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Coronavirus crisis: an urgent note on the application of trade regulation rules.

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The coronavirus crisis has already made headlines and caused historic stock market declines, and we have been surprised by the speed of events affecting our daily lives. Business leaders are going to be forced to make decisions, many of them quickly, factoring in the legal dimension of those decisions in order to avoid mistakes that could aggravate things.

This episode of the epidemic has numerous dimensions, with implications under employment law (work leaves, staff restructuring), contract law (application of the *force majeure* exception to performance of contracts) and bankruptcy (financial strains), amongst many others.

From a commercial perspective, the coronavirus crisis invites caution in terms of pricing of scarce goods. In France, for example, the government has announced price controls or even confiscation of sensitive material, such as disinfection gels and masks. Sudden rises in prices, although seemingly inherent to the law of supply and demand, may constitute a breach of the prohibition of abuse of dominant position and, in fact, there are several significant precedents for investigations by European competition authorities into excessive pricing of drugs in recent years. The excessiveness feature (certainly debatable) can be determined, for example, by comparison with neighboring geographic markets or by the existence of clearly disproportionate profits. Price discrimination can also in certain circumstances amount to an abuse of dominant position, as can pricing below cost, particularly when those are part of wider strategies to exclude competitors. Under competition law, such obligations limit the freedom of action of undertakings that are characterized as dominant (an economic concept that is flexible depending on the circumstances, and which should be considered in connection with companies having market shares of around 40% or more in a market).

Another potentially relevant area in the current context is that of the supply chain, twofold. First, in addition to supply obligations arising from sector-specific regimes (*e.g.*, pharmaceuticals), dominant companies may (again) incur antitrust liability if they interrupt or hinder supply to customers. This type of conduct may also be contrary to the unfair trade laws, which do not require the existence of a dominant position, and may, therefore, affect a wider universe of companies.

Second, there are reports that that factories may experience problems in the supply chain. In the last few hours, there have been reports of supermarkets with empty shelves. Earlier it was reported that major British supermarket chains have called for a relaxation of the rules to enable cooperation in the supply chain. Indeed, rules on restrictive agreements may become relevant. On the one hand, agreements between competitors that seek to address the crisis through, for example, market sharing, price-fixing or broad trading conditions are clearly problematic from a legal perspective. On the other hand, however, cooperation between competitors improving productivity or efficiency (*e.g.* to secure the supply chain in an

adverse context such as coronavirus) and meeting certain minimum requirements need not be problematic and should instead be blessed by the competition authorities.

Another potentially relevant area is that of State aid policy. As a general rule, State aid is prohibited under European law (with multiple and broad exceptions). It is still too early to say, but perhaps the present scenario will require aid to companies affected by the coronavirus crisis, and it would not be surprising if the European Commission were to relax its administrative control of State aid, as it already did in the financial crisis.

In the context of *shock* such as that of the coronavirus, it is to be expected that the mergers and acquisitions of companies will come to a standstill. Later on, in a situation of contraction of demand, this could make it necessary or convenient to accelerate concentration in the affected sectors. To the extent that mergers and acquisitions may be a problem in sectors already concentrated, the use of the *failing firm defence* as a justification to facilitate concentration cannot be ruled out, if the alternative is the disappearance of competitors.