Regulating for Globalization

Trade, Labor and EU Law Perspectives

The antitrust implications of COVID-19 in the European Union

Federica Ferrari (University of Bologna) · Thursday, August 27th, 2020

Introduction

Among its countless repercussions, the outbreak of the COVID-19 pandemic had disastrous consequences on the economy, affecting both supply chains and the demand curve in numerous markets. Market conditions changed abruptly due to anti-COVID restrictions and the health emergency caused the demand for numerous products and services to decline, whereas the request for others, such as hand sanitizers or masks, steeply increased. Undertakings have faced (and still are facing) difficult conditions.

These exceptional circumstances triggered a discussion between competition authorities on how competition in the internal market was impacted and what measures should be adopted in response to the crisis. On the one hand, it immediately appeared clear that antitrust should continue to be enforced rigorously, in order to prevent undertakings taking advantage of the emergency situation to collude or to reinforce a dominant position (for example, by fixing higher prices for essential goods). On the other hand, the need emerged for some undertakings to cooperate to soften the effects of the crisis. As a matter of fact, the increase in the demand for certain products, the difficulties in the production and distribution due to anti-COVID measures, caused certain companies to necessitate some form of cooperation to avoid shortages of essential goods.

The foregoing considerations led to the adoption, within the European Union, of several documents and statements by the European Competition Network ("ECN"), the European Commission and National Competition Authorities ("NCAs"). These documents proposed guidelines to face the emergency situation that mainly affected the enforcement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU")[1].

As for Article 102 of the TFEU, abuses of dominance are particularly dangerous given the current situation, hence there is no doubt that its enforcement should continue. In particular, the most troublesome practice that emerged during the pandemic was that of exploitative pricing. The extreme rise of the demand for certain products created the opportunity for undertakings to take advantage and increase prices. However, whereas in the case of already dominant undertakings competition authorities can easily tackle this phenomenon under competition law, in other circumstances it was argued that consumer protection could be better suited.

The implications of COVID-19 on the enforcement of Article 101 of the TFEU

As mentioned above, after the spreading of COVID-19, the European Commission, along with NCAs, considered how competition law should respond to the crisis caused by the pandemic. These reflections led to the adoption by the ECN[2], on 23 March 2020, of a statement illustrating how competition authorities could help undertakings to face the impact of the pandemic.

In particular, whereas the necessity to keep enforcing competition rules was strongly remarked, it was also recognized the possibility for companies to temporarily cooperate, only to the necessary extent, to face the challenges posed by this critical situation. To this end, the ECN agreed not to actively intervene against agreements between undertakings that aim to avoid shortages of scarce products and to assure their fair distribution. According to the ECN statement, such agreements either would not raise concerns under antitrust law or they would generate efficiencies that would outweigh any restrictive effect on competition. In this occasion, competition authorities agreed to provide undertakings with the possibility to ask for an informal guidance about the compatibility of their agreements with EU competition law.

After the statement issued by the ECN, on April 8, the European Commission adopted a Temporary Framework Communication which laid out a more detailed framework to address the consequences of the pandemic. The Commission recognized that, while it is crucial to continue to apply antitrust rules, undertakings might need to cooperate to overcome the effects of the crisis. To this end, the Communication set the criteria that will be followed in assessing the legality of such cooperation projects to help undertakings self-evaluate their practices. Facilitating self-evaluation aims at allowing undertakings to determine ex ante whether a cooperation practice is lawful quickly enough to ensure effective business decisions[3] However, the Framework exceptionally reintegrated comfort letters as a way for undertakings to seek ad hoc guidance, although the decision of issuing the letters is left to the discretion of the Commission.

First of all, in its Communication the Commission considered two categories of coordination: on the one hand, coordination that does not raise concerns under competition law (Paragraphs 11-13 of the Temporary Framework); on the other hand, that that would normally be considered anticompetitive but is allowed, under certain conditions, in light of the emergency situation (Paragraphs 14-16 of the Temporary Framework).

The category of conducts that does not raise issues, provided that there are sufficient safeguards, comprises the forms of coordination entrusted upon a trade association or an independent third party (e.g. an independent advisor, an independent service provider or a public body). Such agreements may consist, for example: a) in the coordination for the joint transportation of input materials; b) in contributing to the identification of those essential medicines for which there are risks of shortages; c) in the aggregation of production and capacity information, without exchanging individual company information; d) in working on a model to predict the demand on a Member State level, and identifying supply gaps; e) in sharing aggregate supply gap information, and request participating undertakings, on an individual basis and without sharing that information with competitors, to indicate whether they can fill the supply gap to meet demand. These conducts are considered legitimate and helpful for undertakings to avoid shortages and to deal with the critical situation caused by the pandemic.

Nonetheless, the Commission considered that some companies might need to coordinate further. In certain circumstances companies (and in particular those operating in the health sector) might need to: a) conclude agreements for the coordination of production, stock management and

transportation, which could require the exchange of sensitive information; and b) organize and rationalize the sites of production. Such agreements would normally fall within the scope of the prohibition laid down by Article 101 of the TFEU. However, in light of the exceptional circumstances caused by the pandemic, they are admissible and will not give rise to an enforcement priority. However, it is necessary for these agreements to abide by certain conditions. Namely, the cooperation has to be: a) temporary; b) designed to efficiently increase output; c) limited to what is necessary to avoid supply shortages. Moreover, undertakings will have to document all the exchanges and agreements and make them available to the Commission upon request. Lastly, the Commission clarified that the circumstance that such practices are either encouraged or mandated by a public authority will have an influence in their evaluation from an antitrust perspective. In fact, encouragement and/or coordination by a public authority is a relevant factor that could lead to the conclusion that the coordination is not problematic under competition law. Whereas, in the case of a public imperative request to temporarily cooperate, to respond to an urgent situation cause by the pandemic, such cooperation is undoubtedly considered allowed.

Finally, the Communication reintroduced the possibility for undertakings to ask the Commission for ad hoc written comfort letters assessing specific and well-defined cooperation projects (Paragraphs 17-18 of the Temporary Framework). The objective pursued by the Commission is to provide a higher level of legal certainty to those undertakings that need to cooperate in order to face the crisis.

Since the entry into force of Council Regulation (EC) No. 1/2003, undertakings can no longer send notification of their agreements to the Commission to obtain an ad hoc exemption from Article 101 of the TFEU; on the contrary they have to self-evaluate the legitimacy of their own practices. However, the Commission considered that, given the situation caused by the pandemic and the subsequent need for some undertakings to cooperate, there might be the need for ad hoc feedback on the legality of their cooperation projects. The reintroduction of comfort letters, however, has to be considered exceptional and the decision of issuing such letters will be at the discretion of the Directorate General of the Commission.

On this basis, on 8 April, the Commission issued its first comfort letter regarding, unsurprisingly, the pharmaceutical industry. The ad hoc feedback allowed the cooperation project submitted by the association Medicines for Europe[4] and provided some guidance over the necessary safeguards.

As for National Competition Authorities of Member States, they moved in the same direction as the ECN and the European Commission[5]. They also recognized both the need for a strict application of competition rules (for example, the *Comisión Nacional de los mercados y la competencia* created a dedicated mailbox for complaints for anticompetitive practices related to the pandemic[6]) and the possible necessity to coordinate for undertakings to face the crisis (the *Bundeskartellamt*, for instance, issued a comfort letter for the automotive industry in consideration of the complexity of the chain of production of automobiles and the difficulties that arose due to the emergency situation).

The legal basis for the exceptions to the enforcement of Article 101 of the TFEU

These measures, which are undoubtedly helpful considering the confusion and the difficult market conditions generated by the pandemic, deserve a couple of considerations. First of all, it should be noted that Article 101 and 102 of the TFEU do not postulate exceptions to their application, not

even in the case of emergencies. Article 101, therefore, hardly constitutes a valid legal basis to "turn" conducts that are problematic from an antitrust perspective (i.e. those mentioned in Paragraphs 15 and 16 of the Temporary Framework) into legally sound practices. However, it has been noted, that the coordination projects that the Temporary Framework refers to could likely fall into the scope of the exemption contained in the third paragraph of Article 101[7]

. However, in order to benefit from the exemption, the agreements have to meet the necessary conditions. As a matter of fact, these practices do aim at improving and guaranteeing the production and the efficient distribution of medical supplies. As long as these agreements impose on undertakings only the indispensable restrictions to reach their objectives and do not eliminate competition with respect of a substantial part of the products in question, they appear to be justifiable based on Article 101.3 of the TFEU[8]. The same reasoning can hardly be applied to the case of anticompetitive conducts that are allowed because they are mandated by a public authority. As it has been noticed, Articles 101 and 102 of the TFEU do not allow Member States to derogate them for reasons of public health and such derogations could also be considered a violation of the duty of sincere cooperation[9]. However, if the State identifies the public interest pursued and authorizes a temporary cooperation between firms in function of that interest, such an intervention could be legitimate. This as long as the national legislation maintains its public character and does delegate to private operators the responsibility for taking decisions affecting the economic sphere[10].

As mentioned above, the Temporary Framework Communication exceptionally reintroduced comfort letters, which were used – before the entry into force of Regulation No. 1/2003 – under Regulation No. 17/62. Comfort letters, although binding for the European Commission based on the principle of legitimate expectation, are not legally binding for national judges, which can annul the agreements based on Article 101.2 of the TFEU. This circumstance risks to jeopardize the purpose of providing a higher level of legal certainty. It has been argued that this objective could have been better achieved by relying on Article 10 of Regulation No. 1/2003[11] and adopting a finding of inapplicability. According to this provision, the Commission can, in light of a public interest, adopt a decision stating that Article 101 is not applicable to an agreement either because the conditions of the first paragraph are not fulfilled or because the conditions of Article 101.3 are satisfied. However, the application of this provision would have required a more in-depth examination which could have prolonged the process to the disadvantage of undertakings[12].

Pandemic-induced excessive prices and Article 102 of the TFEU

As mentioned above, if on the one hand the need for undertakings to cooperate in light of the effects of the pandemic has been largely recognized, on the other hand, it was also strongly remarked the necessity to continue enforcing antitrust rules in order to avoid anticompetitive behaviors aimed at exploiting the emergency situation.

One of the anticompetitive practices that worried the most is the risk of exploitative pricing. The peak in the demand for certain products, such as masks or medical supplies, created opportunities for companies to substantially increase prices. In response to such conducts it was debated whether competition law, and specifically Article 102 of the TFEU, is the most suitable option to deal with excessive prices in times of COVID-19[13]. The most problematic aspect in applying Article 102 of

the TFEU is the finding of dominance. In fact, it has been argued that the distorted market conditions might have generated temporary and "situational" dominance. It is sufficient to think that during lockdowns the geographic dimension of a given market was restricted due to the impossibility for consumers to move. In these circumstances, dominance might be temporary and circumstantial. Whereas it cannot be excluded that competition authorities could move towards the recognition of the existence of a temporary and circumstantial dominance, such an operation would face significant challenges[14]. Therefore, it has been argued that consumer protection might be better suited to tackle this sort of practices, unless of course they were implemented by undertakings that were already dominant. At the European Union level, the Consumer Protection Cooperation ("CPC") Network, with the support of the European Commission, issued a common position on the most reported scams occurring in relation to the pandemic. Among these, the use of pressure selling techniques in order to charge excessive pricing was also listed as contrary to the Unfair Commercial Practices Directive ("UCPD")[15].

However, the phenomenon of exploitative pricing is being investigated by both competition authorities as well as consumer protection authorities[16], and, given the circumstances, a cooperative approach is probably the most desirable choice.

Conclusions

In conclusion, the pandemic caused numerous problems and difficulties in the internal market and the opportunities created by the crisis to exploit their market power or to profitably collude require antitrust to keep being vigorously enforced. It also appeared, however, that the emergency situation required some undertakings to cooperate in order to avoid shortages of essential goods. To this need, competition authorities have responded with the intent to provide guidance to undertakings by communicating the criteria that followed to evaluate cooperation projects and by re-introducing the possibility to seek ad hoc feedback on such projects.

As for the risk of undertakings taking advantage of the emergency situation to apply exploitative prices, a joint approach by antitrust and consumer protection authorities is probably the most desirable option. In fact, whereas problems do not arise when an already dominant undertaking practices excessive pricings, when dominance is circumstantial consumer protection is probably a better choice.

References[+]

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