

COVID-19 and Competition law



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The Covid-19 pandemic is generating a global health and economic crisis that has completely disrupted the functioning of our economies.

On the one side, several measures restricting the activity of economic agents that the Government has approved in recent weeks, all within the framework of the declaration of the State of Alarm, undoubtedly have an impact on competition. On the other side, at the moment the public interest in tackling and / or alleviating the devastating effects of the pandemic in health terms while guaranteeing the operation of essential activities is an absolute priority.

In this alert, we briefly explain how we think Covid-19 may affect the application of Competition law.

I. There is no general derogation from Competition law

Despite the crisis and the fact that Royal D 463/2020, of March 14, declaring the state of alarm ("RD 463/2020") suspended the handling of files, antitrust rules remain in force and their effective application may be especially important during the crisis.

The European Competition Network (ECN), which includes the Spanish national authority (CNMC), recently published a statement on how competition rules apply during the crisis. The ECN warns that vigilance shall increase on those companies that may try to take advantage of this situation by creating cartels or abusing their dominant position, hindering the supply of essential products or making them more expensive.

II. The fight against abuses continues without exception

In Spain, the CNMC has strengthened surveillance of possible abuses, calling on citizens to collaborate in detecting this type of practice through a mailbox for complaints and queries related to the pandemic. The CNMC will be especially attentive to the sectors of medical devices and funeral services.

All competition authorities stated that they will closely monitor the most sensitive markets to detect possible abuses. In the face of obvious changes in our purchasing routines (think, for instance, of the limited distance that may be covered during the State of Alarm to reach a food store), competition is severely weakened, many consumers may be less sensitive to price increases, and the potential for abuse increases exponentially. We can think of an array of situations, with radical changes even to the market configuration and features: e.g. a local trade that suddenly becomes dominant in its territory; suppliers of essential products overwhelmed by increased demand, who may have incentives to coordinate with competitors; or even operators who might hoard excessively (and even criminally) essential medical devices.

Several authorities are already acting against companies' potentially abusive behaviour towards consumers, issuing warnings or even initiating investigations against operators that may be applying excessive prices.

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As an example, the Italian Authority has already launched two investigations against the platforms Amazon and Ebay for possibly excessive prices of masks and disinfectant gels. The French Government has adopted a decree to temporarily limit the prices of disinfecting gels and thus avoid possible abuse. In Spain, we are also seeing initiatives in a similar sense, the Government having prohibited a price increase for funeral services; telecommunications services; suspending any number portability that requires the physical presence of a technician; and cuts in basic supplies for the duration of the crisis. Certain online platforms have also spoken about its tracking of possible abusive prices on medical devices.

In short, authorities will not tolerate that companies take advantage of this crisis to impose excessive prices, either through their own prices or by establishing minimum resale prices. In this regard, the ECN statement reminds us that manufacturers may set maximum resale prices, which in fact could help avoid unjustified price increases.

III. Competition rules are relaxed in relation to necessary and temporary cooperation between companies

According to the ECN statement, competition authorities will not actively intervene against cooperation agreements between companies, provided these are temporary and necessary to ensure the supply and distribution of scarce products.

This does not mean that companies are given *carte blanche*. Hardcore cartels (e.g. price fixing or market sharing) are still prohibited, especially if they affect essential commodities.

However, certain cooperation agreements between companies, while restricting competition, may also generate efficiencies that - perhaps (we do not intend to venture here an assessment that would require knowing the specific facts) - offset such restrictive effects. In this regard, a variety of collaboration agreements are being proposed in several jurisdictions: for instance, agreements among transport companies to share logistics networks and thus ensure the supply of essential products in light of current demand peaks; agreements for the joint production and marketing of food or health products; R&D agreements between pharmaceutical companies to find an effective treatment for Covid-19; or even restrictions on parallel trade that seek to ensure the supply of essential products at the national level.

Conversely, agreements to set payment terms, to unify the reaction to possible insolvency situations or to cap bonuses for workers providing essential services may be problematic. In fact, whoever spots if such practices can report them through the mailbox made available by the CNMC.

Competition rules are relaxed in relation to necessary and temporary cooperation between companies

Therefore, in light of any possible cooperation agreement, companies should weigh their advantages and benefits against possible restrictive effects on competition. It is worth recalling that competition rules are only softened for agreements that are necessary and proportionate in the face of this particular global emergency. If doubts arise, competition authorities have already made themselves available to provide guidance on specific agreements.

IV. State aid

Both the Spanish Government and other EU Member States have granted aid to sectors most affected by the crisis. Should such aid be incompatible with the general prohibition of State aid within the EU, the European Commission has announced a certain relaxation of that prohibition. It has published a Guide for Member States to submit applications for authorisation as well as a Temporary Framework, which allows Member States to adopt five types of aid:

- Direct grants, selective tax advantages and advance payments of up to €800,000 per company, to cover urgent liquidity needs;
- State guarantees for bank loans to companies, to ensure banks keep providing loans to the customers who need them;
- Subsidised public loans to companies, to cover immediate working capital and investment needs;
- Safeguards for banks that channel State aid into the real economy, which shall be considered aid for the banks' customers and not the banks themselves; and
- Short-term export credit insurance.

In this context, it is of outmost importance that companies receiving State funds ensure that the European Commission has authorised the scheme. Otherwise, companies could be ordered to return the amounts received, as well as the interest accrued since they were granted.

V. Merger control

At the national level, the suspension of terms and deadlines decreed by RD 463/2020 affects both operations that were already notified and those that are notified during the State of alarm. Therefore, the corresponding authorisations will be delayed.

However, the third Additional Provision of RD 463/2020 would allow the CNMC to lift such suspension at the request of interested companies if it were necessary to avoid serious damage to their rights and legitimate interests.

At the European level, the European Commission has published a statement requesting companies to consider delaying new merger filings until further notice, whenever possible. However, the latest news from DG COMP show that this authority continues to operate and assess operations even while teleworking (e.g. in-depth assessment of the acquisition of Tachosil by Johnson & Johnson).

It is mandatory that, when facing any potential cooperation agreement, companies remember that the relaxation of competition rules concerns necessary and proportionate agreements in the light of the global emergency that we are facing

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