus, l’Autorità dispone l’oscuramento dei siti web* <https://farmaciamaschile.it> e <http://farmacia-generica.it>; PS11723 - *Coronavirus, sospesa la commercializzazione di un farmaco antivirale venduto a più di 600 euro e disposto l’oscuramento del sito* <https://farmacocoronavirus.it>.

Likewise, the ICA launched two separate investigations against the platforms Amazon and eBay for misleading claims and excessive price increases relating to the marketing of hand sanitizing products, respiratory tract protection masks and other health and hygiene products.¹¹

Business Risks

Businesses should consider that, in this context of sanitary emergency, competition authorities are particularly keen to take enforcement action to prevent unfair and deceptive commercial practices detrimental to consumers. Enforcement actions are particularly targeted at digital platforms. Companies active in sensitive areas should put in place robust, efficient and nimble monitoring procedures to ensure that they do not fall foul of the law, which can have serious consequences in terms of fines but also leading to the closure of website and the temporary suspension of the commercial activity.

V. UPDATE ON SUSPENSORY MEASURES ADOPTED IN ITALY

In Italy, Article 103 of the Law Decree no. 18/2020 (*Decreto Cura Italia*) suspended until 15 April the running of all deadlines and time limits concerning all administrative proceedings that are pending on 23 February or are commenced after that date. The deadline of 15 April has been extended to 15 May by Article 37 of Legislative Decree no. 23/2020.

By two communications dated 1 April¹² and 10 April,¹³ the Italian Competition Authority (“ICA”) clarified that any **communication/notification** (in particular, of mergers) or **complaint** sent during the period from 23 February to 15 May will be deemed to have been received at the end of the suspension period, i.e. on 16 May.

In addition, the ICA pointed out that all approaching deadlines for the payment of **antitrust fines** are suspended. Fines that were due between 23 February and 15 May now have a new deadline of October 1.

For **consumer protection fines**, the enforcement period is suspended and will start running again at the end of the suspension, i.e. on 16 May.

¹¹ PS11716-PS11717 - *Coronavirus, l’Autorità avvia istruttoria nei confronti di Amazon e Ebay per claim ingannevoli ed eccessivi aumenti dei prezzi*, press release available at <https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-begins-investigating-Amazon-and-eBay-for-misleading-claims-and-excessive-price-increases>.

¹² ICA, *Comunicazione sull’interpretazione dell’art. 103 del decreto legge 17 marzo 2020, n. 18, approvata dal Collegio dell’Autorità nella seduta del 1° aprile 2020*, 1.4.2020, available in Italian at <https://www.agcm.it/dotcmsdoc/allegati-news/200401.pdf>.

¹³ ICA, *Comunicazione sull’interpretazione dell’art. 103 del decreto legge 17 marzo 2020, n. 18, così come modificato dall’art. 37 del decreto legge 8 aprile 2020, n. 23, approvata dal Collegio dell’Autorità nelle sedute del 1° aprile e del 10 aprile 2020*, available in Italian at https://www.agcm.it/dotcmsdoc/allegati-news/200401_new.pdf.



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