

Covid-19, collaboration, liability and immunity

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Enforcing antitrust law while responding to a global pandemic

The action taken by enforcers during this recent pandemic was focused on business continuity, from day one, and guided by two axes: continued enforcement and accrued guidance.

For enforcers in general, it has always been very clear that the crisis did not mean that the competition rules were suspended, but rather that they were fully in force. The enforcer must ensure that, at a time when consumers are most vulnerable, they are kept protected through the application of competition rules.

On the other hand, enforcers understood the pandemic was an extreme event that could trigger the need for cooperation between companies to ensure fair supply and distribution of scarce supplies, such as essential health goods, to all consumers.

The good thing is that competition rules are flexible enough to ensure that certain kinds of welfare-enhancing cooperation are allowed.

Therefore, both at the EU and at national level, enforcers recognized the need to provide guidance to companies, in particular to those considering collaboration in order to ensure the supply and fair distribution of scarce products.

The recognition that providing guidance was important came first in the form of official statements from national competition authorities, including the AdC¹, as well as from the European Competition Network². This is the EU enforcement network which gathers national competition agencies in the EU and the European Commission. Most of these statements were issued as soon as March 2020.

¹ See AdC's press release (March 16, 2020): <https://www.concorrenca.pt/en/articles/adc-assures-vigilance-antitrust-practices-exploit-current-situation-detriment-people-and>

² See ECN's joint press release (March 23, 2020): <https://www.concorrenca.pt/en/articles/antitrust-joint-statement-european-competition-network-ecn-application-competition-law>

Soon after, in April 2020, the European Commission also adopted³ a temporary framework for assessing collaboration agreements in response to situations of urgency stemming from the Covid-19 outbreak. It was under this framework that the European Commission issued comfort letters.

While recognizing the importance of guidance, European enforcers made it very clear that they would not allow companies to take advantage of the pandemic and cartelize or abuse their market power. This was clear in the statements that I just mentioned and also in enforcement actions which followed. I will discuss this later.

A similar statement was issued by the International Competition Network, the ICN, in April 2020⁴, showing availability to provide informal guidance to companies and associations regarding cooperation under limited circumstances.

These policy statements were important to let the market know that antitrust enforcers remained fully operational and open for business.

Finally, at EU level, we also coordinated with the EU Commission regarding any guidance which could potentially also be relevant in other EU Member States.

During this time, and still to our time today, it was essential to maintain an intense advocacy and enforcement activity. One thing we know from previous crises is that **underenforcement is counterproductive**.

With this in mind, the AdC, as many other enforcers, opened several investigations *in* this context and *despite* this context.

More recently, and in the context of the economic recovery, antitrust policy continues to play an important role, including through guidance to the public sector, as we will see later during this talk.

Examples of national competition agencies' guidance

Let me now give you a few examples of guidance that the AdC provided.

In the **banking and financial sector**, the agency issued⁵ written guidance to the Portuguese Banking and Consumer Credit Associations. Their members – banks and other credit institutions – wanted to apply similar criteria for suspending loan payments in the context of the crisis.

³ See Communication from the European Commission (April 8, 2020): https://ec.europa.eu/info/sites/default/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf

⁴ See ICN's statement (April 8, 2020): <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf>

⁵ See AdC's press release (May 20, 2020): <https://www.concorrenca.pt/en/articles/covid-19-adc-warns-associations-need-comply-competition-rules>

The guidance related to the adoption by those associations of the main conditions to be applied to the suspension of those loan payments. This type of joint action had been encouraged by the European Banking Authority and by the Portuguese Central Bank in order to allow banks to help the economy without disregarding their prudential duties.

In this context, the AdC warned about the risks of exchanging confidential information and the importance of ensuring that banks and credit institutions remained free to grant their clients more favorable conditions than the ones set under this suspension.

In the **pharma sector**, the AdC issued guidance addressed to the Pharmacies' National Association. Following the sudden price increase of face masks, alcohol gel, certain medicines and medical devices, the association recommended that pharmacies should comply with a specific maximum resale margin for these products. It was important to note that such a recommendation may actually serve as a focal point and lead to a price alignment in the market, besides discouraging innovation.

As for enforcement, because it was clear to the AdC that antitrust law was not suspended during the pandemic, the agency resumed dawn raids as soon as it was possible, i.e. September 2020. Overall, since then and up to March 2022, the AdC conducted 10 dawn raids, covering more than 20 locations and 30 undertakings.

Then, in the first half of 2020, the AdC opened an investigation⁶ in the **sports sector**. This was based on a decision by Portugal's Soccer League involving the clubs of the first and second divisions. They had agreed not to hire soccer players who terminated their contracts for reasons related to the Covid-19 outbreak. In this case, we also imposed interim measures ordering the immediate suspension of the agreed decision.

The AdC's preliminary view – the main investigation is ongoing – is that this decision constitutes a no-poach horizontal agreement, thus leading to a decrease in workers' bargaining power and wage level, besides depriving them of labor mobility.

This type of agreement can also harm competition between rival clubs in the hiring of 'inputs' (i.e. players) that are relevant for the quality and competitiveness of their teams. Therefore, the agreement also has the potential of depriving consumers of sports events of greater quality.

EU guidance

At EU level the European Commission also provided relevant guidance. As I mentioned earlier, the Commission adopted a Temporary Framework Communication. This Communication explained to the market the main criteria that the Commission would follow when assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the coronavirus outbreak. On the basis of the Communication, measures should (i) benefit consumers; (ii) be temporary in nature; and (iii) not go beyond what is strictly necessary.

⁶ AdC's press release (2020) <https://www.concorrenca.pt/en/articles/adc-issues-statements-objections-anticompetitive-agreement-labour-market-first-time>

The Communication, which is still in place, also foresees the possibility of issuing comfort letters. This is an exceptional departure from usual practice, since as a general principle, companies must assess on their own whether an agreement is compatible with EU competition law.

And on the basis of the Temporary Framework, the Commission issued two comfort letters:

- the first in April 2020, addressed to Medicines for Europe and relating to a cooperation project designed to avoid situations of shortages of COVID-19 medicines;
- the second letter was issued in March 2021. It addressed bottlenecks in the production of Covid-19 vaccines and was aimed at accelerating the use of additional available capacities across Europe.

This Communication will remain applicable until the Commission withdraws it, once it considers that the underlying exceptional circumstances are no longer present.

Finally, a word about what other national enforcers in Europe have done. Those who are part of jurisdictions in the EU have of course subscribed the ECN statement showing availability to provide guidance.

Some competition authorities specified sectors in which cooperation might be necessary, such as the health (Finland) and agri-food sector (Italy).

As to specific examples of guidance, in Germany the Bundeskartellamt exempted certain types of cooperation between automotive firms. The Dutch competition authority enabled collaboration between hospitals, hospital pharmacies and other stakeholders in the health industry. The Italian competition authority authorized cooperation between associations of pharmaceutical distributors.

There are several examples of guidance but in general competition agencies have always required that collaboration should remain limited to what is strictly necessary.

This was an important message. Authorities ensured that competition would not stand in the way of urgent and necessary cooperation while preserving the role of competition, so that consumers were not deprived of the benefits of competition during the crisis. Enforcers showed flexibility in the process, prioritizing guidance in order to give legal certainty.

How much does competition matter for the economic recovery

In addition to guidance for the private sector, in times of crisis it is also important for enforcers to provide guidance to the **public sector**. Policy-makers are now striving to create the best possible conditions to recover as soon as possible, and on firm grounds, from 2020's losses.

I believe that as countries are attempting to jumpstart their economies, the principles of competition policy are evermore so important.

Looking back at the beginning of the pandemic, in early March 2020, no one could have expected the economic upheaval that was going to take place up to today.

From record quarterly declines in GDP to disruptions in supply and a sharp decrease in the consumption of in-person services, the effects of the pandemic were devastating, in particular in sectors such as hospitality, transportation, restaurants and in-person recreation. All this has had a tremendous impact on economic growth which policy-makers are now striving to recover.

I also see this unique context as an opportunity that we can seize to build back better.

Antitrust policy has a key role to play in contributing to a more innovative and resilient economic recovery. And we know that we are far from exhausting antitrust policy's full potential.

This was the focus of a Report by the AdC, issued in June 2021, on the role of competition policy in implementing the economic recovery strategy⁷. The report includes recommendations and principles to be considered by Government and other policy-makers when implementing the national economic recovery strategy.

I will highlight three **competition principles** or policies that can be **embedded in recovery strategies**:

1. Ensuring competitive neutrality in public financial support to firms;
2. Removing, across sectors, unnecessary barriers to entry and expansion, so as to unleash the full potential for recovery and growth;
3. Combatting bid-rigging and ensuring competitive and efficient public tenders, given the sizeable public spending and investment head.

The AdC identified these principles as essential to promote competition, efficiency and innovation, in order to strengthen the path to an inclusive and sustainable economic recovery. We are very confident that by enhancing competition policy in those areas, recovery will be **amplified**. Competition can indeed be a catalyzer for growth and innovation.

We must remain mindful that implementing such principles will require **determination** to change legislation as we might have known it for decades. It will also require careful consideration in designing efficient procurement procedures. And it will require **impartiality** in applying state support.

And so I will argue that if our country policies put competition *at the core* of their efforts for recovery, we will obtain significant change *for the better* and *for the many*.

Are crisis cartels emerging already?

In the AdC we are seeing evidence of potential cartels which arose in the context of the pandemic crisis. Our ongoing investigations are still at an early stage. The dawn raids regarding one such cartel, **in the health sector**, were

⁷ AdC (2021) *The role of competition in implementing the economic recovery strategy*.
<https://www.concorrenca.pt/sites/default/files/2021-AdC-contribution-on-economic-recovery.pdf>

carried out in mid-March. Whether there will be a global wave of enforcement associated with crisis cartels, at this stage it is early to say.

Crisis cartels, as you know, are those in which firms affected by a crisis agree to reduce overcapacity and maintain or even increase prices. This can be labeled opportunistic behavior – but it is also one that is illegal.

Given the characteristics of the recent crisis, I see potential for detecting cartels in the following areas: (1) in the digital space, and e-commerce in particular, because a lot of business shifted to that area during lockdowns - and stayed there; (2) in no-poach and other wage-fixing agreements; (3) in bid-rigging, especially in public procurement; and (4) in sectors that are most impacted by these exceptional circumstances, e.g. health.

This is why it is important for consumers that antitrust agencies to maintain high vigilance toward anticompetitive behavior in this period. Because all of this occurs when many households and firms are in a financially vulnerable situation.

Impact of the war in Ukraine

In the meantime, in March we heard in the press that companies were considering coordinating their response to disruptions in the supply chain in the context of the war and the economic sanctions against Russia.

Companies may want to complement EU sanctions through, for example, boycotting Russian firms. A collective boycott is a serious violation of competition rules. And there may also be a need to cooperate to overcome supply shocks in particularly affected sectors. Competition authorities in Europe started receiving requests for informal guidance from companies that wanted to cooperate to respond to the crisis.

With this context in mind, recently the ECN issued⁸ a joint statement on the application of competition law in the context of the war in Ukraine. One of the main messages is that competition authorities stand ready to provide guidance in this scenario and that they will apply the same principles of proportionality and necessity that were agreed during the Covid-19 crisis.

At the same time, the statement also stressed the need to remain vigilant to ensure that essential products such as energy, food or raw materials remain available at competitive prices, and markets are not further distorted through anticompetitive agreements or exploitation in terms of excessive pricing on affected products.

⁸ See ECN's Joint Statement (March 21, 2022): <https://www.concorrenca.pt/en/articles/antitrust-joint-statement-european-competition-network-ecn-application-competition-law-0>