

Informative Note

Cooperation agreements and the application of competition law in the exceptional context caused by COVID-19

24th March 2020

In the light of the situation caused by the COVID-19 pandemic, many national competition authorities have expressed their views on the possible consequences of the pandemic on the market and, in particular, on how it could lead to a breach of the rules of competition law. In this regard, and in an attempt to avoid this, the National Commission for Markets and Competition (CNMC) has published [a press release](#) in which it announces increased vigilance on all practices or abuses that may lead to the shortage or increase in price of certain essential products, in particular those related to the protection of public health. It also warned that special attention will be paid to all collusive behaviour which may have as its objective the fixing of abusive prices or which consists of agreements between operators.

Similarly, the national competition authority has set up [series of e-mail accounts](#) to encourage citizens to observe market behaviour and report possible anti-competitive conduct that may be taking place.

In this respect, it is important to note that, despite the current context, the competition rules in Spain remain fully in force and applicable, and consequently the various operators still intervening in the market cannot fail to take them into account.

Notwithstanding the above, in view of the great wave of doubts as to whether there could be a softer application of competition law, taking into account the very exceptional circumstances we are experiencing and the lack of - apparently - a unified criterion, the European Competition Network (ECN) - a mechanism for cooperation and communication between the European Commission and the national competition authorities of the Member States that was created precisely to bring together criteria in particularly controversial matters - has issued a communication on the application of competition law in the context of COVID-19. (*Vid.* [ECN message](#)). In this communication, it is stated that the aim of the antitrust rules is to ensure a level playing field between companies, regardless of the factual situation. However, the notice also states that it is understood that, in the circumstances, undertakings may have a temporary need to cooperate with each other in order to ensure fair supply and distribution, and accordingly states that **the ECN will not actively intervene against any such temporary measures which are deemed necessary to avoid a shortage of supply.**

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Notwithstanding the above, the ECN notes that basic products must continue to be offered at competitive prices, otherwise measures will be announced against all those undertakings which are taking advantage of the current situation, either by abusing their dominant position or by setting up so-called cartels.

It should also be noted that the notice seems to follow the same line as the approach taken by the United Kingdom's Competition Authority (CMA), which, on the occasion of COVID-19, also issued a notice stating that the competition rules may prevent the cooperation needed between companies to deal with the present crisis. Therefore, following the same criteria as those laid down by the United Kingdom Government, the CMA has decided to 'relax' the competition rules in order to help, in particular, the retail channels to cooperate and try to mitigate the effects of this crisis.

The same applies to the Dutch Competition Authority (ACM), which has also offered to answer any questions raised by companies on the partnerships they wish to set up to combat the crisis caused by COVID-19.

The case of South Africa also stands out, where a block exemption has been approved for all horizontal cooperation agreements between companies in the pharmaceutical sector.

In any case, the truth is that in all the communications referred to, we can find the same warning: **under no circumstances will covert conduct be tolerated which, taking advantage of the context, involves the commission of serious infringements.** And it is not for nothing, in fact, that we can already find some examples such as the case of the Italian Anti-Monopoly Authority (AGCM), which has already opened an investigation into various online sales channels for the possible commission of anti-competitive practices through the fixing, principally, of abusive prices on hygiene and basic need products. The competition authorities are therefore calling for responsible behaviour on the part of all economic operators.

In conclusion, without prejudice to the fact that the rules on competition must be respected at all times regardless of the circumstances, **it is advisable that, given the time we are witnessing, companies act with particular prudence before taking any kind of decision** and that, in any case, they have the advice of a professional expert in the field. In this regard, we must not forget that the full application of competition law also involves, of course, the possible imposition of significant penalties on the offending companies as well as, in certain cases, the private application of competition law, which means that those who have been harmed by an anti-competitive practice can claim compensation for the damages that it would have caused them within five years of its commission.

We hope the information is useful and of interest to you. At Andersen Tax & Legal we have created a multidisciplinary team to attend to all the questions that may arise on this aspect or in relation to the COVID-19.

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