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## COVID-19 and Antitrust:

### The measures adopted by the Italian Competition Authority

#### 1. Introduction

The crisis caused by the Covid-19 pandemic has called for unprecedented measures also in relation to the enforcement of competition law. At the national level, the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* – “ICA”) has put in place several initiatives to support undertakings and protect consumers during the current emergency.

#### 2. The ICA Communication on cooperation agreements

On 24<sup>th</sup> April 2020, the ICA published a communication (the “ICA Communication”) in order to outline its approach in the evaluation of cooperation agreements entered into by undertakings to tackle the challenges arising from the Covid-19 pandemic in relation to the scarcity, distribution and transport of essential goods and services<sup>1</sup>.

The ICA Communication is a consistent follow-up to the European Commission's recent Communication on business cooperation in response to situations of urgency stemming from the COVID-19 outbreak<sup>2</sup> (the “Temporary Framework”) and is also in line with the guidance given by the European Competition Network with a statement dated 23<sup>rd</sup> March 2020<sup>3</sup> (the “ECN Statement”) and by the International Competition Network on 8<sup>th</sup> April 2020<sup>4</sup>.

Effective from 24<sup>th</sup> April 2020 until further notice, the ICA Communication aims, on the one hand, at providing guidance on the criteria that the ICA will follow when assessing cooperation projects among undertakings and, on the other hand, at describing the temporary procedure introduced by the ICA to assure companies about the compliance with competition law of individual cooperation projects.

##### a. Guidance for the assessment of business cooperation projects during the Covid-19 outbreak

The ICA acknowledges that the current exceptional circumstances may lead to the need for companies to cooperate in order to address – or at least mitigate – the most dramatic consequences of the crisis, for the benefit of the entire community.

In this respect, in line with the provisions of the Temporary Framework and the ECN Statement, the ICA Communication specifies that the ICA will not actively intervene against necessary, temporary and proportionate measures to promote the supply and adequate distribution of essential goods and services that may be scarce during the crisis.

<sup>1</sup> The ICA Communication can be accessed at this [link](#) (Italian text only).

<sup>2</sup> The Communication on the Temporary Framework is accessible at this [link](#).

<sup>3</sup> The ECN Statement can be viewed at the following [link](#).

<sup>4</sup> International Competition Network, *Competition during and after the COVID-19 pandemic*, 8 April 2020, at this [link](#).

In this regard, while the Temporary Framework has referred (albeit by way of example) to the sole case of cooperation aimed at tackling the lack of medicines and medical devices, the ICA Communication expressly mentions both the health sector and the agri-food sector<sup>5</sup>, thus acknowledging their essentiality.

In relation to the forms of cooperation that it deems admissible, the ICA refers to the following areas:

- in **relationships between competitors**, in accordance with the Temporary Framework, the ICA Communication states that, in principle, entrusting to trade associations or independent third parties of coordination tasks in relation to the supply of essential products does not raise concerns under competition law<sup>6</sup>. Apart from such case, the ICA envisages to assess “*with greater flexibility*” even more problematic forms of cooperation<sup>7</sup>, provided that these are proportionate, temporary and necessary to facilitate the supply of medicines or devices that are crucial for the fight against Covid-19, as well as other essential goods and services.
- in **vertical relations** (*i.e.* those between companies operating at different levels of the supply or distribution chain), drawing on the ECN Statement, the ICA points out that suppliers have the power to set maximum prices for their products, which allows them to limit speculation in the pricing at the distribution level.

#### **b. The (temporary) procedure for the prior appraisal of cooperation projects**

Also in its choice of the tools and procedures to provide guidance to enterprises, the ICA Communication is consistent with the Temporary Framework, in that it recognises that in order to ensure a more effective and timely reaction to the pandemic, enterprises may need support in self-assessment of their cooperation projects.

To this end, in addition to being willing to provide informal assistance to companies or trade associations<sup>8</sup>, the ICA has set the possibility to provide, exceptionally and at its own discretion, assurances (in the form of so-called comfort letters) on the compliance with competition law of specific initiatives.

This provision is complementary to the similar procedure set forth in the Temporary Framework<sup>9</sup>, given that the ICA’s comfort letter procedure only concerns the compliance with national competition law<sup>10</sup>.

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<sup>5</sup> See Communication, §13, as well as the ICA press release of 24<sup>th</sup> April 2020 (at this [link](#)).

<sup>6</sup> Taking inspiration from §12 of the Temporary Framework, the ICA specifies that third parties could be entrusted with the tasks to: *i)* coordinate joint transport and distribution of input materials; *ii)* identify medicines, medical devices or food supplies for which there are risks of shortages; *iii)* share aggregate supply gap information, and request participating undertakings, on an individual basis and without sharing that information with competitors, to indicate whether they can fill the supply gap to meet demand.

<sup>7</sup> For example, forms of cooperation aimed at the reorganisation of an entire production sector with the prospect of increasing and optimising production and that “*inevitably require an exchange of disaggregated and sensitive information and a degree of coordination between undertakings that in ‘normal’ times would certainly be problematic*” (ICA Communication, §§15-16).

<sup>8</sup> For this purpose, the ICA has dedicated an e-mail address to inquiries about the compatibility of specific cooperation projects with competition law ([accordi-cooperazione-COVID@agcm.it](mailto:accordi-cooperazione-COVID@agcm.it)).

<sup>9</sup> Indeed, the Temporary Framework allows the Commission to publish, on a temporary and exceptional basis, comfort letters in relation to individual cooperation projects.

<sup>10</sup> See ICA Communication, §19. The national legal framework is set by Law 10<sup>th</sup> October 1990, no. 287 (O.J. No. 240 of 13.10.1990).

### 3. The suspension of procedural deadlines and of the payment of fines

Article 103 of the so called “Cura Italia” Decree<sup>11</sup> has provided for the suspension of administrative procedural terms which were supposed to run between 23<sup>rd</sup> February and 15<sup>th</sup> May 2020. The final date of such terms will therefore be postponed by as many days as the suspension.

The ICA has issued a Communication<sup>12</sup> on the interpretation of this provision in which it has clarified that the *ex lege* suspension is applicable to time limits for the closure of proceedings and endo-procedural phases, as well as to time limits concerning individual procedural steps and those governing the initiation of proceedings. Accordingly, any notification, communication or complaint filed in the period between 23<sup>rd</sup> February and 15<sup>th</sup> May 2020 may be deemed to have been received on 16<sup>th</sup> May 2020. Moreover, the ICA excluded from this suspension: *i)* the deadlines for precautionary proceedings; *ii)* those within which undertakings must comply with the ICA's warnings; and *iii)* the deadlines for complying with the measures imposed in the conditional authorisation of a merger.

As far as the payment of fines (including instalments) is concerned, the ICA has ordered, on the one hand, the extension until 1<sup>st</sup> October 2020 of the deadline for the payment of fines for competition law infringements and, on the other hand, the suspension until the 15<sup>th</sup> May 2020 of the 30-day deadline for the payment of consumer protection penalties<sup>13</sup>.

### 4. The initiatives of the ICA on unfair commercial practices

In the exercise of its **consumer protection powers**, the ICA has acted promptly by initiating numerous proceedings to tackle unfair commercial practices aimed at leveraging the health emergency. In particular, the ICA focused on the online sale of products which play a significant role during the Covid-19 pandemic. The ICA has taken a number of measures, including:

- suspending the unauthorised online sale of pharmaceutical products, often combined with misleading advertising of their preventive and/or curative powers<sup>14</sup>;
- requesting the operators of major search engines and browsers to take action against the unauthorised online sale of drugs for Covid-19<sup>15</sup>, by transmitting the list of URLs of unauthorised pharmacies identified by the Finance Guard and requesting their removal from search results;
- launching investigations against online marketplaces relating to the use of misleading claims about the effectiveness of certain hygiene and health products and the unjustified and substantial

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<sup>11</sup> Law Decree, 17<sup>th</sup> March 2020, No. 18, Measures to strengthen the national health service and provide economic support for families, workers and businesses connected to the COVID-19 epidemiological emergency (O.J. No. 70, 17.3.2020), converted by Law 24<sup>th</sup> April 2020, No. 27 (O.J. No. 110, 29.4.2020). The suspension, initially provided for until 15<sup>th</sup> April 2020, was subsequently extended to 15<sup>th</sup> May 2020 by Article 37 of Law Decree No. 23 of 8<sup>th</sup> April 2020 (O.J. No. 94 of 8.4.2020).

<sup>12</sup> The Communication is available at this [link](#).

<sup>13</sup> In this respect, the ICA has specified that the period of suspension will not be taken into account for the calculation of interest and surcharges for penalties whose payments' deadline expired before 23<sup>rd</sup> February 2020.

<sup>14</sup> See the proceedings initiated against: [farmacocoronavirus.it](#) ([injunction](#) of 17<sup>th</sup> March blocking the access to the portal and decision of 16<sup>th</sup> April confirming the precautionary measures, referred to in Bulletin no. 18/2020, at this [link](#)), [Carlita Shop](#) ([injunction](#) of 22<sup>nd</sup> March to remove references to the preventive effectiveness of the products and [measure](#) of 8<sup>th</sup> April acknowledging compliance with precautionary measures), [Rapid Test Covid-19](#) ([injunction](#) of 22<sup>nd</sup> March to prohibit access to the website), [OxyStore](#) ([injunction](#) of 27<sup>th</sup> March removing the references to the preventive effectiveness of the products and [decision](#) of 8<sup>th</sup> April acknowledging compliance with precautionary measures), [Farmaciamaschile.it](#) ([injunction](#) of 27<sup>th</sup> March to prohibit access to the website and initiation of the investigation procedure referred to in Bulletin no. 17/2020, at this [link](#)), [Farmacia-generica.it](#) ([injunction](#) of 27<sup>th</sup> March prohibiting access to the website, [order](#) confirming the precautionary measures of 22<sup>nd</sup> April and, finally, [order](#) initiating the investigation procedure) and [TigerShop](#) ([injunction](#) of 8<sup>th</sup> April).

<sup>15</sup> See [press release](#) of 21<sup>st</sup> April 2020, concerning Google, Apple, Italiaonline, Microsoft, Yahoo, Mozilla and DuckDuckGo.

increase in their prices<sup>16</sup>;

- carrying out checks on potential abuses in the provision of services whose use has increased during the crisis, such as online donations<sup>17</sup>, legal assistance for actions for damages to health<sup>18</sup> and tests for Covid-19 antibodies<sup>19</sup>.

More recently, with reference to the **large-scale food retail sector**, the ICA sent on 7<sup>th</sup> May 2020 a request for information to several food retailers in order to acquire information on price trends – both retail and wholesale – of groceries, detergents, sanitizers and gloves<sup>20</sup>. This request, concerning about 3,800 points of sale, is aimed at ascertaining potential cases of exploitation of the current health emergency.

## 5. Conclusions

On the one hand, the analysis of the initiatives taken at the national level in response to the current crisis shows that the ICA's approach is in line with the one of the European Union. Indeed, the ICA is geared towards greater flexibility in the assessment of cooperation agreements between companies aimed at dealing with the problematic effects of the pandemic.

On the other hand, the Authority is proving to be firm and swift in the application of consumer protection law against initiatives finalised at exploiting the crisis to put in place abusive practices to the detriment of consumers.

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<sup>16</sup> After having sent requests for information to the main online sales platforms (see press release of 27<sup>th</sup> February at the following [link](#)), the Authority launched investigations against: Amazon and eBay on 12<sup>th</sup> March 2020 (referred to in the following [press release](#)), Wish on 3<sup>rd</sup> April 2020 (investigation closed without applying any measure, with [decision](#) of 8<sup>th</sup> April 2020) and, finally, the Vova.com platform on 29<sup>th</sup> April 2020 (referred to in the following [press release](#)).

<sup>17</sup> See, in this regard, the [injunction](#) adopted on 22<sup>nd</sup> March 2020 against the GoFundMe donation platform.

<sup>18</sup> See the investigation started on 2<sup>nd</sup> April 2020 against A.P. Risarcimento e Consulenza S.r.l. at the following [link](#).

<sup>19</sup> See the investigation launched on 17<sup>th</sup> April against private health care facilities that advertised tests for Covid-19, at this [link](#).

<sup>20</sup> See the investigation launched on 7<sup>th</sup> May 2020 (at the following [link](#)) against several supermarkets chains, including Carrefour Italia S.p.A., MD S.p.A., Lidl S.p.A., Eurospin S.p.A., as well as some Conad and Coop cooperatives.