



## ANTITRUST DEVELOPMENTS DURING COVID-19

In the current issue, we deal with recent antitrust developments related to COVID-19.

### Table of contents

1. Italy: State Aid and COVID-19.....	2
2. Enforcement of antitrust rules on agreements and abuses during the COVID-19 outbreak .....	4
3. Antitrust rules for the life science sector during COVID-19 .....	5
4. Unfair commercial practices and COVID-19 .....	6



## 1. Italy: State Aid and COVID-19

In response to the economic crisis caused by the COVID-19 outbreak, the European Commission has published a Communication setting out the main drivers of the *Coordinated Economic Response to the COVID-19 emergency* by the European Institutions and has adopted the *Temporary Framework for State aid measures support the economy* ("**Temporary Framework**")<sup>1</sup>. Both Communications set out the measures Member States may implement under the EU State aid regime to support their citizens and ensure liquidity and access to finance for companies, in particular SMEs, which are facing economic difficulties due to the COVID-19 pandemic. The Temporary Framework also outlines the rules the European Commission should apply when assessing State aid schemes in support of national economies notified by Member States<sup>2</sup>. On April 9, 2020, the European Commission has also launched a consultation procedure with Member States, which is aimed at examining the potential inclusion within the scope of the Temporary Framework of measures enabling Member States to provide re-capitalisation to companies in need, as well as the relevant compatibility conditions.

The support measures that Member States may adopt under the EU State aid regime to mitigate the socio-economic impact of the COVID-19 pandemic include general support measures that do not qualify as State aid, as well as State aid measures that are not subject to the prior notification and standstill obligations under Article 108(3) TFEU. These include:

- support measures granted to providers of healthcare services or other services of public interest;
- general measures (*i.e.*, applicable to all companies), such as wage subsidies, suspension of payments of corporate and value added taxes or social contributions;
- financial support measures directly granted to consumers, for instance for cancelled services;
- *de minimis* aid measures, *i.e.* measures that satisfy the eligibility criteria and do not exceed the thresholds provided under any *de minimis* Regulation<sup>3</sup>;
- aid measures that meet the eligibility criteria and compatibility conditions laid down in any of the general or sector-specific block exemption Regulations and Decisions<sup>4</sup>. The relevant Regulations and Decisions cover, *inter alia*, aid measures in favour of SMEs and their access

---

<sup>1</sup> European Commission's Communication of March 19, 2020 on the "[Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak](#)", as [amended](#) on April 3, 2020 (please click here for the [consolidated version](#)).

<sup>2</sup> In the last few weeks, the European Commission approved around fifty national measures notified by Member States under the Temporary Framework. In addition, the Commission adopted four decisions on four national measures under Article 107(2)(b) TFEU, which qualifies as *de jure* compatible with the internal market aid granted to make good the damage caused by natural disasters or exceptional occurrences.

<sup>3</sup> [Regulations \(EU\) n. 1407/2013](#) and [n. 360/2012](#) establish the eligibility conditions for *de minimis* aid granted to, respectively, undertakings active in most sectors and undertaking providing services of general economic interest. Under the former, an aid measure qualifies as *de minimis* where the total amount of aid granted to a single undertaking does not exceed a EUR 200.000 over three fiscal years. For the road haulage sector the ceiling is EUR 100.000, for the agriculture and fisheries sectors the ceilings are, respectively, EUR 25.000 and EUR 30.000. Under the latter, aid may qualify as *de minimis* if it does not exceed a total amount of EUR 500.000 per undertaking over three fiscal years.

<sup>4</sup> In particular, (i) the General Block Exemption Regulation ([Regulation \(EU\) No 651/2014](#)), which applies to most sectors of the economy, (ii) the Block Exemption Regulations that apply to the agricultural and forestry sectors ([Regulation \(EU\) No 702/2014](#)) and the fisheries and aquaculture sectors ([Regulation \(EU\) No 1388/2014](#)), (iii) and the European Commission [Decision](#) on aid granted to undertakings providing services of general economic interest.



to finance, disadvantaged workers, regional ports and airports, local infrastructures, aid to make good the damage caused by natural disasters, regional aid, etc.

Compensation and support measures that are subject to prior notification under the EU state aid regime may still be approved by the European Commission where they satisfy specific compatibility conditions and are granted to:

- companies facing bankruptcy due to the COVID-19 outbreak (art. 107(3)(c) TFEU)<sup>5</sup>;
- companies active in sectors that have been seriously affected by the COVID-19 outbreak (e.g., transport, tourism and hospitality), for damages suffered due to the outbreak (art. 107(2)(b) TFEU)<sup>6</sup>.

Based on Article 107(3)(b) TFEU, which covers aid to remedy a serious disturbance in the economy of a Member State, Member States may also grant the additional aid that the European Commission has set out under the Temporary Framework and which are potentially subject to the prior notification requirement: direct grants, selective repayable advances or tax advantages; State guarantees on bank loans; subsidized interest rates for loans; guarantees and loans channeled through credit institutions or other financial institutions; short-term export credit insurance; support for COVID-19 relevant research and development; support for testing and upscaling infrastructures; support for the production of COVID-19 relevant products; targeted deferrals of tax payments and/or suspensions of social security contributions; targeted wage subsidies for employees.

Law Decree No. 23 of April 8, 2020 ("**Liquidity Decree**") was adopted in the above context and provides for the implementation of measures up to EUR 400 billion aimed at: facilitating access to credit for undertakings and professionals, supporting exports, supporting the operation of undertakings, suspending tax-related obligations, as well as strengthening special powers in strategic sectors (so-called golden powers) and in the justice sector. Apparently, discussions with the European Commission on the Liquidity Decree are already ongoing. Based on the EU State aid provisions described above, certain support measures provided under the Liquidity Decree may not trigger the prior notification and standstill obligations under Article 108(3) TFEU. Other support measures may, instead, require prior approval from the European Commission before implementation if they meet the selectivity criterion and, thus, qualify as State aid. These measures include:

- the granting by SACE S.p.A. ("**SACE**") of guarantees to national and international banks and financial institutions providing liquidity support to companies;
- the co-insurance support system for exports, where the Italian State takes over from SACE its insurance-related commitments;
- the granting by the State of guarantees on any exposures of Cassa Depositi e Prestiti S.p.A.;
- the strengthening of support measures related to the Guarantee Fund for SMEs provided under Law Decree n. 18 of March 17, 2020 ("**DL Cura-Italia**")<sup>7</sup>.

---

<sup>5</sup> The [Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty](#) shall apply.

<sup>6</sup> This compensation may also be granted to undertakings that were already granted aid under the [Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty](#).



## 2. Enforcement of antitrust rules on agreements and abuses during the COVID-19 outbreak

The outbreak of COVID-19 and its economic impact within and outside of the EU has raised a number of questions related to the application of competition rules in the current crisis framework. The European Competition Network has recently published a statement in which it has clarified the key points on the application of competition rules to agreements and abuses during the outbreak<sup>8</sup>.

- i. Because of the extraordinary conditions created by COVID-19 pandemic, companies are allowed to cooperate to guarantee availability of the products necessary to fight the outbreak;
- ii. in principle, competition authorities will not intervene against necessary and temporary measures put in place by companies;
- iii. it is of paramount importance to guarantee the availability of the products used to fight COVID-19 at competitive prices. Competition authorities will thus monitor conducts aimed at introducing unjustified excessive prices, while companies will be allowed to fix maximum prices, so as to avoid price speculations;
- iv. companies are invited to contact national competition authorities, the EU Commission or the EFTA Surveillance Authority in case of doubts on the application of competition rules.

In a number of jurisdictions, both within and outside of the EU, measures aimed at regulating the application of competition rules during the COVID-19 outbreak have been introduced.

- ⇒ In France, the government has adopted regulations aimed at setting the price and guaranteeing the availability of products used to fight COVID-19<sup>9</sup>.
- ⇒ In Italy, the seizure of tools used for the fight of COVID-19 has been allowed<sup>10</sup>.
- ⇒ In Germany, the government will introduce rules authorizing cooperation between manufacturers and retailers to avoid shortages of food products<sup>11</sup>.
- ⇒ In Greece, the Competition Authority has clarified that it will not intervene *vis-à-vis* measures aimed at setting maximum prices or recommended prices (or even fix prices for promotions) where the market share thresholds set forth by Regulation 330/2010 (30%) are exceeded, assuming that such measures are justified<sup>12</sup>.

---

<sup>7</sup> On 25 March 2020, as part of the measures provided for by the DL Cura-Italia, the European Commission has already approved ([SA.56690](#)) a State guarantee scheme to support a moratorium on the debts contracted with banks by SMEs affected by the current health emergency.

<sup>8</sup> See the *Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis* at: [https://ec.europa.eu/competition/ecn/index\\_en.html](https://ec.europa.eu/competition/ecn/index_en.html).

<sup>9</sup>See <https://www.autoritedelaconurrence.fr/fr/article/message-du-reseau-europeen-de-concurrence-lattention-des-entreprises-concernant-lepidemie>.

<sup>10</sup> See Article 6 of the Decree Law No. 18 of 17 March 2020 (“DL Cura Italia”), according to which the Head of the Department of Civil Protection may order the requisition, by any public or private entity, until the end of the state of emergency, of goods of any kind, necessary to deal with the health emergency. *DL Cura Italia* available at: <http://www.governo.it/node/14252>.

<sup>11</sup>See *German retailers to be allowed to coordinate supply to avoid Covid-19 shortages*, in *MLex* at: <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1172429&siteid=190&rdir=1>.

<sup>12</sup> See <https://www.epant.gr/enimerosi/deltia-typou/item/836-deltio-typou-efarmogi-kanonon-antagonismoy.html>.



- ⇒ In the U.K., the government will adopt measures aimed at allowing supermarkets to cooperate (i.e. to share human resources, delivery vans, depots) in order to guarantee the availability of food products<sup>13</sup>.
- ⇒ In Norway, a temporary exemption from the application of competition rules in the transport sector has been introduced<sup>14</sup>.
- ⇒ In Iceland, the Competition Authority has granted an exemption from the application of competition rules with respect to cooperation in a number of sectors (transport, pharma, credit)<sup>15</sup>.
- ⇒ In Canada, the Competition Bureau has clarified that cooperation initiatives between companies will be exceptionally allowed<sup>16</sup>.
- ⇒ In Turkey, the Competition Authority has announced that it will intervene against conduct of excessive prices, especially in the fresh food sector<sup>17</sup>.

### 3. Antitrust rules for the life science sector during COVID-19

On 8 April 2020, the EU Commission has adopted a Communication setting out a temporary framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (“**COVID-19 Communication**”)<sup>18</sup>. In the COVID-19 Communication, the Commission provides guidance on the main rules for cooperation between pharma companies during the COVID-19 pandemic, which can be summarized as follows:

- ⇒ Trade associations may be entrusted with collecting information aimed at (i) coordinate joint transport for input materials, (ii) identifying essential medicines, (iii) defining aggregate production and capacity data, (iv) defining demand prediction models, (v) share supply gap information. In these cases, no individualised information should be exchanged.
- ⇒ Coordination aimed at reorganisation of production, so as to focus on optimising output of most requested medicines, is possible.
- ⇒ Exchange of commercially sensitive information can occur in exceptional circumstances with the following safeguards: (i) such exchanged should be objectively necessary to increase output and address shortages of products, (ii) it should be in place only during the COVID-19 outbreak, (iii) the measures adopted should be proportionate. In any case, companies should document the exchanges of information occurred and submit them to the Commission upon request.

---

<sup>13</sup> A brief summary of the measures at: <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>.

<sup>14</sup> See: <https://www.regjeringen.no/no/aktuelt/flyselskapene-gis-klarsignal-til-a-samarbeide/id2693957/>.

<sup>15</sup> See the section *Exemption from the ban to cooperate*, at: <https://en.samkeppni.is/published-content/news/covid-19>.

<sup>16</sup> For more details on the assessment of the Canadian Competition Bureau, see: <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html>.

<sup>17</sup> See <https://www.rekabet.gov.tr/en/Guncel/public-announcement--afef54447272ea118125005056b1ce21>.

<sup>18</sup> European Commission’s Communication of 8 April 2020 on the *Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*, C(2020) 3200 final.



- ⇒ The Commission is ready to provide guidance to companies in cases where there is uncertainty as to the application of competition rules.
- ⇒ The Commission will continue to strictly enforce competition rules against situations in which undertakings take advantage of the pandemic to abuse their dominant position of unjustifiably break cartel prohibitions.

#### 4. Unfair commercial practices and COVID-19

In the most critical phase of the health emergency caused by COVID-19, the Italian Competition Authority (“ICA” or “Authority”), by virtue of its competence in the field of consumer protection, has taken action in several cases, adopting interim measures aimed at promptly repressing the unfair conduct of companies commercializing products allegedly used for the pandemic.

In four cases, the ICA considered unfair the commercial practice of promoting medicinal products and supplements by claims which would have led consumers to consider such products, contrary to the truth, to be suitable for contrasting COVID-19<sup>19</sup>. In one case, the ICA challenged claims that were likely to give rise to the erroneous belief that the use of a test, in the domestic environment, would allow a quick and reliable self-diagnosis of possible COVID-19 contamination<sup>20</sup>. In another case, the conduct being vetted consisted in having advertised a life-saving “prevention kit” against COVID-19, which boasted undemonstrated anti-virus capabilities<sup>21</sup>. The practice of a fundraising platform, that induced consumers to make online donations automatically charging a 10% commission on donations, was also challenged<sup>22</sup>. In addition, there have been cases in which the Authority has requested information from companies or initiated an investigation into the unjustified increase in the price of masks and other sanitizing products<sup>23</sup>. More recently, the Authority intervened by adopting an interim measure against a company that invited to purchase FFP2 category masks through its website, using images and descriptions of well-known and reliable brands<sup>24</sup>. In the Authority’s view, such conduct is deceptive as the products sold, which did not hold any certification, did not have the required quality and technical characteristics. Moreover, the masks were sold at high prices and delivered considerably later than the advertised time frame of 24/48 hours.

In most cases, the ICA intervened by adopting immediately enforceable interim measures, by virtue of the powers granted to it by Article 27, paragraph 3, of the Consumer Code. The latter provision allows the Authority to order the immediate suspension of the commercial practice before having thoroughly examined it, due to an urgent situation justifying such suspension<sup>25</sup>. The Authority grounded the extreme seriousness, and urgency for the interim measures intervention in

---

<sup>19</sup> PS11723 – *Farmaco Coronavirus-Kaletra*, decision No. 28173 of 17 March 2020; PS11722 – *Carlita Shop-Integratori antivirali*, decision No. 28178 of 22 March 2020; PS11735 – *Farmacia generica.it-Kaletra*, decision No. 28207 of 27 March 2020; PS11733 – *Farmacia maschile.it-Kaletra*, decision No. 28206 of 27 March 2020.

<sup>20</sup> PS11727 – *Rapid test COVID-19*, decision No. 28202 of 22 March 2020. With reference to the most recent proceedings initiated by the ICA, please see the press release in case PS11734 of 3 April 2020.

<sup>21</sup> PS11732 – *Oxystore-Vendita online prodotti emergenza sanitaria*, decision No. 28205 of 27 March 2020.

<sup>22</sup> PS11726 – *Gofundme-Commissioni facoltative*, decision No. 28179 of 22 March 2020.

<sup>23</sup> Press release of 27 February 2020 in case PS11705, and press release of 12 March 2020 in cases PS11716 and PS11717.

<sup>24</sup> Press release of 10 April 2020 in case PS11736.

<sup>25</sup> See also Article 8, paragraph 3, of ICA’s decision of 1<sup>st</sup> April 2015, No. 25411, *Regulation on investigation procedures concerning misleading and comparative advertising, unfair commercial practices, violation of consumer rights in contracts, violation of the prohibition of discrimination, unfair terms*, published in the Official Journal of 23 April 2015, No. 94.



the actuality of the conduct of the companies, the involvement of the generality of consumers due to the exponential diffusion of COVID-19, as well as the exploitation of the pandemic to influence consumers.

The key issue, in the decisions of the Authority, is the notion of the consumer, who is in a *“particular condition of weakness”*, *“significantly affected by the current health emergency situation”*, with a consequent *“alteration of his ability to evaluate”*. Therefore, the ICA describes a vulnerable and weak consumer. In order to assess the unfairness of a commercial practice, it is necessary to consider, among others, the parameter of the *“average consumer”*<sup>26</sup>. According to the interpretation of the Court of Justice<sup>27</sup>, an *“average consumer”* is a subject reasonably well-informed and circumspect, who takes into account the social, cultural and linguistic factors surrounding him. Already in the past, however, the administrative judge<sup>28</sup> has considered legitimate the intervention of the Authority aimed at protecting the most vulnerable consumers, observing that, if the abstract model of the average consumer appears to be suitable to base a judgment of unfairness, the expansion of the notion of *“average consumer”* becomes justified if it is necessary to ensure the protection of the right to health.

The cases involving COVID-19 emergency seem to confirm an approach aimed at expanding the notion of *“average consumer”*. The ICA describes a weak and vulnerable consumer, clearly because of the serious crisis condition caused by the pandemic, and extends this condition of weakness and vulnerability to *“the generality of consumers”*, without identifying a specific category of consumers which could be more sensitive than others.

---

<sup>26</sup> In the Italian case law, *ex multis* State Council, decision of 4 March 2013, No. 1259; State Council, decision of 4 July 2012, No. 3901; Regional Administrative Court of Lazio, decision of 23 May 2011, No. 4532.

<sup>27</sup> *Ex multis*, Court of Justice, judgement of 13 January 2000, case C-220/98, *Estée Lauder*.

<sup>28</sup> *Ex multis*, Regional Administrative Court of Lazio, decision of 3 July 2012, No. 6026.

# Newsletter

APRIL 2020



Covid-19  
Task Force

The EU, Antitrust and Regulation Department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

For further information:

**Vito Auricchio**

---

**Partner**

T. +39 06.93.18.271 /  
+39 02.89.63.071

[vauricchio@legance.it](mailto:vauricchio@legance.it)

or your direct contact at Legance.



# Newsletter

APRIL 2020



Covid-19  
Task Force

## THE FIRM

Legance is an independent Italian law firm with expert, active and result-oriented lawyers, with a strong team spirit that has permitted a flexible and incisive organisational model that, through departments active in all practice areas of business law, offers the right balance between the specialist and the lawyer as a global consultant. Legance comprises over 270 lawyers, working in its Milan, Rome, London and New York offices, and has a diverse and extensive practice covering the following areas: Corporate Finance; Banking & Finance; Energy, Project & Infrastructure; Debt Capital Markets; Equity Capital Markets; Financial Intermediaries Regulations; Investment Funds; Dispute Resolution; Restructuring and Insolvency; EU, Antitrust and Regulation; Employment and Industrial Relations; Tax Law; Administrative Law; Real Estate; Compliance; Shipping, Aviation and Transportation; Intellectual Property; TMT (Telecommunications, Media and Technology); Environmental Law; Insurance Law; Food Law; Data Protection; White Collar Crimes. For more information, please visit our website: [www.legance.com](http://www.legance.com).

## DISCLAIMER

The only purpose of this Newsletter is to provide general information. It is not a legal opinion nor should it be relied upon as a substitute for legal advice.

This Newsletter is sent to persons who have provided their personal data in the course of professional relations, meetings, seminars, workshops or similar events. It's may also receive this newsletter because Legance was authorized. You may finally receive it, because you have engaged Legance. If you wish not to receive the newsletter anymore, please write an email to [newsletter@legance.it](mailto:newsletter@legance.it) and you will be removed from the list of recipients. Until you cancel yourself from the list of recipients your personal data will be processed on paper or electronically for purposes which are related to the existing professional relations, or for information and divulgation reasons, but are not communicated to third parties, unless such communication is imposed by law or strictly necessary to carry out the relation. Data controller is **Legance – Avvocati Associati**. The list of the data processors is available if you write an email to [clienti.privacy@legance.it](mailto:clienti.privacy@legance.it). In any event, you are entitled to your rights as set forth in the current data protection legislation. All the above requests must be forwarded by fax to **Legance – Avvocati Associati**, on nr. +39 06 93 18 27 403.

Legance - Avvocati Associati and its partners are not regulated by the Solicitors Regulation Authority ("SRA") and the SRA's compulsory insurance scheme does not apply to them (they are instead covered by equivalent Italian insurance). A list of the partners of Legance - Avvocati Associati is open to inspection at the office of its London branch at Aldermay House 10-15 Queen Street - EC4N1TX, and also on the following website [www.legance.com/professionals](http://www.legance.com/professionals). Legance LLP only advises on Italian law related matters.