

# COVID-19: PRESSURE POINTS: BUSINESS ASSOCIATIONS AND COMPETITION LAW DURING THE COVID-19 CRISIS: DO'S AND DON'TS (SPAIN)

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Legal Briefings - By **Henar González, Manuel Contreras and Pilar Carrasco**

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The current crisis and market uncertainty triggered by COVID-19 are forcing many companies to explore new formulas of collaboration to overcome the challenges that the current exceptional circumstances have generated. Many sectors have seen their sales and income plummet, while others are encountering huge challenges to secure their supply chains. In turn, this situation has led to increased contact among companies, where business associations are playing a key role in the search for solutions, including the collective negotiation and amendment of certain terms and conditions.

In that context, it is a common misconception that the COVID-19 crisis and the decreed state of emergency are sufficiently strong arguments for avoiding the application of competition rules. Completely the opposite: the competition authorities have prosecuted and punished anti-competitive behaviour aimed at price fixing, customer sharing or reducing supply in times of crisis or economic recession, when it is even more likely for practices of that kind to emerge.

Business associations and their members must be aware that the current exceptional circumstances do not release them from their obligation to comply with competition rules. Indeed, several competition authorities, including the National Markets and Competition Commission (“**CNMC**”), have made public announcements warning companies that they will react in the strongest terms and prosecute any anticompetitive practices during the COVID-19 crisis. Indeed, the CNMC has confirmed that it has opened investigations in at least three sectors as a result of complaints received in April 2020. More information in our latest articles:

- [COVID-19 PRESSURE POINTS: The CNMC has announced actions to prevent anticompetitive practices and market abuse in the context of the COVID-19 health crisis \(Spain\)](#)
- [COVID-19 PRESSURE POINTS: The CNMC launches a whistleblowing/ enquiries tool for competition law matters related to the COVID-19 outbreak \(Spain\)](#)

The Public Authorities’ involvement, which has proposed incentives for companies to enter into collaboration arrangements, does not amount to a release from the application of competition rules. In the absence of a clear legal mandate, companies and associations cannot rely on the Authorities’ involvement to avoid compliance with competition rules.

Competition provisions prohibit arrangements that restrict competition and both associations and their officers may be held liable for competition infringements; they may also be punished for those infringements and would be subject to considerable financial and reputational damage. This does not mean that all contact and collaboration among companies is prohibited, even when in the context of a business association; however, it is essential to undergo the required compliance procedures and to ensure that all players have the proper training and know what to can and cannot do.

We include below some basic recommendations for business associations to ensure that contact among operators and collaboration arrangements that may be necessary in the current circumstances are performed without risk of breaching competition rules.

## **DO'S**

- **Associations should implement and follow competition compliance programmes and apply them strictly, ensuring that all members are aware of their contents.** The CNMC has recently published its proposed Guide on Compliance Programmes, which sets out the criteria that the CNMC considers necessary for a

compliance programme to be effective. More information in this e-bulletin: [The CNMC publishes a guide on competition law compliance programmes.](#)

- **An agenda should be prepared before any face-to-face or remote meetings among association members.** A statement should be issued before each meeting reiterating the commitment made by all members to comply with competition rules and pointing out that discussions or exchanges of sensitive commercial information in breach of those rules will not be tolerated. Minutes should be taken of all discussions and deliberations at the meeting. If there is any doubt as to the matters to be discussed at the meeting, the association should request the presence of a legal adviser specialised in competition law who can offer guidance if members present at the meeting begin to discuss aspects that venture beyond the strictly necessary.
- **Special attention should be paid to processes where information is gathered and distributed among the members, especially if competitively sensitive information** – as a rule of thumb, all commercial information of an operator that is not public constitutes competitively sensitive information, particularly if that information refers to marketing strategies, pricing, discounts, payment schedules, sales margins, distribution networks, sales areas, production issues, costs structures, the identity of customers and suppliers, tenders, or research, development, distribution and marketing plans of future products and services.
- **When collecting competitively sensitive information on each individual member,** an association must put measures in place that prevent third parties from having direct or indirect access to that information, except in the case of historic information (information that is more than one year old). As a rule of thumb, when an association circulates information that is sufficiently aggregated among its members or discloses it to third parties, and that information cannot be attributed to individual members, it would not be in breach of competition rules. In the context of a collaboration arrangement, sensitive commercial information should only be exchanged insofar as that information is strictly necessary to achieve the ends sought by the collaboration.
- **Legal advice should be sought before entering into an undertaking or arrangement connected to matters that are competitively sensitive.** The CNMC has recently rolled out an online tool through which it is possible to make enquiries on whether a collaboration arrangement entered into to tackle the COVID-19 crisis is compliant with competition rules.
- **An effort should be made to properly document the efficiencies sought by entering into collaboration arrangements and how consumers will be benefited by doing so.** The pro-competitive impact of arrangements of this kind must be clear.
- **The association's employees must be reminded of the importance of taking care with language and wording used when drafting formal** (minutes, bulletins, press releases, etc.) and informal communications (emails, WhatsApp, chats, etc.) to avoid misunderstandings and questionable interpretations.

# DONT'S

- **Associations should not neglect their compliance with competition rules during the COVID-19 crisis and they should not make recommendations to their members or be involved in arrangements that are forbidden by those rules.** Any recommendation or guidance, whether formal or otherwise, that might influence how companies act in terms of prices – even where a recommendation refers to maximum prices – may be anti-competitive. Likewise, recommendations regarding the passing on of costs to customers or on production or sales planning might also infringe competition rules if the purpose sought is not pro-competitive and those recommendations are not essential.
- **Internal rules and regulations should not be put in place that prevent members from applying discounts and, in general, competing independently with other members.**
- **Associations should not encourage or be involved in commercial boycotts** – such as imposing sanctions – aimed at forcing members to display a specific commercial conduct.
- **Associations should not become forums or platforms for exchanging their members' sensitive commercial information, forbidden by competition rules.** The gathering, distribution and discussion of information related to prices or other commercial terms, customers, production or marketing plans should be avoided without prior legal advice.

[COVID-19 Europe](#)

[Navigating the COVID-19 outbreak](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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