# X.
# State Aid and Competition



# Glossary

**AdC**

Competition Authority

**ASAE**

Economic and Food Safety Authority

**Block Exemption Regulation**

Regulation (EU) no 651/2014 of the Commission, of 16 April 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty

**CF**

Cohesion Fund

**Communication from the European Commission of 13-03-2020**

Communication COM(2020) 112 final, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup on a coordinated economic response to the COVID-19 outbreak, dated 13 March 2020

**Council of Ministers' Decision no. 10-A/2020**

Council of Ministers' Decision no. 10-A/2020, of 13 March, approves a set of measures relating to the COVID-19 epidemic

***De minimis* Regulation**

Regulation (EU) no. 1407/2013 of the Commission, of 18 December 2013, on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid

**Decree no. 2-A/2020**

Decree no. 2-A/2020, of 20 March, implementing the state of emergency declared by Presidential Decree no. 14-A/2020, of 18 March

**Decree no. 2-B/2020**

Decree no. 2-B/2020, of 2 April, regulates the extension of the state of emergency decreed by the President of the Republic

**Decree-Law no. 10-H/2020**

Decree-Law no. 10-H/2020, of 26 March, establishes exceptional and temporary measures to encourage the acceptance of payments based on cards during the COVID-19 pandemic

**Decree-Law no. 10-I/2020**

Decree-Law no. 10-I/2020, of 26 March, establishes exceptional and temporary measures in light of the COVID-19 pandemic relating to the cultural and artistic sphere, in particular regarding shows not held

**Decree-Law no. 70/2007**

Decree-Law no. 70/2007, of 26 March, regulates commercial practices for price reductions at retail establishments in order to clear stock, increase sales or promote the launch of a new product not previously marketed by the economic agent

**ECN**

European Competition Network

**EMFF**

European Maritime and Fisheries Fund

**ERDF**

European Regional Development Fund

**EUSF**

European Union Solidarity Fund, set up by Regulation (EC) 2012/2002 of the Council, of 11 November 2002

**IRTP**

Individual Restrictive Trade Practices

**IRTP Act**

Decree-Law no. 166/2013, of 27 December, establishes the regime applicable to individual restrictive trade practices

**Law no. 1-A/2020**

Law no. 1-A/2020 of 19 March, approves exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19

# Glossary

**Law no. 23/2018**

Law no. 23/2018, of 5 June, on the right to compensation for infringement of competition law, transposes Directive 2014/104/EU, of the European Parliament and of the Council, of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

**Law no. 4-A/2020**

Law no. 4-A/2020, of 6 April, first amendment to Law no. 1-A/2020, of 19 March, which approves exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19, and the second amendment to Decree-Law no. 10-A/2020, of 13 March, which establishes exceptional and temporary measures regarding the new Coronavirus - COVID-19 epidemic

**Law no. 44/86**

Law no. 44/86, of 30 September, on the state of siege and the state of emergency

**LdC**

Law no. 19/2012, of 8 May, Competition Act

**Mid Caps**

Mid-cap enterprise as set out in Article 2(2) of Decree-Law no. 81/2017 of 30 June

**Presidential Decree no. 14-A/2020**

Presidential Decree no. 14-A/2020, of 18 March, declares the state of emergency due to the occurrence of a public disaster

**Presidential Decree no. 17-A/2020**

Presidential Decree no. 17-A/2020, of 2 April, renews the state of emergency declaration due to the occurrence of a public disaster

**Regulation on certain categories of specialisation agreements**

Regulation (EU) no. 1218/2010 of the Commission, of 14 December 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements

**Small Mid Caps**

Small mid-cap enterprise as set out in Article 2(3) of Decree-Law no. 81/2017, of 30 June

**SME**

Small and Medium-Sized Enterprises

**SNEOC**

Electronic Merger Notification System

**Temporary Framework**

Commission Communication C(2020) 1863 final, of 19 March 2020 - Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak

**TFEU**

Treaty on the Functioning of the European Union

# X. STATE AID AND COMPETITION

## X.A. Background

During this moment of crisis and national emergency the immediate and obvious concern of the national legislature does not seem to lie in Competition Law. Nevertheless, the truth is that previous experience and the *status quo* itself reveal that Competition Law (and the transitory regime to which its application may potentially be subject) will and shall not be a variable absent from the general equation.

Firstly, the importance of economic incentives and support measures for companies – from which much is demanded, in terms of maintaining certain salary levels – combined with the clear insufficiency of the European Union budget to simultaneously respond to the emergency scenario which has engulfed all of Europe, mean that State Aid takes on the central role to help economic operators affected by the crisis caused by COVID-19.

It is, then, through Competition Law that States and companies will be able to find support regarding (*i*) the possible financing, given the controls to which State Aid is subject, and (*ii*) the existing opportunities, to which companies will have to remain alert so that they can avoid or overcome the effects of the present crisis.

To this first and most evident chapter on State Aid we must add, secondly, the importance of companies bearing in mind that, even though the current scenario might appear to "require" or "justify" the softening or the suspension of national and European rules regarding horizontal and vertical restrictive agreements, cooperation and the conclusion of certain agreements (formally or informally) with competitors and other economic operators active upstream or downstream in the market, are still subject to scrutiny under national and European rules, which frequently waive an analysis of the effects of the behaviour, by only appreciating its "potential harm".

The final chapter that must not be forgotten is the one on individual restrictive trade practices and other topics on commercial activity, such as the punishment of economic crimes and the question of sales at reduced prices. Such aspects must also be kept in mind, given the legislation recently or about to be published, which will certainly have a decisive impact on the activity (and its respective limits) of the various operators in the market.

Finally, we shall turn our attention to questions on merger control (because the economy cannot stop and all crises cause consolidations), as well as to the "exceptional" treatment that has been dedicated to the administrative, regulatory and judicial ongoing and about to open proceedings and processes, both at the national and at European levels.

These are, then, the main aspects with which we shall deal and, above all, those to which companies should pay special attention and not neglect, for as some national authorities, including the Portuguese, have made clear: the state of emergency is not a state without Competition Law.

The post-COVID-19 (wherever this moment happens to be), will also be a time during which Competition Law cannot be dismissed. This crisis' suddenness and unpredictability not only led to significant changes in market structures but has also forced an adaptation of the different instruments used as a response. It seems, therefore, necessary that those instruments adapt themselves to the post-crisis, allowing Competition Law to find the answers it needs. Specificities on the standards of predictability as

well as on the assessment of the future impacts of mergers, and, finally, on the terms, extent and scope of the measures adopted to support and encourage the "return" of the undertakings to their activities should therefore be "adapted" to these new circumstances.

## X.B. State Aid

The disruption and problems with liquidity caused by the current situation oblige the Government to adopt measures to support and foster the economy, for which State Aid is pressing.

In this sense, and as referred to in the Communication from the European Commission of 13-03-2020, the main reaction in this respect will necessarily – given the limits of the European Union budget to react to a true "European state of emergency"– have to be provided by national budgets or by funds under Member States' control, this calling for a more flexible approach on the application of the rules on State Aid.

At the national level, the Government has already approved a number of support and incentive measures for companies, which, as detailed below, leads us to anticipate a continued and potentially broader action at this level, for which the subject of State Aid plays a central role.

Aware of the restrictions imposed by the regime of control to which such measures are normally subjected to (measures that are, strictly speaking, considered incompatible with the internal market),[1] the Commission, by its Communication of 13 March, exempted the following from the controls on State Aid:

*(i)* The adoption of wage subsidies and the suspension of the payment of corporation tax and value added tax, as well as social contributions, provided the measure is of general application; and also,

*(ii)* The granting of direct financial support to consumers, motivated, for example, by cancelled services or purchased tickets whose price has not been refunded by merchants.

In addition, the Commission took advantage of said Communication to strengthen and recall the possibility of justifying the support granted, whether under Article 107(3)(c) or Article 107(2)(b) of the TFEU, always with respect for the respective and applicable prior approval and/or control regimes on the part of the Commission, and further underlined the additional means of using the *de minimis* Regulation and the Block Exemption Regulation. Thus, and as an example, the Commission considers that the COVID-19 outbreak qualifies as an "exceptional occurrence" for the purposes of Article 107(2)(b) (see Annex III of the Communication of 13 March).

And the question is not insignificant. It should be noted that, based on the same standard, Denmark was authorised by the European Commission, within 24 hours (after receipt of the notification), to grant state aid of around EUR 12,000,000, in order to "compensate organisers for the damages caused by the cancellation of large events with more than 1,000 participants"[2].

We should also note that the Commission, in Annex III of the said Communication, is open to making exceptions to the "one time, last time" rule, under which – when applied – companies which have received rescue and/or restructuring aid in the last ten years are not eligible to benefit from further aid of this nature.

In addition, if the Member States intend to increase – by less than 20% – the budget dedicated to already approved support schemes, this increase – since it does not constitute an amendment to the aid already approved and,

[1] As per Article 107 of the TFEU.

[2] See Commission Decision C(2020) 1698 final, of 12-03-2020.

as such, does not qualify as new State aid – will not be subject to notification, and may be directly operated by Member States, without intervention from the Commission. And they will also benefit from applying a simplified assessment procedure for increases of more than 20%.

The Commission's intervention did not stop here, however. Indeed, following its Communication, and similarly to what happened in 2008 in response to the global financial crisis, the Commission adopted, on 19-03-2020, a Temporary Framework, aiming to avoid that the support granted by Member States is irrevocably subject to the tight controls applicable to State Aid procedures.

For this purpose, and based on Article 107(3)(b) of the TFEU, the Temporary Framework initially provided for five types of support which the Member States may employ with greater flexibility:

*(i)* Aid in form of direct grants, repayable advances or tax advantages: Member States may therefore create grant schemes worth up to EUR 800,000 to allow a company to address urgent liquidity needs (section 3.1.);
*(ii)* Aid in the form of guarantees on loans taken out from banks by companies: Members States may provide state guarantees so that banks do not cease granting loans to customers which require them or adjust the conditions of loans already granted (section 3.2.);
*(iii)* Aid in the form of subsidised interest rates for loans: Member States can grant companies loans with subsidised interest rates (section 3.3.);
*(iv)* Aid in the form of guarantees and loans channelled through credit institutions or other financial institutions: this aid is given through credit and financial institutions, provided these benefits are channelled to the largest possible number of final recipients (section 3.4.);
*(v)* Short-term export credit insurance: the regime contained in the Communication from the European Commission to the Member States on the application of Articles 107 and 108 of the TFEU to short-term export credit insurance (section 3.5.)[3] has thus been loosened.

It is important, however, to clarify that, in order to preserve the conditions of fair competition in the market, the Temporary Framework makes its application dependent on a set of conditions, in particular pertaining to the economic activity, payroll, turnover, liquidity requirements and the financial situation of the beneficiary company.

The Temporary Framework will remain effective until the end of December 2020, this not precluding a possible succession of temporary regimes, as the Commission will analyse the need for an extension prior to this date.

To this end, we should note that, on 27-03-2020, the Commission sent the Member States a first draft proposal to extend the Temporary Framework[4]. Following this, on 03-04-2020, an amendment was adopted to the Temporary

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[3] Following on from the Temporary Framework, the European Commission decided, on 27-03-2020 (result of a public consultation launched on 23-03-2020) to temporarily withdraw all countries from the list of "marketable risk" countries as part of the Communication regarding short-term export credit insurance for guaranteed operations. These are therefore considered temporarily as non-marketable. This change means that public insurers will be able, in principle, to act and provide insurance to cover export credit risk for guaranteed short-term operations for all countries, without the Member State in question needing to demonstrate that the respective country is temporarily "non-marketable".

This change makes the regime referred to in this section 3.5 even more flexible. The change will last until 31-12-2020, prior to which the Commission will reassess the situation and clarify the future situation for "countries with marketable risk".

[4] See https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_551 [last accessed on 03-04-2020].

Framework[5] which broadened the possibilities granted to Member States to boost research, testing and production of products to fight the coronavirus outbreak, and also adopted selective application measures to protect jobs and to support the economy.

This extension provides for five additional types of aid measures, which allow States, besides the direct subventions already provided for, to give direct grants, repayable advances, guarantees for loans that cover 100% of the risk (no-loss guarantees), or capital injections up to a maximum value of aid within the scope of section 3.1 of EUR 800,000 per company.

Thus, and returning to the above scheme, the following have been added to the Temporary Framework:

*(i)* Support for coronavirus-related research and development projects relating to COVID-19 – direct grants, repayable advances or tax advantages for research into COVID-19 and other relevant antiviral medications are now considered compatible with the single market (section 3.6);

*(ii)* Support for the construction and upscaling of testing facilities – Member States can grant aid in the form of direct grants, tax advantages, repayable advances and no-loss guarantees to support investments enabling the construction or upscaling of infrastructures needed to develop and test products useful to tackle the coronavirus outbreak (section 3.7);

*(iii)* Support for the production of products relevant to tackle the COVID-19 outbreak – Member States can grant aid in the form of direct grants, tax advantages, repayable advances and no-loss guarantees to support investments enabling the production of coronavirus-relevant products, which include not only the relevant drugs and treatments (including vaccines), but also, among others, medical and hospital equipment (including ventilators, protective clothing and equipment, as well as diagnostic tools) and data collection/processing tools (section 3.8);

*(iv)* Targeted support in the form of deferral of tax payments and/or suspensions of social security contributions in favour of companies particularly affected by the COVID-19 consequences (therefore, selective application measures), by instance, companies in certain sectors or regions, or of certain type or dimension – this is a possibility that includes deferrals of payment of taxes and of social security contributions (including cases in which payments in instalments are owed) (section 3.9);

*(v)* Targeted support in the form of wage subsidies for employees, in order to avoid lay-offs during the COVID-19 outbreak – as in the previous point, when limited to certain sectors, regions and/or type/dimension, with the aim of contributing to the wage costs of companies that, without this support, would lay off personnel (section 3.10).

On May 8, 2020, the second amendment to the Temporary Framework was adopted, this time, with a very specific scope, apparently related to a gradual "return" to normality. Through this second amendment, the scope of the Temporary Framework has been enlarged, so that State aid in the form of *i)* aid for the recapitalization of non-financial companies, and *ii)* the granting of subordinated debt could be authorized, provided that undue distortions of competition in the single market are prevented.[6]

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[5] See Commission Communication C(2020) 2215 final - Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, available at https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_1st_amendment_temporary_framework_en.pdf, [last accessed on 04-04-2020].

[6] See Communication C(2020) 3156 final from the Commission amendment to the Temporary Framework for State Aid Measures to support the economy in the current Covid-19 outbreak, available at: https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_2nd_amendment_temporary_framework_en.pdf, [last accessed on 12-05-2020].

The new types of support regarding recapitalization measures are identified in section 3.11 of the Temporary Framework. Subordinated debt, regulated in paragraph 26 of the Temporary Framework, will be subject either to section 3.3. of the Temporary Framework, regarding debt instruments, or to the (new) section 3.11., in case it exceeds the ceilings set out in the former section.

Both supports are subject to the fulfilment of strict conditions, such as the prohibition on the payment of dividends or bonuses, among others. Paragraph 83 of the Temporary Framework, as amended, also provides for an obligation of "transparency", which requires large companies to provide information regarding the use of the aid received, in particular, regarding the EU objectives, and the EU objective of climate neutrality.

This regime (in particular, section 3.2) has – prior to its first enlargement – already benefited France which digitally notified the Commission, on 17-03-2020, of various support measures relating to the French state guarantee scheme for loans to companies. These aimed to compensate organisers of large events that were planned to take place between 06-03-2020 and 31-03-2020, with an estimated total budget of EUR 1,000,000,000.[7]

Also under this Temporary Framework, just two days after its approval, the Commission authorised four Portuguese guarantee schemes for SME and Mid-Caps[8] affected by the coronavirus outbreak, in compliance with the Union's rules on State Aid due to the limited (*i*) term, (*ii*) size, and (*iii*) risk assumed by the State.

Portugal thus became, alongside France, one of the pioneers to benefit from the more flexible and faster regime introduced by the Temporary Framework for State Aid control. Since then we have seen daily approvals of aid schemes from Member States in various areas.

The schemes approved therein will allow companies belonging to four sectors – (*i*) tourism, (*ii*) catering and related, (*iii*) travel agents, tour operators, event organisers and similar, and *(iv)* essentially all other sectors of the economy – to continue to take out loans from banks, limiting the risks associated therewith and thus being able to ensure the maintenance of minimum levels of liquidity, for which a total budget of EUR 6,200,000,000 is currently allocated. According to publicly accessible information,[9] the lines (*iii*) and (*iv*) are now closed, as a result of the number of operations submitted to them having already reached the maximum amounts defined.

In accordance with the Commission's public communication, "these schemes aim to limit the risks associated with issuing operating loans to those companies that are severely affected by the economic impact of the Coronavirus outbreak. The objective of the measures is to ensure that these companies have sufficient liquidity to safeguard jobs and continue their activities faced with the difficult situation caused by the Coronavirus outbreak".[10]

In accordance with the measures adopted by the Portuguese Government and approved by the Commission based on the Temporary Framework (state guarantee scheme), all financial aid will be channelled through banks and other financial institutions.

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(7) See Commission Decision C(2020) 1884 final, of 21-03-2020 - *Aide d'État SA.56709 (2020/N) – France – COVID-19: Plan de sécurisation du financement des entreprises*, available at https://ec.europa.eu/competition/state_aid/cases1/202012/285133_2141269_36_2.pdf, [last accessed on 22-03-2020].

(8) See definition of a mid-cap enterprise in Article 2(2) of Decree-Law no. 81/2017, of 30 June.

(9) See https://www.spgm.pt/pt/catalogo/linha-de-apoio-a-economia-covid-19/ [last accessed on 11-05-2020].

(10) See the communication, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_506 [last accessed on 23-03-2020].

Since this may involve not only the aid intended for the recipients of loans but also indirect aid to the banks themselves, as the Commission expressly acknowledged in paragraph 28 of the Temporary Framework, this may create a risk vis-à-vis State Aid for the banks in question.

In paragraph 31 of the Temporary Framework, the Commission requires that any bank through which the support is channelled be able to demonstrate that it operates a mechanism which guarantees that the advantages arising from the aid are passed on to the largest extent possible to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates.

However, as this mechanism does not necessarily guarantee that the bank fully channels the advantages resulting from the aid, this might result in an indirect benefit to the bank itself. This corresponding (indirect) aid will have to be approved by the Commission before being granted to the bank. Otherwise, the support (i.e. the State guarantee) would potentially be illegal and possibly invalid (until its approval), which could leave the bank unprotected and exposed to the risk of the loan recipient's insolvency.

Thus, our *prima facie* understanding of section 3.4. of the Temporary Framework is that, provided the bank can demonstrate the mechanism required in paragraph 31, any indirect aid afforded to the bank will be approved jointly with (or will also be covered by the approval of) the direct aid in favour of the final beneficiary. However, as the same does not directly result from section 3.4. nor from any other part of the Temporary Framework, one can consider that banks minimise the abovementioned risks by ensuring that they fully pass on the advantages received from the State guarantee to the final beneficiaries.

In the meantime, the Commission approved several schemes for support for companies and, in some cases, for self-employed workers to be implemented in Germany, Italy, Latvia, Luxembourg, Spain, Denmark, the United Kingdom, Estonia, Ireland, Malta and Sweden, some more than once, by reference to schemes for aid in different areas such as exports, cancellation of trips, aid for small and medium-sized enterprises, among others, with an exceptional number of requests expected[(11)]. Following the approval of the Temporary Framework (in its initial wording), the Commission's website publishes, on a daily basis, its decisions on multiple State aid schemes, these showing, more recently, an increased attention towards companies in the agri-food chain.

We should also point out that Portugal's pioneer spirit did not stop at the initial version of the Temporary Framework, given that only one day after the publication of the amendment and extension of the Framework, the Portuguese State had two State Aid schemes approved (a direct grant scheme and a State guarantee for investment and working capital loans granted by commercial banks), totalling EUR 13,000,000,000. These are support measures for SMEs and large companies. They aim to help businesses cover immediate needs in terms of working capital or investment, and thus intend to ensure the continuity of the respective activities[(12)]. The aforementioned support, namely the support line for almost all sectors of the economy, was implemented by the Portuguese State under this aid scheme.

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(11) See decisions and communications here: https://ec.europa.eu/commission. In particular, and for an overview of the measures adopted to date, either under the Temporary Framework or under Article 107 (2b) of the TFEU, https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2_b_and_107_3_b.pdf, [last accessed on 14-05-2020].

(12) See the communication, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_599 [last accessed on 04-04-2020].

In this regard, we should also highlight the publication of two Proposed Regulations, both relating to the release of funds to counteract the economic effects of the COVID-19 outbreak.

In the first Proposal[13] the Commission proposes to mobilise funds from the European Structural and Investment Funds, waiving for this purpose the obligation to request repayment of pre-financing not spent by the ERDF, the ESF, the CF and the EMFF until the programme ends.

These unrecovered sums should, under the Proposal, be used by Members States to accelerate investments related to the COVID-19 outbreak, under those Funds.

As such, the investment priorities of the ERDF for research, technological development and innovation will be replaced by investment in products and services necessary to promote the response capabilities of public health services. For this purpose, and anticipating the need to change the programmes, the Proposal contains a list of "non-substantial modifications" that will not require any approval through a Commission decision.

The Second Proposal,[14] which proposes to amend Regulation (EC) 2012/2002 of the Council, of 11-11-2002, which set up the EUSF, aims to expand its application to the great public health questions emerging.

In these terms and for those purposes, the Commission proposes to increase the level of advances for individual disasters of all categories to 25% of the expected contribution from the EUSF, limited to a maximum of EUR 100 million, and also proposes an increase in the total level of appropriations for advances from the EUSF in the annual budget, from EUR 50 million to EUR 100 million.

Finally, and given the impacts of the crisis on the maintenance of jobs, the Commission put forward, on 02-04-2020, a proposal for a Regulation to create a new temporary support instrument – SURE (Temporary Support to mitigate Unemployment Risks in an Emergency)[15] – which will provide financial assistance to Member States, up to a maximum of EUR 100,000,000,000. This support aims to cover the costs associated with the temporary scheme to reduce working hours and suspend employment contracts, together with similar measures implemented in various Member States.

## X.C. Anti-competitive practices and private enforcement

The state of calamity in which the country finds itself may foster cooperation between competitors and other operators at different levels of the production and distribution chains for goods and services in the market.

It is therefore important to recall that agreements between competitors (at the horizontal level) and agreements with other players in the market (at the vertical level) may be considered anti-competitive and, as such, forbidden, either by Article 101 of the TFEU or by Article 9 of the LdC (Competition Act).

This will not be so in the case of an agreement that is strictly necessary and directly related to the implementation of a manifestly pro-competitive and lawful operation, in which case it may be considered legitimate and valid, according to EU case law.

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(13) Proposal for a Regulation COM(2020) 113 final – Coronavirus Response Investment Initiative of 13-03-2020.

(14) Proposal for a Regulation 2020/0044 (COD) to provide financial assistance to Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency, of 13-03-2020.

(15) Proposal for a Regulation COM(2020)139 final 2020/0057 (NLE) on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, of 02-04-2020.

Furthermore, the legislature itself, in particular in Article 101(3) of the TFEU and Article 10 of the LdC, sets forth that such agreements may be justified when, among other considerations, they improve the production and distribution of goods and services, provided that consumers are afforded a fair share of the resulting benefit (which may well be the case in the emergency and calamitous scenario caused by the COVID-19 outbreak), and the agreements concerned do not allow the parties to eliminate competition in a substantial part of the market.

It is, therefore, important to pay attention to the guidance that competition law can give in this matter.

Thus, and with respect to the new solutions, it is important to note that, via Council of Ministers' Resolution no. 10-A/2020, the Ministry of State for the Economy and Digital Transition was chosen to coordinate the Working Group for Monitoring and Assessing the Supply Situation for Food and Retail Sectors due to the Market Dynamics caused by COVID-19, **adopting the preventive or corrective measures that come from this group in order to maintain or re-establish normal conditions of supply** (paragraph 5(b) of the said Resolution).

Now, for the purposes of maintaining the "normal conditions of supply", the vision on the role of Competition Law may give rise to truly antagonistic responses on the part of the legislature and enforcement agencies. Companies should anticipate such responses. To this end, we have seen competition regulators in several countries set up task forces, whose aim is to advise the government on Competition Law matters, important in the context of the crisis.[16]

Thus, regarding the different responses referred to above, a first one comes from the United Kingdom Government, which has been supported by the Competition and Markets Authority, and also backed up by EuroCommerce,[17] the representative body for the retail sector. In this regard, the British Government understood the need for the urgent introduction of temporary changes to Competition Law. It suspended some rules which classify certain types of behaviour as conclusively anti-competitive.

The idea is to allow joint actions, especially by supermarkets, to respond to growing levels of demand. As a consequence of the approval of this package of measures, it will be possible for UK retailers not only to share information about stocks but also to cooperate regarding their respective logistical needs, for example, by sharing distribution vehicles. The "lifting of the competitive veil" will thus allow these operators to share the resources deemed necessary to satisfy growing levels of demand.[18] The emergency legislation has been extended beyond supermarkets to cover health services and the ferry operators between the Isle of Wight and the mainland United Kingdom. This was done through three orders[19] which set forth that, for this purpose, the operators which intend to benefit from the scheme must inform the Secretary of State of the said cooperation agreements or projects within 14 days.

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(16) See, for example, https://www.concurrences.com/en/bulletin/news-issues/preview/the-uk-competition-authority-launches-a-covid-19-taskforce-to-ensure-compliance-en, [last accessed on: 03-04-2020].

(17) EuroCommerce has already demonstrated its support for the suspension of particular rules from Competition Law as a way of ensuring the maintenance of continuous supply of essential goods.

(18) The German Economy Minister, Peter Altmaier, seems to take a similar line. In a communication, he set out his intention to loosen the application of Competition Law as a means of facilitating cooperation between the food retail supply chains and thus to safely satisfy the dietary needs of the population. See the communication at: https://www.tagesschau.de/wirtschaft/altmaier-kartellrecht-corona-101.html [last accessed on: 21-03-2020].

(19) Order 2020 (SI 2020/368), Order 2020 (SI 2020/369) and Order 2020 (SI 2020/370).

The South African legislature also approved, on 19-03-2020, a block exemption for the health sector, with which it aims to allow a series of vertical and horizontal agreements to be concluded between hospitals and health centres, medical suppliers, specialist doctors and radiologists, pathologists and laboratories, pharmacies and health service providers when necessary to coordinate the capacity, use and availability of goods and means in response to the pandemic.[20] Besides this, several exemptions relating to the banking and retail sectors[21] were approved. They allow certain categories of agreements or practices to be exempted from scrutiny through Competition Law.

In a similar vein, we should highlight the identical position adopted by the Australian competition regulator, which has allowed the discussion between financial institutions to coordinate the moratoria to be granted on loans.[22]

Noteworthy is also the action which New Zealand may take, following instructions from the Government to the Commerce Commission as to afford more flexibility in the application of Competition Law,[23] in particular regarding the activities of supermarkets and telecommunications companies. The Australian competition authority, recognising the financial difficulties felt by small companies and their workers, decided, under a provisional and urgent authorisation, to allow cooperation between the Australian Banking Association and domestic banks in order to implement a set of support measures for small companies.[24]

The ECN itself, in a communication, showed its understanding that this situation may trigger the need for companies to cooperate with each other in order to guarantee the fair distribution of scarce goods to consumers, and also declared that it would not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. Also because, under the circumstances, it affirms that such measures are unlikely to be problematic, since (*i*) they would either not amount to a restriction of competition under Article 101 of TFEU (and its national implementations) or (*ii*) generate efficiencies that would most likely outweigh any such restriction.[25]

One should also look at the temporary exemption (granted for three months) acknowledged by the Norwegian Government to airlines – Scandinavian Airlines – land and sea transport companies, allowing them to temporarily coordinate the transport of passengers and goods in Norway, according to the Government, to "ensure that citizens have access to necessary goods and services".[26]

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[20] Available for consultation at: http://www.gpwonline.co.za/Gazettes/Gazettes/43114_19-3_DTI.pdf [last accessed on 21-03-2020].

[21] Respectively here https://www.gov.za/sites/default/files/gcis_document/202003/43134rg11059gon358.pdf and here https://www.gov.za/sites/default/files/gcis_document/202003/43134rg11059gon358.pdf, [last accessed on 04-04-2020].

[22] More information available at: https://www.accc.gov.au/media-release/australian-banking-association-small-business-relief-package [last accessed on 20-03-2020].

[23] See coverage at: https://businessdesk.co.nz/article/covid-19-anti-competition-laws-relaxed-for-business [last accessed on 23-03-2020].

[24] See https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-banking-association-small-business-financial-relief-package [last accessed on 03-04-2020].

[25] See the communication, available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf [last accessed on 23-03-2020], where, however, it advises companies to seek proper legal advice. The ECN also states that it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (*e.g.* face masks and sanitising gel) remain available at competitive prices and that it will not hesitate to take action against companies taking advantage of the current situation by cartelising or abusing their dominant position.

[26] More information available at https://www.regjeringen.no/no/aktuelt/flyselskapene-gis-klarsignal-til-a-samarbeide/id2693957/ [last accessed on 20-03-2020].

Finally, it should be noted that changes are expected in Brazil relating to the suspension of the application of certain rules from the national competition regime. The competent body will also look at other infringements, considering the extraordinary circumstances created by the pandemic.[27]

This is, however, as we have said, only one of the views that may come to be adopted in the application of Competition Law.

Thus, another position might be the one adopted by the AdC which, in a communication on 16-03-2020.[28] guaranteed "that it remains particularly vigilant in its mission to detect potential abuses or anti-competitive practices which exploit the current situation to the detriment of people and the economy, for example, in terms of price fixing or market sharing. Suppliers, distributors and resellers in all economic sectors, including goods and services necessary for the protection of health, the supply of families and companies and community life, must adopt commercially responsible behaviour, at all levels of the supply chain, including e-commerce. [...] The AdC reminds you that any person or company may digitally report suspicions of anti-competitive practices through the AdC's Reporting Portal".[29]

This seems to be a position similar to the one adopted in other Member States, in particular by the Italian competition authority which, on 27-02-2020, began two investigations into the behaviour of the Amazon and eBay online platforms. These investigations arose from countless complaints made by consumers about the unjustified increase in price of disinfectant and disposable protective masks. In a similar vein, the Dutch competition authority, despite acknowledging that Competition Law offers opportunities for companies to cooperate in order to avoid losses, not just for themselves but also for consumers, also warned that the crisis could not serve as a justification for taking advantage of the present situation of uncertainty or scarcity, and made it clear that companies cannot abuse a dominant position in the market by artificially raising the "usual" prices. The authority also recalls that companies must continue to provide accurate and realistic information about whether their products can be distributed and with how much delay compared to normal situations.[30]

The Ukrainian competition authority also adopted this position. It made recommendations not only to 34 pharmacies but also to 10 national retail chains in order for them to avoid, in the absence of any economic justification, to stop artificially inflating prices of (*i*) protective face masks and, in the second case, of (*ii*) disinfectants and various long-lasting foods. The operators were also warned that the scenario could constitute evidence of a concerted practice. The same authority, on 15-03-2020, announced that it would investigate the increases seen in flight prices charged by the Ukraine International Airlines in the days prior to the suspension of air traffic to and from Ukraine.[31]

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(27) See project draft here: https://www.conjur.com.br/dl/projeto-lei-senado-11792020-coronavirus.pdf, [last accessed on 04-04-2020].

(28) Communication 03/2020. "AdC remains particularly vigilant in its mission to detect potential abuses or anti-competitive practices which exploit the current situation", available at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202003.aspx [last accessed on 21-03-2020].

(29) In a similar vein, in Spain, the National Commission on Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*) gave a warning at: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/20200312_NP_medidas_excepcionales_eng.pdf [last accessed on 20-03-2020]. And likewise in France, the French competition authority (*Autorité de la Concurrence*) (See https://concurrence.public.lu/fr/actualites/2020/coronavirus-responsabilite-entreprises.html [last accessed on 20-03-2020].

(30) See https://www.concurrences.com/IMG/pdf/dutch_competition_authority_acm_s_oversight_during_the_coronavirus_crisis_press_release_18_march_2020.pdf?58044/820827035470f02ec78be92a98702e71083b0773 [last accessed on 03-04-2020].

(31) See http://www.amc.gov.ua/amku/control/kyivr/uk/publish/article/91556 [last accessed on 03-04-2020].

Although these concern unilateral behaviours, it is important to keep in mind that Competition Law does not only ban anticompetitive agreements and concerted practices but also the abuse of a dominant position, by a company in the market[32] (Article 102 of the TFEU and Article 11 of the LdC).

Likewise, it should also be noted that the Hellenic Competition Commission not only warned of the fact that the rules of Competition Law remain fully applicable, thus justifying it would remain attentive to the existence of hardcore restrictions (by object) – such as the imposition of minimum or fixed resale prices – but also effectively started an investigation aimed at a group of companies active in the production, import and trading of health products, in particular, surgical masks and disposable gloves, as well as other products (including antiseptic solutions), following a number of consumer complaints, driven by the rising prices of products and limited stocks.

One should conclude from the foregoing that, even in these times, companies must not forget the restrictions that competition rules place on cooperation among themselves and, in particular, with competing companies.

Indeed, the public "warnings" and clarifications that are being given by national competition authorities throughout Europe,[33] including the ECN, justify that, until a legislative initiative is approved in this regard (if any), companies should keep in mind and not forget that the expected position from the authorities is that the crisis does not on its own exempt anti-competitive practices normally forbidden under Competition Law. In other words, companies cannot try to justify eventual collaborative behaviours or practices by simply referring to any "incentive" to such collaboration from national Governments (insufficient, as we shall detail below) or by using the pandemic situation as a justification.[34]

We should also highlight that the European Commission has provided informal guidance for companies and their lawyers about the terms on which it is possible to engage in temporary and pro-competitive cooperation with another economic agent to deal with the pandemic situation. For this purpose, the Commission created an online tool to receive and deal with requests for information from different stakeholder.[35]

In the same vein, and similarly to what happened with State aid rules, the Commission approved, on 08-04-2020, a Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of emergency stemming from the current COVID-19 outbreak.[36] Although the Framework appears to focus, exclusively, on

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(32) In China, a shop in Beijing was given a fine for having disproportionately increased the price of face masks. In Korea, investigations have been launched into alleged practices of bundling face masks with other products. In the United States, concerns have so far been directed towards misleading advertising practices regarding the effectiveness of certain products for preventing or treating the virus.

(33) And which also extend to the American continent. In this respect, see the notes from the Mexican and Canadian authorities, available at https://www.cofece.mx/wp-content/uploads/2020/03/COFECE-012-2020_COFECE-COVID-19.pdf and https://www.canada.ca/en/competition-bureau/news/2020/03/statement-from-the-commissioner-of-competition-regarding-enforcement-during-the-covid-19-coronavirus-situation.html, [last accessed 03-04-2020].

(34) A warning that the Romanian Competition Council specifically made, publishing guidelines and warning companies that they cannot use COVID-19 as a "justifying reason" for any anti-competitive practice.

(35) Available at https://ec.europa.eu/competition/antitrust/coronavirus.html.

(36) See C(2020) 3200 final Communication from the Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, available at: https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf, [last assessed on 11-05-2020].

business cooperation in the health sector, there is a general concern about the "legitimacy" of measures aimed at reducing the gap between supply and demand, so the possibility of engaging in certain behaviours under the current exemptions should continue to be subject to a specific and case-by-case assessment, which is not dispensed with by the state of emergency, calamity or any other set of political measures that might characterize the "state of exception" (broadly speaking).

This does not mean that possibilities of cooperation do not exist. In abstract, it is possible to justify certain practices - besides the case law already referred to – by considering the Regulation on certain categories of specialisation agreements.[37] However, this possibility should be subject to further analysis and considered with precaution.

This approach also emerges from the joint statement from the Competition Division of the Department of Justice and the Federal Trade Commission.[38] Because they may also be transposed into European competition law, the references to collaboration for research and development,[39] to joint purchase agreements when they aim at greater efficiency and the reduction of transaction costs (valuable in the field of the acquisition of medical and hospital material and equipment), as well as the decisions of associations of companies, in particular in order to sustain or demonstrate the needs and difficulties caused by the state of emergency in certain sectors of activity are worth mentioning.

A final note of caution should also be directed at the repercussions and treatment of a potential "excusing" legislative intervention in this matter.

In fact, European Union case law holds that companies may be exempted from liability when the situations of alleged breach or infringement of Competition Law result ultimately from national legislation that, for example, imposes the "forced collaboration" between competing economic operators or the exercise of any other practice, classed, in abstract, as anti-competitive under Competition Law rules.

Under the circumstances, this note is of extreme importance precisely because the state of emergency may be used as a justification for the adoption of government measures as to the creation of a true "state of exception from Competition Law".

Thus, one should keep in mind the following:

*(i)* European Union case law holds that Articles 101 and 102 of the TFEU (correspondent, in national law, to Articles 9 and 11 of the LdC) will not apply in situations in which national legislation (*a*) imposes behaviours contrary to competition or (*b*) eliminates any possibility of competitive behaviour, in which case there will not really be a competitive market and a restriction on competition;[40]

*(ii)* This case law, however, only includes a relatively narrow range of factual situations. This is because it considers that companies will remain subject to the application of competition law in cases where national law

[37] Despite the quota thresholds required for its application being quite low (as a rule of 20%) and hardcore restrictions remaining in place.

[38] Available at: https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19 [last accessed on 25-03-2020].

[39] See Regulation (EU) No 1217/2010, on the application of Article 101(3) of the TFEU to certain categories of research and development agreements Text with EEA relevance.

[40] See, in this regard, the following rulings: Court of Justice Ruling of 11 November 1997, France v Ladbroke Racing, C-359/95 P and C-379/95 P, EU:C:1997:531; ruling of 14 October 2010, Deutsche Telekom AG v European Commission C-280/80-P; ruling of 29 March 2012, Telefónica v European Commission, T-336/07, EU:T:2012:172; and ruling of 17 February 2011, Konkurrensverket v TeliaSonera Sverige AB, EU:C:2011:83, all available at www.curia.europa.eu.

limits itself to encouraging or facilitating the adoption of anti-competitive behaviour, i.e. when national law leaves open the possibility that competition may be prevented, restricted or distorted by the adoption of autonomous behaviours by companies;

*(iii)* To this extent, one can add the risk of the Member State, author of the said legislation, being held liable itself under the principle of fair cooperation, for the adoption of measures that restrict competition; therefore, the greatest care should be taken in the adoption, application and interpretation of State rules which may emerge to respond to the needs of the exceptional circumstances.[41]

To these substantive notes, we shall add a few final remarks on procedural aspects.

Indeed, attention must be drawn to the rule contained in Article 7(3) of Law no. 1-A/2020, which creates a new cause of suspension for limitation and expiry deadlines relating to all processes and proceedings, a decision which will obviously also affect the sanctioning proceedings underway, and likewise penalties already imposed (see Article 74 of the LdC) for infringements of Competition Law. A regime that applies regardless of the stage – before or after the statement of objections – at which the said processes or proceedings find themselves.[42]

With regards to private enforcement actions arising from competition law breaches, everything indicates that the limitation period for the right to compensation, as provided for in Article 6 of Law no. 23/2018, should also be considered suspended while the exceptional situation remains. This is what seems to result from a methodically correct reading of the provisions of the said Article 7(3). If, in fact, a limitation period for rights, which is interrupted "by the judicial summons or notification to the alleged infringer" is at issue, one should understand that it will fall within the scope of the provisions of the said rule, and therefore remains suspended.

Law no. 1-A/2020, which has already been successively amended, has not yet revoked Article 7, on the suspension of the periods referred to therein.

## X.D. Restrictive trade practices and changes in commercial matters

Nowadays, the strict application of the legislation relating to IRTP, in particular the provisions of the IRTP Act, regarding the prohibition of sales at a loss in Article 5, may prove to be unreasonable, and might also lead to a monopolisation of the resources of the competent regulatory authority – ASAE –, resources that could instead be channelled to investigating infringements and practices that really harm consumers.

In fact, the Council of Ministers approved, on 07-05-2020, a Decree-Law that sets out an exceptional and transitory regime for commercial practices with price reduction, which will allow establishments that have been closed (or whose activity has been suspended), as a result of the measures adopted in response to the COVID-19 outbreak, to sell their products more easily (and with fewer restrictions). The aforementioned diploma provides that sales carried out during the months of May and June 2020 are not to be included in the maximum sale limit of

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(41) See ruling of 22 May 2003, Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission and Mobilkom Austria AG, C-462/99, EU:C:2003:297; ruling of 17 May 2001, TNT Traco SpA v Poste Italiane SpA and Others, C-340/99, EU:C:2001:281.

(42) In a more daring interpretation, one can perhaps read the aforementioned rule as allowing only the competent authority (before which the referred proceedings are heard) to invoke COVID-19 as a cause for suspension or, even, an extension of deadlines in progress, an interpretation that would prevent it from being considered an automatic suspension.

124 days per year (cf. paragraph 1 of article 10 of Decree-Law no. 70/2007, of 26-03-2007).[43]

Regardless of this worthwhile legislative intervention, economic operators must remain vigilant. Indeed, ASAE's activity in this area remains particularly significant. It is important to remember that ASAE has already launched an inspection operation on 28 economic operators for allegedly unlawful profit obtained from the sale of goods necessary to prevent and combat the pandemic, in particular personal protective equipment and medical devices (masks, gloves, suits), as well as biocidal products, namely, alcohol, alcohol gel and disinfectants. As a result of this action, the following processes were begun: (*i*) a criminal process for unlawfully obtained profit from the sale of alcohol gel[44] and (*ii*) two administrative processes for illegal commercial practices; according to the statement ASAE gave to the press on 19 March, five incidents of suspected unlawfully obtained profit are still under investigation.

Similarly to the AdC, the ASAE warns in its communications that "it will continue to take action to combat profiteering and to ensure that products on the market meet the requirements, guaranteeing fair competition and consumer safety".[45]

For the purposes of "legislative chronology", it is important to recall that Presidential Decree no. 14-A/2020, which declared the State of Emergency, determines - in particular in what concerns the rights whose exercise is partially suspended - that "the competent public authorities may request the provision of any services and the use of movable and immovable property, health care units, commercial and industrial premises, companies and other production units, and may order **the opening, working and operating of companies, premises and means of production or their closure and impose other limitations or modifications to the respective activity, including changes to the quantity, nature or price of the goods produced and marketed or to the respective procedures and distribution circuits and marketing, as well as changes to the respective operating regime**".

More conclusive was the Presidential Decree which renewed the State of Emergency (Decree no. 17-A/2020), since on the same point it makes express reference to the possibility of "measures being adopted to set prices and combat profiteering or hoarding of certain products or materials".

Which did not come without incident. Indeed, in the context of the declaration of the state of emergency in Portugal, no measures on prices and hoarding had **yet** been imposed, since according to Law no. 44/86, under which the Government is empowered to give execution to the state of emergency, Decree no. 2-A/2020, aimed at doing so, did not in fact set forth any measures in this respect.

The situation changed, however, with the approval of Decree no. 2-B/2020, which, by regulating the extension of the State of Emergency, not only expressly revoked, through its Article 46, Decree no. 2-A/2020, but also set forth, in its Article 28(2)© that "the member of the Government responsible for health, with powers of delegation, determines the necessary execution measures", from among which "c)

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(43) See Notice from the Council of Ministers, of 07-05-2020, available at: https://www.portugal.gov.pt [last accessed on 10-05-2020].

(44) Besides the provisions of the IRTP Act, one must not forget the regime resulting from Decree-Law no. 28/84, referring to crimes against the economy and against public health, and Decree-Law no. 70/2007 that regulates commercial practices for price reductions at retail establishments in order to clear stock, increase sales or promote the launch of a new product not previously marketed by the economic agent.

(45) See the communication, available at https://www.asae.gov.pt/espaco-publico/noticias/comunicados-de-imprensa/asae-fiscaliza-lucro-ilegitimo-em-bens-necessarios-para-a-prevencao-a-pandemia.aspx [last accessed on 21-03-2020].

Measures to contain and limit the market, set maximum prices, centrally monitor stocks and quantities produced, and exempt the payment of fees for economic operators acting in urgent situations".

In the same vein, Decree-Law no. 14-F/2020, gave Decree-Law no. 10-A/2020, a new Article 32-B, according to which "the member of the Government responsible for the area of the economy, together with the member of the Government responsible for the sectorial area, if it is the case, may, with the power to delegate, determine the necessary exception measures, in the context of the emergency situation caused by the COVID-19 disease pandemic, and for the duration of the state of emergency, in relation to market containment and limitation measures, maximum price fixing, limitation of profit margins, monitoring stocks and quantities produced, and exemption from payment of fees for economic operators acting in urgent situations".

Following this, two orders have been adopted, aimed at fixing *i)* maximum prices for bottled liquefied petroleum gas (LPG), in standard steel tariffs, in types T3 and T5 (see Order no. 4698-C/2020, of 17-04-2020), as well as *ii)* a maximum profit of 15% in wholesale and retail sale of medical devices and personal protective equipment, as well as alcohol gel and sanitizing (see Order no. 4699/2020, of 18-04-2020).

Similar measures have been adopted throughout the globe. For example, in South Africa, the COVID-19 outbreak caused the elaboration of a set of rules that sought to determine and detect irrational and unfair prices, as well as the obligations of suppliers to guarantee the fair distribution of goods to their clients and to keep certain goods in stock (even if, for this purpose, it is necessary to impose restrictions on the volume and quantity of goods acquired by each customer for a certain period)[46].

To determine excessive prices, the South African government decided that, during the calamity, any material increase in price of a good or service covered by this regulation [47] that (*i*) does not correspond or is not equivalent to an increase in the supply cost for this good or service, or (*ii*) increases the margin or the price of this good or service above its average margin or price, calculated based on the three months prior to 01-03-2020, will be considered a relevant and critical factor to determine and classify a price as excessive or unfair.

We should also in this regard draw your attention to the terms of Decree-Law 10-H/2020 and Decree-Law no. 10-I/2020, still applicable, which respectively establish exceptional and temporary measures to encourage the acceptance of payments based on cards and measures in the cultural and artistic sphere, in particular regarding shows not held.

Under Article 2 of the first of those acts:

*(i)* The fixed component of any fee for card payments made at point-of-sale terminals is suspended;[48]
*(ii)* Increases in the variable components of fees for such payments, as well as other fixed fees not suspended by the previous number, are prohibited; and
*(iii)* New fixed or variable fees regarding the acceptance of card payments made at point-of-sale terminals is prohibited.

In line with Article 3 of the same Decree-Law no. 10-H/2020, beneficiaries of card payments which provide point-of-sale terminals cannot refuse or limit acceptance of cards to pay for any goods or services, regardless of the value of the transaction, while the suspension is in force.

[46] Available at http://www.gpwonline.co.za/Gazettes/Gazettes/43116_19-3_DTI.pdf [last accessed on 21-03-2020].

[47] This concerns basic foods and consumer products, including medical and hygiene products.

[48] Also Article 5 of Law no. 7/2020 of 10-04-2020.

Regarding cultural and artistic events and the respective ticketing, Decree-Law no. 10-I/2020 sets forth that:

*(i)* No other price or fee can be charged for the substitution of a ticket for events not held between 28-02-2020 and up to 90 days following the end of the state of emergency and subsequently rescheduled (Article 4(7));
*(ii)* The rescheduling of the show cannot lead to an increase in the ticket price for those who, on the date it was rescheduled, already had tickets (Article 4(8));
*(iii)* Agencies, ticket offices and digital ticket sales platforms, as well as owners or operators of entertainment facilities, premises and venues that have their own ticketing, cannot demand from cultural promoters the commission due for the aforementioned shows not held or cancelled (Article 7);
*(iv)* The owners or operators of entertainment facilities, premises and venues cannot charge any supplementary price to the cultural promoter (Article 8).

In its turn, Article 11-A, as amended by Law no. 7/2020, of 10-04-2020, sets out a duty for the intermediaries (if applicable), and once they have received the payment from the contracting entity, to pay a proportionate and equitable sum to workers that have been involved in the events, and without prejudice to the proportional collection of commissions due to them.

As for civil requisition, this is only referred as a guarantee for public health (Article 28 of Decree no. 2-B/2020, in the meanwhile revoked by Decree no. 2-C/2020, also inapplicable, due to the fact that Presidential Decree no. 20-A/2020, which it used to regulate, is no longer effective). Article 18 afforded the Minister for the Economy and Digital Transition a wide range of powers regarding the opening or closing, or operating conditions, of all commercial establishments, i.e. including those that must be closed and those that can remain open (Annexes I and II respectively of the decree). This rule should be read in conjunction with Articles 9 *et seq*. of the same act, regarding the closure of facilities and premises and the suspension of activities. Now, and after the declaration of calamity, by Resolution of the Council of Ministers no. 33-A/2020, of 30-04-2020, the strategy of softening and lifting the confinement measures approved to fight the pandemic of COVID-19, and as established by that Resolution of the Council of Ministers no. 33-C/2020 of 30-04-2020, is in place, which implies the gradual reopening of those establishments.

In any case, and for the purpose of understanding which measures are in force today, it should be noted that, through Order no. 4147/2020 of 05-04-2020, the Minister for the Economy and Digital Transition delegated all the powers attributed to the same thereunder to the Secretary of State for Tourism and the Secretary of State for Trade, Services and Consumer Protection, within their respective powers, and also ratified all the acts carried out by the secretaries of State since 02-04-2020.

Under this delegation of powers, the Secretary of State for Trade, Services and Consumer Protection determined through Order no. 4148/2020 of 05-04-2020 that:

*(i)* All wholesale food establishments could combine their activity with that of retail, and could under this order and while it is in force sell their products directly to the public, provided the respective safety and hygiene are observed, as well as the regime for priority service set forth in Decree no. 2-B/2020, and for this purpose must:

- All goods include the respective selling price to the public;
- Be made available for purchase as individual units;
- Be guaranteed by the owners of the premises, if necessary through adopting

specific measures for the same, that the quantities available to each consumer are adequate and dissuasive of hoarding situations;

as well as

*(ii)* The suspension of trade activities for bicycles, motor vehicles and motorcycles, tractors and agricultural machinery, ships and boats, without prejudice to the provisions of Article 10(2) of Decree 2-B/2020.

This order was, then, the first measure to combat hoarding, even though it appears for now to have a preventive character and to give some margin to wholesale operators regarding the concrete measures to be adopted for this purpose.

The same measure is still in force in the post-state of emergency, now under Article 9 of the Resolution of the Council of Ministers no. 33-A/2020, of 04-30-2020,which declares the situation of calamity.

## X.E. Merger control proceedings

Although no legislative initiative has been adopted in Europe so far to suspend or adapt the merger control proceedings, the European Commission issued a communication, under which parties are encouraged to delay merger filings, given the complexities and disruptions in terms of staff and means[49].

In the same communication, the Commission states that it will accept, and indeed encourage, electronic submissions, either via email (to *comp-merger-registry@ec.europa.eu*, with a copy to the members of team, if it has been assigned one) or digitally through the eTrustEx system.

Although apparently all the procedures relating to merger control have been maintained, there is a risk of delays, which could force the Commission: (*i*) to stop the clock on the applicable provisions to decide on certain transactions, as indeed has been happening; or even (*ii*) issue *ad hoc* amendments to guidelines.

At the national level, the AdC published on its website a communication where it also encourages the use of digital means. It states that "[t]he AdC invites all interested parties to use the available electronic channels, such as the Reporting Portal, the Electronic Merger Notification System (SNEOC), among others available on the AdC website"[50].

In addition, in a statement sent via email ("New procedures for communication with the AdC"), the AdC reinforced: (*i*) the use of digital means in communication with the Authority, including with regard to merger pre-notification requests; (*ii*) the sole use of the SNEOC for other correspondence related to merger files; further emphasising that (iii) any original documents should only be sent at the request of the AdC and that, when strictly necessary, in-person service will be subject to prior appointment.

On the other hand, Article 17(1) of Decree-Law no. 10-A/2020, which sets forth that "deadlines are suspended where their expiry would lead to a tacit approval by the administration of permits and licences requested by private parties", has been repealed by Decree-Law no. 20/2020, this meaning that the tacit approval of the decision, in case the AdC does not decide during the "tacit approval period", will apply once more.

Something else will be to find out if the administrative procedures themselves will be suspended, since the provision in question does not say so.

[49] See the communication, available at https://ec.europa.eu/competition/mergers/information_en.html [last accessed on 22-03-2020].

[50] Available at: http://www.concorrencia.pt/vEN/Pages/Homepage-AdC-vEN.aspx [last accessed on 22-03-2020].

In a similar vein, Article 7 of Law 1-A/2020, regarding deadlines and diligences, came into force on 20 March, and its effects are also backdated to 9 March[51]: paragraph 3 of this rule sets forth that "[the] exceptional situation likewise constitutes a cause for suspending the limitation and expiry time limits relating to **all types of processes and proceedings**".

In other words, the limitation and expiry time limits of (apparently, since it covers "all") ongoing or about to open processes are suspended, but the ongoing processes and procedures are not themselves suspended.

In fact, the legislature did not establish a general rule for suspending administrative proceedings but instead chose to do so only regarding administrative offence, sanctioning and disciplinary procedures, even though they are in progress before independent administrative entities (as the AdC, which is expressly referred to) – Article 7(9)(b), as amended by Law no. 4-A/2020.

Likewise, regarding administrative and tax proceedings, this only concerns acts carried out by individuals. The provision of the cited Article 7(9)(c), as amended by Law no. 4-A/2020 is now clearer, and includes in this exceptional regime for proceedings (and with the necessary adaptations) any and all acts carried out by private parties, including, for example, the deadlines for submitting observations in ongoing or about to open proceedings, or replies to requests for information or documents, but no longer includes acts carried out by the administrative authorities, in the situations not included within item *b)*'s scope of application.

It is true that, in the most recent requests for additional information in the context of merger cases, issued before the entry into force of the amendment of this article by Law no. 4-A/2020, the AdC has made express reference to the cited Article 7(2). The question was debatable, however, since the AdC did not - through publishing guidelines, or in its notifications to companies or their representatives or attorneys - expressly and unequivocally state that it considered the deadlines to be suspended.

Finally, we note that the crisis set in motion by COVID-19 may cause the reappearance of the "failing firm defence", as set out in §§ 89 et seq. of the **Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings**[52], which allows the Commission to conclude that a particular merger is compatible with the common market if one of the companies is insolvent. The AdC has tended to follow the same approach. This argument has already been relied upon and considered by the UK competition authority, which, on 17-04-2020, has provisionally cleared Amazon's investment in Deliveroo, given the strong probabilities that, in the absence of the same, the latter will have to abandon the market.

Also at the substantive level, it is important to underline that, despite the ongoing crisis in the country, the AdC applied a fine to the Hospital Particular do Algarve of EUR 155,000 for gun jumping,[53] although it accepted payment in instalments, invoking the specific circumstances of the present.

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(51) Under Article 6 of Law no. 4-A/2020, which makes the first amendment to Law 1-A/2020, and which interprets Article 10 of Law 1-A/2020, "as considering 9 March 2020, set forth in Article 37 of Decree-Law no. 10-A/2020 of 13 March, as the date on which Articles 14 to 16 take effect, and also the date on which the provisions of Article 7 of Law no. 1-A/2020 of 19 March take effect".

(52) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/C 31/03). This argument was used in the COMP/M.6796 – AEGEAN/ OLYMPIC II case, in which drastic changes in market conditions, caused by a financial crisis in the country, combined with the company's financial difficulties were in the end decisive for Commission's conclusion.

(53) See Communication 04/2020, available at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202004.aspx [last accessed on 04-04-2020].

Some countries did not only issue guidance designed to encourage the postponement of merger notifications,[54] the use of digital means when postponement is not feasible, but also rules designed to suspend the time limits for evaluating a particular merger case by the competent authorities[55].

### X.F. Other procedural issues

Besides what has already been said about procedural deadlines, important in the realm of Competition Law, reference is made to what is provided for in the section on Litigation[56] with regard to the deadlines that apply to the courts with jurisdiction over competition matters – TCRS, TRL and TC.

This means that, as explained in more detail below, from the date on which the relevant article of Law no. 1-A/2020 takes effect[57] until the end of the extraordinary regime thus defined, all legal deadlines in ongoing cases before the TCRS, TRL or TC are suspended, without prejudice to the regime set out in Article 7(5) of that law.

The situation is different in the European Union Courts. The Court of Justice, in a communication of 19-03-2020, informed that the deadlines to bring an action or an appeal continue to apply, and the parties must respect them, without prejudice to the potential resort to Article 45, second paragraph, of the Protocol on the Statute of the Court of Justice of the European Union. The same applies to the General Court.

The deadlines set for cases in progress – except for urgent cases – and the deadlines set by the Secretary are extended by one month counted from 19 March[58].

As for hearings scheduled up to 03-04-2020, both communications (from the two courts) provided for their postponement. This situation has changed with the new press release, issued on 27-04-2020, which foresees the gradual resumption of hearings, starting on 25-05-2020, as long as the "conditions allow".

A similar amendment to Law no. 1-A/2020 is expected in the coming days.

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(54) As in France and Ireland, https://www.autoritedelaconcurrence.fr/en/article/adaptation-merger-control-procedures-due-coronavirus-covid-19 e https://www.ccpc.ie/business/covid-19-temporary-merger-notifications-process/, [last accessed on 04-04-2020]. In China, the competition authority issued a communication forbidding in-person meetings, and requested that the parties submit notifications of merger operations through digital means, as well as any necessary contacts with the authority – See: https://www.concurrences.com/IMG/pdf/china-5.pdf?58156/ec239e443ac7a22ee6e13e79fc188c2141dd2503, [last accessed on: 04-04-2020].

(55) As in Denmark, where the Minister of Industry, Business and Financial Affairs issued an order which suspended the time limits for merger control for 14 days, available at: https://www.en.kfst.dk/nyheder/kfst/english/news/2020/20200318-time-limits-for-merger-control-are-suspended-for-14-days/, [last accessed on 04-04-2020].

(56) See Chapter XVII, Judicial and Arbitration Actions, for developments regarding the terms and conditions under which, in urgent cases, the practice of any process and procedural acts is allowed through distance communication.

(57) That is, 9 March.

(58) For its part, the communication regarding the General Court refers to these deadlines being "adapted" to the context.

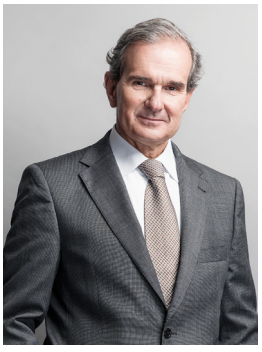
**COMPETITION LAW CONCERNS**

| Topic | Risks | Background/Recommendations |
|---|---|---|
| State Aid | • Emergence of opportunities for financing that may not have a valid legal basis under State Aid;<br>• Sudden financing opportunities;<br>• Risk of indirect (and therefore unlawful) support to banks that does not meet the requirements of the Temporary Framework. | • Further developments are expected at both the European and national levels regarding the way in which this more flexible regime will be applied. Although it is a topic which touches more on state action, it is important for companies to be aware of the greater flexibility in the assessment of the legality of support measures and therefore to be alert to financing opportunities, that they should always analyse, from the point of view of their compatibility with the legislation in force;<br>• For their part, banks should, as far as possible, pass to the final beneficiaries of loans the benefits of the state guarantee or the subsidised interest rates that they receive. |
| Anti-competitive practices and private enforcement – substantive aspects | • The continued application of the Competition Law rules, contained in the LdC and TFEU and also of the relevant soft law regarding vertical and horizontal restrictions, prevents companies from coordinating among themselves many aspects of their commercial policy and, consequently, its application requires caution and care;<br>• The fact that the consolidated case law of the European Union excludes companies' liability when there is national legislation imposing the adoption of certain anti-competitive behaviours does not make the matter irrelevant, since: (*i*) such understanding is restricted to cases in which national legislation eliminates any and all possibilities of anti-competitive behaviour on the market; and (*ii*) the Member State may still, in such cases, be held liable under the principle of fair cooperation. | • Operators should remain aware and keep the level of care they always take both for cooperation with competitors and in relationships with suppliers and distributors. Due to the lack of derogations or suspensions of the application of Competition Law so far, at national or European level, companies should remain alert and committed to the compliance with the applicable national and European legislation;<br>• Accordingly, companies:<br>– Should not, and despite the unprecedented disruptions to supply and demand, discuss or fix prices with competitors or agree resale prices with suppliers;<br>– Should not exchange commercially sensitive information with their competitors, including that regarding commercial conditions, quantities bought, sold or stored, prices to be charged, or negotiation terms with common suppliers;<br>– Should always take their decisions independently and avoid agreeing anything with competitors, including discussing their resale price with suppliers;<br>– Should avoid communicating the terms of their future conduct to competitors; |

**COMPETITION LAW CONCERNS**

| Topic | Risks | Background/Recommendations |
|---|---|---|
| | | – Should seek the necessary legal advice to determine whether a particular logistical collaboration project is permissible under the rules in force;<br>– Should be alert to the legislation being published on a daily basis, which may change (reinforcing or derogating) the rules applicable to their sector of activity. |
| Anti-competitive practices and private enforcement – secondary aspects | • The temporary and wide-ranging changes to the applicable process and procedural legislation, especially the suspension of limitation deadlines for ongoing proceedings and processes, requires particular attention to and careful analysis of the relevant legislation, together with the processes in progress before the AdC, or about to be open at the TCRS. | • Given the complexity that such analysis requires, companies should consult and seek the necessary legal advice. |
| Restrictive trade practices and changes in commercial matters | • Tight control of the practices prohibited by the IRTP Act and the legislation applicable to economic crimes. | • Companies should remain committed to comply with the legislation applicable to restrictive trade practices and avoid acts of questionable legality. They should seek legal advice when necessary, without neglecting the guidelines that may result from the legislation issued by the competent bodies. |
| Merger control proceedings | • Delays in the process and preference for electronic means. | • Companies should: (*i*) delay notification of non-urgent deals; and (*ii*) use the available digital means to submit notifications, contact case-handlers, among others. |
| Other procedural issues | • Transitory solutions and doubts and uncertainty regarding deadlines. | • Despite the performance of any procedural acts before the TCRS, TRL and TC being suspended, companies should continue to carry out any procedural acts whose deadlines are pending in ongoing cases or about to open before the Court of Justice or the General Court. |

## AUTHORS



**Carlos Botelho Moniz**
Partner

**Inês F. Neves**
Junior Lawyer

**Joaquim Vieira Peres**
Partner

**Luís do Nascimento Ferreira**
Partner

Member
Lex Mundi
World Ready

# MORAIS LEITÃO
## GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

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### MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

**LISBOA**
Rua Castilho, 165
1070-050 Lisboa
T +351 213 817 400
F +351 213 817 499
mlgtslisboa@mlgts.pt

**PORTO**
Avenida da Boavista, 3265 – 4.2
Edifício Oceanvs
4100-137 Porto
T +351 226 166 950 - 226 052 380
F +351 226 163 810 - 226 052 399
mlgtsporto@mlgts.pt

**FUNCHAL**
Av. Arriaga, n.º 73, 1.º, Sala 113
Edifício Marina Club
9000-060 Funchal
T +351 291 200 040
F +351 291 200 049
mlgtsmadeira@mlgts.pt

mlgts.pt

### ALC ADVOGADOS

**LUANDA**
Masuika Office Plaza
Edifício MKO A, Piso 5, Escritório A/B
Talatona, Município de Belas
Luanda – Angola
T +244 926 877 476/8/9
T +244 926 877 481
geral@alcadvogados.com

alcadvogados.com

### HRA ADVOGADOS

**MAPUTO**
Avenida Marginal, 141, Torres Rani
Torre de Escritórios, 8.º piso
Maputo – Moçambique
T +258 21 344000
F +258 21 344099
geral@hrlegalcircle.com

hrlegalcircle.com

### MdME LAWYERS

**MACAU**
Avenida da Praia Grande, 409
China Law Building
21/F and 23/F A-B, Macau
T +853 2833 3332
F +853 2833 3331
mdme@mdme.com.mo

**HONG KONG**
Unit 2503 B
25F Golden Centre
188 Des Voeux Road
Central, Hong Kong
T +852 3619 1180
F +853 2833 3331
mdme@mdme.com.mo

Foreign Law Firm

mdme.com.mo