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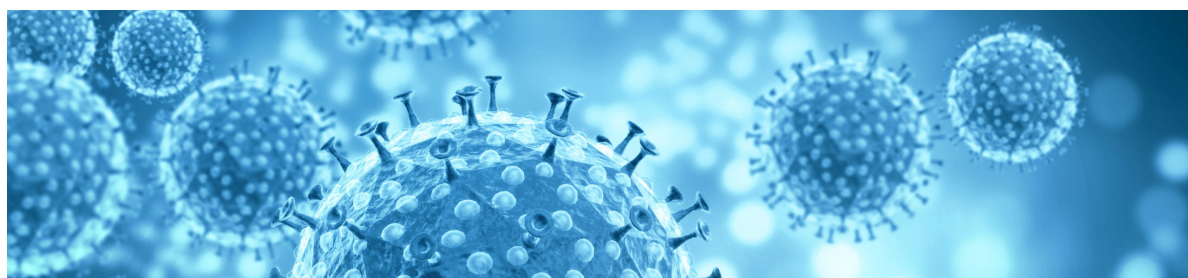
COVID-19 is Not a “Get Out of Jail Free Card” from EU Competition Law



By Jacques Derenne, Dimitris Vallindas and Ciara Barbu O'Connor on March 24, 2020

Posted in Coronavirus, EU Competition and Regulatory

The COVID-19 pandemic has triggered worldwide pandemonium and is disrupting business throughout all sectors. It is undeniably a major shock for the global economy. While the need for a coordinated response has been recognised at the highest levels in the EU, this does not mean that the application of competition law is suspended during the crisis.



In fact, the risk of competition law infringements often increases in times of crisis. For example, companies in difficulty may see cooperation with competitors as the only viable option; in other instances, certain companies may see an opportunity to exploit vulnerability by adopting abusive behaviour, as already seen in the sales of hand sanitizer at extortionate prices in light of the high demand resulting from COVID-19 (investigations for excessive pricing have been opened in Italy and Poland) or even face mask supplies being diverted from the health sector to the public at much higher prices. Competition authorities throughout Europe, including the European Commission, have been quick to respond and the prevailing message is simple: competition law continues to apply!

Some of the key elements that companies must keep in mind are as follows:

1. As noted, competition rules continue to apply. This is the golden rule.
2. Companies should bear competition law in mind when considering cooperating or collaborating with competitors even when asked to do so by governments in light of the COVID-19 crisis, as governmental encouragement cannot be used as a shield in the event

- of an investigation. Collaborating with competitors and, to a lesser extent, with other operators in a vertical relationship, continues to entail competition law risks.
3. In a joint statement issued by the European Competition Network of national competition authorities of the EU Member States on 23 March, companies have been reassured that the authorities will not act against legitimate cooperation aimed at preserving the supply of goods and services during the Covid-19 crisis, but nevertheless warning that they will not tolerate any price-gouging in particular by suppliers of medical equipment. When in doubt, seek further clarification from in-house or outside legal counsel.
 4. Some temporary and targeted exemptions or relaxing of the applicable rules will exist, but companies must carefully evaluate whether these apply to them. For instance, in the UK, competition rules were relaxed to allow retailers to share data on stock levels, cooperate to keep shops open or share distribution depots and delivery vans in order to meet the food-supply issues raised by COVID-19. Germany is also considering allowing closer cooperation between food retailers to avoid shortages. In Norway, the airlines SAS and Norwegian were granted a three-month exemption from Norway’s competition laws.
 5. However, competition authorities remain on their toes and on the lookout for possible anticompetitive behaviour. Sharing sensitive information, discussing prices, restricting output, sharing markets or customers continue to entail significant competition law risks, even in times of crisis. Some may remember that invoking the uncertainty that followed the 9/11 attacks did not prevent the European Commission from fining eleven airlines over €700 million for fixing fuel and security charges on flights. The Romanian competition authority has even published guidelines warning companies to not try to use the COVID-19 pandemic as an excuse for anti-competitive behaviour.
 6. Possibly abusive behaviour will also be closely scrutinised. In the UK, the CMA has already published an open letter to pharma, food, and beverage companies warning them not to try and capitalise on the ongoing crisis by charging unjustifiably high prices for essential goods or making misleading claims about their efficiency. The Italian competition authority is also investigating certain e-commerce providers on similar issues. Likewise, bundling high-demand products with other products can be dangerous. While such behaviour is generally problematic for companies with market power, in times of crisis regulators could define narrow geographic and product markets, which could result in companies finding themselves in a position they were not before. Such behaviour can also result in State regulation, as for example in France, where the government decided to impose price controls on hand sanitizers.
 7. Measures to limit the spread of the virus will also necessarily affect the functioning of competition authorities. While the latter are in theory “open for business”, the European Commission has already asked companies to delay their merger notifications where possible, and is no longer allocating case teams for new matters. This is due to the constraints European Commission officials are facing by working from home and the risk that third parties might not respond to requests for information. The same is true for France, Belgium, and Ireland, while the Italian authority has suspended all deadlines until 15 April.
 8. Alternatively, competition authorities might delay the moment when a filing is “complete” (to delay starting the formal deadlines), send requests for information to “stop the clock”, or simply be obliged to open a “Phase II” investigation, because they would not be in a position to complete their assessment during “Phase I”. And if market testing is required, further delays can be expected, as customers, competitors, and suppliers might have difficulties providing the requested information to the authorities.

9. The COVID-19 crisis has resulted in the Commission adopting a Temporary Framework to enable Member States to provide certain type of State aid more easily. We have published a separate blog on this matter here.
10. Private enforcement across Europe will also take a backseat for the time being as courts are postponing hearings.
11. The Court of Justice and General Court of the European Union have suspended all hearings.

Our Brussels team is available to provide assistance with any competition or EU law questions your company may have during and after the COVID-19 outbreak.

As you are aware, things are changing quickly and the aid measures and interpretations described here may change. This article represents our best interpretation and recommendations based on where things currently stand. This article is for informational purposes only and does not constitute legal advice and does not form an attorney client relationships.

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