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# COVID-19 and Competition Law – Companies Must Not Quarantine Competition Law Compliance

*By Christopher Thomas, Raphael Fleischer, Christian Ritz &  
Stefan Kirwitzke<sup>1</sup>*

*(Hogan Lovells)*

*Edited by Rosa M. Abrantes-Metz & Donald Klawiter*

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Competition law will not be at the top of companies' agendas today. COVID-19 presents companies with many challenges and the consequent disruption is likely to affect the global economy significantly in the coming months and potentially years. This will trigger companies around the globe to look for whatever solutions they can find to deal with this crisis. Such solutions may involve scenarios of cooperation with competitors to deal with supply-chain challenges or with potential future overcapacity. Companies should be aware that competition law will continue to apply during the COVID-19 crisis – be it in the EU, its Member States or all around the world.

COVID-19's impact on the functioning of the economy may prompt companies to collaborate with their competitors in hopes of overcoming the hardship, be it now or in the aftermath of the current freeze of social life and economic activity. However, EU competition law (and competition laws of EU Member States and elsewhere) does not look favorably at collaboration between competitors that restricts competition. Many competition authorities, e.g. in Greece,<sup>2</sup> France,<sup>3</sup> Latvia, Luxembourg,<sup>4</sup> Poland,<sup>5</sup> Portugal,<sup>6</sup> Spain,<sup>7</sup> and the United Kingdom, have already publicly announced that they will closely scrutinize behavior with respect to the supply of goods in high demand due to COVID-19. The same scrutiny should be expected from the European Commission. In fact, the European Commission is already vetting public statements of Eurocommerce (the European association of retailers) asking governments to ease the constraints of competition laws in an effort to allow retailers to cooperate to ensure the proper functioning of the supply-chain. Experience and case law from former crises show that the EU Commission has taken a strict approach to so-called crisis cartels.<sup>8</sup>

Meanwhile, the current crisis has also led to a statement from the European Competition Network ("ECN")<sup>9</sup>, in which the European competition authorities are organized, indicating that ECN members will not actively intervene against certain forms of cooperation necessary to ensure supply continuity. Similarly, the German Federal Cartel Office (and ECN member), has shown potential flexibility in the application of competition law in times of crisis, at least regarding key economic areas such as food supply-chains.<sup>10</sup>

In this context, companies need to understand what they *can* do and *cannot* do to deal with the current crisis from a competition law perspective.

## **A. DESPITE COVID-19 – COMPETITION LAW REMAINS APPLICABLE**

COVID-19 or not, EU competition law remains applicable, and companies are still barred from restricting competition by agreement or other forms of coordinated behavior as set out in Article 101 Treaty on the Functioning of the European Union ("TFEU"). While EU competition law allows for efficiency defenses, only restrictions of competition that are indispensable, produce efficiencies of which a fair share goes to consumers, and do not eliminate competition, are permitted.

While the ECN has publicly suggested a degree of leniency in its abovementioned statement ("Joint statement on application of competition law during the Corona crisis"), the ECN has reminded companies that competition law remains applicable, and that competition authorities in Europe will not hesitate to take action against companies taking advantage of the current situation by cartelizing or abusing their dominant position. The ECN has

emphasized that competition rules should ensure a level playing field between companies also in a period when companies and the economy as a whole suffer from crisis conditions.<sup>11</sup>

The European Commission's position is that an economic crisis alone will not exempt anti-competitive activities between competitors from antitrust scrutiny. In the aftermath of the 9/11 attacks – when aviation insurers independently withdrew their "war risk" cover (leading to planes being unable to fly) – insurers cooperated on restoring that cover. Despite the benefits to the functioning of the markets and, indirectly, to consumers, the Commission spent several years investigating this coordination under Article 101 TFEU, before ultimately closing the investigation by imposing remedies on insurance companies – albeit without imposing fines.<sup>12</sup>

The French Competition Authority, for example, has so far never regarded an economic downturn as a justification for anti-competitive conduct. Other authorities in the EU have been similarly clear not to allow anti-competitive practices to be justified on the basis of economic turmoil (e.g. Greece, Poland, Spain, and others).

## **B. NO GENERAL CRISIS EXEMPTION UNDER (EU) COMPETITION LAW**

In general, even during a crisis, competition law remains applicable. However, governments might seek to counter the crisis by making unprecedented provisions for companies seeking to cooperate. The severity of the ongoing COVID-19 crisis and its impact on the functioning of markets is very difficult to gauge at this time. While collaboration between competitors will very likely be scrutinized by the European Commission and competition authorities in EU Member States and elsewhere, it is conceivable that governments may establish exceptions, or authorities may take a lenient approach when considering fines.

Companies have been calling on governments to respond to permit competitors to collaborate in the public interest and, some countries have responded to such requests already. In Norway, for example, the Government has granted the country's air, land and sea transportation sector a conditional three-month exception from antitrust enforcement. Subject to conditions, the exemption allows companies temporarily to coordinate to maintain *"the transportation of passengers and goods in Norway in order to secure the population access to necessary goods and services."*<sup>13</sup>

In the UK, large grocery retailers have reached rationing agreements to counter rapidly depleting stocks due to panic buying. In response to calls from retailers, the UK government announced on March 19, 2020 that competition laws would be *"relaxed"* to allow *"supermarkets work together to feed the nation."* The UK CMA is not seeking to pursue companies for cooperating (or rationing products) where this is necessary to protect the functioning of the supply-chain (hence, protecting consumers). The CMA has warned however that it will tackle collusion that is not essential to deal with the COVID-19 crisis.

Similarly, the German Minister of Economics, Peter Altmaier, has announced on March 20, 2020 that the German Government wants to loosen up competition law in Germany. During the crisis, Altmaier wants to facilitate cooperation between grocery retail chains so they can supply the population with food safely: *"If the food industry and grocery retailers cooperate to ensure the supply of food to citizens in the crisis, then we will take up questions of competition law with the competition authorities and reach a solution."*<sup>14</sup> The same day, the President of the German Federal Cartel Office stated that competition law can be flexible if serious reasons

require such flexibility, and that his authority is available for discussions with relevant market players.

In its joint statement of March 23, 2020, the ECN has stated that it will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. It has further reminded companies that they can reach out to the respective competition authority any time for informal guidance.<sup>15</sup>

In the past, there have been other examples of authorities exempting companies for the application of competition law. For instance, the UK temporarily exempted fuel suppliers from competition laws to allow them to coordinate their activities in an effort to ensure that emergency and other critical service providers would still have fuel at times of shortage of supply.

We note, however, that to date a comparable exemption from the application of EU competition law has never taken place. While the COVID-19 crisis is arguably unprecedented in the history of the EU and of EU competition law, we do not view such a development as currently foreseeable. For the moment, therefore, companies should assume that EU competition will continue to apply. In any case, any kind of coordination between competitors should be assessed carefully from a competition law perspective, potentially discussed with the competent competition authority prior to implementation.

### C. HOW COMPANIES CAN AND CANNOT COOPERATE TO DEAL WITH THIS CRISIS

The European Commission has in the past accepted that efficiency gains can derive from companies cooperating to protect public health (e.g. in *Pasteur Mérieux-Merck*).<sup>16</sup> However, various forms of cooperation between competitors will be considered a prohibited restriction of competition under Article 101 TFEU:

- The exchange of competitively sensitive information between competitors; in particular, sharing information on prices, output volumes, customers
- The allocation of markets or agreements on prices or volumes

But other forms of cooperation might be acceptable under current circumstances in order to deal with the current pandemic crisis. For example, the following types of cooperation might be lawful under EU competition law provided such cooperation is legitimate and procompetitive and does not go beyond what is necessary:

- Collaboration on logistics or the improvement of distribution channels in times of crises to ensure continuity of supplies of critical goods and/or services (without exchanging competitively sensitive information – see above). Indeed, companies may consider – under strict conditions – combining forces under the Specialisation Block Exemption Regulation.<sup>17</sup>
- Exchange of non-competitively sensitive information (for example exchanges of aggregated information allowing for better forecasts of over- and undersupply).
- Joint advocacy actions between competitors vis-à-vis governmental bodies/officials to take action countering the crisis is possible – as described above for the UK groceries retail sector

- Industry-wide standard setting, especially if clear efficiency gains are demonstrable.
- Joint research and R&D is possible under EU competition law but subject to limitations and conditions. For instance, the EU R&D Block Exemption Regulation<sup>18</sup> allows for cooperation when it leads to more and more effective R&D activities, creating new or improved products and enabling faster market introduction.
- Certain cooperation on purchasing, commercialization, production and R&D is envisaged even in normal times by the European Commission’s Horizontal Cooperation Guidelines<sup>19</sup> – and this continues to apply.

In any event, companies should carefully assess potential cooperation with competitors under applicable competition law rules and, in case of doubt, consider pro-active outreach to competition authorities.

#### **D. GOVERNMENT-INDUCED COOPERATION UNDER EU COMPETITION LAW**

A particular situation may arise when companies are forced (by law) or encouraged by governments to cooperate. Is it then lawful for competitors to collaborate in a way that would restrict competition? Under EU competition law, the answer is that government intervention is a defense for collusion resulting in the restriction of competition only where such conduct is formally required by law, and where the behavior does not go further than what is strictly required by law. If the government’s intervention leaves any room for competition, companies are expected to compete in that space.

At EU Member State level, the analysis is similar. For instance, in the midst of the Bovine Spongiform Encephalopathy (“BSE”) crisis, Belgian laboratories testing for BSE allocated volumes between themselves and exchanged competitively sensitive information. The Belgian Competition Authority (“BCA”) found no infringement of Article 101 TFEU and the Belgian law equivalent. To face the BSE crisis, the Belgian State had (i) ordered laboratories to cooperate and had (ii) unilaterally set prices and volumes for testing among laboratories. This left no room for laboratories to compete and the BCA found that, in the absence of a competitive market, restrictions of competition cannot arise.

In the current COVID-19 crisis, governments in the EU have started to intervene in the economy (e.g. through explicit measures or obligations, such as limiting prices, agreeing on volumes, or by stimulating companies to cooperate in finding technical or commercial solutions for the challenges posed by the COVID-19 crisis). When this is the case, it will be of great importance for companies to assess the impact of government intervention on their business, and to identify the competition law risks arising from such intervention.

#### **E. KEY TAKEAWAYS**

The current COVID-19 crisis already today poses unprecedented economic challenges for companies in Europe and around the globe. It will require specific political and economic measures to respond to the crisis and its economic consequences. However, it is to be expected that competition authorities around the globe will keep a close eye on potential

competition law infringements and will certainly test potentially anticompetitive measures taken by companies, especially when it comes to collaboration between competitors.

Going forward, companies should specifically keep in mind the following points:

1. Companies must carefully consider the way in which they deal with the COVID-19 crisis, especially if their preferred solutions involve close collaboration with competitors.
2. The concrete antitrust risk remains difficult to assess, but precedent suggests that companies should err on the safe side.
3. Companies should assess the risks with their external antitrust counsel and should view information exchanges via business associations or other platforms with caution.

In case of doubt, companies should consider whether to take up the ECN's offer of informal consultation with the respective competition authorities.

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<sup>1</sup> Christopher Thomas is Partner in the antitrust and competition practice of Hogan Lovells in Brussels; Raphael Fleischer, LL.M. (University of Chicago) is Senior Associate in the antitrust and competition practice of Hogan Lovells in Brussels; Christian Ritz, LL.M. (USYD) is Partner in the antitrust and competition practice of Hogan Lovells in Munich; Stefan Kirwitzke is Associate in the antitrust and competition practice of Hogan Lovells in Brussels.

<sup>2</sup> <https://www.epant.gr/enimerosi/deltia-typou/item/831-deltio-typou-antiantagonistikes-praktikes-se-eidikes-koinonikes-kai-oikonomikes-synthikes.html>.

<sup>3</sup> <https://www.lefigaro.fr/flash-eco/coronavirus-l-autorite-de-la-concurrence-surveille-les-eventuels-prix-abusifs-20200316>.

<sup>4</sup> <https://conurrence.public.lu/fr/actualites/2020/coronavirus-responsabilite-entreprises.html>.

<sup>5</sup> The Polish Competition Authority has announced the creation of a special task force to monitor price increases.

<sup>6</sup> [http://www.concorrenca.pt/vEN/News\\_Events/Comunicados/Pages/PressRelease\\_202003.aspx](http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202003.aspx).

<sup>7</sup> [https://www.cnmc.es/sites/default/files/editor\\_contenidos/Notas%20de%20prensa/2020/20200312\\_NP\\_medidas\\_excepcionales\\_eng.pdf](https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/20200312_NP_medidas_excepcionales_eng.pdf).

<sup>8</sup> Contribution of the EU, OECD, Global Forum on Competition, January 27, 2011, Crisis Cartels: [https://ec.europa.eu/competition/international/multilateral/2011\\_feb\\_crisis\\_cartels.pdf](https://ec.europa.eu/competition/international/multilateral/2011_feb_crisis_cartels.pdf).

<sup>9</sup> [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).

<sup>10</sup> [https://www.focus.de/finanzen/boerse/wirtschaftsticker/virus-kartellamt-zeigt-sich-in-corona-krise-offen-fuer-ausnahmeregel\\_nid\\_11794142.html](https://www.focus.de/finanzen/boerse/wirtschaftsticker/virus-kartellamt-zeigt-sich-in-corona-krise-offen-fuer-ausnahmeregel_nid_11794142.html).

<sup>11</sup> [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).

<sup>12</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_05\\_361](https://ec.europa.eu/commission/presscorner/detail/en/IP_05_361).

<sup>13</sup> <https://www.regjeringen.no/no/aktuelt/flyskapskapene-gis-klarsignal-til-a-samarbeide/id2693957/>.

<sup>14</sup> <https://www.tagesschau.de/wirtschaft/altmaier-kartellrecht-corona-101.html>.

<sup>15</sup> [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).

<sup>16</sup> Commission Decision of 6 October 1994, Case IV/34.776 – *Pasteur Mérieux-Merck*, paragraphs 82-91.

<sup>17</sup> Commission Regulation (EU) No 1218/2010 of December 14, 2010.

<sup>18</sup> Commission Regulation (EU) No 1217/2010 of December 14, 2010.

<sup>19</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p.1.