

e-Competitions

Antitrust Case Laws e-Bulletin

Competition Law & Covid-19

Competition Law & COVID-19: An overview of EU and national case law

FOREWORD, COMPETITION POLICY, COVID-19

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e-Competitions Special Issue Competition Law & Covid-19 | 26 March 2020

The COVID-19 pandemic creates unprecedented issues for businesses and the global economy as a whole. The antitrust community is at the early stages of reacting to the situation: agency staff are working hard to keep the wheels on their existing workload, while taking steps to alleviate immediate supply and liquidity issues; meanwhile, the antitrust bar has started to debate with characteristic alacrity the appropriate short, medium, and even long-term responses to the challenges raised by the outbreak.

This Special Issue contains more than 70 early contributions to that debate. It includes articles and press releases from private practitioners and agencies in more than 20 countries, which cover a broad range of reactions and perspectives from around the world.

As these pieces show, in the immediate term we have seen an expedited response to some of the most pressing issues generated by the crisis and the sanitary containment measures being adopted throughout the world: antitrust agencies have had to switch to teleworking and adapt their workflow; statutory deadlines for investigations have been suspended in some countries that have been particularly affected (*e.g.*, Spain [7] and the Philippines); meanwhile several agencies have introduced extraordinary short-term measures that clarify the application of antitrust rules to certain categories of behavior, and in some cases exempt them altogether.

In the meantime, the considerable impact of the sanitary crisis on the real economy in Europe is leading to massive public support initiatives aimed at providing liquidity to companies, which will generally require clearance under EU State aid rules. Since March 16, the European Commission has moved quickly to relax the relevant rules with two communications. In particular, the Commission: (i) classified COVID-19 as an “exceptional occurrence” under Article 107 (2) (b) TFEU [2], which permits aid aimed at compensating for the direct damage that has occurred as a result, and is likely to be used in particular in the travel, tourism and hospitality sectors; (ii) in a “temporary framework” adopted on March 19 [3], re-activated Article 107 (3) (b), which permits aid aimed at remedying serious disturbances in a Member State’s economy and was extensively used after the 2008 financial crisis (very quickly afterwards, the Commission started clearing in record time several massive aid schemes on this basis, in

particular in Germany and France); and (iii) encouraged Member States to use other readily available legal bases in order to adopt support measures that do not need prior clearance (for instance non-aid measures or measures falling under the General Block Exemption Regulation or the *de minimis* thresholds).

This has been accompanied by several initiatives and developments that may well form the start of broader trends:

- Agencies are setting up task forces to consider and respond to antitrust issues that arise as a result of the outbreak. [4]
- Price gouging and excessive pricing investigations have started in multiple jurisdictions such as Italy [5] or China, especially with regard to supplies that relate to the COVID-19 outbreak.
- There has been a renewed focus on consumer protection rules, with the United Kingdom [6] and Australian agencies having already issued public reminders of the relevant rules.
- The sanitary crisis and containment measures have given rise to some horizontal cooperation initiatives, for instance in retail or logistics, and some authorities have already stated that they would look favorably at such initiatives. [7]
- Extensive work-from-home policies and the suspension of certain statutory deadlines have raised challenging issues for antitrust authorities attempting to conduct market tests, and for merging parties trying to push through merger control approvals. Some authorities have started prioritizing cases and are increasingly calling parties to postpone formal notifications. [8]
- In parallel, businesses may be finding it even more difficult than normal to respond to extensive requests for information, which may have contributed to an increased use of stop-the-clock powers by the European Commission and other agencies. [9]
- The wave of notifications under State aid rules is probably only beginning and the Commission has started to clear new schemes or measures literally every day since March 20. [10]

Looking further ahead, practitioners are anticipating the crystallization of several issues that may push the boundaries of established principles in competition law, in particular if the sanitary crisis and its economic consequences last for an extended period of time:

- Beyond the immediate horizontal cooperation initiatives that may be needed to manage the challenges of an extended lockdown, the antitrust bar is gearing up for a debate on whether antitrust rules are fit for purpose in the current circumstances or, for example, crisis cartels may justify short-run cooperation to secure the long-term survival of certain industries.
- In merger control, notifying parties may seek to revive “failing firm” and industrial policy arguments to persuade agencies to approve concentrations that raise *prima facie* substantive issues.
- Under EU State aid rules, general liquidity measures available to the entire economy may give rise to more targeted interventions for companies or sectors that were in difficulty before the COVID-19 outbreak even began. A key question will, therefore, be whether the new legal bases activated by the Commission under Article 107 (2) (b) and 107 (3) (b) will be able to cover all such interventions, or whether the Commission will need to fall back on the more stringent conditions of Article 107 (3) (c) regarding rescue and restructuring aid. The banking sector, which is in addition covered by rules under State aid control and recovery and resolution rules, will also need to be monitored closely.

- Finally, a period of economic distress combined with extensive use of work-from-home policies may put strain on businesses' compliance policies, potentially leading to antitrust violations.

All this points to a challenging time for antitrust agencies and private practitioners, as it does for the broader business community. We have no doubt that the antitrust community will meet these difficulties, and look forward to a broad and healthy debate on these issues. Meanwhile, we hope that you, your colleagues, and families, are well and stay safe at this time.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] See **Spanish Competition Authority**, *The Spanish Competition Authority suspends most procedures in line with the Government's Royal Decree declaring state of alert, but keeps open the e-services portal for procedures whose parties can prove that delay is against public interest*, 19 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93812.

[2] See **Morten Nissen, José Rivas**, *The EU Commission encourages delay of merger notifications and electronic submission as special measures due to COVID-19*, 16 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93784.

[3] See, e.g. **Morten Nissen, José Rivas**, *The EU Commission adopts a new Temporary Framework to complement the existing State aid toolbox during the COVID-19 outbreak*, 19 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93810, **James Webber, Ruba Noorali, Sara Ashall, Matthew Readings, Elvira Aliende Rodriguez**, *The EU Commission announces a major relaxation of the State aid rules via a new Temporary Framework during the COVID-19 outbreak*, 19 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93813, and **François-Charles Laprèvote, Theodora Zagoriti, Giulio Cesare Rizza**, *The EU Commission adopts a Temporary Framework to support the economy in the context of the COVID-19 outbreak*, 19 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93837.

[4] See, e.g. **UK Competition Authority**, *The UK Competition Authority launches a COVID-19 taskforce to ensure compliance in markets affected by the public health emergency and to advise the Government on competition law matters during the outbreak*, 20 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93814.

[5] See **Italian Competition Authority**, *The Italian Competition Authority investigates online sales platforms for excessive pricing of hand sanitizers and respiratory protection masks in the face of COVID-19 outbreak in the country*, 27 February 2020, *e-Competitions Bulletin Preview*, Art. N° 93787.

[6] See, e.g. **Gillian Sproul, Simon Harms**, *The UK Government and the Competition Authority adopt two recent measures against shortages and high prices during the COVID-19 outbreak*, 19 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93884.

[7] See, e.g. **Joanna Christoforou**, *The UK Government announces measures to allow supermarkets to work together to feed the nation during the COVID-19 outbreak*, 19 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93844, **Norwegian Competition Authority**, *The Norwegian Government grants the transportation sector a 3-month temporary exception from the Competition Act as special measure due to COVID-19*, 19 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93782, and **Australian Competition Authority**, *The Australian Competition Authority allows banks to cooperate on a small business relief package in the face of COVID-19 outbreak*, 20 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93825.

[8] See, e.g. **Philip Monaghan**, **Courtney Dyer**, **Riccardo Celli**, *The EU Commission updates its practical guidance to merging parties and encourages companies to delay merger notifications until further notice due to the COVID-19 outbreak*, 16 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93822, **Léna Sersiron**, **Romain Travade**, *The French Competition Authority is not able to guarantee the usual processing delays for mergers since its staff is working remotely during the COVID-19 situation*, 17 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93802, and **Philip Andrews**, **Laura Treacy**, *The Irish Competition Authority encourages delay of merger filings and establishes a temporary process for electronic notification of mergers as special measures due to COVID-19*, 18 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93832.

[9] See, e.g. **Thomas McGrath**, **Sascha Schubert**, *The US FTC and EU Commission struggle to balance the need for business and the practical challenges for mergers during the COVID-19 outbreak*, 13 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93800.

[10] See, e.g. **European Commission**, *The EU Commission approves a €130 million State aid scheme to help the Danish small and medium-sized enterprises affected by the COVID-19 outbreak*, 21 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93871, **European Commission**, *The EU Commission approves €3 billion Portuguese State aid schemes for small and medium-sized companies and midcaps affected by the COVID-19 outbreak*, 22 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93873, and **European Commission**, *The EU Commission approves a €50 million Italian State aid scheme to support the production and supply of medical devices*, 22 March 2020, *e-Competitions Bulletin Preview*, Art. N° 93877.