Overview of EU competition law
recent developments in the Healthcare and Lifesciences sector – trends and perspectives

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Overview of EU competition law developments in the HLS sector

Abstract

This article aims to provide an overview of competitions authorities’ recent activity regarding the Healthcare and Lifesciences sector, both at the EU level and in seven Member States, and also to identify dominant trends and perspectives in this sector.

Over the past three months, the Commission and national competition authorities have been particularly busy in providing businesses with guidance to organise cooperation to tackle the Covid-19 outbreak and avoid shortages of essential medicines, while always recalling that such cooperation should not be an excuse to implement crisis cartel. The “comfort letter” issued by the Commission to Medicines for Europe allows this association to implement measures that are normally prohibited under competition law, only deemed to be justified by their purpose and temporary nature.

As with anticompetitive agreements, unfair pricing practices continue to be high on the competition authorities’ agenda. As excessive pricing regarding highly demanded health products became a hot topic during the Covid-19 crisis, the authorities’ response extends from close scrutiny of prices on the market, to formal investigations and sometimes resulting in temporary pricing regulation of such products. Recent investigations demonstrate that although different jurisdictions may tackle unfair pricing practices with different instruments (regulation, unfair practices or anticompetitive practices), the objective remains to ensure that consumers do not suffer from high prices, especially in the health sector.

Merger control is impacted by the crisis: information gathering has become more difficult and notifying companies should anticipate delay. However, competition authorities’ current message is that the crisis will not result in lower standards of mergers assessment. Notifying parties may now seek to invoke the “failing firm” defence, which leads to the clearance of a transaction that might ordinarily raise competition concerns.

Relaxing the State aid framework has become an important part of the Commission’s action to handle the crisis and businesses carrying out R&D projects related to Covid-19 and other antiviral-relevant research may now benefit from State aid measures in the form of direct grants, repayable advances or tax advantages.

One of the future challenges for competition authorities in the Life sciences sector will likely be to ensure that competitors’ collaborations stop after the crisis. Cooperation implemented might trigger future investigations and risks or private enforcement proceedings, so companies should remain careful and continue to ensure compliance of their actions with competition law.

We also expect that the pre-crisis trend of regulating against excessive pricing will continue to be high on the agenda of the European Commission and EU competition authorities especially in the Life sciences sector.

And the coming months may confirm a trend for ensuring fairness in market behaviour, at all levels of the commercialisation chain.

During these turbulent times, the health sector is at the core of the economic machine and one of the keys to solve the health crisis. Competition law continues to apply fully to pharmaceutical and medical devices companies. However, the competition authorities’ activity in the sector over the last two months demonstrates their willingness to take account of the new circumstances in applying competition law.

This summary of competition authorities’ recent positions, decisions and investigations at EU level and in seven of the main Member States (see table below) highlights various trends, among which are (i) the continuing monitoring of the healthcare and life sciences sector for anticompetitive agreements and unlawful pricing practices, (ii) the willingness to help businesses organise cooperation intended to handle the outbreak including the creation of task forces to help manage antitrust or consumer protection issues arise, (iii) the prioritisation of cases dealt with by the agencies, leading to the postponement or suspension of non-essentials mergers and investigations, and (iv) the increased willingness to approve State aid, where that aid is likely to benefit businesses carrying out R&D projects related to Covid-19 and other antiviral-relevant research.

By analysing European competition authorities’ enforcement current areas or focus, this article aims at providing a picture of what competition authorities may focus on in the coming months.
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1 Antitrust

Anticompetitive agreements

Horizontal issues

Over the past two months, the top priority has been to ensure that competition law concerns do not contribute to a shortage of essential products, and especially critical hospitals medicines. On 8 April, the Commission issued Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak, focused on the efforts by Member States to ensure rational supply, allocation and use of medicines to treat infected patients, for instance by increasing and reorganising production, avoiding national stockpiling or ensuring fair distribution of supply.

To support this objective, the Commission’s Competition Directorate (“DG Comp”) published, on the same day, its Temporary framework for assessing antitrust issues regarding business cooperation to tackle urgent situations stemming from the covid-19 outbreak (“antitrust temporary framework”), designed to help companies developing common supply strategies and providing mutual responses.

This framework follows the announcement by the European Competition Network (“ECN”) on 23 March that, although European competition authorities continue to enforce antitrust rules, they will not actively intervene against necessary and temporary measures settled in order to avoid a shortage of supply.

The temporary antitrust framework, which focuses on the healthcare sector but is also applicable to other sectors where necessary, sets out guidance to enable some forms of cooperation through trade organisations in the healthcare sector in a manner which is competition law compliant, as long as safeguards against anticompetitive exchanges of information are implemented. Examples of coordination given by the Commission are coordinating joint transport for input materials, aggregating production and capacity information or sharing aggregate supply gap information and request undertakings to indicate whether they can fill the supply gap to meet demand (through existing stocks or increase of production), always without exchanging individual company information. This approach does not depart fundamentally of what is usually permitted under EU competition law.

However, the Commission has acknowledged that further cooperation could be needed, in order to reorganise the companies’ production, which may require exchange of information that would normally raise competition concerns. Such exchanges would be admitted if objectively necessary to increase output, temporary in nature, and not exceeding what is strictly necessary. To benefit from such relaxation of competition law enforcement, cooperating competitors are required to document all their exchanges.

Under this antitrust temporary framework, undertakings may also receive informal prior guidance. Matching words with actions, the Commission immediately issued the first EU comfort letter in nearly 20 years to generic, biosimilar and value added pharmaceuticals association Medicines for Europe, whose members supply over 67% of all medicines across Europe. This comfort letter was published on 29 April and is interesting to examine. It reveals that the cooperation by the members of the association, and approved in principle by the Commission, goes far beyond what is normally accepted by competition authorities as it covers modelling of demand for Covid-19 related drugs, identification of production capacity and existing stocks as well as the possibility to adapt or reallocate production and existing stocks, in addition to addressing distribution issues. The cooperation notified and approved may also cover coordination of available industry capacity, optimisation of the use of resources available in the industry (like APIs).

(2) Temporary framework for assessing antitrust issues regarding business cooperation to tackle urgent situations stemming from the Covid-19 outbreak
(3) Comfort letter published on 29 April 2020
(4) Medicines for Europe website
Cooperation which involves exchange of sensitive information and coordination of commercial behaviour has, in the Commission’s view, a legitimate purpose in the current crisis situation and takes place in a context where cooperation has been encouraged by the Authorities themselves.

The Commission also notes the safeguards which have been proposed by the association to ensure that the cooperation remains strictly limited to what is indispensable and does not restrict competition beyond what is necessary. In particular, the cooperation will remain open to any pharmaceutical company willing to join, minutes of meetings will be kept, data will be shared in aggregate form only and the cooperation will be limited in time to the Covid-19 crisis. The Commission insists that prices are not discussed and, interestingly, its comfort letter is subject to the participants’ commitment not to increase their prices beyond what is justified by an increase in costs, which shows that the reinstatement of the practice letters may also be a way for the Commission to impose some kind of regulation of prices which would otherwise be more difficult and lengthy to investigate.

National competition authorities have also published their views regarding businesses cooperation in response to Covid-19.

On 25 March, the UK Competition Market Authority (“CMA”) published its approach to business cooperation in response to Covid-19, stating that it will not take enforcement action where businesses adopt temporary and appropriate measures to coordinate, to avoid shortage or ensure security of supply. One week earlier, an authorisation has been given by the UK government to supermarkets to share data with each other on stock levels, cooperate to keep shops open, and to share distribution depots and delivery vans. At the same time, the CMA has announced a significant reallocation of its resources to a new task force focusing on supervision of Covid-19 related activity.

On 24 April 2020, the Italian Competition Authority (“ICA”) provided guidance for Italian companies seeking to cooperate, especially in the health and pharmaceutical sector, and offered to give informal advice or even comfort letters to undertakings or trade associations. In application of such guidance, the ICA has validated, on 1st June 2020, a cooperation project regarding distribution of single-use chirurgical masks through pharmacies and parapharmacies. The agreement, entered into by pharmacists associations and the Covid-19 Emergency Commissioner, consists in a joint purchase and in a pro-quota sharing of the quantities purchased at the price agreed with suppliers, and will be effective until 20 June 2020.

In Spain, the National Commission on Markets and Competition (“CNMC”) has received numerous queries regarding the lawfulness of cooperation agreements between operators in the health products sector (face masks, respirators and hydroalcoholic gels) and is currently assessing compliance of such agreements with Spanish competition rules.

In between, examples of cooperation have multiplied. A consortium of six manufacturers of blood-derived drugs, including the French Fractionation and Biotechnology Laboratory, has emerged to develop and manufacture a drug to treat severe forms of Covid-19. GSK and Sanofi have also stated their common project to create an adjuvanted Covid-19 vaccine.

In France, Air Liquide Medical Systems, PSA, Valeo and Schneider announced an innovative consortium to manufacture 10,000 artificial respirators while a collective of volunteers (from public and private organizations) has created, on the basis of an open source initiative, the “MakAir”, an artificial respirator dedicated to people affected by severe Covid-19.

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(5) CMA press release of 25 March 2020
(6) UK government press release of 19 March 2020
(7) ICA press release of 24 April 2020
(8) MLex press release of 2 June 2020
(9) CNMC press release of 24 April 2020
(10) APM press release of 6 April 2020
Although such temporary cooperation between competitors is allowed, undertakings seeking to collaborate must watch out not to implement cartels, more likely to occur during crisis\(^{(11)}\). Indeed, in a crisis context, undertakings may feel more keen to share confidential information, directly or indirectly (via common clients for example - the so-called “hub and spoke” practice).

At a recent conference, Commission officials reported that DG Comp is still actively monitoring the market and will not tolerate any collusive pricing. Such behaviour is likely to attract significant penalties, as shown by two recent decisions\(^{(12)}\) of the CMA, fining four pharmaceutical companies over £3m (in addition to a payment of £1m directly to the National Health Service), for market sharing and exchanging competitively sensitive information, to try to keep prices up, relating to antidepressant drug nortriptyline (also leading to the disqualification of a company director).

As many companies are now struggling with liquidity issues because of the pandemic, governments are concerned with helping them to survive. To this end, the German Parliament passed legislation to make businesses fined by the German competition authority benefit from a relief from paying interest on fines, in the form of deferrals or payment instalments, to ease their financial burden\(^{(13)}\).

**Vertical issues**

Latest developments show a renewed interest in customer or territory allocation issues and online restrictions in vertical agreements. In particular, the recent FCA "Apple" decision is noteworthy as, in addition to sanctioning anticompetitive distribution agreements, it dealt with the French concept of abuse of economic dependency and has set a record fine (€1,1 billion)\(^{(14)}\).

The European Commission is currently reviewing its vertical agreements block exemption regulation ("VBER"). It has announced that no delay to this process is expected because of Covid-19\(^{(15)}\) and has published, on 25 May 2020, its final report with the results of the studies that were requested to support this review\(^{(16)}\). There were relatively few issues of vertical restraints related to Covid-19, although agencies may have to consider the need to exempt temporary territorial allocation agreements.

One recent example of vertical issue is the French law-based decision on alleged exclusive import practices in the medical equipment sector for overseas hospitals, where the FCA considered the risk that Fisher & Paykel Healthcare may have entrusted the import of its products (artificial ventilation masks useful for patients in intensive care) into French Guiana, Guadeloupe and Martinique to only one company, located in the United States, which would have prevented local distributors to purchase these products. As the French subsidiary of the Fisher group immediately clarified the group’s distribution rules to avoid any risk of disruption in the supply of these highly demanded products, the FCA closed the investigation\(^{(17)}\).

At the conference referred to above, Commission officials disclosed that they had been asked to comment on a vertical agreement in which the supplier of a pharmaceutical input restricted the use of that input by the purchaser to Covid-19 related products.

\(^{(11)}\) See decision 18-D-15 of the FCA fining wholesale distributors of veterinary drugs and their professional organizations for anticompetitive agreements €16m

\(^{(12)}\) UK CMA press release of 4 March 2020

\(^{(13)}\) MLex press release of 29 April 2020

\(^{(14)}\) FCA press release of 16 March 2020, decision not yet published

\(^{(15)}\) MLex press release of 15 April 2020

\(^{(16)}\) European Commission, Support studies for the evaluation of the VBER

\(^{(17)}\) FCA press release of 6 April 2020
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Unilateral practices

Pricing policies

Price levels are a classic competition law topic. Historically, the major concern of competition authorities has been predatory pricing and they were reluctant to investigate excessive prices abuses. This is in part because of the complexities of defining when a price is “excessive”. However, over the last few years, they have shown a renewed interest in addressing excessive prices, especially in the pharmaceutical sector.

An example of these difficulties is illustrated in the UK case involving Pfizer and Flynn. In that case the CMA imposed fines of £84.2m and £5.2m respectively for excessive pricing of phenytoin sodium capsules (an anti-epilepsy drug). Those fines were overturned in a first level appeal on the basis of difficulties in demonstrating that the prices were excessive. On 10 March 2020, the UK Court of Appeal rejected the CMA’s appeal. The question of abuse and penalties were remitted to the CMA. The CMA appears to have reduced the priority that it is giving to other historic excessive pricing cases in the pharmaceutical sector during the pandemic, so as to free up staff for Covid-19 related work.

At the EU level, the Commission is still investigating whether Aspen has abused its dominant position by having imposed significant and unjustified price increases for some of its cancer drugs (following a first condemnation of Aspen by the competition authority in Italy in 2016). The Commission has said publicly that it intends to keep working on this case during the current pandemic.

In Italy, the ICA is looking at whether Leadiant has abused its dominant position by imposing excessive prices for its chenodeoxycholic acid-based medicines. The case is understood to be under review by the Dutch and Belgian competition authorities as well.

Excessive pricing turns out to be a hot topic in the context of the Covid-19 crisis, as several products (hydroalcoholic gels, masks, gloves...) became highly demanded, which has lead certain manufacturers or resellers to increase their prices. The governments and competition authorities’ response extends from close scrutiny of prices on the market, to formal investigations.

But most of the interventions and investigations which have been made public over the last couple of months in relation to these health products are based more on consumer protection rules than on a potential abuse of dominance under competition law.

In addition to UK CMA and Spanish CNMC steps to scrutinise the markets concerned, in Italy, the ICA initiated two proceedings against Amazon and Ebay for unfair commercial practices (deceptive claims and excessive prices) in relation to the sale by third parties on the two platforms of products such as hand sanitizers and disposable respiratory protection masks.

In France, the French government has even introduced a temporary legislation to regulate the prices of hydroalcoholic gels and surgical masks, to avoid further price speculation. In the UK, the CMA has advised the government to consider such emergency time-limited legislation to tackle price gouging, as competition and consumer law are not designed to apply to such unusual circumstances.

(18) CMA press release of 10 March 2020
(20) AGCM press release of 15 October 2019
(21) CMA press release of 20 March 2020: The CMA created a taskforce to scrutinise market developments and identify harmful sales and pricing practices and warned companies not to implement unjustifiable prices or misleading claims.
(22) CNMC press release of 7 April 2020: The CNMC is investigating price gouging regarding sanitizing gels and raw materials to manufacture them, as well as shortages on the market.
(23) AGCM press release of 12 March 2020
(25) MLex press release of 24 April 2020
The latest examples show that, whilst different jurisdictions approach the topic of unfair pricing practices with different instruments (regulation, unfair practices, anticompetitive practices) the objective is equivalent: the protection of consumer welfare. No matter what legal basis is used, all jurisdictions continue to monitor businesses’ conduct regarding prices. The latest CMA annual plan confirmed that it will continue to have a strong focus on the UK pharmaceutical sector\(^\text{26}\). Companies seeking to make their prices vary, or wishing to launch a new product and set up its price, should therefore be careful when determining such prices.

**Discrimination**

Undertakings should also contemplate the risk of abuse of dominant position resulting from discriminatory allowances, although the necessity to differentiate between clients, taking into account objective differences between them, can be admitted especially in a crisis context leading to product shortages. But any discrimination felt by a client in reference to a health product deemed to be essential would likely prompt claims.

A recent illustration of this risk is the investigation of the Dutch Competition Authority (“ACM”) into possible abuse of dominant position by Roche regarding shortages of Covid-19 testing material\(^\text{27}\). The ACM finally closed the investigation as Roche supplied the Dutch government and third parties with its Covid-19 testing formula and committed to cooperate to ensure sufficient supply.

\(^{26}\) CMA Annual Plan consultation 2020/21, 23 January 2020

\(^{27}\) ACM press release of 3 April 2020
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2 Merger control

The Covid-19 crisis has rendered the merger control assessment more difficult than usual...

At the EU level, the Commission faced difficulties in gathering evidence and conducting market investigations. It has therefore advised that, when a market investigation is anticipated, companies should approach the merger control unit and discuss the timing in advance. The decision to file a merger notification however remains in the hands of companies and the Commission will appreciate on a case-by-case basis whether the case needs to be examined without delay.

A recent example of a delayed approval is the acquisition by EssilorLuxottica of Grandvision, since the Commission opened a phase II probe into the proposed transaction in February, the competition investigation has been suspended twice. The deadline resumed on 30 April. Such suspension may expose buyers to penalties for having exceeded the deadline for regulatory approval. Opening of phase II investigation also led to the decision of Johnson & Johnson to abandon its plan to acquire Takeda Pharmaceutical’s surgical patch product ‘TachoSil’. 

However the Commission continues to review ongoing transactions, as shown by the approval on 22 April of the merger of Mylan and Pfizer’s Upjohn division, subject to the divestment of Mylan’s business for certain generic medicines. The parties have however decided to postpone the closing, to focus on Covid-19 related matters.

In France, the FCA decided to suspend the deadlines by which it is supposed to take a decision on merger projects, as from 12 March 2020, until 24 June 2020. Only electronic submissions or the ones made by using the FCA’s dematerialised notification platform are possible. The FCA, just like the Belgian and German competition authorities, has encouraged companies to postpone any proposed economic concentration that is not urgent. In Germany, legislation has been passed to extend the merger review deadlines for deals notified between 1st March 2020 and 31 May 2020 (from one month to two for phase I, from four months to six for phase II).

In the UK, the CMA’s timescales have not been altered but delays should be expected. It issued guidance on information-gathering, timing of investigations and the conduct of meetings and hearings, as well as its approach to interim measures and substantive assessment. In that context, it has stated that it will not relax the standard of the “failing firm” defence, which leads to the clearance of a transaction that might ordinarily be blocked, on the grounds that the target is failing and bound to leave the market in any event. A key difference between the UK merger control regime and that of the EU, is that in the UK it is the CMA that controls when the statutory timetable starts running.

Competition authorities’ current message is that the crisis will not result in lower standards of mergers assessment. However, notifying parties may now seek to invoke the “failing firm” defence, rarely used in normal times, to convince agencies to approve concentrations that raise competition issues, by demonstrating that as many firms face bankruptcy, the merger’s impact would be positive. Thus, in the UK, the CMA cleared Amazon’s acquisition of Deliveroo at Phase II, primarily on the grounds that Deliveroo was failing.

In any event, businesses should implement strategies to anticipate the risk of delay. Starting early informal discussion with competition authorities agents is an option (prenotification phone calls are not unusual at the Commission); providing concise filings and preparing compelling arguments for priority treatment may be a boost.

(28) Case M 9569 – deadline suspension ended on 30 April
(29) Reuters press release of 10 April 2020
(30) European Commission press release of 22 April 2020
(32) FCA press release of 27 March 2020, FCA press release of 18 May 2020
(33) MLex press release 22 April 2020
(34) MLex press release of 24 April 2020, MLex press release of 22 April 2020
(35) CMA press release of 17 April 2020
3 State aid

The most significant impact of the crisis on the economy is that it has triggered the need for a massive public support initiatives for companies. The Commission has loosened the current State aid framework by adopting on 19 March a Temporary Framework for State aid measures and cleared in record time a huge number of State aid schemes.

Pharmaceutical and medical devices companies may not be in an immediate need for general financial support in the form of direct grants, repayable advances or tax advantages like the ones provided under the initial Framework given that the life sciences sector is going well and was strongly growing before the crisis (30 billion euros of turnover for the French medical devices sector in 2019\(^{(36)}\), 55.9 billion euros for the French pharmaceutical sector in 2018\(^{(37)}\)).

Despite increased demand for some products as a result of the pandemic, life sciences companies may still need other types of State aid like the ones provided for in the amended Temporary Framework.

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On 3 April, the Commission published a First Amendment to this temporary Framework to cover additional types of aid (in the form of direct grants, repayable advances or tax advantages), likely to benefit life sciences companies working on Covid-19 related products, i.e.:

- aid for R&D projects carrying out research into Covid-19 and other antiviral relevant research (vaccines, medicinal products and treatments, medical devices, hospital and medical equipment, etc.) provided that State aid beneficiaries grant non-exclusive licenses under non-discriminatory market conditions to third parties in the EEA;
- aid for the construction and upscaling of testing facilities (testing services will have to be provided at market price on a transparent and non-discriminatory basis);
- aid for the production medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; medical devices, hospital and medical equipment (including ventilators, protective clothing and equipment as well as diagnostic tools); disinfectants and data collection/processing tools.

A recent example is the approval by the Commission, on 5 June 2020, of a €5 billion French "umbrella" scheme to support R&D, testing infrastructures and production of Covid-19 relevant products\(^{(38)}\). Businesses cooperating with each other or with research organisations will benefit from a 15% bonus when the project is carried out in cross-border collaboration with research bodies or other undertakings, or when supported by more than one Member State.

Pharmaceutical or medical devices companies not working on Covid-19 products might not benefit from other State aid measures, apart from short-term working measures for employees whose activities have become impossible to carry out, such as healthcare companies’ sales forces visiting pharmacies and doctors. In that respect, it remains to be seen if, after deconfinement measures, healthcare companies will change their approach to their spending in relation these representatives’ activity which may have proven that it is not essential to run the business.

On a wider note, the current crisis raises the question of maintaining State aid rules. Despite the Commission’s excellent responsiveness, notifying state aid represents a considerable administrative burden whereas the financial support need to be immediate. Some stakeholders are even wondering whether state aid rules should be simply suspended\(^{(39)}\).

\(^{(36)}\) SNITEM website
\(^{(37)}\) Economic record of LEEM
\(^{(38)}\) European Commission press release of 5 June 2020
\(^{(39)}\) MLex press release 22 April 2020
Over the last two months, both the Commission and national competition authorities have carried out an enormous amount of work, with two objectives.

First, issuing guidance to businesses and strengthening legal certainty. The proliferation of speeches, press releases and guidelines demonstrates their willingness to guide businesses, particularly in the health sector, through these hard times in order to ensure the delivery of rapid benefits to consumers. The return of comfort letters (a practice abandoned by the Commission in the context of antitrust cases 15 years ago) also contributes to promoting legal certainty in these uncertain times. However, at the EU level, practice has shown that businesses have made little use of dedicated tools set up by the Commission (in particular the website and mailbox) to help them avoiding anticompetitive behaviours when cooperating during the crisis.

Competition authorities are even willing to provide guidance when the scope of the contemplated cooperation falls outside the Commission’s antitrust temporary framework, as recently demonstrated by the FCA which provided a French opticians’ trade association with clarifications regarding its intervention to support its members in dealing with real estate agents over their commercial rents during the Covid-19 crisis.

The antitrust temporary framework highlights the special role given to trade associations, supposed to organise cooperation between competing undertakings while keeping a distance between its members to preserve as far as possible the effectiveness of the competition rules, although the decision-making practice regularly proves that professional bodies overstep what is permitted by not preventing their members to share sensitive information.

Secondly, competition authorities’ initiatives emphasise that the Covid-19 crisis does not offer a wildcard to competitors to ignore competition law, by implementing cartels or unjustifiable high prices. Many agencies have created dedicated email addresses, to centralise all complaints and queries related to the application of competition and consumer rules in the context of Covid-19, scrutinize sensitive markets and encourage the reporting of reprehensible behaviours.

The period highlights the great responsiveness of European agencies, especially the Commission, which approved Medicines for Europe’s demand only two days after the proposal was submitted by the association and has issued a huge number of State aid decisions since March. In France, the FCA closed the investigation regarding alleged exclusive import practices in the medical equipment sector for overseas hospitals without any in-depth probe, relying on the parties’ commitments, which is not very common.

But what’s next after the crisis for the Lifesciences sector?

It is generally expected that, in the aftermath of the Covid-19 crisis, as with any crisis, there is likely be a wave of consolidation in many markets where weakened players will be acquired by their competitors who have less suffered as a result of the pandemic. Merger control will be a key enforcement of area for competition authorities across the globe, particularly in markets which see a considerable degree of consolidation.

It is also a common feature of many crisis that operators on markets having suffered from drop in prices are tempted to exchange sensitive information on prices or even agreeing on prices, clients or production levels thus prompting cartel enforcement by competition authorities. However, this is likely to apply less in the life sciences and healthcare sector because, as said above, sales and revenues of most of the pharmaceutical companies are not negatively impacted by the pandemic – quite the opposite – and, as demand tightens, there will be less downward pressure on prices, triggering cartel activity.

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(40) MLex press release of 2 June 2020
(41) FCA press release of 22 April 2020
We therefore see rather that the future challenge of competition authorities in the life sciences sector will be to ensure that competitors’ collaboration stop after the crisis and organise the come back to a fully competitive world.

We cannot rule out that, once the crisis is over, cooperation during the crisis period will trigger investigations, regarding their object, or their extent, and more private enforcement proceedings by competitors or clients could emerge. As a number of outstanding issues remain regarding the way out of the crisis, companies should not weaken efforts achieved to make their policies comply with competition law. Furthermore, we recommend that all variations from full compliance with competition law are carefully limited, documented and the justification is fully recorded.

Finally, we expect that the pre-crisis global trend of regulating against excessive pricing which has prevailed especially in the pharmaceutical sector over the last couple of years is likely to continue to be high on the agenda of the European Commission and EU Competition authorities.

Beyond these, we see another trend, which has developed not only in the healthcare and life sciences sector, for ensuring fairness in market behaviour, at all levels. Member States are equipped differently to address potential unfair practices with some with a single Authority having dual jurisdiction over fairness towards consumers or trade partners and anticompetitive practices while other have different authorities each having respective jurisdictions over these issues.

But what is sure is that seeing consumers suffering from high prices or difficulties to purchase in another Member State for example will likely prompt investigations.