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WAR IN UKRAINE AND ECONOMIC SANCTIONS: ANTITRUST LAW IS ADAPTING TO THE CIRCUMSTANCES BUT CONTINUES TO APPLY



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On March 21st, 2022, the European Competition Network (“ECN”), which brings together the European Commission, the EFTA Surveillance Authority (ESA) and the national competition authorities of the EU/EEA, including the French Competition Authority, published a joint statement on the application of competition law in the context of the war in Ukraine (the “Statement”).[1]

The Statement reiterates that the rules and mechanisms of competition law make it possible to take into account market and economic developments, especially in crisis situations and that competition rules ensure “a level playing field between companies”, and that these rules should continue to apply even in times of disruption such as now.

The ECN does, however, recognize that the consequences of the conflict may lead companies to adapt their behavior on the market. This may include cooperation measures to address disruptions caused by sourcing difficulties and sanctions against Russian companies and assets imposed by the European Union.

Cooperation between companies that are competitors or located at different levels of the distribution chain can qualify as an anticompetitive agreement when it leads to distorting free competition on the market.[2] For competition authorities, the existence of a deteriorated economic context does not, in principle, justify such an infringement of competition law.[3]

On an extraordinary basis, to take into account the situation caused by the war in Ukraine, the ECN indicates that “cooperation measures to mitigate the effect of severe disruptions would likely either not amount to a restriction of competition under Article 101 TFEU/53 EEA or generate efficiencies that would most likely outweigh any such restriction”.

Consequently, “the ECN will not actively intervene against strictly necessary and temporary measures specifically targeted at avoiding the aforementioned severe disruptions caused by the impact of the war and/or of sanctions in the Internal Market.”

The competition authorities are thereby giving companies leeway to adapt to the current economic situation, and will exercise greater flexibility in assessing possible infringements of competition law.

This leniency should not, however, be taken for a blank check: the Statement stresses the utmost importance of ensuring that essential products “remain available at competitive prices and that the current crisis is not used to undermine a competitive level playing field between companies”

Operators “taking advantage of the current situation by entering into cartels or abusing their dominant position” will therefore face the possibility of sanctions.

The position taken by the ECN is very similar to the one it adopted in 2020 in the context of the economic crisis engendered by the Covid-19 pandemic.[4] The European Commission subsequently went further by publishing a communication on April 8th, 2020 assessing the measures taken to respond to the crisis.[5] In that framework, it notably issued comfort letters to validate cooperation initiatives between pharmaceutical companies to address the shortage of medicines.[6] In France, the Competition Authority also took specific measures such as adapting litigation deadlines, extending time periods for merger control processes, and setting up a dedicated network to address business concerns, such as commercial lease rent reviews.[7]

For the time being, the Commission has not made any communication about the implementation of similar tools in the current context.

Companies considering putting temporary cooperation measures in place can, however, get in touch with the ECN member authorities, which in France is the Competition Authority, to obtain “informal guidance”.

The Statement focuses on cooperation between companies and says relatively little about another risk engendered by the current crisis, in particular due to the sanctions against Russian companies, namely abuse of a dominant position.

In effect, the ban on doing business with these companies could result in their market share passing to their competitors



and to these competitors coming to hold a dominant position, if not a monopoly, on the market.

While holding a dominant position is not unlawful *per se*, conduct consisting in exploiting this position to drive competitors out of the market, or in imposing unfair business terms on partners, is strictly prohibited.

There is thus a risk that some companies may become dominant and that their practices or their contracts, hitherto permissible, may henceforth qualify as an abuse of a dominant position.

In the Covid-19 context, the European Commission had made known that it would not tolerate practices consisting in exploiting the crisis as a cover for abuse of dominant position, *"including dominant positions conferred by the particular circumstances of this crisis"*.^[8]

Caution should therefore be exercised in this respect, and consideration given to the advisability of taking proactive measures.

[1] https://ec.europa.eu/competition-policy/system/files/2022-03/202203_joint-statement_ecn_ukraine-war.pdf

[2] §L. 420-1 of the French Commercial Code and Article 101 of the Treaty on the Functioning of the European Union.

[3] Decision No. 15-D-19 of December 15th, 2015 of the French Competition Authority regarding practices implemented in the standard and express delivery sectors, paragraph 672.

[4] See our newflash dated March 23rd, 2020: *"Coronavirus: European Competition Authorities are understanding but remain firm in the context of Covid-19"*.

[5] See our newflash dated April 10th, 2020: *"The European Commission supports the combat against shortage in compliance with competition law"*.

[6] See our newflash dated May 5th, 2020: *"Covid-19: Publication of the European Commission's comfort letter allowing a cooperation between pharmaceutical producers to tackle medication shortages"*.

[7] <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-clarifies-options-professional-association-dealing-its-members-rent-during>

[8] Communication from the European Commission dated April 8th, 2020: *"Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak"*, paragraph 20.
