

COVID-19 and Competition law

The response of competition authorities to the crisis

The health emergency caused by the COVID-19 outbreak has altered supply and demand conditions in several markets, including disruptions in supply chains or unexpected peaks and valleys of demand. As a result, some companies may be forced to consider cooperating with third parties (including their competitors) to ensure the proper supply and distribution of products and services.

As we mentioned in our previous [alert](#) on competition developments and COVID-19, the European Network of Competition Authorities (ECN), which includes the Spanish national authority (CNMC), already anticipated its position with respect to this type of agreements, stating that the authorities would not act against those that were necessary and temporary to ensure the supply and distribution of essential products whose scarcity could jeopardize their availability to consumers.

We should recall, however, that this relaxed application of the rules does not allow for opportunistic behaviour, such as abuses of a dominant position or collusive practices by operators who might seek through cooperation with their competitors to mitigate a fall in their sales (output limitation, price agreements, market and/or customer sharing, etc.) and that the various authorities have already announced that they will continue to closely and actively monitor market developments to detect such behaviour.

In this alert, we review the measures taken by different competition authorities in recent weeks that we consider most relevant and will draw some practical conclusions for all.

The European Commission allows cooperation between companies to ensure the supply of essential products

On 8 April 2020, the European Commission published a [Communication](#) on the Temporary Framework for Assessing Competition Issues related to Business Cooperation in response to the COVID-19 emergency.

This Communication sets out the legality of possible forms of cooperation between companies to ensure the adequate supply and distribution of essential products and services.

The Communication has two objectives: (i) to explain the criteria that the Commission will apply when analysing cooperation projects between companies to alleviate shortages of essential products; and (ii) to establish an exceptional procedure by which the Commission may provide legal guidance on specific cooperation projects by granting *ad hoc* comfort letters.

This is a significant paradigm shift, considering that more than 15 years ago the system of prior consultation and individual approval was abolished. Since, companies no longer have to consult the Commission on the legality of a given practice in order to obtain an individual exemption decision^[1], but must assess it themselves in accordance with the various Community guidelines and the abundant existing case law.

However, given the current situation of exceptionality, the Commission has considered that companies may need specific guidance to avoid assuming a risk of non-compliance with the competition rules which could act as a brake on initiatives that are in principle designed to promote the general interest. This is why the Commission has decided to make itself available to companies providing them with an assessment within a short period of time and giving them certainty as to the compatibility of certain projects with Competition law.

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^[1] Following the entry into force of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [10]1 and [10]2 of the Treaty.

Thus, the Commission acknowledges that measures to adapt production, manage stocks or reorganise distribution may be necessary to deal with the crisis, and that implementing such measures requires a certain degree of exchange of information that, on other occasions, could be problematic from a competition law perspective.

The Commission states that such measures should not pose a problem if guarantees are put in place to minimise the risks to competition to the extent strictly necessary. Ultimately, it considers that cooperation will not be problematic if it (i) is designed and necessary to increase production efficiently or to avoid shortages in the supply of essential products or services; (ii) is temporary; and (iii) does not go beyond what is strictly necessary. Please note that it is essential to document any exchanges of information and cooperation agreements and to submit them to the Commission at its request.

In recent weeks, the Commission has already decided on several requests from companies that considered cooperation initiatives. We would highlight the letter of compatibility issued on the same day as the communication was published, giving the green light to Medicines for Europe, a network of manufacturers to ensure the supply of critical medicines for COVID-19 patients. This cooperation is designed to provide an efficient response to the current peak in demand for this type of product by pooling resources to improve, increase or reorganise production. It may also include the distribution of medicines.

The Commission has issued this letter subject to various guarantees accepted by Medicines for Europe. First, the cooperation will be open to any manufacturer of medicines who wishes to participate, an invitation that Medicines for Europe has already published. Second, all meetings and agreements reached in the context of the cooperation will be documented and shared with the Commission. Third, the exchange of sensitive information between manufacturers will be limited to what is strictly necessary to carry out the cooperation. In this respect, commercial information of the participants will always be collected by Medicines for Europe or a designated third party and provided to the other participants always in an aggregated form. The Commission will also indicate to the participants the appropriate forum for the exchange of information. Fourth, the cooperation is temporary and will end when the shortage of this type of product is over.

The British CMA

The UK Competition Authority (CMA), for its part, has adopted guidelines for the analysis of business cooperation in response to Covid-19, as it acknowledges that strict compliance with competition law could prevent certain cooperation between companies that are necessary to deal with the crisis.

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The CMA states that it will not pursue those temporary measures taken by companies that (i) are appropriate and necessary to avoid shortages or ensure the supply of essential products; (ii) are in the public interest; (iii) contribute to the welfare of consumers; (iv) address critical issues raised by the pandemic; and (v) do not last longer than strictly necessary.

From this perspective, the key factor in the analysis will be to assess the potential damage that coordination may cause to consumers or to the economy at large. Thus, coordination arrangements that ensure the supply of products to consumers or that the latter may travel safely to their respective jobs do not appear to be likely to harm consumers. The CMA says that this logic would apply even if the coordination were to reduce the range of products offered to consumers, provided that such a reduction is necessary to ensure the supply of essential products.

The Spanish CNMC

Also in Spain, the CNMC has announced that, in order to provide legal certainty to companies in their specific projects, it is prepared to implement a system of *ex ante* analysis of the compatibility with the Spanish Competition Act of the agreements submitted for consultation, provided that the following conditions are met:

- (i) necessity and proportionality in the present context;
- (ii) temporality;
- (iii) openness to third parties;
- (iv) avoidance of exchanges of sensitive commercial information between competitors that go beyond what is strictly necessary; and
- (v) documentation of contacts between the parties to the agreement and availability of such documentation at the CNMC's request.

Practical effects of these measures in our jurisdiction

It should be recalled that the CNMC, on March 31st last, made available to the public and companies a mailbox for consultations and complaints about anti-competitive conduct related to COVID-19.

According to its Register up to April 24th, since the opening of the mailbox the CNMC has received about 300 consultations and complaints sent by individuals and companies. As a result of the complaints received - most of which refer to possible anti-competitive conduct in the financial and marketing of basic goods and services sectors - the CNMC has launched investigations into three sectors:

- In the financial sector, the CNMC is assessing whether the fact that some financial institutions require additional guarantees to grant loans guaranteed by the State and other financial aid granted in the framework of this situation is compatible with the regulations or whether they could constitute unfair conduct.

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- The CNMC is also investigating whether the prices charged by various undertakers may derive from anti-competitive agreements or unfair aggressive behaviour, which may reduce the freedom of choice of relatives of the deceased.

- Finally, the CNMC also investigates the increase in the price of hydroalcoholic gels and the raw materials used in their manufacture (ethanol).



Source: CNMC

The CNMC has also received numerous queries about the legality of commercial agreements between competitors to deal with the effects of the crisis arising from COVID-19, specifically in the insurance, hospital, banking and health products (masks, respirators, and hydroalcoholic gels) sectors.

Although it is not publishing decisions, we know that the CNMC is responding to these queries quickly and efficiently, so we understand that this opens up a very interesting avenue for all those companies that in these exceptional times are considering any cooperation project with their competitors and have doubts about its compatibility with Competition law.

To this end, we would like to remind you of the requirements for benefitting from this new prior consultation procedure:

(i) There must be a clear and direct connection with the exceptional situation we are experiencing (therefore, the CNMC will not assess any measures that seek to resolve a previous problem, even if this has been exacerbated by COVID-19).

(ii) Beyond serving the companies, measures must serve the general interest, so that any improvements or efficiencies obtained must directly benefit consumers and users.

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(iii) Clearance will be easier to obtain if the products concerned are essential. However, we understand that this does not prevent the CNMC from assessing agreements that do not directly affect essential products, provided that they meet the other requirements.

(iv) The measures must be strictly necessary to solve the problem at issue and not go beyond that (this means limiting exchanges of information, avoiding coordination on issues that are not strictly necessary such as prices, volumes, etc.).

(v) Agreements must be temporary, i.e. last only while this exceptional situation does (which in no way means that they depend formally on whether the State of Alarm remains in force).

(vi) Cooperation must be open to third parties and, above all, transparent, in the sense that the CNMC must be informed punctually of all steps taken.

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Marimón Abogados is a law firm founded in 1931 that offers legal services in all areas of law and has offices in Barcelona, Madrid and Seville.

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