

Communication from the Autorità Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency

(Only the Italian version is authentic)

COVID-19 and the implications for competition policy

1. The Autorità Garante della Concorrenza e del Mercato (hereafter the Authority) is fully aware of the economic and social consequences of the spread of COVID-19 at national, European and global levels.
2. These exceptional circumstances may entail a need for undertakings to cooperate, in order to address, or at least mitigate, the most dramatic consequences of the crisis, for the benefit of the community, e.g. to ensure the supply and fair distribution of essential products to all consumers.
3. Competition rules ensure that undertakings can compete on a level playing field. This remains an important objective even at a time when businesses and the economy are facing an emergency.
4. However, national and European competition rules have mechanisms in place to take into account, where appropriate and necessary, changing economic and market conditions.
5. Therefore, in the current circumstances, the Authority does not intend to oppose any necessary, temporary and proportionate measures taken to avoid shortages of supply, in line with the Communication from the European Commission of 8 April 2020.

Objectives of this Communication

6. This Communication refers to possible forms of cooperation between undertakings aimed at facilitating the production and adequate distribution of essential goods and services that may be scarce during the crisis due to the unforeseeable surge in demand.
7. The purpose of the Communication is (i) to anticipate the general criteria that will be used to assess such cooperation projects and outline the antitrust enforcement priorities that will be favoured during the crisis and (ii) to explain the temporary procedure that the Authority intends to introduce to provide guidance to undertakings on specific and clearly outlined cooperation projects.

Cooperation projects and self-assessment

8. It is well known that the possibility of ex-ante notification to the Authority of agreements between undertakings plays only a marginal role today, as undertakings are now called to self-assess their agreements.

9. At this juncture, the Authority (like the European Commission and other national authorities) has realised that businesses may need guidance to facilitate the self-assessment of cooperation projects aimed at preventing shortages of essential goods and services.
10. The Authority is ready to offer all the necessary indications to undertakings or trade associations, so as to facilitate and accelerate the preparation of all measures and initiatives aimed at tackling the COVID-19 crisis, especially when uncertainties remain as to the compatibility of such initiatives with competition rules.
11. For this purpose, a dedicated mailbox has been set up on the Authority's website (accordi-cooperazione-COVID@agcm.it) which can be used to ask for information.

Different forms of cooperation

12. The COVID-19 emergency response may require different degrees of cooperation, which may turn out to be more or less problematic from a competition point of view.
13. In the health sector (and possibly in the agri-food sector), cooperation could, for example, be limited to trade associations or independent third parties being given the task of: (i) coordinating the transport and distribution of raw materials; (ii) identifying for which medicines or medical devices (or foodstuffs) shortage problems may arise; (iii) providing aggregated information (not regarding individual undertakings) on available production and capacity or on possible supply gaps.
14. These activities do not, in principle, raise competition concerns (see *Commission Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements*).
15. At this stage, it may also be necessary to further extend cooperation to address critical supply shortages. Cooperation could, for example, seek to reorganise an entire economic sector, with a view to increasing and 'optimising' production, by avoiding the risk of focusing, for example, on the production of specific drugs or medical devices at the expense of others that are equally essential.
16. These initiatives inevitably require an exchange of disaggregated and sensitive information and a degree of coordination between undertakings which would undoubtedly be problematic in 'normal' times. In this particular context, the Authority (in line with the policies recently illustrated in the aforementioned Communication from the European Commission) could assess such initiatives with greater flexibility provided that they are actually necessary to facilitate the production of drugs or medical devices important for the fight against the virus or of goods and services deemed essential, are applied for the time strictly necessary and are characterized by a high degree of proportionality.
17. In this context, the Authority also considers it appropriate to clarify that the existing rules on vertical agreements allow undertakings to set maximum prices for their products. Such agreements could be useful in order to limit unjustified price increases at the distribution level.

Ex-ante evaluation of cooperation projects

18. The Authority, through the Directorate-General and the Sectoral Directorates for Competition, will continue to provide informal guidance to companies and trade associations on specific cooperation projects (especially when there is still uncertainty about their compatibility with competition law), in order to contribute to a more effective and swifter response to the crisis caused by COVID-19.
19. In order to provide a higher degree of legal certainty, in this particularly difficult phase for the economy, the Authority, through the Directorate-General for Competition, may, on an exceptional basis and at its own discretion, express its assessment in writing with a comfort letter on specific initiatives, provided they are defined with sufficient clarity.

These comfort letters shall cover exclusively the application of national antitrust law (Law no. 287/90).

Conclusion

20. In summary, the Autorità Garante della Concorrenza e del Mercato is conscious of the extraordinary challenges that our economic system has to face during this period of health, economic and social emergency. In this context, the Authority may only encourage pro-competition cooperation projects, making all its expertise available to ensure such projects are consistent with competition rules.
21. At the same time, it is crucial to ensure that products considered essential for health protection and emergency response remain available at competitive prices. The Authority will not hesitate to use all the tools at its disposal to take action against companies that seek to exploit the current situation opportunistically, whether through cartel arrangements or abuses of a dominant position.
22. The Communication will be operational from 24 April 2020 until further notice.