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COVID-19: COMPETITION LAW
ENFORCEMENT CONSIDERATIONS

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The rapid escalation of the COVID-19 public health crisis has led to an unprecedented situation that poses countless legal challenges at both the international and national level. This newsletter addresses the main competition law issues arising from the economic situation and measures adopted to address the COVID-19 pandemic.

In Spain, the government has adopted, among others, two extraordinary provisions to try to address the crisis caused by the COVID-19 outbreak. First, Royal Decree 463/2020 declaring a state of emergency to address the COVID-19 health crisis was adopted and entered into force on 14 March 2020. It was modified by Royal Decree 465/2020 of 17 March ("**State of Emergency RD**"). Secondly, on 17 March 2020, Royal Decree-Law 8/2020 on urgent and extraordinary measures to address the economic and social impact of COVID-19 was adopted ("**RDL 8/2020**").

1.1 State aid

Several Member States of the European Union (“EU”), including Spain through RDL 8/2020, have announced urgent measures to address the economic impact of COVID-19. These measures must comply with EU regulations on State aid and **may require prior authorisation from the European Commission**, in accordance with the provisions of Articles 107 et seq. of the Treaty on the Functioning of the European Union (“TFEU”).

Even in times of crisis, it is important that potential beneficiaries of State aid verify that any funds are legal before taking receipt of them. For up to ten years after receipt, the European Commission may order the repayment of State aid that is not compatible with the TFEU and has not been previously approved; this applies for a period of 10 years from the date of the aid is granted.

Not every State measure will require prior authorisation from the European Commission. Several of the measures provided for in RDL 8/2020, which are intended to apply without distinction to all sectors of the economy (e.g. wage subsidies, or the suspension of corporation tax or VAT payments or social security contributions), or direct payments to consumers (e.g. for services that have been cancelled), are generally not governed by the State aid rules.

The measures that do constitute State aid are those that apply to specific sectors, either pursuant to the regulation that governs them (they only apply to one sector of the economy) or de facto (in practice they only benefit companies in a given sector or which are in a special situation that constitutes an exception to the general scheme). As a general rule, these measures must be notified to and approved by the European Commission in advance. **However, express prior authorisation from the European Commission is not needed** if the measures fall within the scope of existing exempting regulations and do not exceed the limits laid down therein (e.g. *de minimis* aid, R&D or aid to SMEs).

The European Commission has announced a set of measures to deal with the COVID-19 crisis¹ that invites Member States to make use of two TFEU articles intended to be applied in an emergency or

¹ https://ec.europa.eu/commission/presscorner/detail/es/ip_20_459

crisis situation such as the present one, and which allow State aid to be granted to undertakings and complement traditional aid measures:

- (i) Aid to compensate undertakings for damage caused by “natural disasters or exceptional occurrences” (Article 107.2.(b) TFEU). This provision may be used to justify aid to sectors directly and specifically affected by the crisis, such as transport or tourism, or to undertakings in sectors affected by the order to close establishments to the public included in the State of Emergency RD, among which the European Commission highlights the transport, tourism, hotel, restaurant and retail sectors, and organisers of events that have been cancelled. It is important to note that the “one time, last time” principle does not apply to this type of aid; that is, beneficiaries of aid aimed at rescuing and restructuring non-financial entities in crisis under article 107.3.(c) TFEU may also be beneficiaries of measures against COVID-19 during the same period of 10 years. Accordingly, justified aid on the basis of article 107.2.(b) TFEU can be combined with rescue and restructuring aid aimed at solving serious liquidity needs and financial difficulties due to COVID-19 or that have been aggravated by it.
- (ii) Aid to “remedy a serious disturbance in the economy of a Member State” (Article 107.3.(b) TFEU). The European Commission has confirmed that the COVID-19 outbreak is a serious situation that requires a quick response and acknowledges that, as a consequence, “the entire EU economy is suffering a serious disturbance” and that public support is necessary to ensure that undertakings have sufficient liquidity to be able to continue operating during and after the COVID-19 outbreak.

Thus, on 19 March 2020 the European Commission adopted a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak² (“Framework”). The Framework entered into force immediately and will remain in force until 31 December 2020. It envisages several types of aid that may be offered by Member States:

- a) **Direct grants, selective tax benefits and advance payments:** allow states to grant aid up to EUR 800,000 per “undertaking” (not per individual company or subsidiary) so that it may meet its urgent liquidity needs. There must be an estimated budget for the aid and it can only be granted to undertakings that were not in crisis on 31 December 2019 but are currently as a result of the COVID-19 outbreak.
- b) **State guarantees for bank loans granted to undertakings:** Member States will be able to offer public guarantees to ensure that banks continue lending funds to clients that need them. Guarantee premiums are set at a minimum level, distinguishing between SMEs and larger corporations, and on the basis of their duration. It is also

² https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

possible for Member States to adopt different provisions, modulating maturity, price and guarantee coverage on the basis of what is indicated in the Framework. The maximum permitted duration of guarantees is six years.

- c) **Subsidised public loans to undertakings:** Member States will also be able to grant loans to undertakings with reduced interest rates that enable them to cover their immediate capital and investment needs. The Framework sets a basic interest rate that can be adjusted by Member States. The duration of the loan contract may not exceed six years.
- d) **Short-term export credit insurance:** the Framework provides for increased flexibility in how Member States can demonstrate that, in a given country, marketable risks are not covered by private insurance companies, making it possible for the Member State to offer short-term export credit insurance if needed.

It is noteworthy that the Framework expressly indicates that this aid is **aimed directly at undertakings** and that banks must limit their activity to channelling it to undertakings. Accordingly, any aid that is granted to financial institutions falls outside the scope of the Framework and will follow the ordinary State aid procedures.

Member States **must notify the European Commission in advance of the measures they intend to adopt** in applying the Framework, although, as long as they comply with the Framework's requirements, the measures will be considered to be compatible with the internal market. In practice, this means that it should not be difficult to obtain express authorisation for the aid within a short timeframe as from the date of notification. In fact, the European Commission is being particularly swift in approving aid, having already approved five aid frameworks in less than five days since the announcement of the Framework.³ Under this Framework, the European Commission has approved a scheme of state guarantees notified by Spain for businesses and self-employed workers with a budget of 20.000 million euros.

³ The European Commission has set up an email inbox and dedicated telephone number so that Member States may submit notifications of COVID-19 aid. The European Commission has already approved multiple measures notified by Italy, Portugal, Germany, France, Denmark, Luxembourg, Latvia and Spain.

1.2 Merger control

The State of Emergency RD foresees the suspension of all administrative deadlines for as long as it remains in force. The procedural deadlines to adopt and notify merger-control decisions in the context of ongoing proceedings are therefore suspended and the Council of the National Markets and Competition Commission (the “CNMC”) is no longer under an obligation to adopt a decision within the normal terms. Similarly, parties to those proceedings are no longer under an obligation to respond to requests for information when the deadline to respond had not expired on or before 14 March 2020 and, accordingly, cannot be sanctioned by the CNMC for failing to respond during the term of the State of Emergency RD.

However, paragraph 3 of the third additional provision of the State of Emergency RD provides that the CNMC may adopt organisation and investigation measures to avoid serious harm to the rights and interests of the parties to proceedings, as long as the parties agree to them. In practice, on the basis of this provision and at the request of the interested parties, the CNMC is ordering the continuance of proceedings that clearly do not pose any competition concerns and that, consequently, do not require consultations with third parties such as competitors, clients or suppliers, and may therefore be handled without difficulty.

For its part, the European Commission has published a communication⁴ in which it requests parties to delay merger notifications, as long as this is feasible. It justifies this request by stating that it may encounter difficulties in collecting information from third parties during this period and that it may face restrictions in terms of accessing information and databases due to the measures adopted to encourage remote-working.

⁴ <https://ec.europa.eu/competition/mergers/news.html>

1.3 Sanction Proceedings - Cooperation between undertakings and deadlines

The CNMC has warned undertakings that it does not consider that the current crisis means, generally speaking, that they can infringe the rules on agreements between undertakings or abuse dominant positions. In fact, the CNMC has increased its vigilance of possible abuses or practices that could hinder the supply, or increase the price, of products that are considered essential to protect the health of consumers.

However, the CNMC, as other competition authorities have done, has also demonstrated a certain degree of understanding in light of the exceptional situation caused by the COVID-19 outbreak. A recent joint communication by the European Commission and Member States' national competition authorities states that competition authorities intend to adopt a certain degree of flexibility when assessing temporary cooperation agreements between businesses that concern the supply and distribution of scarce consumer products and which generate efficiencies that avoid supply shortages. They have gone so far as to indicate that they have no intention of intervening in these cases and are willing to respond to consultations and offer informal guidance on projects that facilitate the production and supply of essential products.⁵ The competition authorities also underline that manufacturers are allowed to impose maximum resale prices on their distributors, which could contribute to limiting potential price increases by distributors.

The maximum deadline for the CNMC to conclude sanction proceedings has been automatically suspended, as have procedures or requests that had not concluded on or before 14 March 2020, such as responses to requests for information or submissions of written observations regarding statements of objections or decision proposals.

⁵ https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

1.4 Leading Lawyers



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