

KPMG Legal- Toncescu si asociatii: “Competition law and Covid 19 in a nutshell”



Anticompetitive practices and abuse of dominance

1. At European level

Due to the continuous need for products and due to the difficulties that some companies are facing during the coronavirus crisis, the European Competition Network (“ECN”) has published a joint statement on the application of competition law during these difficult times, which is intended to guide the competitive behavior of companies:

- For the purpose of avoiding a shortage of supply, companies can take temporary measures to cooperate, solely to ensure the supply and fair distribution of scarce products to all consumers. However, these measures should not infringe competition law.
- Companies are encouraged to approach the Commission, the EFTA Surveillance Authority or their national competition authority whenever they have doubts about the compatibility with competition rules of the temporary measures they have adopted.
- Products that are essential to protect the health of consumers should be kept at competitive prices. The ECN has announced that it will take action against companies that abuse their position or that take advantage of the current situation generated by the pandemic and raise their prices without an objective justification.
- Manufacturers are encouraged to apply the existing legal provisions which allow them to set maximum resale prices for their products. In this way, they may prevent their distributors from increasing prices in an unjustified manner.

2. On a national level

The Competition Council’s recommendations are in line with those formulated by the ECN. The focus is mainly (i) on the possibility for companies to act in a coordinated manner in order to avoid a deficit of essential products and to ensure their balanced distribution and (ii) on maintaining competitive prices for products . Even if cooperation between competitors may appear to be an efficient way to respond to the challenges of the market, the legal prohibitions on anti-competitive practices should not be neglected.

Permitted practices

Ø Increasing prices with an objective justification (e.g. an increase in the price of raw materials, limited availability of couriers or transportation companies, decrease of stocks).

Ø Formulating measures to prevent the abusive increase of the prices of essential products and services on online platforms (e.g. prohibiting the sale of overpriced essential products on online marketplace platforms, limiting the unjustified raising of the prices of essential products, suspending the sale of certain products if abuse is suspected).

Ø Formulating measures to reduce the risk of speculation and to allow more consumers to buy what they need (e.g. limiting the quantities of essential products which can be acquired by one person, or amending opening hours).

Ø Coordinating actions to ensure the supply and distribution of essential products to all or only certain consumers (e.g. companies may coordinate to transport their merchandise and to organize home deliveries for consumers at high risk).

Prohibited practices

Ø Increasing prices as a consequence of the crisis situation, without justification.

Ø Exchanging sensitive information such as business strategy, cost pricing information.

Ø Excluding other competitors from the market.

Ø Abusing a dominant market position (e.g. increasing the price of a product considered essential for the health of the consumer such as face masks or gel in the case of producers which have a market share of at least 25% or a lower market share if certain conditions are met).

Ø Concluding anti-competitive agreements with competitors in order to restrict the sale of a particular product or service, fixing prices or allocating territories between competitors.

direct recommendation to consider a practice as being permitted or prohibited because the assessment of each practice will be carried out depending on (i) the industry in which the company is operating and (ii) the particularities of each case.

For further immediate guidance and an agile assessment of each planned cooperation measure related to the COVID-19 crisis, please contact us.

I. State-aid**1. At European level**

On 19 March 2020, the European Commission issued the Temporary Framework for State Aid measures to enable Member States to support the economy during the current COVID-19 outbreak, as amended on 3 April 2020 (the “**Temporary Framework**”). It announced the following types of aid, subject to fulfilling certain conditions, that Member States may provide according to Art. 107(3) of the TFEU in order to diminish the effects of the COVID-19 crisis on the economy:

• **Aid schemes consisting of direct grants, advance payments and selective tax advantages that will not exceed €800,000 per company.**

• **Aid in the form of public guarantees on investment and working capital loans for companies facing difficulties or entering into difficulty as a result of the COVID-19 outbreak.**

• **Subsidised interest rates for loans relating to both investment and working capital needs, available to both large companies and small and medium sized companies.**

• **Aid in the form of guarantees and loans channelled through credit institutions or other financial**

institutions to be provided to undertakings facing a sudden liquidity shortage.

• Short-term export credit insurance

• Direct grants, tax advantages and repayable advances to support coronavirus related research and development,

• Direct grants, tax advantages and repayable advances and no-loss guarantees investments enabling the construction or upgrading of testing and upscaling infrastructures needed to develop and test products useful to tackle the coronavirus outbreak,

• Direct grants, tax advantages and repayable advances and no-loss guarantees Investment enabling the rapid production of coronavirus-relevant products, such as vaccines, medical devices, hospital and medical equipment and necessary raw material, disinfectants or data collection/processing tools;

• Aid in form of deferrals of tax payments and/or suspensions of social security contributions;

• Aid in form of wage subsidies for employees aimed at preserving employment during the outbreak.

If any of the Member States intends to adopt one of the state-aid schemes listed in the Temporary Framework, it must seek the approval of the European Commission as soon as possible. The European Commission undertakes to approve such state aid schemes at very short notice.

The Member States (i) must publish relevant information on each individual grant of aid awarded under the Temporary Framework on the comprehensive state aid website within 12 months of the date it is granted, with the exception of the last two forms of aid from our bullet point list above and (ii) must provide the European Commission with a list of measures put in place on the basis of schemes approved based on the Temporary Framework no later than 31 December 2020.

Separately from the above-mentioned measures that fall under Art. 107 (3) of the TFEU, Member States can also adopt certain supportive measures that fall under the exemption provided in Art. 107 (2) of the TFEU, which provides that aid to make good the damage caused by exceptional occurrences is compatible with the rules of the internal market. Recently, the European Commission recognized that the COVID-19 outbreak qualifies as an "exceptional occurrence" under Art. 107 (2) b) of the TFEU. This means that Member States can take various crisis measures in order to diminish the negative effects that an "exceptional occurrence" can have on the most affected sectors, **such as providing financial support for consumers for cancelled flights or suspending the payment of taxes such as VAT, corporate tax etc. When aid falls under this category, it will be exempted automatically. However, this does not mean that the aid is free of the European Commission's control. The European Commission will have to keep under review all systems of aid and must ensure that measures taken under Art. 107 (2) actually fall under this category. For these reasons, some Member States have already notified the European Commission about the measures taken under Art. 107(2) of the TFEU.**

2. On a national level

The Romanian Government has recently passed some measures in order to support the economy in Romania in the context of the COVID-19 outbreak, namely within the Government Emergency Ordinances no. 29/2020 on some economic and financial – budgetary measures, published in the Official Journal of Romania on 21 March 2020 and 42/2020 for amending and completing the Government Ordinance no. 110/2017 regarding the support program for small and medium sized-enterprises ("SME") IMM INVEST ROMANIA, and also for approving the State aid

scheme for supporting the activity of the SME in the context of the economic crisis generated by the COVID-19 pandemic.

The Government Ordinances are aiming at reducing the impact of the pandemic on the economy by enacting measures such as :i) introducing the possibility of accessing one or more investment loans and/or one or more loans for working capital guaranteed by the State in a percentage of maximum 80% from the financed amount and raising the limit of public guaranteed loan from RON 1,250,000 to a maximum of RON 10,000,000; (ii) introducing the possibility of accessing one or more loans for working capital for microenterprises and small enterprises guaranteed by the State in a percentage of maximum 90% from the financed amount; (iii) granting a subsidy of 100% of the interest rates for loans for microenterprises and small enterprises that fall under art. 1 (3) b) of GEO no. 110/2017 on the Support Program for SME – IMM Invest Romania, (iv) public support from *the state budget* of the administration and risk fees that companies must pay to the *Small and Medium Sized Enterprises Credit Guarantee Fund - but only during the entire period when the de minimis schemes are ongoing.*

Also, the Government Ordinance no. 42/2020 approves the State aid scheme for supporting the activity of the SME in the context of the economic crisis generated by the COVID-19 pandemic. The measures will be granted after the European Commission issues the approval decision.

Moreover, during the state of emergency, SME may defer the payment of invoices for rent and utilities services (water, gas, internet, telephone, electricity) for their headquarters and secondary offices if (i) their activity has been totally or partially interrupted by a decision of the authorities during the state of emergency and (ii) they obtain an emergency certificate issued by the Ministry of Economy, Energy and Business Environment.