

COVID-19 Pandemic: Impact on Competition Law in France

Habiba Bhour

Teacher Assistant, Kuwait International Law School
PHD student, University of Lyon 3-Jean Moulin, France

Abstract

This paper discusses the impact of the Corona pandemic on French competition law, through an analytical methodology based on extrapolating decisions of the French Competition Authority, decrees and ordonnance issued by French authorities, in addition to the text of European regulation, and European cases. This paper debates the procedures of the French competition authorities during the pandemic period aimed at assisting companies in the country and in adapting the procedures for controlling the merger process by enforcing the use of communications for notifications while warning users of the possible extension of merger deadlines. This paper reached a set of results, including the importance of changing and adapting the procedures of the French competition authorities and their impact on this crisis, which led to a reaction to the concerns and questions of economic operators. Competition authorities have remained vigilant and have repeatedly demonstrated their steadfast determination to continue pursuing illegal practices. In light of the previous results, the research recommends the necessity of continuing resistance to competition authorities to the challenges of the crisis and its effects on prices. In the short term, they may need to take action to determine where and when prices will rise in the supply chain and take temporary action or send warning messages to quickly end the offending behavior. These authorities should also coordinate their actions with consumer protection authorities, to protect consumers from unfair pricing practices.

Keywords: Competition authority, Companies rescue, defending action, European commission, Transparency.

Introduction

Competition law aims to frame the principle of freedom of trade and industry and is in principle seen as good news for companies, in the sense that it is seen as a tool for competitiveness rather than as a blockage because it is a path to productivity⁽¹⁾, an incentive for innovation, it prevents rent savings and predatory behavior. In addition, competition law prevents companies from becoming victims of foreign cartels, sometimes financially supported by their State (China for example), takeovers by foreign companies⁽²⁾, hostile takeovers⁽³⁾ or abuse of dominant position as demonstrated by the condemnation of Google⁽⁴⁾.

The economic consequences are appearing day after day; especially the situation can worsen when it is difficult to count on the world trade organization (WTO) which is dying today as evidenced, in particular, by the resignation of Director General in May 2020⁽⁵⁾. The United States is rediscovering the benefits of anti-trust rules after putting them on hold for 20 years⁽⁶⁾. China, for its part, has specific market conquest practices. The French economy will therefore have to rely on French and European competition law tools, existing or to be created to resist the crisis.

Today, new European giants are to be developed thanks to a strong industrial policy. A trade defense policy needs to be built, as well as an anti-dumping policy fighting against slashed prices, facilitated by internet sales. Competition policy can help bring about market solutions provided that it is not restrictive and that it allows the creation of large European companies.

Competition authorities have an important role to play in providing insight

-
- (1) Philippe Aghion, *Competition and Growth: Reconciling Theory and Evidence*, The MIT Press, 2008.
 - (2) Brenot Pierre Sellal Emmanuel Weicheldinger, *Volatility of Securities, Strategic Assets and Foreign Investments*, August & Debouzy, March 13, 2020: <file:///Users/chapuis/Downloads/volatilite-des-titres-actifs-strategiques-et-investissements-etrangers.pdf>. Nicola Bonucci, Sébastien Crepy et Camille Paulhac, Cabinet Paul Hastings
<https://capitalfinance.lesechos.fr/analyses/points-de-vue/controle-des-investissements-etrangers-vers-un-veritable-protectionnisme-europeen-1199488>.
 - (3) exemple l'Etat français a ainsi pu mettre son veto sur le rachat par le géant américain Teledyne de Photonis, société française spécialisée en vision nocturne.
 - (4) <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-sanctionne-google-hauteur-de-150-meu-pour-abus-de-position>.
 - (5) <https://www.latribune.fr/economie/international/le-chef-de-l-omc-bete-noire-de-trump-va-demissionner-en-pleine-crise-economique-mondiale-847815.html> This premature departure of the Brazilian in September comes at a time when the world economy registers its most violent slowdown since the Great Depression of the 1930s. The WTO has been going through a deep crisis for months
 - (6) T. Philippon, «The Great Reversal: How America Gave Up on Free Markets», 2019.

into the positive efficiencies of business concentration for the nation. Given the rigidity of competition, companies need clear rules in order to be able to move quickly on the markets, while providing the authorities with guarantees of compliance with the competition rules. While competition law was created for the benefit of the consumer, it must rapidly evolve for the benefit of economic public order.

However, the economic consequences of the current global pandemic are of such extent that they will necessarily have effects on competition policies in a world dominated by market economy and free trade. As this model is showing its limits more and more every day, competition policies will have to be reviewed to better coordinate with other public policies.

In the immediate term, legal systems already allow states to intervene, as two examples of very different scope illustrate. States can, on the one hand, derogate from the very principle of free competition and price fixing. Apart from requisition measures, this can result in the establishment of price controls on products deemed essential. This is the case in France for gel and hydro alcoholic solutions, the price of which was determined by Decree No. 2020-197 of March 5, 2020⁽⁷⁾ adopted on the basis of Article L 410-2 al. 3 of the Commercial Code, which allows in the event of a crisis or exceptional situations, temporary exemptions from the principle of freedom of prices stated in paragraph 1.

On the other hand, states can above all try to support the economy with massive measures of direct or indirect aid, within the limits set in the European Union by state aid controls. The response from the European institutions was very rapid. Building on the experience of the 2007/2008⁽⁸⁾ crisis, the Commission significantly adjusted this control to allow Member States to take the immediate support measures that the urgency required. While the temporary framework was adopted on March 19, 2020⁽⁹⁾, the list of decisions taken a week later by the Commission was already impressive.

The first decision based on this text, dated March 21, concerns precisely the three support schemes for the French economy⁽¹⁰⁾, which have been declared

(7) Official Journal of the French Republic March 6, 2020.

(8) Here we are talking about the subprime crisis which is a financial crisis which affected the real estate sector and which affected the world economy from 2007.

(9) Communication from the European Union, Temporary framework for State aid measures aimed at supporting the economy in the current context of the COVID-19 outbreak: Official Journal of the European Union n ° C 93, March 20, 2020 The text was enlarged on April 3, 2020.

(10) The European Commission has authorized three French state aid schemes aimed at supporting

compatible⁽¹¹⁾. A second decision concerning France was adopted on March 30⁽¹²⁾. At the same time in the other components of competition law (antitrust and merger control), the authorities have had to adapt. Of course, the issue of relations between firms in difficulty and competition law is far from new and has been studied many times⁽¹³⁾, but in a more limited context.

We were mainly interested in the difficulties of certain companies, whether they were offenders⁽¹⁴⁾ or bought out, more rarely in the difficulties of a specific sector. The global nature of the current crisis, to which must be added the unprecedented containment measures, calls for responses of another degree. Numerous competition authorities around the world have issued press releases and other statements in recent days announcing various measures⁽¹⁵⁾, some going as far as the establishment of “task forces”⁽¹⁶⁾. Their list quite logically follows the progression of the pandemic. Chinese authorities opened fire in early February⁽¹⁷⁾.

They were soon joined by the authorities of the Americas and Europe. Within the Union, apart from the position taken by the Commission, the joint declaration from the member authorities of the European Competition Network dated 23 March 2020⁽¹⁸⁾, which is in addition to the individual measures, deserves to be

the French economy in the context of the coronavirus outbreak. More specifically, these are the following regimes: two regimes allowing the French public investment bank Bpifrance to provide state guarantees on commercial loans and lines of credit, for companies with up to 5,000 employees. And a scheme intended to provide state guarantees to banks on portfolios of new loans for all types of businesses. This is a direct aid to businesses, which will allow banks to quickly provide liquidity to any business that needs it.

(11) Commission of the European Union, press release IP/20/503, March 21, 2020.

(12) Commission of. European Union, press release IP/20/556, March 30, 2020.

(13) for summaries, note., the special issue devoted to this subject, «Companies in difficulty and competition»: RID éco. 1995, p. 303 and s.; DGCCRF, competition workshop, June 23, 2004, “Firms in difficulty and application of competition law” (edited by J.-M. Cot and L. Idot): Rev. conc. consume 2005, n° 143. On the basic issues (crisis cartels, failing company), the issues remain the same, even if the solutions may change due to the scale of the crisis

(14) L. Idot, The company in difficulty facing competition law sanctions, in press, mixtures C. Saint-Alary-Houin, 2010.

(15) R. Pepper, Competition policy & COVID19: An overview of antitrust agencies’ responses, March 26, 2020, e-Competitions, Competition Law & Covid-19, art. n° 93888, www.concurrences.com.

(16) This is the case in the United Kingdom (CMA, cp, March 20, 2020; <https://www.gov.uk/government/publications/covid-19-cma-taskforce>) or in Australia, cp March 27, 2020, <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic>. In France, the Authority announced the establishment of an internal service on April 6, 2020.

(17) Chinese Competition Authority, Formal statement, 6 February 2020, e-Competitions, n° 93921.

(18) Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, disposable <https://ec.europa.eu>.

mentioned taken by the National Competition Authorities (NCAs), including in France the Competition Authority⁽¹⁹⁾.

The economic impact of the Covid-19 health crisis has prompted a rapid reaction not only from governments and the legislature but also from competition authorities in response to the concerns and questions of economic operators. What measures are in place to facilitate cooperation between companies in times of crisis without the risk of hindering competition? What timetable can be anticipated for merger operations?

I- Competition law in the face of Covid -19

A- Arrangement of procedures

The economic impact of the Covid-19 health crisis has prompted a rapid reaction not only from governments and the legislature but also from competition authorities in response to the concerns and questions of economic operators.

As provided for by Law n ° 2020-290 of March 23, 2020⁽²⁰⁾ authorizing the government to take, by ordonnance⁽²¹⁾, all measures allowing “to face the consequences, in particular of an administrative or jurisdictional nature”, ordonnance n ° 2020-306 extends a number of time limits applicable in procedural matters. A circular dated March 26, 2020, from the Ministry of Justice, explains the new method of calculating deadlines. The French Competition Authority is fully concerned by these measures.

As of March 17, 2020, and without waiting for the order of March 25, 2020, the Authority published a press release adapting the merger control procedures due to the Coronavirus which invited companies to postpone their merger plans, imposed the appeal to dematerialized communication for notifications and warned users of the probable lengthening of the deadlines for concentration authorizations.

On March 27, 2020, taking note of the publication of the order (ordonnance) of March 25, 2020, the Authority issued another press release adjusting the deadlines and procedure of the Competition Authority during the period of health emergency.

(19) A first press release was adopted on March 17. It was replaced by a new press release on March 27, 2020 and followed by new announcements on April 6, 2020, <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse>.

(20) Law n ° 2020-290 of 23 March 2020 urgently to deal with the covid-19 epidemic <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746313/#>:

(21) In French politics, an ordonnance is a statutory instrument issued by the Council of Ministers in an area of law normally reserved for primary legislation enacted by the French Parliament.

More structurally, ordonnance no. 2020-306 of March 25, 2020⁽²²⁾ “relating to the extension of expired deadlines and the adaptation of procedures” provided for the suspension, until the expiration of a period of one month after the end of the current state of health emergency, deadlines after which an administrative decision must be taken or is implicitly acquired, as well as the postponement of the starting point of these deadlines

Essentially, the press release provides two types of clarification:

First, the Authority indicates that it is making the procedure dematerialized by requiring the use of electronic means (sending emails) for clemency requests, referrals, observations to a notification of grievances in response to a report or even requests relating to business secrecy. Second, the Authority specifies how the provisions of the order of 25 March 2020 will apply to its procedures.

First, with regard to the time limits to be expected for the processing of merger cases, the Competition Authority indicates that the measures to prevent the epidemic linked to Covid-19 will have an impact on the capacity of services to process merger cases with the usual diligence. In particular, the collection of information from third parties will be made more difficult.

Title II of this ordonnance applies to State administrations, including the Competition Authority, and specifies under Article 7 that “subject to the obligations resulting from an international commitment or from the law of the European Union, the deadlines at the end of which a decision, an agreement or an opinion (...) can or must be taken or is acquired implicitly and which have not expired before March 12, 2020 are, on that date, suspended until ‘at the end of the period’, namely a period of one month from the date of cessation of the state of health emergency declared on March 22, 2020.

As a result, from March 12, 2020, and until the expiration of a period of one month after the end of the state of health emergency, the legal and regulatory deadlines for examining operations are suspended of merger.

The ordonnance does not, however, prevent the adoption of an act or the completion of a formality the term of which expires within the period in question: it does, however, allow the act performed to be considered not to be illegal within the additional time limit⁽²³⁾. The Authority’s position on this

(22) Ordonnance no. 2020-306 of March 25, 2020, relating to the extension of deadlines expired during the health emergency period and to the adaptation of procedures during this same period, Official Journal of the French Republic n ° 0074 of March 26, 2020.
<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755644/2020-10-16/>.

(23) Interpretation circular of March 26 (corrected on March 30) of title I of ordonnance n ° 2020-

point is to make its best efforts to deliver its decisions and opinions within the normal time limits, without waiting for the expiry of the additional time limits conferred by these provisions⁽²⁴⁾. This position concerns above all cases considered as simple, namely those which can be settled by a Phase I decision, and which do not require a market test whose response rate would be compromised by the emergency period.

In addition, the deadlines for implementing the commitments are therefore suspended or postponed until the expiration of a period of one month from the end of the state of health emergency.

However, ordonnance No. 2020-427 of April 15, 2020 (having updated the aforementioned ordinance) notably provides details on the possibility for the administrative authorities to exercise their jurisdiction during the period of a health emergency.

Thus, the Competition Authority can within the framework of its powers “modify or terminate these commitments or, when the interests for whom it is responsible justify it, to prescribe their application or order new ones, within the time limit that ‘she determines. In all cases, the administrative authority takes into account, in determining the obligations or deadlines to be respected, the constraints linked to the state of health emergency”⁽²⁵⁾.

However, as regards the postponement of merger projects, the Competition Authority invites companies to postpone any economic merger project that is not urgent. In the aforementioned press release, the ADLC (French Competition Authority) announces the resumption of these deadlines, suspended since March 12, 2020, from June 24, 2020. During the epidemic, declarations and Documents must be submitted electronically, as delivery of documents in physical form, by hand or by mail, is no longer possible.

On the other hand, it is important to note that it is possible that in the aftermath

306 of March 25, 2020: «The ordonnance does not provide for a general suspension or a general interruption of the deadlines that have expired during the legally protected period defined in Article 1, nor a removal of the obligation to carry out all acts or formalities which expire within the period in question. The effect of Article 2 of the ordonnance is to prohibit that the act which took place within the new time limit could be regarded as late».

(24) Press release, March 27, 2020, «Adaptation of the competition authority's deadlines and procedures during the health emergency period», available at the following address: <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/adaptation-des-délais-et-procédures-de-l'autorité-de-la-concurrence-pendant-la>.

(25) Ordonnance n° 2020-427 of April 15, 2020, laying down various provisions in terms of deadlines for dealing with the covid-19 epidemic, article 6.

of the Covid-19 crisis, an opportunity could be created and the argument of the “failing company” - implying that the bankruptcy of the target is imminent and would be the only way out (counterfactual scenario) in the event that the transaction is not authorized under merger control - is more easily accepted by the ADLC.

B- Covid 19: Competition law to the rescue of companies

1- Competition law is not necessarily an obstacle to cooperation in times of crisis

After a joint press release with the competition authorities of the member states on March 23, 2020, indicating that it would not oppose the necessary and temporary measures put in place to avoid a shortage of supply of basic necessities, the European Commission has since implemented a temporary framework specifically adapted to business cooperation aimed at responding to the health crisis.

The Covid-19 crisis, which companies must face, may lead them to cooperate with each other in order to overcome this event for the benefit of consumers, for example by bringing together logistics solutions in order to distribute essential products.

Thus, on April 3, 2020, the European Commission amended its communication of March 16, referring to the temporary framework for state aid and supporting the economy in the context of the epidemic. In application of this new text, the French regime guarantees aid for small and medium-sized enterprises whose export activities are suffering during the coronavirus pandemic.

Three first aid measures aimed at supporting the French economy were authorized within 48 hours of the entry into force of the temporary framework, a second authorization decision concerning the French “Solidarity Fund” scheme having been issued on 30 March⁽²⁶⁾. The last aid submission concerned the French guaranteed scheme for small and medium-sized enterprises whose export activities are suffering from the coronavirus pandemic: this was also authorized, on April 24, 2020, by the supervisory authority.

The Commission found that the scheme notified by France complied with the conditions set out in the temporary framework. In particular, i) it covers

(26) Decree n ° 2020-371 of March 30, 2020 relating to the solidarity fund intended for companies particularly affected by the economic, financial and social consequences of the spread of the covid-19 epidemic and the measures taken to limit this spread <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041768315/2020-10-13/>.

guarantees on operating credits of limited duration and volume; ii) it is limited in time; iii) it limits the risk taken by the State to a maximum of 90%; (iv) it provides for a minimum remuneration for guarantees; and (v) it contains sufficient safeguards for banks to effectively reserve aid for those recipients who need it. The Commission concluded that the measure was necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State, in accordance with Article 107 (3) (b) of the Treaty on the Functioning of the European Union and under the conditions set out in the temporary framework.

Granted in the form of state guarantees on loans, the aid will be available to all French exporting companies with an annual turnover of less than 1.5 billion euros. The scheme should make it possible to mobilize 150 million euros⁽²⁷⁾, and it aims to limit the risks associated with the granting of credit to exporting companies hardest hit by the economic repercussions of the coronavirus pandemic, and thus to guarantee the continuation of their activities.

Regarding companies, these have not been forgotten since the European Commission published on March 23, jointly with the Supervisory Authority (EFTA) and the national competition authorities together forming the European network of competition, a joint statement on the application of antitrust rules during the covid-19 crisis; on March 30, it also launched a website aimed at helping companies wishing to collaborate lawfully, with a dedicated e-mail address created to accommodate requests for informal advice on specific initiatives.

Finally, on April 8, it published a communication setting up a “temporary framework for the assessment of issues of cartels and abuse of a dominant position linked to cooperation between companies in the response to emergency situations arising from of the current covid-19 epidemic”.

According to the Commission, the epidemic is a serious public health emergency and has produced a major shock affecting the entire economy through different channels and in different ways: general supply shock resulting from the breaking of supply chains. supply, combined with an asymmetric demand shock caused either by a sharp drop in consumer demand for certain products and services, or by a sharp increase in demand for others, notably related to the health sector (in particular which includes pharmaceutical companies, medical equipment manufacturers and their distributors).

(27) https://ec.europa.eu/commission/presscorner/detail/fr/IP_20_734.

These exceptional circumstances may lead companies to cooperate with each other in order to overcome, or at least mitigate, the effects of the crisis for the ultimate benefit of citizens. They can thus ensure the adequate supply and distribution of essential commodities and services scarce during the covid-19 epidemic, thereby addressing shortages of these essential goods: for example, drugs and medical equipment used to test and treat diseases infected patients, or necessary to mitigate and possibly overcome the epidemic.

In view of these objectives, the Commission is proposing, on an exceptional and temporary basis, new “antitrust” assessment criteria. In the health sector in particular, cooperation between businesses - which may moreover have been imposed, encouraged and / or coordinated by the public authority - could thus take different forms, including coordination of the reorganization of production, since it would enable producers to meet the demand for urgently needed medicines in all Member States. This cooperation may further require the exchange of commercially sensitive information and some coordination as to which site produces which drug, so that not all companies focus on one or a few drugs, while others remain in under-production.

These behaviors are obviously problematic and normally condemnable with regard to European competition rules; it is in fact a given that they prohibit any cooperation or exchange of information between economic operators, each of whom must independently determine the policy it intends to follow on the market. But the current exceptional circumstances allow them and do not give rise to an application priority for the Commission, provided that they are limited in time and meet the principles of necessity and proportionality - insofar as they are objectively necessary, but do not go beyond what is strictly necessary to achieve the objective of remedying or avoiding the shortage of supply.

Better yet, the authority encourages pro-competitive cooperation aimed at addressing these challenges, especially in response to emergencies related to the current covid-19 epidemic. However, it is well aware that the self-assessment of their agreements by companies, in principle since the entry into force of Regulation No 1/2003, may not be sufficient to ensure their legal certainty, in particular with regard to new provisions totally contrary to the usual competitive assessments; it is therefore committed to providing antitrust guidance and support to facilitate the correct and rapid implementation of the cooperation necessary to overcome the crisis, in the ultimate interest of citizens, with companies being encouraged to document all exchanges and agreements concluded between them and to make them available to the Commission on request.

2- Comfort letter issued to Medicines for Europe

From April 8, 2020, in application of the temporary application, the Commission sent a first comfort letter, made public on April 28, 2020, to the Association “Medicines for Europe” (MFE)⁽²⁸⁾.

The comfort letter concerns a specific cooperation project between pharmaceutical producers aimed at reducing the risk of a shortage of essential hospital drugs for the treatment of patients with the coronavirus. This project involves in particular the modeling of the demand for Covid-19 drugs, the coordination of the use of production capacities in Europe, as well as the identification of means of optimizing available resources.

Such cooperation would have been strictly prohibited under normal circumstances. However, in the context of the current health crisis, faced with the need to increase production and improve the supply of Covid-19 medicines across Europe, the Commission has authorized this cooperation subject to certain guarantees⁽²⁹⁾.

The Commission points out, however, that this comfort letter does not cover any discussion of prices or any other coordination on matters which are not strictly necessary to achieve the objectives set. Likewise, any behavior leading to opportunistically exploiting the crisis as a “cover” for unnecessary collusive behavior will be penalized.

This is in line with the conclusions of the Commission, which has also identified the risk of shortage with the support of the European Medicines Agency. It therefore recognizes that this cooperation is necessary, in the context of the current crisis, to improve the supply of covid-19 drugs in the European Union; it therefore does not raise competition concerns under Article 101 of the Treaty. MFE agrees, however, to put in place certain guarantees, the first being the open nature of the cooperation to any pharmaceutical manufacturer wishing to participate.

In addition, minutes of all meetings will be drawn up and kept, copies of the agreements concluded between the participating companies - within the

(28) she represents the European generic pharmaceutical industries), aiming to address the risk of shortage of critical hospital drugs for patients infected with covid-19.

(29) First, the cooperation will be open to any pharmaceutical manufacturer wishing to participate, even if he is not a member of the association; Then that the minutes of all the meetings will be drawn up and kept, and copies of any agreement concluded between the companies within the framework of this cooperation will be communicated to the Commission; and finally that the exchange of confidential commercial information between manufacturers will be limited to what is essential to effectively achieve the objectives set out to the Commission.

framework of this cooperation - to be communicated to the Commission, which will make its contribution, as well as the European Agency for Medicines and National Health Systems. As for the exchange of confidential business information between manufacturers, they will be limited to what is necessary to effectively achieve the stated objectives. Finally, the cooperation will be limited in time until the risk of shortage is overcome.

The Commission further specifies that the comfort letter does not cover any price discussion or any other possibility of coordination on matters which are not strictly necessary to effectively achieve the objectives set in the project. It is also subject to the condition that cooperating companies do not unduly increase prices beyond what is justified by possible cost increases. Hence the reminder of the principles according to which the conduct of seeking to exploit the crisis opportunistically and of using it as a “cover” to adopt unnecessary collusive behavior will continue to not be tolerated by the Commission.

II- The reorientation of actions

Several statements testify to the willingness of the competition authorities to adapt to the economic and social consequences of the pandemic by using the instruments at their disposal to redirect their actions. The objective is twofold. We must first protect citizens and production structures (A), but conversely supports useful and necessary actions (B).

A- Protective action

When the objective of protection is in question, competition law is more suited to the fight against certain harmful behavior than to the preservation of sensitive structures and sectors. Either way, it is just one tool among many.

1- The law of anti-competitive practices makes it possible to fight against certain harmful behaviors.

In the absence of state price controls, the decrease in certain goods combined with a sharp increase in demand can lead to a rise or even an explosion in prices. Ensuring that essentials remain available and at reasonable prices becomes the priority⁽³⁰⁾.

Two preliminary remarks can be made. All authorities are not on an equal footing. Those whose competences cover in addition to competition law consumer law are more active, because they intervene in priority on the basis

(30) In France, we think of the origins of the old article 419 of the Criminal Code on the crime of coalition, but we must go back to the analyzes of Domat (C. Prieto, D. Bosco, European Competition Law, Brussels, Bruylant, 2013, No. 31).

of the second. Apart from the example of the Federal Trade Commission in the United States⁽³¹⁾, the one closer to the AGCM, the Italian authority, is significant⁽³²⁾.

Since the start of the crisis, this authority has stepped up its interventions, adopting decisions on interim measures, in particular for misleading advertising, and triggering investigations targeting certain platforms. In addition, the competition authorities' "toolbox" may vary. Certain behaviors, such as excessive prices charged by a company, can escape all qualification.

Thus, in American antitrust law, section 2 of the Sherman Act on monopolization only covers so-called exclusionary abuses, which excludes its application to excessive pricing practices and leads the public authorities to rely on other regulations⁽³³⁾. Subject to these reservations, the competition authorities have the usual tools to apprehend certain behaviors, whether they are carried out by isolated companies or the result of concerted practices. Some of them did not hesitate to issue warnings to operators⁽³⁴⁾ and act very quickly, as shown by the intervention of the Authority in France with regard to exclusive import practices.

Within the European Union, Article 102 TFEU and equivalent national texts also cover so-called exploitative abuses; action is possible in particular against excessive prices. Before the crisis, such practices were again condemned in certain European states, such as Italy and France, precisely in the medical sector⁽³⁵⁾.

However, the implementation of this text comes up against the usual limits due to the precondition of the dominant position and the difficulty of applying the test resulting from the United Brands case law⁽³⁶⁾. With regard to the prohibition of potential cartels, the difficulties lay less in characterization than in establishing collusion between the different parties to the cartel. The

(31) On the FTC website, the actions taken under each legislation are clearly distinguished, <https://www.ftc.gov/coronavirus/ftc-in-action>.

(32) the list of actions carried out: <https://en.agcm.it/en/media/press-releases/>.

(33) in the United States, the use of provisions of the Californian penal code or of the penal code of the State of New York to apprehend the practices known as price inflation, (gouging prices) (BS Karp, e-Competitions, no. 93689).

(34) e.g., warnings from the Dutch authority, cp March 18, 2020, e-Competitions, No. 93817, from the Portuguese authority, cp March 16, 2020, e-Competitions, No. 93830.

(35) G. Muscolo and G. Pitruzzella, Unfair prices: A few remarks on competition policy and antitrust analysis, *Concurrences*, n° 1-2018, p. 60.

(36) In the Sanicorse case, the Authority's decision (dec. 18-D-17) was annulled by the Paris Court of Appeal (CA Paris, 14 Nov. 2019, n° RG 18/23992, Sanicorse, against / Competition Authority).

horizontal cartels may not be dismantled until the crisis is over, when the authorities regain their full investigative powers.

In terms of vertical relations, the statement by the European Competition Network deserves to be mentioned. To limit the prices of products, the European authorities point out that, since the prohibition on imposed prices concerns only minimum prices, manufacturers are in no way prohibited from setting maximum prices to curb price increases.

2- Beyond the prohibition of harmful behavior

The protection of the production tool is becoming topical again. Thus, the relocation in Europe of certain activities to ensure self-sufficiency of essential goods, preservation of sensitive sectors, is concerns now displayed by governments.

Viewed in isolation, merger control is not the right tool, because that is by no means its objective. Other mechanisms must be used to allow for the consideration of essential interests other than competition. Those provided for in merger controls have in fact shown their limits whether it is, in Union law, the operation of Article 21, § 4, of Regulation (EC) No 139/2004, or, in certain national laws, such as French law, the intervention of the Minister of the Economy (C. com., art. L. 430-7-1). On the other hand, this role can be exercised by controlling targeted direct investments⁽³⁷⁾.

From mid-March, as part of the measures related to Covid-19, the Spanish government urgently put in place a system to screen foreign investments in sectors deemed sensitive⁽³⁸⁾. The relay was taken over by the Commission itself, which has just published on March 28, 2020⁽³⁹⁾ Guidelines encouraging Member States to make full use of Regulation No. 2019/452 on the screening of foreign direct investments⁽⁴⁰⁾.

B – A supportive action

Along with protective actions, competition authorities can also relax the application of competition rules to support economic activity. Certain

(37) L. Idot, Merger control and foreign investment control: Concurrences, n° 2-2015.

(38) Spanish Government, Package of economic measures against COVID-19, Press Release, 17 March 2020, V. P. Callol, e-Competitions, n° 93769.

(39) Communication from the European Union, Guidelines for Member States concerning foreign direct investment and the free movement of capital from third countries as well as the protection of European strategic assets, with a view to the application of the Regulation (EU) 2019/452 (regulation on the filtering of FDI): Official Journal of the European Union n° C 99, March 28, 2020.

(40) Regulation (EU) 2019/452, March 19, 2019, establishing a framework for the screening of foreign direct investments in the Union: Official Journal of the European Union n° L 79I, March 21, 2019, p. 1.

temporary measures fall under the law of cartels while restructuring is subject to merger control.

As the European Competition Network points out in its joint declaration, in this period of crisis, companies may be called upon to cooperate to guarantee the production and fair distribution of their products. Consortium creations have already been announced. In Union law, such cooperation agreements fall under Article 101 TFEU 46⁽⁴¹⁾.

In terms of qualifications, such measures should not pose any difficulties, either because a restriction of competition cannot be established, or more likely that the conditions for the exemption are considered to be met. While within the European Union, the Network has contented itself with a simple declaration, hard law texts have sometimes been adopted to guarantee the legality of mergers, in the form of exceptions or exemptions⁽⁴²⁾.

The British case deserves to be pointed out. The government has publicly announced that the competition rules will be put on hold to allow cooperation within large-scale distribution⁽⁴³⁾, before the competition and market authority (CMA) announces in the form of a brochure its position on cooperation agreements⁽⁴⁴⁾. In these various texts, the expression “crisis agreement” is not used and the authorities prefer to insist on the fact that the efficiency gains resulting from these agreements certainly outweigh any restrictions of competition.

In the absence of a binding text guaranteeing an exemption, the authorities limit themselves to indicating that they will not be interested as a priority in this type of cooperation, if these are temporary and necessary measures to avoid a shortage of supply of the products concerned. Innovation is mostly procedural. If in doubt about the legality of their practices, companies are invited to contact the European Commission, or the national authority concerned. Like the American authorities more familiar with the practice of business review processes or advisory opinion processes⁽⁴⁵⁾, the Commission

(41) the Commission refers in particular to the guidelines on horizontal cooperation agreements and on vertical restraints: <https://ec.europa.eu/competition/antitrust/coronavirus.html>.

(42) the example of the Norwegian authority, which provided for a three-month exception for the transport sector, CP, March 19, 2020, e-Competitions, no. 93782.

(43) <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>.

(44) CMA approach to business cooperation in response to COVID-19, 25 mars 2020: <https://www.gov.uk/government/collections/cma-covid-19-response>.

(45) In USA, Joint FTC-DOJ Antitrust Statement Regarding COVID-19, 24 mars 2020, <https://www.ftc.gov/public-statements/2020/03/joint-ftc-doj-antitrust-statement-regarding-covid-19>.

has set up a dedicated mailbox⁽⁴⁶⁾. The Competition Authority has just taken a position in the same direction.

As the crisis will lead to a restructuring of the production apparatus, merger control will once again be in the forefront. On a substantial level, the crisis will revive the theory of the failing company, which, even extended more recently by the Commission, has shown its limits. The question will arise again of its possible relaxation.

From a procedural standpoint, the risks of gun jumping only increase during this period of dormancy. On this point it is easier to consider easing sanctions, as the Portuguese authority has just done in the health sector so as not to jeopardize the functioning of a hospital in this crucial period. Everything will of course depend on the circumstances, and it will probably take a few months to see the first effects⁽⁴⁷⁾.

These are only the first visible consequences of the interactions between the crisis and competition policies. As front-line state aid control illustrates, new things emerge almost every day. One thing is certain, more than ever, these policies must be coordinated with other public policies.

Conclusion

The tools of competition law have been around for a long time. They were already used in 2008 to deal with the stock market crisis. Companies in sectors severely affected by the crisis will have to join forces so as not to die and disappear. This is a major paradigm shift for competition law. Even 10 years ago, talking about crisis cartels was taboo.

However, this notion was not always considered as such (thus, the crisis cartels were specially treated in Germany until 2005, and the maintenance of employment was considered in the past by the ECJ as “an element stabilization system contributing to economic progress”). Pragmatism must therefore dominate.

The competition authorities will look closely at the situations which require collaboration between companies, under their control. They will ensure that there is no distortion of competition while taking into account the massive support plan for national companies which is in it a distorting measure. Some small businesses are more at risk than ever. A national policy can strengthen competition rules to prevent their takeover (by Google for example), for

(46) <https://ec.europa.eu/competition/antitrust/coronavirus.html>.

(47) Press release of April 6, 2020.

example by combining them with a control of non-Community investments in European companies (for example the recent “filtering” mechanism put in place by the Commission and recent national measures to lower the controllability thresholds for such investments in several States, including France).

In addition, nationalizations and recapitalizations are to be expected because the loans guaranteed by the French state will not be sufficient. The impact on competition can be significant due to the reduction in the number of competitors. This would lead to redefining the reference markets within the European Union.

While demonstrating pragmatism, the competition authorities have not let their guard down and have made it clear on several occasions their firm intention to continue, even during the crisis, to pursue practices that would be illegal.

On the one hand, competition authorities should therefore be very vigilant in the event of a sudden and rapid increase in prices. In the short term, they may need to take action to identify where and when prices have raised in the supply chain, and to take interim action or send out warning letters to quickly end the offending conduct.

On the other hand, coordinate their actions with consumer protection authorities, or exercise their (possible) consumer protection powers to protect consumers from unfair pricing practices.

References

1. Books

- Philippe Aghion, *Competition and Growth: Reconciling Theory and Evidence*, The MIT Press, 2008.
- Richard Whish and David Bailey, *Competition Law*, 7th edition, Oxford University Press, USA, 2012.
- Alison Jones and Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law Text, Cases, and Materials*, 7th edition, Oxford, 2019.
- Ioannis Lianos, *Competition Law: Analysis, Cases, & Materials*, Oxford, 2019
- C. Prieto and D. Bosco, *European Competition Law*, Bruylant, Brussels, 2013, No.31.
- Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets*, Belknap Press: An Imprint of Harvard University Press, 2019.

2. Articles

- Laurence Idot, Merger control and foreign investment control, *Revue des droits de la concurrence*, *Competition Law Journal*, n° 2-2015 (July 2020).
- G. Muscolo and G. Pitruzzella, Unfair prices: A few remarks on competition policy and antitrust analysis, *Concurrences*, n° 1-2018, (June 2020).
- L. Idot, The company in difficulty facing competition law sanctions, in press, *mixtures C. Saint-Alary-Houin*, 2010 (July 2020).
- R. Pepper, Competition policy & COVID19: An overview of antitrust agencies' responses, March 26, 2020, *e-Competitions*, *Competition Law & Covid-19*, art. n° 93888, *www.concurrences* (May 2020).
- Chinese Competition Authority, Formal statement, 6 February 2020, *e-Competitions*, n° 93921 (september 2020). Jorge Padilla, Nicolas Petit, *Competition Policy and The Covid-19 Opportunity*, *concurrences antitrust publication*, (May 2020).
- William E. Kovacic, *Roads Not Taken: The Federal Trade Commission and Google*, (septembre, 2020).

- George Teboul, l'adaptation du droit des entreprises en difficulté à la crise du Coronavirus, Recueil Dalloz, 202014, page 785(June 2020).
- Hakim Hadj-Aissa, Covid-19 et application des dispositions du titre IV du livre IV du code de commerce, Actualité juridique contrat, (Juillet 2020).

3. Websites and links

- Authority of competition, COVID-19: L'Autorité indique sous quelles conditions une coopération entre concurrents peut être tolérée en période de crise sanitaire, autorité de la concurrence de la nouvelle caledonie,03 July 2020 (in french), <https://www.autoritedelaconcurrence.fr/en/basic-page/covid-19>.
- Nathalie Jalabert Doury, Covid-19 et application des règles antitrust : Ce à quoi les entreprises françaises doivent s'attendre, Mayer Brown; 18 July 2020(in french), <https://www.mayerbrown.com/fr/perspectives-events/publications/2020/06/covid-19-and-competition-enforcement-changes-french-businesses-should-expect>.
- Vincent Jaunet, Contrôle de concentration, Magenta société d'avocat, 18 septembre 2020-10-17 (in french), <http://www.magenta-legal.com/blog/controle-des-concentrations-la-commission-europeenne-annonce-vouloir-etendre-son-controle-et-acceptera-desormais-dexaminer-certaines-operations-de-concentration-qui-ne-franchissent/>.
- European commission, Antitrust rules and coronavirus, European commission completion, 8 april 2020-10-17, <https://ec.europa.eu/competition/antitrust/coronavirus.html>.
- Practical la EU, COVID-19: European Commission guidance on foreign direct investment and free movement of capital from third country , 27 March 2020, [https://uk.practicallaw.thomsonreuters.com/w-024-6851?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-024-6851?transitionType=Default&contextData=(sc.Default)&firstPage=true).

Table of contents

Subject	Page
Abstract	69
Introduction	70
I. Competition law in the face of Covid-19	73
A. Arranging procedures	73
B. Covid 19: Competition law to the rescue of businesses	76
1. Competition law not necessarily an obstacle to cooperation in times of crisis	76
2. comfort letter issued to Medecine of Europe	79
II. Reorientation of actions	80
A. Protective action	80
1. The law of anti-competitive practices makes it possible to fight against certain harmful behaviors	80
2. Beyond the prohibition of harmful behavior	82
B. A Support Action	83
Conclusion	84
References	86