

Competition Law and COVID 19

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With more than 200 countries affected to date, the current crisis presents far reaching implications for competition law and policy on a global scale. This crisis is affecting developed and developing countries alike, especially by putting young competition authorities under a stress test of the resilience of their competition rules. As the pandemic of COVID19 spreads to every parts of the world, most recently the African continent, competition authorities are looking at whether relaxing their competition rules to allow for cooperation between key actors of the health sector and other essential economic sectors, like the airline industry. However, full or partial relaxation of competition rules may have adverse effects on industries, business and consumers by resulting in anti-competitive practices such as price fixing, excessive pricing and collusion between competitors.

Competition authorities have responded to this crisis in a piecemeal approach. While the European Commission was quick to a temporary framework[1] and relied on measures implemented during the 2008 financial crisis[2] , in the US, the FTC and DOJ only recently issued a guidance note based on previous emergency situations (Harvey and Irma hurricanes) to allow cooperation of competitors in the health sector, especially in the development of vaccines.[3] The UK has granted temporary exemptions from anti collusion rules to supermarkets. An approach also adopted by the German competition authority to ensure continuity of food supplies. South Africa promptly enacted an overall sector wide block exemption for the health sector.[4] Some countries like France and China have toughened up their price regulations.[5]

With a surge in excessive pricing of health-related products such as masks and hand sanitizers, competition authorities are currently dealing with ongoing investigations in a wide range of jurisdictions, namely the UK, France, Brazil, Russia, Spain and Italy. Some have announced price controls over high demand items. This has already been done in France through a decree regulating the price of hand sanitizers to prevent retailers and pharmacists engaging in abusive price increases.[6] Enforcement of sanctions against anti-competitive conducts toughened up, especially from competition authorities in Kenya and China, which have already heavily put sanctions on retailers engaged in excessive pricing of

health-related products.

In times of crisis, governments can allow specific exceptions for joint research projects because they understand the need for collaborative efforts between firms to, for instance, develop a vaccine. Such exceptions have already been granted during other pandemics such as Swine Flu in 2009, MERS in 2015 and influenza in 2019. Those exceptions may be exempted from competition rules. For instance, the European Commission has called for an increase effort in research and development at the European level to develop a vaccine against COVID 19 within an exceptional regulatory framework (as it already did in 2009). [7] In South Korea, similarly, the government encouraged the main pharmaceutical companies to work together on a vaccine through an emergency use authorisation that was established post MERS in 2015.[8]

Apart from exceptions, certain countries granted exemptions from anti collusion rules to businesses in specific economic sectors. The most far reaching measures were taken by South Africa with the COVID-19 Block Exemption for the Healthcare Sector 2020. It established price controls on everyday goods as well as a list which exempts hospitals, medical suppliers, laboratories and pathologists, pharmacies, and healthcare funders from engaging in anti-competitive collaboration.[9] Other temporary exemptions have been granted to the airline industry by Norway, the retail sector in Germany, banking in Australia, the distilled spirit industry in the US, education in Denmark and tourisms in Italy and Kazakhstan.

Competition authorities must enforce strict compliance to competition rules, even during this time of pandemic. Despite this, some leverage and legal leeway enacted by certain competition authorities demonstrates a willingness to allow for a temporary flexibility to mitigate the economic impact. This can be achieved through sector specific block exemptions, strict guidance on collaboration in times of emergency or enhanced legislation on price controls. This time of crisis creates a great opportunity for competition authorities around the world to engage in international cooperation to share best practices. Prompt responses to the crisis in developing countries demonstrates the ambition and dynamism of such agencies (Peru, South Africa, Kenya). Nevertheless, it remains to be seen how competition authorities will cope during the crisis with sustaining investigation, enforcement and compliance with competition rules.

[1] François-Charles Laprévôte, 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

[2]

<https://www.concurrences.com/fr/bulletin/special-issues/competition-law-covid-19/competition-policy-covid-19-an-overview-of-antitrust-agencies-responses>

[3]

<https://www.competitionpolicyinternational.com/ftc-and-doj-announce-expedited-antitrust-procedure-for-coronavirus-public-health-efforts/>

[4] Minister of Trade and Industry of South Africa, 'Covid-19 Block Exemption for the Health Care Sector, 2020 – South Africa' (2020) 657 Government Gazette 12.

[5] State Administration of Market Supervision (SAMR) of People's Republic of China, 'Urgent Notice of the General Administration of Market Supervision on Severely Cracking down on Price Violations in the Production of Preventive and Control Materials during the Epidemic Prevention and Control Period' (5 February 2020)

<http://www.gov.cn/zhengce/zhengceku/2020-02/06/content_5475223.htm> accessed 22 March 2020.

[6] 'Encadrement Des Prix Pour Les Gels Hydroalcooliques' (*Economie.gouv.fr*, 2020)

<<https://www.economie.gouv.fr/dgccrf/encadrement-des-prix-pour-les-gels-hydroalcooliques-voir-la-faq>> accessed 22 March 2020.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Pandemic (H1N1) 2009' (15 September 2009) 1 <<http://op.europa.eu/en/publication-detail/-/publication/9ec8052e-c269-4b57-9be9-4b40c5101d15/language-en>> accessed 22 March 2020.

[8]

<https://www.reuters.com/article/us-health-coronavirus-testing-specialrep/special-r>

eport-how-korea-trounced-u-s-in-race-to-test-people-for-coronavirus-
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[9] South African Government, 'Guidelines - Coronavirus Covid-19 in South Africa' (23 March 2020) <<https://www.gov.za/coronavirus/guidelines>> accessed 23 March 2020.