

**Newsletter** | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019



5 May 2020

## EU at the Time of COVID-19

### 1. The European Union at the Time of COVID-19

#### 1.1

The tsunami of the Coronavirus Disease 2019 (COVID-19) pandemic has struck and the sense of humanity throughout Europe seems to have prevailed and to have made everyone accept, in principle, that a shock, originally symmetrical, but then, fatefully, asymmetrical in its evolution and effects, is to be opposed and overcome through uniform choices, to be shared in the interest of everyone.

Thus, we are talking again about *de facto* “solidarity”, certainly not a new expression, referred to, in different ways, 23 times in the European Treaties, and which constitutes a “value” (Article 2 TEU) and also an “aim” (Article 3 TEU) of the European Union. Moreover, solidarity, to which French Statesman Robert Schuman plainly appealed, has been the “*fil rouge*” of the progressive construction of the community building, began long ago in March 1957.

Therefore, the following direction taken at the meeting of the Eurogroup (in inclusive format) held on 9 April 2020 by teleconference as required at the present time, during which the European Union’s finance ministers, having conveyed this popular feeling, was unanimously decided on in the face of the pandemic: “*We are committed to do everything necessary to meet this challenge in a spirit of solidarity.*”

This commitment - reminiscent of the historic commitment of the former President of the European Central Bank (ECB), Mario Draghi, in the defense of the Euro “*whatever it takes*”- was then precisely and validly confirmed during the following European Council meeting of April 23, 2020.

## 1.2

Against the substantial total amounts used to cope with the effects of the pandemic and to ensure a common recovery - estimated to be an amount exceeding Euro 1,500 billion - the following exceptional measures are to be considered:

- a) the creation by the European Investment Bank (EIB) Group of a pan-European guarantee fund of Euro 25 billion which could support Euro 200 billion of financing for companies with a focus on small and medium enterprises, throughout the EU, including through national promotional banks on favorable conditions and covenants, which could be combined with guarantees granted by the national Member State;
- b) the establishment within the European Stability Mechanism (ESM) of a credit line possibly based on the existing Enhanced Condition Credit Line (ECCL) precautionary credit line (up to a total amount of Euro 240 billion), adjusted in light of this specific challenge, addressed to each of the Euro area Member States requesting support, up to 2% of the respective Member’s GDP as of end-2019, with the only requirement that such Member State would commit to using this credit line “*to support domestic financing of direct or indirect healthcare, cure and prevention related costs due to the COVID-19 crisis*”;
- c) total loans for an overall amount of Euro 100 billion provided to Member States in accordance with Article 122 TFEU by means of a financial assistance instrument (SURE) proposed by the European Commission (Commission) to support Member States in their protection of workers, jobs, and certain health-related measures.

The three different measures as described above and clearly subject to future allocation on the basis of the effective, asymmetric, needs of beneficiary States, are characterized as being “loans”. Therefore, to understand their scope, it will be necessary to wait to know the extent of interests and the duration of the respective disbursements, because, the lower the first and the longer the second will be, the less the obligation to repay will affect the budget of the requesting State, until becoming in practice and in the best-case scenario, very close to the much more desirable “grants”.

While the first and third instruments have a general subjective scope, being addressed to all 27 Member States, the second one is addressed only to the 19 Member States of the Euro area and, not only for this reason, is the one that raises concerns among jurists. Indeed, under the belief that the very effectiveness of this intervention depends on the urgency of its adoption (two weeks, as optimistically indicated at Par.III, 16 of the Report of the Eurogroup of April 9, 2020), one wonders how this can happen without changing their legal basis as set forth in the Treaties and therefore, over an indefinite period of time.

Both Article 136(3) TFEU and the ESM Treaty of February 2, 2012 (see: recitals 2,3,6,12 and 15 as well as Article 12) make it a permanent mechanism, with the structural role of “*safeguarding the financial stability of the Euro area*”, in the event of a crisis of market confidence. In this perspective, the strict conditionality constraints and the resulting strict inspections (by the so-called Troika or, eventually, by the sole Commission) on their compliance by the requesting State are set and justified with the common aim of overcoming the crisis. Also, they are a necessary counterweight of the loan and as a guarantee of its repayment by the beneficiary State within the agreed timeframe.

It is unclear whether the strict conditionality required by EU law can exceptionally be considered as fulfilled by the commitment to use the financed amounts to support domestic financing as regards only the direct and indirect effects of the COVID-19 crisis. The “Conditions” which any borrower of any loan must accept and comply with are something different, especially when the applicable law states that they must be “rigorous” in nature. It will be particularly instructive to see how the Commission will handle this issue of making such an instrument in a way to be consistent in principle with the Treaties and also functioning within two-week time.

### **1.3**

In addition to the measures mentioned above, it has been widely publicized by senior representatives of the EU institutions and Heads of Government that close negotiations are pending to prepare and support the recovery by providing funds through the EU budget (which would be increased from the current GDP, amounting to 1.2% of the GDP of the Member States, to 2%) or through a different path that has been referred to the Commission.

This measure, whatever its form will be, is not an alternative to the others, but is in addition to them, by providing an amount that is currently considered useful for the achievement of the current support and recovery purposes. The decision to anchor it to the EU budget 2021 - 2027, unless appropriate bridging solutions are put in place, would delay the use of the benefits.

In the framework of this intervention, one of the options would be the issuance of “Recovery or Corona bonds” related to the emergency of the current exceptional situation. Despite the common sharing of the principle of solidarity (as mentioned above) in the present circumstance, it is not a simple path. This does not relate to the legal basis of this mechanism, certainly identifiable in Article 122 TFEU, which can be supplemented by Article 352 TFEU (with the consequent compulsory intervention of the European Parliament, careful defender of social policy), but it relates to the fear that some Member States have in accepting, even in the extremely exceptional circumstances like the present one, the application of mutuality deriving from that.

The solution put forward in this paragraph, once the issues on how and under which proportion it is possible to obtain the funds to be distributed and/or the guarantees to be issued have been resolved, should in any case establish their form, “grants” or “loans” or a mixture, and, respectively, the arrangements for the allocation and duration of the loan and the extent of interest.

### **1.4**

The whole package of measures envisaged above, once finalized by the Commission in the upcoming weeks, before its final approval, may require compliance with national procedures and constitutional requirements of some Member States. This is another reason why the ECB needs to maintain its current monetary policy action, aimed at stabilizing the Euro area and containing spreads. The current measures might, subsequently, also prove themselves not to be decisive to validly face and counter the dramatic impact of the pandemic, which is striking certain EU countries more than others and is having effects not only of economic order, but primarily of social order. Nevertheless, a serious, constructive and immediate response from the EU may be valuable in showing the common way forward.

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On April 15, 2020 the Commission and the European Council released a joint communication designing a roadmap to phase-out the containment measures due to the COVID-19 outbreak. The document

emphasizes the need for a *European approach* to face the impact of COVID-19 on the EU Member States' economies and health systems (Roadmap Communication).

In particular, according to the EU institutions, relaxation of the confinement should be based on several elements: (i) epidemiological criteria; (ii) sufficient health system capacity of the Member States; (iii) appropriate monitoring capacity of the outbreak's spread. Moreover, the Roadmap Communication lists concrete recommendations Member States should consider when planning to lift containment measures and seeks to set a common framework for the so called "phase two" of the pandemic.

The adoption of the Roadmap Communication is only the latest action taken by the EU Institutions in the framework of the outbreak. The first weeks of the crisis were characterized by unilateral actions and, as recalled by the Roadmap Communication, by "*competition between national, regional and community municipalities procurement, supply chain disruptions including export restrictions and lack of information on the needs of different Member States*". A coordinated response was then needed to safeguard the *acquis* of the EU internal market.

Since then, the EU Institutions (and in particular the Commission) have taken several measures to face the pandemic and adjust the way business is carried out across the EU. In this context, the application of EU and trade law has been "adapted". Competition law, public procurement, internal market, consumer protection: the provisions concerning all these areas of practice are being applied with enough flexibility to allow an effective response to COVID-19.

For instance, the Commission is providing antitrust guidance and comfort letters for cooperation between firms aimed at overcoming shortages of essential goods and services. Several Member States have introduced new legislation on Golden Powers to prevent "predatory" take overs of their strategic companies and the Commission issued relevant guidance to follow while drafting such legislation. Even the WTO has clarified that subsidies aimed at increasing the production of medicines are allowed in this context.

In the following sections of this document we try to illustrate the main aspects of this "application in time of crisis" of EU law also in light of international trade law.

## **2. EU Competition Law and COVID-19**

In recent weeks, the Commission put in place an unprecedented regulatory framework to deal with the COVID-19 emergency.

The examination of the measures taken by the Commission and some national competition authorities may indicate that the emergency nature of the current context is giving rise to a peculiar application of competition law. For the moment, however, it cannot be said (or at least not yet) that these changes imply that non-economic objectives are going to be taken into account during the assessment performed by competition authorities, as invoked by some scholars' papers having a certain echo overseas.

### **2.1 Merger Control and COVID-19**

Concerning merger control procedures under Regulation (EC) 139/2004:

On March 13, 2020 the Commission published a call for companies to delay, where possible, notifications of new corporate transactions and encouraged electronic filings, without any delivery of hardcopies. The

same invitation has appeared on the website of the German (*Bundeskartellamt*), the French *Autorité de la concurrence* and other competition authorities.

Due to general lockdowns and quarantine periods enacted in many Member States, the outbreak has an impact on companies' ability to collaborate with the Commission during the investigations. For this reason, the Commission suspended the second phase of the examination of several mergers where companies were unable to reply in time to certain requests for information through the "stop the clock" procedure.

It is unknown whether the emergency situation will lead the Commission to grant general exemptions or relax its assessment on exemptions from the stand-still obligation, *i.e.* the rule preventing companies from closing a transaction before the Commission has completed its analysis. On one side, complying with the stand-still obligation while the conclusion of M&A transactions suffers a slow-down may involve difficulties for operators having announced an operation or having already proceeded to the signing of the transaction. On the other side, the stand-still obligation is not merely a procedural obligation. Exemptions to this rule are usually granted only in the case of simplified notifications, where *prima facie* the transaction does not raise competition concerns.

The Commission's activity concerning merger control seems not to have diminished during the last weeks: 33 decisions were adopted, of which 20 clearance decisions (14 in simplified cases, five unconditional clearances in non-simplified mergers and 1 clearance with remedies).

However, performing market investigations or market tests for remedies remains a challenge for the Commission, especially if sectors/regions are concerned where firms have been forced to shut down. Moreover (and more importantly), the disruption of the economic activities in certain regions may also have an impact on the substantial assessment of mergers which may bring a non-negligible margin of uncertainty on the outcome of the Commission investigation.

## **2.2 Antitrust and COVID-19**

Concerning antitrust, the outbreak has had a significant impact from the enforcer's point of view.

First, on March 23, 2020 the European Competition Network (ECN) - the network of competition authorities of the EU Member States, within which the Commission has the leading and coordinating role - published a joint statement announcing that the ECN authorities will not sanction cooperation agreements between companies aimed at ensuring the continuity of supplies of products. At the same time, they will take action to avoid cartels and anti-competitive practices in the field of health care, in particular masks and disinfectants. On the other side, the ECN authorities warn that they will take action against "*companies that take advantage of the current crisis*". In this regard, it may be argued that the authorities best placed to intervene in order to counter these conducts are those that cumulate both antitrust and consumer protection enforcement.

Subsequently, on March 30, 2020 DG COMP created a specific page on its website on antitrust and coronavirus, where reference is made to the above-mentioned ECN statement. The Commission adds that, for specific cooperation initiatives with an EU dimension, that need to be swiftly implemented to effectively tackle the COVID-19 pandemic, and where there is still uncertainty about whether such initiatives are compatible with EU competition law, DG Competition is ready to guide companies, associations and their legal advisors. For that purpose, a dedicated mailbox [COMP-COVID-ANTITRUST@ec.europa.eu](mailto:COMP-COVID-ANTITRUST@ec.europa.eu) was launched that can be used to seek informal guidance on specific initiatives. In order to facilitate a swift follow-up, companies are asked to provide upfront as much detail

as possible on the initiative, including: (i) the firm(s), product(s) or service(s) concerned; (ii) the scope and set-up of the cooperation; (iii) the aspects that may raise concerns under EU antitrust law; and (iv) the benefits that the cooperation seeks to achieve, and an explanation of why the cooperation is necessary and proportionate to achieve those benefits in the current circumstances.

More recently, on April 8, 2020 the Commission adopted a Temporary Framework (TF) to provide antitrust guidance to companies cooperating in response to urgent situations related to the current coronavirus outbreak. The TF covers cooperation projects aimed at addressing a shortage of supply of essential products and services in any sector (although the TF strongly focuses on the health sector) and has no fixed duration. In particular, such projects may be covered by the TF where they are: (i) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients; (ii) temporary in nature; and (iii) not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply. The TF also illustrates the procedure to require guidance from the Commission, which can also provide comfort letters at its discretion, which is new and noteworthy.

The first comfort letter released by the Commission on this basis was issued in the healthcare sector and concerned an industry cooperation initiative taken by Medicines for Europe, aimed at securing the supply of hospital medicines necessary to help patients with respiratory difficulties (e.g. sedatives, muscle relaxants, analgesics, and antibiotics). The initiative will include central gathering and modeling of demand and production needs, to identify the highest risks of shortages and coordinate action to avoid over-supply of some and under-supply of other medicines.

The action taken by the Commission and the other competition authorities shows that, in the current exceptional circumstances, several cooperation measures would not be considered as problematic under EU competition law. However, it is advisable to put in place safeguard measures to maintain compliance with competition law, some of which may include: (i) coordination and information exchange should be limited to what is indispensable to address shortage risks and, in any event, be enacted under attorney or third-party supervision; (ii) in order to seek transparency, minutes of the meetings should be taken; (iii) these cooperative mechanisms must be limited in time; (iv) the involvement of competition authorities to provide guidance/supervision must be considered.

### **2.3 State Aid and COVID-19**

State aid was one of the first fields where the Commission took steps to allow a fast response to the outbreak.

On March 13, 2020 the Commission issued a Communication entitled “*Coordinated economic response to the COVID-19 outbreak*”, by which it clarified that EU Member States can develop measures to support businesses in line with existing EU state aid rules: firstly, Article 107(2)(b) of the Treaty on the Functioning of the European Union (TFEU), which provides that aid to make good the damage caused by natural disasters or exceptional occurrences “shall be compatible” with the internal market, which implies that national government measures must be authorized by the Commission (which cannot exercise any discretion). The notion of “exceptional occurrences” has so far been interpreted restrictively by the Commission (so much so that the latter rule has been successfully invoked in very few cases, such as the spread of bovine spongiform encephalopathy, c. d. “mad cow disease”); secondly, Article 107(3)(b) TFEU which provides that aid to remedy “a serious disturbance” in the economy of an EU Member State “may be considered” compatible with the internal market. This provision, which has been widely used during the economic crisis of 2008-2013 to provide financial assistance to banks affected by the crisis, leaves

more discretion to the Commission in deciding whether to authorize aid granted by that Member State; thirdly, Article 107(3)(c) TFEU, concerning aid to facilitate the development of certain economic activities.

Subsequently, by means of a Communication issued on March 19, 2020 the Commission adopted a Temporary Framework under Article 107(3)(b) TFEU (subsequently amended on April 3, 2020), repeating what it had already done during the financial crisis of 2008-2013. Such Temporary Framework allows, *inter alia*, Member States to provide businesses with up to €800,000 (gross) liquidity in the form of direct subsidies, reimbursable advances or tax breaks, as well as to subsidized interest rates. Furthermore, public guarantees are allowed, which may cover both investment and working capital loans. Credit institutions and financial intermediaries implementing the measures will not be subject to the rules on state aid to the banking sector. Unlike the TF adopted for antitrust, the Temporary Framework for State aid has a limited duration of one year.

As of April 17, 2020 the Commission approved 62 measures, of which 6 under Article 107(2)b, 54 under Article 107(3)b and 2 under Article 107(3)c TFEU. The choice between these provisions is problematic, since COVID-19 is both an exceptional circumstance and a cause of serious difficulties to the economy of Member States. However, it may be said that article 107(2)b TFEU seems designed to cover situations where actual and clear damage has occurred, while Article 107(3)b has a “perspective” dimension. This may explain the lower utilization of Article 107(2)b TFEU. As for the content of the measures notified, at the current time Member States seem to have a preference for grants (26 notifications) and guarantees (32 notifications) rather than for loans (14 notifications). Much of this aid was authorized in just a few hours, by virtue of the fast-track procedure implemented by DG COMP.

The COVID-19 epidemic, therefore, seems to lead to a significant change in state aid policy, certainly only explainable by the unprecedented nature and scale of this pandemic, as defined by the World Health Organization (WHO). The change is felt both in terms of the legal instruments adopted and the new ways in which the Commission intends to deal with the emergency. However, certain aspects of the Temporary Framework on state aid may be criticized. For instance, with reference to the liquidity that may be provided under the Temporary Framework, a group of companies will be considered as a single undertaking. That may mean that the limit of 800.000 Euro applies to the entire group and, as a consequence, this wording limits the scope of actual benefit available for economic operators to continue their activities. It appears that, according to Commission’s data, currently 54% of the amounts of notified aid concern only one Member State, Germany.

### **3. COVID-19: Business Subsidies and State Guarantees from the WTO Perspective**

During a speech delivered to the Washington International Trade Association on April 9, 2020 Deputy Director-General of the World Trade Organization (“WTO”) Alan Wolff explained his view that the multilateral trading system needs to face the current crisis setting three main priorities:

- i. dealing with the threat to public health;
- ii. dealing with the *calamitous decline* of the global economy (a fall between 13% and 32% of world trade is expected in 2020) and preparing the essential recovery that must follow;
- iii. considering structural reforms for the world trading system and the WTO itself.

Referring to the first two points above, in a previous speech Mr. Wolff had already expressed the condemnation by the WTO of export restrictions put into place by a growing number of States without notice or consultation, with specific regards to restrictions on export of medical supplies and equipment.

On the same occasion, he also affirmed that nothing in the WTO rules prevents subsidies from being granted to increase the global supply of medical products needed to respond to the COVID-19 pandemic.

In general, even though the implementation of subsidies is regulated and limited, within the multilateral trading system, by the Agreement on Subsidies and Countervailing Measures (SCM Agreement) of 1994, the scope of such agreement is quite limited and remedies are not always effective due to the difficulty in proving damages caused by the challenged subventions.

Substantially, only export subsidies, or those intended to replace imports by increasing domestic supply, are directly targeted. In any event, not all such subventions are prohibited *per se*.

The definition of *subsidy* under the SCM Agreement refers to a financial contribution, issued by a government or any public body – including state-owned companies – within the territory of a Member, which confers a benefit for the recipient (Art. 1 SCM Agreement). However, if a subsidy is widely available, such a distortion in the allocation of resources is presumed not to occur. On this point, this rule also applies under EU law, which states that general, non-selective measures do not fall within the notion of prohibited State aid.

In fact, specific subsidies as defined above are prohibited, and Members shall neither grant nor maintain them, if they are “specific” to certain sectors/operators and “contingent”, in law or in fact, upon export performance (*s.c. export subsidies*) or upon the use of domestic over-imported goods (*s.c. local content subsidies*) (Art. 3 SCM Agreement).

Such subsidies are prohibited because they are more likely to have adverse effects on the interests of other Members, being designed to directly affect trade. Since the subsidies to increase the global supply of medical products are designed as a response to the COVID-19 outbreak, they may not adversely affect international trade and thus may be allowed under WTO rules.

## **4. The Impact of COVID-19 on the EU Single Market**

The urge to combat the COVID-19 pandemic prompted several Member States to take unilateral measures both to ensure the availability of essential medical products within their respective markets, as well as to protect the health of their population.

Such actions, which include export bans on medicines and medical devices, restrictions on sales and prices, as well as reintroduced checks at internal borders, impact on free movements of goods and individuals, hence on the integrity of the EU Single Market.

### **4.1 The Free Movement of Goods and Services**

As far as the movement of goods is concerned, several Member States (including Germany, France, Hungary, and Czech Republic) reacted to the crisis by preventing exports of protective equipment, medicines or other medical products, also targeting export to other EU Member States.

The Commission first responded to such actions by issuing a Communication on March 13, 2020 whereby it recalled that restrictive national measures on export are prohibited under Article 35 TFEU, which



forbids quantitative restrictions or measures having an equivalent effect, even if nondiscriminatory between both domestic trade and export trade. It also highlighted the importance of preserving the integrity of the Single Market to tackle and mitigate the socio-economic consequences of the outbreak “*at a time where solidarity between Member States is the most needed*”.

In response to the aforesaid Communication aiming to prevent Member States from implementing the export bans on face masks and medical equipment, many Member States in question having renounced, or suspended, the related national measures.

Nevertheless, Member States may argue in the future that such restrictions could be justified under Article 36 TFEU, since they are aimed at the protection of health and human life. However, to justify such view, Member States must prove that the relevant measures are proportionate, *i.e.* there are no less restrictive alternatives, and are not arbitrarily discriminatory or a disguised restriction on trade between Member States.

According to certain authors, this could be the case where there is a real and verifiable shortage of medical equipment, medicines or other materials. In this case the shortage of stocks must be sufficiently serious and justified by adequate scientific data. In fact, the main principle remains that available medical equipment must go where it is most needed within the EU.

With a further Communication of March 16, 2020 and in the *Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak* of April 8, 2020 the Commission reiterated its view that no restriction – including the requirement of additional certifications – should be imposed on the circulation of goods in the Single Market, unless duly justified, and that the supply chain of essential products, including medicines and medical equipment as well as perishable food products and livestock, should be guaranteed, ensuring manufacturing at full capacity, implementing regulatory flexibility, fair distribution of supply and fully implementing green lanes.

#### **4.2 The Authorization for Exportation of Personal Protective Equipment to Third Countries as a Means to Preserve the Single Market**

On March 15, 2020, the Commission Implementing Regulation (EU) 2020/402 made the exportation of personal protective equipment (PPE) outside of the EU subject to the production of an export authorization, with the aim of preventing shortages of PPE within the EU and leading Member States to revoke restrictions on trade towards third countries and within the Single Market. Such regulation is no longer in force as of April 26, 2020.

#### **4.3 Free Movement of Persons and Temporary Non-Essential Travel Restrictions**

As far as the free movement of persons is concerned, several Member States reacted to the spread of COVID-19 by applying border control measures and travel restrictions on both EU internal and external borders, with the risk of undermining the adequate functioning of the Single Market.

Therefore, the Commission, in the above-mentioned Communication of March 16, 2020 while acknowledging the possibility of reintroducing temporary controls on internal borders for reasons of public policy and internal security, observed that entry could not be refused. Persons instead shall be subject to screening measures and placed in isolation or transferred to a health care facility. It also highlighted the need to allow the transit of EU citizens returning to their Country and frontier workers, especially of health professionals and of others who perform essential services.

Concerning the management of external borders, the Commission proposed a temporary restriction on non-essential travel to the EU, endorsed by the Schengen Area Member States on March 17, 2020. It established that all persons, both EU and non-EU nationals, shall be subject to systematic checks when entering the Schengen Area. Third-country nationals whose travel is not considered to be essential in the current circumstances could be refused entry in the Schengen Area.

The restriction does not apply to family members of Member States' nationals, regardless of their nationality, as well as third-country nationals with a residence permit and their dependents and nationals or residents of San Marino, Andorra, Monaco and the Vatican. Other categories of third-country nationals permitted entry include, *inter alia*, health care professionals, frontier workers, seasonal workers in agriculture, and freight transport personnel.

#### **4.4 Temporary Lift of Customs Duties and VAT on Imports of Medical Devices and Protective Equipment**

To assist health care systems struggling against the COVID-19 pandemic, the importation of medical devices from third countries, including testing kits, ventilators, and protective equipment was granted a temporary waive on customs duties and Value Added Tax (VAT). The suspension applies retroactively from 30 January 2020, for six months with the possibility of renewal.

The more favorable conditions apply to goods intended for distribution free of charge to patients, persons at risk or to persons involved in combating the COVID-19 outbreak, by or on behalf of State organizations or organizations approved by the competent authorities in the Member States or disaster relief agencies.

#### **4.5 Lifting Restrictive Measures**

As for the lifting of the confinement measures, the already mentioned Joint EU Roadmap of April 15, 2020 states that Member States should act depending on the stabilization of epidemiological data, the adequacy of the health system capacity, and an appropriate monitoring capacity. The restrictions will be gradually withdrawn, and they will become more targeted, in terms of people and geographic areas concerned. Moreover, the rollback of internal border controls will be phased, first easing movement between low-risk areas, and EU external frontiers will re-open afterwards, as the pandemic decreases worldwide.

## **5. COVID-19 and Golden Share Rules**

Among the major risks that Member States are facing in the current emergency is that of being exposed to speculative actions by third parties intending to acquire control of companies of national interest.

To address such critical risk, the EU is developing common solutions for Member States, especially with a view to authorizing the latter to establish or, minimally, to strengthen national shields against third countries' speculative initiatives. In particular, as far as foreign direct investment and free movement of capital are concerned, on March 25, 2020 the Directorate-General for Trade of the Commission published specific guidelines highlighting that it is the ultimate responsibility of Member States to adopt measures preventing the pervasive effects of predatory buying of strategic assets by foreign investors, by making full use of national investment screening mechanisms as well as of the Governments' "golden powers", where existing.

The guidelines recall principles already established by: (i) the Communication of July 19, 1997 concerning intra-EU investments; (ii) the recent Regulation (EU) 452/2019, which allows the screening of foreign

investments by both the Member States and the EU Commission, especially when such investments risk jeopardizing EU programs (e.g., Horizon 2020); and (ii) the case law of the Court of Justice of the EU (ECJ) on the limits that a “golden shares” or “golden powers” regime has to fulfill in order to comply with EU rules (for instance, judgments C-54/99 of March 14, 2000 *Église de Scientologie*, C-503/99 of June 4, 2002 *Commission v Belgium* and C-463/00 of May 13, 2003 *Commission v Spain*).

The adoption by States of these kind of mechanisms, which may have the potential effect of restricting the free movement of capital in violation of Article 63 TFEU, shall be legitimated under the “public policy or public security” exception set out in Article 65 TFEU, provided that such measures meet the relevant proportionality and appropriateness requirements set forth by ECJ. While designing the “golden powers” and “golden shares” regimes, Member States must indicate the specific objective circumstances in which those powers are to be exercised and observe the principle of proportionality, which requires that the measures adopted are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary to obtain it. The lack of compliance with these principles implies the incompatibility of the national regime with the EU law.

In the context of the current emergency, Member States are essentially authorized to exercise their public policy and public security prerogatives by granting the State deeper supervisory and/or powers of intervention in the event of transactions with third parties involving companies considered of a national interest.

During the last few weeks, this approach has been adopted by some Member States, which have revealed their intention to strengthen their “golden share” regime. This is the case of Spain, which has temporarily subjected foreign direct investments to government authorization, and Germany, which appears to have legitimated the Government to pose a veto on the transactions with non-EU parties concerning strategic assets. Italy’s Government has included banks and insurance companies in the list of strategic sectors in which the State can exercise its “golden powers”, including the right to pose a veto on crucial transactions with both EU and non-EU parties until December 31, 2020.

Against this backdrop, the ECJ remains empowered to supervise the adoption of these new, national legislations concerning “golden powers” in order to ensure their compliance with EU law; nevertheless, it cannot be completely excluded that, due to this emergency framework, the ECJ may decide to interpret less rigidly the limits imposed in this field through its case law or even to conceive *ad hoc* parameters to better balance the freedom enshrined in Article 63 TFEU and the urgent need to protect the economies of Member States.

In any event, as recalled by Commissioner Margrethe Vestager, another option always available to Member States to avoid the above-mentioned speculative actions is the acquisition of shares in companies active in strategic sectors. In fact, such intervention would be in line with the “principle of neutrality” of Article 345 TFEU, which states that the EU Treaties do not prevent *per se* nationalizations or privatizations of companies.

## **6. COVID-19 and Public Procurement and Concession Directives**

The COVID-19 pandemic has impacted all economic sectors. Nevertheless, by their very nature, certain (mostly public) services have a leading role in navigating the emergency: this is the case, for example, of those services related to health and civil protection.

Against this backdrop, with a view to simplifying the public procurement framework for the purchase of the supplies, services, and works needed to address the crisis, the Commission authorized, by means of a

Communication dated April 1, 2020 the recourse to the shortened procedures provided by Directive 2014/24/EU on public procurement (Public Procurement Directive), under the consideration that the spread of the outbreak can fall within the notion of an *unforeseeable event*, defined in Article 32(2)(c) of the Public Procurement Directive. Moreover, to address situations of extreme urgency in which the adoption of such flexibilities would not be sufficient, the Commission also legitimated the use of negotiated procedure without publication, an additional tool to be allowed on a case-by-case basis for a faster awarding of contracts to provide for COVID-19 pandemic related needs.

These guidelines have the effect to *de facto* widen the framework of those circumstances to which the provisions set forth by the Public Procurement Directive concerning the regular procedures for the award of public services does not apply. Indeed, the Directive already establishes that certain civil protection and danger prevention services provided by non-profit-making organizations or associations are excluded from its scope and their procurement may therefore be awarded through a negotiated procedure without prior publication.

Similar derogations are provided by Directive 2014/23/EU on concessions (Concessions Directive), according to which a certain flexibility shall be offered to the contracting authorities in the event of unforeseeable external events, to adapt the concession to each specific circumstance, without recurring to a new award procedure, except when it implies a change in the overall nature of the concession – e.g. with the replacement of the work or service to be provided – or a substantial change in the type of concession.

Such derogations have always been interpreted strictly to include only circumstances of extreme urgency related to unforeseeable events.

The concepts of urgency and unforeseeable external circumstances have also been analyzed by the ECJ, which, for example (i) ordered Italy to suspend the award of a public works contract on the grounds that urgency was not due to unforeseeable events; (ii) found that the extreme urgency relied on by the Spanish Government was not incompatible with the time limits provided for in the context of an accelerated procedure. Regarding the medical sector, the Court also clarified that in a situation of urgency, a contracting authority is entitled to take all interim measures required to enable it to procure the medical devices necessary for the operation of a hospital.

Certain authors have expressed the view that, due to the interconnection of EU and third Countries economies and the urgency to procure essential goods during the outbreak, the entry of third-country bidders to the internal market should be encouraged. Already in 2019, the Commission adopted a specific guidance to address this matter, mainly aimed at preventing abnormally low-priced offers and encouraging quality-based procurement (the Communication C(2019)5494).

## **7. EU Consumer Protection and COVID-19**

On March 23, 2020 Didier Reynders, the EU Commissioner for Justice and Consumers, wrote to a number of platforms, social media, search engines, and marketplaces to require their cooperation in removing unfair conducts from their platforms.

The Commissioner's communication follows the initiative taken, on March 20, 2020 by the Commission and the national consumer authorities of the EU Member States and EEA Countries, which issued a Common Position on COVID-19 on the most reported scams and unfair practices taking place during the outbreak.

It is worth recalling that under Regulation (EU) 2017/2394 consumer protection authorities of the Member States are linked in a pan-European enforcement (CPC) network with the Commission, a cooperation *forum* similar to the European Competition Network of the EU antitrust authorities (ECN).

The CPC Common Position illustrates several conducts aimed at harming consumers that have been put in place during the pandemic:

- operators making explicit or implicit claims that their products (often medicines) can prevent or cure a COVID-19 infection while failing to base those claims on solid scientific evidence. Such claims are in breach of Articles 5 and 6 of the Directive 2005/29/EC, that prohibit misleading actions regarding the main characteristics of the product, in conjunction with Article 17 of the Annex I (blacklist), which prohibits in all circumstances false claims that a product is able to cure illnesses;
- pressure selling techniques or other conducts providing inaccurate information about market conditions or the possibility of finding the product (especially medical equipment). Such conducts breach Articles 5 and 6 of the Directive 2005/29/EC, in conjunction with Article 7 of the blacklist, which prohibits in all circumstances to state that a product is only available for a very limited time, when this is not true;
- the exploitation of any specific circumstances of such gravity as to impair the consumer's judgement to influence his decision to purchase a product, which breaches Articles 8 and 9 of the Directive 2005/29/EC, on the prohibition of aggressive commercial practices.

The CPC Common Position also recalls that information society service providers are asked to provide the CPC Network adequate information as a matter of urgency should the need arise for authorities to rapidly signal scams and unfair commercial practices.

Before April 1, 2020 queries from consumers related to the COVID-19 outbreak mainly concerned five business sectors: passenger transport by air (44%), accommodation services (26%), package travel (25%), passenger transport by land or sea (3%), and recreation and culture (2%).

National authorities have acted in a number of occasions against allegedly unfair conducts breaching the EU legislation on consumer protection and unfair practices. The measures adopted include the issuance of fines and taking down of websites containing misleading advertising, as well as the publication of communications on the most common scams linked to COVID-19.

For instance, the Italian competition and consumer protection authority (AGCM) blocked the website of a trader who advertised a drug containing the active ingredients of an antiviral for HIV treatment as the “*only drug against Coronavirus*”. The German consumer protection agency (VZBV) has sent several “cease and desist” injunctions to operators selling medical equipment (e.g., protection masks) at excessive prices. Moreover, the French, German, UK, Hungarian, and Italian authorities have all issued guidance to businesses and consumers.

Consumer protection has also recently become a priority for the action of the Commission. Indeed, the recently adopted Directive (EU) 2019/2161, of November 27, 2019 provides for criteria to establish effective, proportionate, and dissuasive penalties in relation to widespread infringements of the law. In this context, it can be argued that the authorities best placed to counter this kind of conduct are those cumulating both antitrust and consumer protection powers, since they can choose the best enforcement tools depending on the circumstances of the individual case.

## 8. The Impact of COVID-19 on the Agricultural and Agri-Food Sectors

### 8.1 The WTO Members’ joint statement on trade in agricultural and food products of 22 April 2020

On April 2, 2020 the EU, together with a further 21 WTO Members (including the United States, Australia, Canada, China, Ukraine, and the UK), made a joint statement on *Responding to the COVID-19 pandemic with open and predictable trade in agricultural and food products*.

On the premise that export restrictions and similar trade restrictive measures can adversely affect food availability, resulting in price spikes, increased price volatility, and possible shortages, the Members agreed on a commitment to help ensure a well-functioning global agriculture and agri-food supply, and namely, *inter alia*:

- to ensure that supply chains remain open and connected;
- to exercise restraint in establishing domestic food stocks of agricultural products that are traditionally exported;
- not to impose agriculture export restrictions and refrain from implementing unjustified trade barriers on agriculture and agri-food products and key agricultural production inputs;
- that emergency measures related to agriculture and agri-food products designed to tackle COVID-19 must be targeted, proportionate, transparent, and temporary.

The joint statement acknowledges that, according to the Agriculture Market Information System’s<sup>1</sup> Market Monitoring report from April 2020, global food markets are still well balanced, while cereal stocks “are expected to reach their third highest level on record this season”.

### 8.2 The European Commission’s Short-Term Outlook on Agricultural Markets in 2020

The conclusions of the Agriculture Market Information System appear to be in line with the Commission’s *Short-term outlook for EU agricultural markets in 2020* (Outlook) published on April 20, 2020.

In the Outlook, the Commission remarks that, for the moment, EU agriculture has suffered relatively less damage compared to other parts of the economy more affected by the lockdown measures.

Nonetheless, restriction of movement and border management measures within the EU have already created obstacles in deliveries of raw materials and food during the first weeks of the crisis, while availability of workers is a concern at all levels of the food supply chain due to the broadly adopted restrictions on free movement of people.

The above-said issues lead to increased transport costs and difficulties in road freight, as return trips are often linked to non-essential economic activities.

Further factors, such as complications in cross-border and seasonal labor – crucial in different sectors such as fruit and vegetables – and possible shortages in the upcoming harvest seasons, may worsen the

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<sup>1</sup> An inter-agency platform launched in 2011 by the G20 Ministers of Agriculture to enhance food market transparency and policy response for food security following the global food price hikes in 2007/08 and 2010.

future scenario, which has already been complicated by estimates that half of global private consumption expenditures are at risk, according to the section of the Outlook dedicated to macroeconomic which quotes the IHS Market analysis.

### **8.3 The European Union's First Response to Labor Availability Issues Caused by the Health Crisis**

Since the COVID-19 pandemic struck Europe, the Commission responded by adopting various measures and guidelines also in the agricultural and agri-food sectors.

As highlighted in the Outlook on the agricultural market referred to above, labor availability has been a key concern from the early stages of the pandemic.

On 30 March 2020, the Commission issued the *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 1021/03)*.

As the Member States' answers to the health crisis included restrictions on free movement of people, availability of workers was reduced in different fields, from farms to transport, from warehouses and ports to retail.

Based on the understanding that frontier workers, posted workers, and seasonal workers, living in one country but working in another, are crucial for ensuring the supply of goods also in the agricultural and agri-food sectors, the Commission invited Member States to take specific measures toward a coordinated approach at the EU level.

The main principle underlying such guidelines is that continued free movement of all workers in critical occupations is essential, the latter including, *inter alia*, health professionals, ICT professionals, workers in the pharmaceutical and medical devices industry, as well as fishermen, food manufacturing and processing workers, and food and related products machine operators (see point 2 of the Guidelines).

In light of the above, the Commission urged Member States to establish specific, burden-free, and fast procedures for the border crossing of critical workers.

Moreover, acknowledging that in several Member States the agricultural sector relies heavily on seasonal workers from other Member States, and that in certain circumstances seasonal workers in agriculture perform critical harvesting, planting, or tending functions, the Commission stated that in such situations, Member States should treat those workers in the same manner as the workers that exercise critical occupations referred to above, establishing specific procedures to ensure a smooth passage for them (see points 9 and 10 of the Guidelines).

### **8.4 Further Measures Adopted by the European Union to Face the Crisis with Regards to the Agricultural and Agri-Food Sectors**

The Commission's response to the crisis in the agricultural and agri-food sectors was not limited to the issue of labor availability.

On April 6, 2020 the Commission also adopted an extension until June 15, 2020 of the deadline for submitting common agricultural policy (CAP) payment applications to receive both direct payments and rural development payments. While the extension is possible for all eligible farmers in all Member States, it is up to each country to decide whether to use it.

Further measures were adopted on April 16, 2020 when the advances of direct payments were increased (from 50% to 70%) and rural development payments (from 75% to 85%) for farmers. In addition, Member States will be able to pay them, starting from October, even before finalizing all on-the-spot checks. As for the latter, checks to ensure that eligibility conditions for payment are met will be reduced in number, with more flexibility granted also in terms of the timing of the checks, to pursue a more efficient use of resources while respecting the confinement rules.

The Commission also encouraged the use of new technologies to replace the traditional on-the-spot checks, using means such as satellite images to check agricultural activities and on the field geo-tagged photos to prove that investments took place.

Following that, a further incentive for the Commission to adopt other measures to support the agricultural and agri-food sectors came from the EU-27 Ministers for Agriculture who, on 17 April 2020, issued a joint statement whereby, emphasizing the *vital role* of farmers and the wider sector in maintaining security and food supply in Europe during this crisis, called on the Commission to facilitate the adoption of further measures.

Lastly, on April 22, 2020, the Commission announced further extraordinary measures to respond to the COVID-19 crisis, including:

- the proposition of granting private storage aid for dairy and meat products, allowing their temporary withdrawal from the market for a period that could vary between two to six months;
- the introduction of flexibility in the implementation of market support programmes for wine, fruits, vegetables, olive oil, apiculture, and of the EU's school scheme, the programme aimed at promoting healthy eating habits among children through the distribution of fruit, vegetables, and milk products;
- the authorization of exceptional derogation from EU competition rules under article 222 (*Application of Article 101(1) TFEU*) of the Common Markets Organization Regulation, allowing under certain conditions, and with the validity of six months, agreements between undertakings, decisions by associations of undertakings and concerted practices, provided that they do not undermine the proper functioning of the Internal Market and strictly aim to stabilize the sector.

## **8.5 Measures Adopted to Mitigate the Impact of the COVID-19 Outbreak in the Fishery and Aquaculture Sector**

On April 24, 2020 on the premise that the fishery and aquaculture sector has been particularly hard hit by the crisis due to a significant drop in demand ensuing from the COVID-19 outbreak, the European Parliament and the Council adopted Regulation (EU) No. 2020/560, introducing specific measures to support such industry.

By amending the Regulations on the common organization of the markets in fishery and aquaculture products (*Reg. (EU) No. 2013/1379*) and on the European Maritime and Fisheries Fund (*Reg. (EU) No. 2014/508*), the European Union adopted measures to:

- make it possible to support the temporary cessation of fishing activities caused by the health crisis with a maximum co-financing rate of 75 % of eligible public expenditure;
- include fishermen on foot as eligible for support in case of temporary cessation of activities;
- include new vessels (registered for less than two years) as eligible for support measures;



- apportion 10% of budgetary resources under shared management pursuant to Art. 13, Reg. (EU) 2014/508, in mitigation of the health crisis;
- grant working capital and compensate the reduction of sales and additional storage costs for aquaculture farmers and processors;
- support producer organizations and associations for the storage of fishery and aquaculture products.

The Regulation, negotiated and processed as a matter of urgency, became effective on April 25, 2020.

*\* This GT Newsletter is limited to non-U.S. matters and law.*

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