



Competition Law and Covid-19

Joint statement by the European Competition Network (ECN) on application of competition law during the Covid-19 crisis

Background

Covid-19 has caused an unprecedented health and economic crisis in Europe to which member states have reacted with exceptional measures aimed to preserve public health and to avoid the expansion of the virus. In this context, the ECN has published a Joint Statement on the application of competition law during this crisis. The Spanish Competition Authority has echoed such statement publishing its translation on its official webpage.

Competition law still applies but it reacts to the situation

The first message of the Statement is that competition law, as well as its objectives and basic principles, remain totally in force despite the exceptional nature of the current crisis. At times like the current ones, it is still important to ensure a level playing field between companies and to fight against those who distort competition to the detriment of the public interest. For this reason, cooperation agreements with competitors remain prohibited if they have as their object or effect the restriction of competition (art. 101.1 TFEU) and they do not have pro-competitive elements that outweigh the anticompetitive harm (art. 101.3 TFEU).

Without prejudice of the foregoing, the ECN recognizes that the current extraordinary situation may trigger the need for companies to

cooperate in order to ensure the supply and fair distribution of scarce products to all consumers, and that the different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments.

Considering the above, the ECN understands that cooperation agreements aimed to ensure the supply of essential products must be assessed in view of the specific current circumstances. According to the Statement, the most likely scenario is that such agreements will not amount to a restriction of competition or will generate efficiencies (allow access to essential products) that will outweigh such restrictions. Consequently, the ECN undertakes not to “actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply”.

Do not go over the line

The position of the ECN facilitates cooperation between competitors, but it is not a blank cheque. Agreements must be temporary (they must be in force only during the crisis) and limited to what is indispensable to guarantee the supply of products to the consumers. If the cooperation is more intense, the parties will walk into a dangerous path.

In case of doubt, the Declaration encourages companies to reach out to the competent authorities to obtain informal guidance.



Fight against abusive conducts remains

Additionally, the ECN states in the Statement that it is of utmost importance to ensure that products considered essential to protect the health of costumers (e.g. face masks and sanitizing gel) remain available at competitive prices. For this reason, the ECN warns that they “will not hesitate to take action against companies taking advantage of the current situation by cartelizing or abusing their dominant position”. It is clear from the communication that aggressive action will be taken against agreements on prices to capture excessive

margins, or against the unilateral imposition of abusive conditions. In this respect, it is important to note that the Authorities may take action not only against the manufactures, but also against distributors established in the EU.

Finally, the ECN points out that manufacturers are allowed to set maximum prices for their products to fight against speculation and opportunistic price increases. This type of measure, which is acceptable under applicable laws, is very useful to limit unjustified price rises in a period of exploding demand of certain products.