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## Covid-19 and competition policy: a Swiss perspective

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Bovet, Christian; Bacharach, Jeremy; Delaloye, Valentine

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## Competition law and health crisis

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**Christian Ahlborn**  
**Partner** Linklaters, London

**Jeremy Bacharach**  
**PhD Candidate** University of Geneva

**Christoph Barth**  
**Partner** Linklaters, Düsseldorf

**Christian Bovet**  
**Professor** University of Geneva

**Marcel Boyer**  
**Emeritus Professor of Economics** University of Montréal  
**Associate Member** Toulouse School of Economics

**Jacques Buhart**  
**Partner** McDermott, Will & Emery, Brussels and Paris

**María Pilar Canedo Arrillaga**  
**Professor of Law** University of Deusto, Bilbao  
**Commissioner** Competition Chamber of CNMC, Madrid

**Michele Carpagnano**  
**Partner** Dentons, Rome  
**Professor** Trento University

**Daniel A. Crane**  
**Professor of Law** University of Michigan, Ann Arbor

**Aymeric de Moncuit**  
**Référéndaire**  
Court of Justice of the European Union, Luxembourg  
**Lecturer**  
University Paris II Panthéon-Assas

**Valentine Delaloye**  
**Teaching Assistant** University of Geneva

**Jacques Derenne**  
**Partner** Sheppard Mullin, Brussels  
**Professor** University of Liège, Belgium & Brussels School of Competition

**David dos Santos-Goncalves**  
**Managing Associate** Linklaters, Düsseldorf

**David Gabathuler**  
**Legal Consultant** EU, Competition and Trade Law, Baker Botts, Brussels

**Mark Griffiths**  
**Director** Norton Rose Fulbright Africa, Johannesburg

**Leigh Hancher**  
**Senior Advisor** Baker Botts, Brussels  
**Professor of European Law** Tilburg University  
**Professor of EU Energy Law** Florence School of Regulation

**David Henry**  
**Counsel** McDermott, Will & Emery, Brussels

**Dr. Pierre M. Horna**  
**Legal Affairs Official** Competition and Consumer Policies Branch of the UNCTAD Secretariat, Geneva

**Frédéric Jenny**  
**Professor of Economics** ESSEC Business School, Cergy

**David Kupka**  
**Associate** Willkie Farr & Gallagher, Brussels

**Siún O'Keeffe**  
**Manager Academy** Netherlands Authority for Consumers and Markets, The Hague

**Christian Ritz**  
**Partner** Hogan Lovells, Munich

**Cesare Rizza**  
**Counsel** Cleary Gottlieb, Rome

**Matthias Schlau**  
**Associate** Hogan Lovells, Munich

**Mario Siragusa**  
**Senior Counsel** Cleary Gottlieb, Rome

**Anastasia Usova**  
**Partner** Redcliffe Partners, Kyiv

**Faustine Viala**  
**Partner** Willkie Farr & Gallagher, Paris

**Masako Wakui**  
**Professor of Law** Kyoto University Faculty of Law

# Competition law and health crisis

## ABSTRACT

*The unexpected shock provoked by the Covid-19 crisis and the measures taken to limit the spread of the pandemic have affected the functioning of many markets. Throughout the world, competition authorities which, in the last decade, had been enforcing their laws in the context of steady economic growth have had to adjust their enforcement practices not only to the difficulties of running their operations due to lockdowns but more importantly to adjust to collapsing markets or markets for essential goods characterized by severe shortages, in a context of deep economic depression with many firms facing severe liquidity constraints or even the threat of bankruptcy. Competition authorities have responded to these extraordinarily brutal circumstances by adjusting their enforcement priorities, exempting certain forms of cooperation, relaxing their standards for efficiency defence, adopting emergency procedures, allowing state aids under certain conditions, accepting mergers because the target had all of a sudden become a failing firm etc.... while at the same time insisting that these changes did not mean a weakening or an alteration of the competition law principles that they previously followed. This set of articles describes in detail the responses of a number of competition authorities, analyzes the differences in the responses of various governments and competition authorities to the Covid-19 crisis and discusses whether these responses imply a departure from the traditionally accepted goals and enforcement principles of competition.*

*Le choc inattendu provoqué par la crise du Covid-19 et les mesures prises pour limiter la propagation de la pandémie ont affecté le fonctionnement de nombreux marchés. Partout dans le monde, les autorités de la concurrence qui, au cours de la dernière décennie, avaient appliqué leurs lois dans le contexte d'une croissance économique régulière, ont dû adapter leurs pratiques non seulement aux difficultés de gestion de leurs opérations résultant du confinement de leurs agents mais surtout à l'effondrement de la demande sur certains marchés et l'existence de graves pénuries de biens essentiels pour lutter contre la pandémie sur d'autres marchés. Dans un contexte de profonde dépression économique, de nombreuses entreprises sont confrontées à de graves contraintes de liquidité voire à la menace de faillite. Les autorités de la concurrence ont réagi à ces circonstances extraordinairement brutales en ajustant leurs priorités, en exemptant certaines formes de coopération, en assouplissant leurs standards en matière de gains d'efficacité, en adoptant des procédures d'urgence, en autorisant sous certaines formes des aides d'État, en acceptant des concentrations au nom de la théorie de l'entreprise défaillante etc.... Simultanément, elles ont insisté sur le fait que ces changements ne signifiaient pas un affaiblissement ou une modification du droit de la concurrence. Ce dossier décrit en détail les pratiques d'un certain nombre d'autorités de la concurrence, analyse les différences dans les réponses à la crise Covid-19 de divers gouvernements et autorités de la concurrence et examine si ces réponses impliquent une modification par rapport aux objectifs ou aux principes traditionnellement acceptés de mise en œuvre du droit de la concurrence*

## Introduction

**Frédéric Jenny**

**Professor of Economics** ESSEC Business School, Cergy

## Foreign investment lockdown

**Christian Ahlborn**

**Partner** Linklaters, London

**Christoph Barth**

**Partner** Linklaters, Düsseldorf

**David dos Santos-Goncalves**

**Managing Associate** Linklaters, Düsseldorf

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**Christian Bovet**

**Professor** University of Geneva

**Jeremy Bacharach**

**PhD Candidate** University of Geneva

**Valentine Delaloye**

**Teaching Assistant** University of Geneva

## Competition, open social democracy, and the Covid-19 pandemic

**Marcel Boyer**

**Emeritus Professor of Economics** University of Montréal  
**Associate Member** Toulouse School of Economics

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**Jacques Buhart**

**Partner** McDermott, Will & Emery, Brussels and Paris

**David Henry**

**Counsel** McDermott Will & Emery, Brussels

## Competition and Corona crisis: Some reflections from Spain with an advocacy perspective

**María Pilar Canedo Arrillaga**

**Professor of Law** University of Deusto, Bilbao  
**Commissioner** Competition Chamber of CNMC, Madrid

# Covid-19 and competition policy: A Swiss perspective

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**Christian Bovet**

christian.bovet@unige.ch

**Professor**

University of Geneva

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**Jeremy Bacharach**

jeremy.bacharach@unige.ch

**PhD Candidate**

University of Geneva

---

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**Valentine Delaloye**

valentine.delaloye@unige.ch

**Teaching Assistant**

University of Geneva

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## I. Legal framework

1. To understand the legal situation in Switzerland, it is necessary to briefly describe the legal framework within which the special regulations aimed at mitigating the effects of the Covid-19 crisis in our country are integrated. The factual background, for its part, is substantially the same as in most of the countries neighbouring Switzerland: a pandemic situation and confinement of the population.

2. During this very special period, the executive authority of the Swiss Confederation, the Federal Council, holds the prerogative to adopt emergency measures by ordinance,<sup>1</sup> based on Article 185(3) of the Federal Constitution.<sup>2</sup> According to this provision, the federal government “*may (...) issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.*” Thus, although this reference does not appear explicitly in all the ordinances, all the extraordinary measures adopted by the Federal Council in connection with the Covid-19 crisis are based on this provision. Article 7 of the Federal Act on Epidemics<sup>3</sup> provides an additional legal basis for enacting temporary ordinances in the case of

extraordinary health situations.<sup>4</sup> Three general observations may be made about these texts: (i) They are only applicable in case of emergency, i.e., to counter existing or imminent threats of serious disruption to public order or internal or external security.<sup>5</sup> Given its repercussions, the Covid-19 crisis constitutes without any doubt a situation justifying these emergency measures. (ii) These ordinances must be limited in time. (iii) Indeed, the decrees become obsolete six months after their enactment,<sup>6</sup> unless they are submitted to the Federal Assembly for approval or if a draft act for their integration into ordinary law is presented<sup>7</sup> in accordance with the regular Swiss legislative process.

3. The Federal Council has used this prerogative to adopt a few essential measures in an initial decree entitled Ordinance on Measures to Combat the Coronavirus<sup>8</sup> enacted on 13 March 2020 and amended many times since then, as well as to adopt a series of other decrees introducing specific measures in various areas affected by the crisis.

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1 Based on the terminology adopted in Switzerland, we opted for the term “ordinance” rather than “decree.”

2 Federal Constitution of the Swiss Confederation of 18 April 1999 (Cst.; Classified compilation [“RS”] 101). The Swiss federal administration provides English translations of important legal texts, although these translations are unofficial and therefore have no legal force. Where an English translation has been provided, the text will be cited in English. If no English translation has been provided, the act will be cited in French with a free translation by the authors, in brackets.

3 Loi fédérale sur la lutte contre les maladies transmissibles de l’homme du 28 septembre 2012 [Federal Act on Epidemics of 28 September 2012] (LEp; RS 818.101).

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4 Article 185 Cst. is not mentioned in the preamble to this law. Instead, it refers to other constitutional provisions granting the Confederation the power to issue, on Swiss nationals living abroad, health protection in the fight against serious diseases (Article 118[2] Cst.), medically assisted procreation and genetic engineering. The first paragraph of Article 118 Cst., which states that the Confederation may take measures to protect health within the limits of its powers, does not appear in the preamble, either.

5 Article 7d of the Government and Administration Organisation Act of 21 March 1997 (GAOA; RS 172.010).

6 Ibid.

7 Ibid.

8 Ordinance on Measures to Combat the Coronavirus of 13 March 2020 (Covid-19 Ordinance 2; RS 818.101.24).

## II. Application of competition law

4. Several political and geographical factors may influence the economics of the current crisis in Switzerland: its geographical position in the middle of Europe, while not being a member of the European Union; its rather small size; the number of multinational groups having their general or their European headquarters in Switzerland; the strong pharmaceutical industry; the federal structure leading to an allocation of competences between the Confederation and the Cantons; and a political and economic consensus culture. Swiss competition law already addresses some of these issues, for instance through strict rules on vertical restraints<sup>9</sup> or abuses of dominant position.<sup>10</sup> The strong reminder issued by the Swiss Federal Competition Commission (COMCO/WEKO) should be situated in this broad political, economic and legal context.<sup>11</sup>

5. In addition, the Federal Council presented to the Parliament draft provisions pertaining to relative market power,<sup>12</sup> excluding, however, Swiss buyers holding such power.<sup>13</sup> A revised draft was adopted by the National Council and will now find its way to the Council of States. Although the concept of “relative market power” would be defined in a new Article 4(2a) CartA, a limitation of the possibility for the buyers to acquire products abroad at the prices and under the conditions practised in that country would be considered as abusive under Article 7 CartA,<sup>14</sup> if this behaviour stems from an undertaking holding relative market power. As a consequence, the field of application of the latter rule would be extended in order to encompass both abuses performed by undertakings holding a dominant position and those of undertakings holding relative market power. On the other hand, it seems that only the first category of abuses would be sanctioned under Article 49a CartA, but this might be corrected by the second council. The interest of these draft provisions is twofold: first, the debate took

place only a few days before the Federal Council adopted the first ordinance on the Covid-19 crisis, but none of the representatives who expressed themselves at length on the draft law referred to this situation.<sup>15</sup> This is especially surprising because, second, several speakers mentioned explicitly in their statements the prices of medical and pharmaceutical goods.<sup>16</sup>

6. Finally, as implicitly indicated by the COMCO/WEKO in its statement, special measures constituting an exception to competition policy are allowed under the conditions of Article 3(1) CartA, which provides that statutory provisions exempting from competition markets pertaining to certain goods or services prevail over the CartA (e.g., provisions establishing prices or granting special rights to undertakings to enable them to fulfil public duties). Obviously, this is a key provision in the special Covid-19 regulatory regime set up by the Federal Council thus far. These rules will be analysed in a broad competition policy perspective, also taking into account for instance constitutional aspects such as equality among competitors.

## III. Public procurement

7. The legal framework governing public procurement in Switzerland is rather complex: at the international level, rules are set forth by the WTO agreement on government procurement<sup>17</sup> and the bilateral agreement entered into with the EU;<sup>18</sup> at the national level, different regulations apply depending on whether the goods or services in question are being acquired by a federal<sup>19</sup> or a cantonal<sup>20</sup> entity.

8. With the full support of the Conférence des achats de la Confédération [Conference on the Procurement of the Confederation] (CA),<sup>21</sup> the Coordination Conference for Public Sector Construction and Property Services

9 Articles 4(1) and 5(4) of the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (CartA; RS 251), as well as Competition Commission, Communication sur les accords verticaux du 28 juin 2010 [Communication on vertical restraints of 28 June 2010], as revised on 22 May 2017 (Communication on vertical restraints).

10 Article 4(2) and (7) CartA.

11 Swiss Federal Competition Commission, Press release of 26 March 2020, “Le droit des cartels s’applique durant la crise du coronavirus”, available on COMCO’s website at <https://www.weko.admin.ch/weko/fr/home/actualites/communiqués-de-presse/nsb-news-msg-id-78586.html>.

12 Federal Council, Message relatif à l’initiative populaire “Stop à l’îlot de cherté – pour des prix équitables (initiative pour des prix équitables)” et au contre-projet indirect (modification de la loi sur les cartels du 29 mai 2019) [Introductory Report regarding the federal popular initiative “Putting an end to the high-price island – in favour of fair prices” and the indirect counter-proposal (amendment of the Cartels Act of 29 May 2019)] (Federal Gazette [“FF”] 2019 p. 4665) and draft law of the same date (FF 2019 p. 4743).

13 Ibid., p. 4727.

14 Currently this provision is in substance the equivalent of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and qualifies the behaviours of undertakings holding a dominant position to be considered as abusive. The National Council did not follow the Federal Council and deleted proposed Article 7a CartA from the draft law and “replaced” it by a new Article 7(2)(g) CartA.

15 The first version of the Covid-19 Ordinance 2 was adopted by the Federal Council on 13 March 2020.

16 Debates before the National Council on 9 March 2020 (parliamentary item 19.037; Official Bulletin [“BO”] 2020 p. 205); for instance, Birrer-Heimo, Ritter, Michaud Gigon or Fivaz.

17 Agreement of 15 April 1994 (RS 0.632.231.422), as revised on 30 March 2020 (parliamentary item 17.020; FF 2019 p. 4413).

18 Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement of 21 June 1999, OJ L 114, 30.4.2002, p. 430 (RS 0.172.052.68).

19 In particular, Loi fédérale sur les marchés publics du 16 décembre 1994 [Federal Act on Public Procurement of 16 December 1994] (LMP; RS 172.056.1), to be replaced by a new law dated 21 June 2019, to enter into force on 1 January 2021 (Official Compilation [“RO”] 2020 p. 641). Also Ordonnance sur les marchés publics du 11 décembre 1995 [Ordinance on Public Procurement of 11 December 1995] (OMP; RS 172.056.11), to be replaced by a new ordinance dated 12 February 2020, to enter into force on 1 January 2021 (RO 2020 p. 691).

20 Accord intercantonal sur les marchés publics du 25 novembre 1994/15 mars 2001 [Agreement among Cantons on Public Procurement of 25 November 1994/15 March 2001] (RS 172.056.5), to be replaced by a new agreement dated 15 November 2019 (Conférence suisse des directeurs cantonaux des travaux publics, de l’aménagement du territoire et de l’environnement [Swiss Conference of Cantonal Directors of Public Works, Urban Planning and Environment], AIMP révisé, <https://www.dtap.ch/fr/dtap/concordats/aimp/aimp-2019>). This agreement is then implemented by cantonal regulations.

21 <https://www.bkk.admin.ch/bkk/fr/home.html>. These recommendations were also supported by the Communauté d’intérêts des maîtres d’ouvrage professionnels privés (IPB) [Community of Interests of Professional Private Project Owners].



issued a set of recommendations in order to attenuate the negative economic effects of the Covid-19 crisis in Switzerland from a public procurement standpoint.<sup>22</sup> The Conference reminded the authorities of the special legal regime applying in emergency situations providing for exceptions relating to the protection of the health and life of persons, animals and plantations as well as the possibility to use a negotiated procedure derogating from the regulations pertaining to competitive tendering.<sup>23</sup> It also advised public entities, within the framework governing public procurement, to opt for procedures that would be adapted to small and medium-sized enterprises (SMEs), for instance by allocating the goods or services in batches or by requesting supporting documentation only from the successful tenderer.<sup>24</sup> Finally, several measures were suggested in order to facilitate the performance of current contracts (e.g., electronic invoicing and rapid payment of invoices and/or instalments).<sup>25</sup> Consistently with the rules governing emergency regulations, these recommendations are valid for a limited period of six months.<sup>26</sup>

## IV. Health

9. Interestingly, public health has not been subject to as many special measures as might have been expected, at least at the federal level. Indeed, according to Article 1a of the Covid-19 Ordinance 2, aspects not covered by this text remain within the power of the cantons. The impact of this ordinance on competition may first be illustrated by its Article 4b, which governs the export of protective equipment and crucial medical goods defined in Appendices 3 and 4, such as mouth-nose protection equipment, protective garments, gloves but also specific drugs, Covid-19 tests, respirators, etc. Henceforth and with few exceptions, the export of these products must be requested from the State Secretariat for Economic Affairs (SECO). Exceptions include, for example, sales to EU members and other “close” countries such as Norway, Iceland, the United Kingdom or the Vatican, provided that reciprocity is ensured. The latter part of the exception will prove challenging in its application given the constantly evolving needs of the trading partners. Should the conditions of the exception clause not be fulfilled, then the SECO will grant an authorization only if Swiss needs are covered.<sup>27</sup>

According to Articles 4e and 10 of the Ordinance, the cantons and health professionals have the obligation to report current stocks of important medical goods and certain drugs (as defined in Appendices 3 and 4) to the competent federal authorities; the same principles apply to other goods and services, such as the occupancy of hospital beds. The authorities may also require similar information from companies that store these products. In addition, the Federal Council may compel manufacturers to produce important medical goods or to give priority to the production of such goods if the supply cannot be guaranteed otherwise.<sup>28</sup> To preserve the economy, the Confederation may compensate the financial losses resulting from changes in production or cancellation of private orders. It is difficult to predict what criteria will be applied to these measures which may create unequal treatment. Finally, according to Article 10a of the Covid-19 Ordinance 2, the cantons may require private hospitals and clinics to make their capacities available for the admission of patients.

10. In order to ensure rapid access to promising new therapies and urgently needed medical devices, a number of exceptions to the existing legislation on therapeutic products have also been adopted. For example, medicinal products manufactured with certain active substances and intended to treat Covid-19 patients can be marketed without authorization if an application for licensing has been submitted, in accordance with Article 4f of the Ordinance. On the other hand, the last decree directly dealing with health aspects<sup>29</sup> limits the sale of certain medicines useful against Covid-19 to one pack per purchase. Doctors and pharmacists may only provide chronically ill patients with the specified medicines in the prescribed quantity or in the quantity required to cover the needs for a maximum of two months per purchase.

11. Public or private events are prohibited and a number of specific businesses such as shops and restaurants shall stay closed. Quite obviously, exceptions are provided for healthcare facilities such as hospitals, “as well as practices and facilities operated by healthcare specialists under federal and cantonal law.”<sup>30</sup> However, depending on the canton, the following professions are or are not considered as health professionals: acupuncturists, opticians, dentists, homeopaths, naturopaths and other alternative medicine specialists.<sup>31</sup> This may create unequal treatment, since certain independent professionals may be banned from practising in some cantons but authorized in others.

12. Interestingly, there is no other significant change in regulations governing the health sector as of today. However, some specific problems related to the Covid-19 crisis have been reported these last weeks, which are

22 Conférence de coordination des services de la construction et des immeubles des maîtres d'ouvrage publics [Coordination Conference for Public Sector Construction and Property Services], Covid-19: Informations de la KBOB, <https://www.kbob.admin.ch/kbob/fr/home/themen-und-trends/coronavirus.html>.

23 Section 3.3.

24 Section 3.2. These measures might to some extent favour local providers.

25 Section 2.1. With respect to current public procurement proceedings, *idem*, Sections 3.1 and 3.2.

26 Section 1. See above section I of the present article.

27 New amendment of April 3, 2020.

28 Article 4k of Covid-19 Ordinance 2.

29 Ordonnance sur la restriction à la remise de médicaments du 18 mars 2020 [Ordinance on the Restriction of Supply of Medicines of 18 March 2020] (RS 531.215.33).

30 Article 6(3)(m) Covid-19 Ordinance 2.

31 Rapport explicatif concernant l'ordonnance 2 du 13 mars 2020 sur les mesures destinées à lutter contre le coronavirus, version du 3 avril 2020 [Explanatory report on Covid-19 Ordinance 2, updated as of 3 April 2020], p. 11.

closely related to the Swiss health system. Indeed, in Switzerland, every individual must join a basic health insurance scheme covering basic care.<sup>32</sup> One may add to this base a complementary component for care that is not covered by the basic insurance, for example for the refund of certain alternative medicine services. Furthermore, in order to qualify for reimbursement, the products and services covered by the basic health insurance have to be effective, appropriate and economical.<sup>33</sup> For example, that includes treatments by psychologists acting on behalf of a doctor (i.e., an employee of a medical centre).<sup>34</sup> As a result of confinement measures, most of them can no longer receive patients in their offices and work by phone or video conferencing from home. However, there is a billing limit imposed on patients who consult remotely and are covered only by basic insurance: unlike psychiatrists, psychologists cannot charge more than 360 minutes of consultation over a six-month period, or 6x60 minutes of sessions per semester. And this, despite of the current situation. The Swiss Federation of Psychologists has requested that this limit be removed and a petition to this effect has been filed with the government.

## V. Credit market

### 1. Measures

#### 1.1 Small and medium-sized enterprises (SMEs)

**13.** Soon after the Covid-19 outbreak in Switzerland, many observers began to warn that SMEs would be heavily affected by the oncoming crisis. This became all the more clear when the Federal Council enacted legislation that severely restricted gatherings and closed certain businesses such as shops, restaurants, fitness centres or hairdressers.<sup>35</sup> It was noted that bankruptcies of SMEs would seriously impact the Swiss economy, as they create two thirds of the jobs in the country.<sup>36</sup> As a response, the Federal Council issued an Ordinance on the provision of loans and guarantees following the coronavirus outbreak,<sup>37</sup> rolling out a system designed to keep SMEs afloat through the provision of emergency, guaranteed loans.

<sup>32</sup> Defined in the Loi fédérale sur l'assurance-maladie du 18 mars 1994 [Federal Act on Health Insurance of 18 March 1994] (LAMal; RS 832.10).

<sup>33</sup> Article 32 LAMal.

<sup>34</sup> Article 32 *cum* 25(2)(a), no. 3 LAMal.

<sup>35</sup> See, for a complete list, Article 6 Covid-19 Ordinance 2.

<sup>36</sup> Federal Department of Economic Affairs, Education and Research, SME Portal, Figures on SMEs: Essential Points in Brief, <https://www.kmu.admin.ch/kmu/en/home/facts-and-trends/facts-and-figures/figures-smes.html>.

<sup>37</sup> Ordonnance sur l'octroi de crédits et de cautionnements solidaires à la suite du coronavirus du 25 mars 2020 [Ordinance on the Provision of Credits and Guarantees Following the Coronavirus of 25 March 2020] (Ordinance on Covid-19 Guarantees; RS 951.261).

**14.** The Ordinance provides two types of loans:

- First, companies affected as a result of Covid-19 may obtain an emergency loan equal to 10% of their 2019 turnover,<sup>38</sup> but not exceeding CHF 500,000.<sup>39</sup> These interest-free<sup>40</sup> loans can be obtained from their current banks.<sup>41</sup> They are in turn fully guaranteed by the Swiss Confederation itself.<sup>42</sup> As timeliness is the priority, banks are not expected to assess the creditworthiness of the borrowers or to perform any other due diligence.<sup>43</sup> Practice shows that generally only a few days are needed for the money to be delivered to the borrower.
- Second, companies may file for a loan equal to 10%<sup>44</sup> of their revenue turnover but not exceeding CHF 20 million,<sup>45</sup> eligible to a guarantee of up to 85% of the sum borrowed by the Swiss Confederation.<sup>46</sup> In that case, however, banks must perform an ordinary due diligence on the borrower<sup>47</sup> and are allowed to charge up to 0.5% interest.<sup>48</sup>

**15.** In both cases, companies with a turnover of over CHF 500 million are excluded from the scheme.<sup>49</sup> In addition, borrowers are under a number of restrictions for the whole duration of the loan, including prohibitions on dividends, shareholder loans and intra-group repayments.<sup>50</sup>

**16.** As a result, the system implemented by the Federal Council allows SMEs to obtain quick and easy credit from their usual financial institutions, while allowing the latter to provide these credits without assuming any financial risk.

#### 1.2 Aviation industry

**17.** Since the beginning of the crisis, air traffic in Switzerland has dropped by more than 95%. This is a matter of considerable concern, since the Swiss economy

<sup>38</sup> Article 7(1) Ordinance on Covid-19 Guarantees.

<sup>39</sup> Article 3(1) Ordinance on Covid-19 Guarantees.

<sup>40</sup> Article 13(2)(a) Ordinance on Covid-19 Guarantees. However, the 4<sup>th</sup> paragraph of this rule grants the Federal Council the possibility to adapt the interest rates every year, the first time on 31 March 2021.

<sup>41</sup> Article 3 Ordinance on Covid-19 Guarantees.

<sup>42</sup> Article 8 Ordinance on Covid-19 Guarantees. From a technical perspective, the federal guarantee is only indirect: the loans themselves are guaranteed by loan guarantee cooperatives—an existing system designed to guarantee ordinary credit to SMEs—who are in turn guaranteed by the federal government.

<sup>43</sup> U. Zulauf and L. Thévenoz, Pas d'obligation de diligence des banques? Centre for Banking and Financial Law, March 26, 2020, <https://cdfb.ch/1119>.

<sup>44</sup> Article 7(1) Ordinance on Covid-19 Guarantees.

<sup>45</sup> Article 4(1) Ordinance on Covid-19 Guarantees.

<sup>46</sup> Article 4(5) Ordinance on Covid-19 Guarantees.

<sup>47</sup> Article 4(1)(b) Ordinance on Covid-19 Guarantees.

<sup>48</sup> Article 13(3)(b) Ordinance on Covid-19 Guarantees.

<sup>49</sup> Article 6(2)(a) Ordinance on Covid-19 Guarantees.

<sup>50</sup> Article 6(3) Ordinance on Covid-19 Guarantees.

relies on the aviation industry—which also employs over 190,000 people—for its imports and exports.<sup>51</sup> On 8 April 2020, the Federal Council announced the drafting of a set of measures aimed at providing liquidity to the aviation industry, which should be focused on offering guarantees by the Swiss Confederation to borrowers.<sup>52</sup>

**18.** From a competition law perspective, such a scheme may qualify as State aid. However, Article 13(2) of the 1999 Agreement between the European Community and the Swiss Confederation on Air Transport<sup>53</sup> authorizes State aid to the aviation industry provided that such aid makes good the “*damage caused by natural disasters or exceptional occurrences*.”<sup>54</sup> It is quite likely the current situation will fall within the scope of this provision.<sup>55</sup>

### 1.3 Culture

**19.** The closure of cinemas, discotheques, museums or concert halls<sup>56</sup> is liable to affect substantially the solvency of businesses active in the cultural sector. To protect them, the Federal Council created a dedicated system of interest-free loans, which can amount to up to 30% of the business’s turnover.<sup>57</sup> While funded by the Federal government, the loans are administered by the cantonal administrations.<sup>58</sup>

### 1.4 Financial institutions

**20.** A number of regulatory requirements,<sup>59</sup> most notably capital requirements, have been relaxed with regard to financial institutions. These measures are not aimed at helping the institutions themselves but mainly at encouraging them to provide credit to struggling businesses. By freeing up the capital ordinarily set aside to withstand financial crises, financial institutions are expected to be able to provide more credit to the economy, thereby allowing businesses to meet their liquidity needs.

**21.** On the one hand, the Swiss Financial Markets Supervisory Authority (FINMA) has already reduced some of the capital requirements it sets itself.<sup>60</sup> On the other hand, the Swiss National Bank and the Federal Council have taken a more drastic measure regarding a metric called the “countercyclical capital buffer.” Indeed, since 2014, in normal circumstances banks are required to set aside additional capital when providing credit in order to “save up” for future periods of stress in the financial system and to slow down the credit market. This additional capital is known as the countercyclical capital buffer (CCyB). On 27 March 2020, the Federal Council approved the recommendation of the Swiss National Bank to deactivate CCyB requirements for financial institutions.<sup>61</sup>

## 2. Effects on the market and observations

**22.** At a high level, the measures described above are an original attempt at answering a persisting unfairness in the credit market, i.e., the inability for SMEs to obtain credit easily, while larger corporations are able to access liquidity with little difficulty, whether through financial institutions or directly on the capital markets, through the issuance of bonds. Providing risk-free guarantees—those of a solvent state—to financial institutions but restricting them to small, less creditworthy borrowers is an adequate way to restore fair competition in a time of crisis.

**23.** The main shortcoming of the Federal Council’s SME credit scheme might be an overreliance on the turnover figures. As discussed, credits are only guaranteed by the Swiss Confederation up to 10% of the SME’s 2019 turnover. However, turnover may be a poor indicator of the company’s current liquidity needs. Companies with a large number of subcontractors—such as general contractors—may be favoured while start-ups that may have had little or no turnover in 2019 might be penalized.

**24.** We can also note a lack of measures directed at larger corporations. Did the Swiss government consider that they did not need additional support? It rather seems to us that the government considered that their liquidity needs should be left to the free market itself, provided that the banks’ ability to lend has been freed up as much as possible by easing capital requirements. Nevertheless, banks are still under no obligation to provide credit, and have no incentive to do so for larger corporations other than the “natural” incentives of the market. It remains to be seen whether this strategy will succeed, or whether larger corporations will face liquidity crises that will require government intervention.

<sup>51</sup> Federal Council, Press release of 4 April 2020, Coronavirus: Federal Council examines bridging loans for aviation industry, <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-78741.html>.

<sup>52</sup> Ibid.

<sup>53</sup> Agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999, OJ L 114, 30.4.2002, p. 73 (RS 0.748.127.192.68).

<sup>54</sup> Article 13(2)(b).

<sup>55</sup> See, in a similar vein, Communication from the Commission C/2020/1863, Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak (2020/C 91 I/01), OJ C 91I, 20.3.2020, p. 1, *passim*.

<sup>56</sup> See Article 6 Covid-19 Ordinance 2.

<sup>57</sup> See Articles 4 and 5 of the Ordonnance sur l’atténuation des conséquences économiques du coronavirus (Covid-19) dans le secteur de la culture du 20 mars 2020 [Ordinance on the Alleviation of the Economic Consequences of the Coronavirus on the Cultural Sector of 20 March 2020] (Covid-19 Culture Ordinance, RS 442.15). Individuals active in the cultural sector but without a corporate structure can also receive governmental aid in the form of indemnities closely resembling employment benefits (see Article 6 Covid-19 Culture Ordinance).

<sup>58</sup> Article 5 Covid-19 Culture Ordinance.

<sup>59</sup> For an exhaustive overview, see Swiss Financial Markets Supervisory Authority (FINMA), FINMA Guidance 03/2020: Exemptions for supervised institutions due to the Covid-19 crisis, 7 April 2020; FINMA Guidance 02/2020: Temporary exemptions for banks due to the Covid-19 crisis, 31 March 2020.

<sup>60</sup> Ibid.

<sup>61</sup> Federal Council, Press release of 27 March 2020, Coronavirus: Federal Council approves deactivation of the countercyclical capital buffer, <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-78604.html>.



25. A new phase in the government's measures may have started with the announcement of liquidity provision for the aviation industry. The next step could consist in replacing the approach based on the size of enterprises to a "sectoral" approach, whereby sectors that have been particularly affected by the Covid-19 crisis will be provided with liquidity.

## VI. Agriculture

26. Agriculture is subject to a substantial set of regulations at the international level, through treaties such as the WTO agreement<sup>62</sup> and the bilateral agreement with the EU.<sup>63</sup> The same phenomenon may be observed in national rules, some of them providing for limited exceptions to a fully competitive regime.<sup>64</sup>

27. The Ordinance on Covid-19 Agriculture<sup>65</sup> does not constitute a specific set of rules but is rather a series of amendments to existing texts. Their impact on competition is quite limited: typically, the subsidization of so-called "meat freezing campaigns" should be seen primarily as a safeguard measure aimed at limiting the waste of resources and accessorially as a supporting measure vis-à-vis a certain sector.<sup>66</sup> Second, the extension of payment deadlines relating to import tariff quotas allocated through an auction system is simply an adaptation of the current regime to the extraordinary situation we are facing.<sup>67</sup> Finally, the ordinance gives the possibility to increase partial import tariff quotas, should the internal market impose such a measure.<sup>68</sup>

62 Annex 1A.3 to the Agreement establishing the World Trade Organization of 15 April 1994 (RS 0.632.20). Also WTO International Dairy Agreement and Bovine Meat Agreement, respectively Annexes 4.c and 4.d to the Agreement establishing the World Trade Organization of 15 April 1994 (RS 0.632.20).

63 Agreement between the European Community and the Swiss Confederation on trade in agricultural products, OJ L 114, 30.4.2002, p. 132 (RS 0.916.026.81).

64 This is typically the case of Article 8a(1) of the Federal Law on Agriculture of 29 April 1998 (AgricA; RS 910.01), according to which: "[O]rganisations of producers of individual products or product groups or the corresponding branches may publish guideline prices at a national or regional level to which suppliers and buyers have agreed." However, the law protects some elements of competition by providing that no undertaking may be forced to comply with guideline prices (Article 8a[3] AgricA) and that no guideline prices may be set for retail sales (Article 8a[4] AgricA).

65 Ordonnance sur les mesures visant à atténuer les conséquences économiques du coronavirus dans le domaine de l'agriculture du 1<sup>er</sup> avril 2020 [Ordinance on Measures to Mitigate to Economic Consequence of the Coronavirus in the Agricultural Sector of 1 April 2020] (Covid-19 Agriculture Ordinance; RO 2020 p. 1141).

66 Article 13(1) of the Ordonnance sur le bétail de boucherie du 26 novembre 2003 [Ordinance on the Market in Commercial Livestock and Meat of 26 November 2003] (OBB; RS 916.341; Section I,2 of the Covid-19 Agriculture Ordinance).

67 Amendments to Articles 19(2) and 54c of the Ordonnance sur les importations agricoles du 26 octobre 2011 [Ordinance on the Importation of Agricultural Products of 26 October 2011] (OIAgr; RS 916.01; Section I,1 of the Covid-19 Agriculture Ordinance) and Article 19 and 35b OBB (Section I,2 of the Covid-19 Agriculture Ordinance).

68 Amendment to Article 36 OIAgr (Section I,1 of the Ordinance Covid-19 Agriculture) and Article 16(4)(b) OBB (Section I,2 of the Covid-19 Agriculture Ordinance).

## VII. Conclusion

28. Nobody will ever contest that we are living an extraordinary situation implying exceptional measures. The interest of this brief and, to some extent, temporary study is to show that authorities addressing the consequences of the current crisis are reacting on a case-by-case basis and looking for the solution that seems the most appropriate at the precise moment they take their decision, with the information available at that time. With respect to competition policy, the difficulty lies in finding the right balance between mitigating the negative economic impact of the pandemic and maintaining the requirements of competition while guaranteeing legal certainty.

29. In Switzerland, the relief adopted is manifold: competition authorities are monitoring the market to avoid abuses; public procurement procedures are made more flexible in order to face urgent health needs; more generally, interventions in the health sector are characterized by a high level of centralization and a significant increase in federal powers. Supporting the economy has become one of the central components of political action, perhaps as important as health policy. Subsidization through cheap loans guaranteed by the public authorities has seemed less constraining on the Swiss liberal economy doctrine than giving free aid to enterprises. This was accompanied by waiving some procedures and form requirements as well as easing several financial ratios. However, while national regulations grant enough flexibility to implement these measures, Switzerland must carefully study the legal framework at the international level, especially because of its numerous bilateral agreements with the European Union. Finally, the authorities should pay special attention to issues pertaining to equality of treatment among competitors. ■