

In the world of COVID-19, companies must not quarantine competition law compliance

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Competition law will not be at the top of companies' agendas today. COVID-19 presents companies with many challenges. Companies will be looking for whatever solutions they can find to deal with this crisis. But they should remember 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. However, EU competition law (and competition laws of EU member states and elsewhere) does not look favourably at collaboration between competitors that restricts competition. Competition authorities of Greece[1], France[2], Latvia, Luxembourg[3], Poland[4], Portugal[5], Spain[6] and the United Kingdom have already publicly announced that they will closely scrutinise behaviour 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. This said, competition authorities in Europe have clarified that they will not actively intervene against certain forms of cooperation necessary to ensure supply continuity – see below.

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. Can companies cooperate to survive COVID-19 under EU competition law?

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

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.[7]

The French Competition Authority has 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 (eg. Greece, Poland, Spain, and others).

B. Do crises lead to exemptions from (EU) competition law?

As indicated, 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.

For instance, at EU level, the European Competition Network (which bring together the European Commission, the EFTA Surveillance Authority, and the competition authorities of the EU/EEA member states), has issued a statement on 23 March 2020 to clarify that EU competition law remains applicable, but that the COVID-19 crisis "*may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers.*" The statement provides a limited reassurance that the authorities will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. It should be noted however that this may not provide protection against intervention in response to complaints from competitors or customers.

Indeed, companies have been calling on governments to respond to permit competitors to collaborate in the public interest. For instance, in the case of Norway, the Norwegian 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.*"[8]

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 19 March 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 20 March 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.*"[9]

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.

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 (eg. in *Pasteur Mérieux-Merck*).^[10] 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 may 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^[11]
- 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^[12] 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, commercialisation, production and R&D is envisaged even in normal times by the European Commission's Horizontal Cooperation Guidelines^[13] – and this continues to apply

D. Government-induced cooperation – is it a trap?

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 defence for collusion resulting in the restriction of competition only where such conduct is formally required by law, and where the behaviour 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.

Governments in the EU have started to intervene in the economy (eg. 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 for companies going forward

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.
4. In case of doubt, companies should consider pro-active outreach to competition authorities (however, it is currently unclear to what extent and how soon they will be willing to engage).

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

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

[3] <https://concurrence.public.lu/fr/actualites/2020/coronavirus-responsabilite-entreprises.html>

[4] The Polish Competition Authority has announced the creation of a special task force to monitor price increases.

[5] http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202003.aspx

[6] https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/20200

[7] https://ec.europa.eu/commission/presscorner/detail/en/IP_05_361

[8] [https://www.regjeringen.no/no/aktuelt/flyselskapene-gis-klarsignal-til-a-samarbeide/id2693957/.](https://www.regjeringen.no/no/aktuelt/flyselskapene-gis-klarsignal-til-a-samarbeide/id2693957/)

[9] [https://www.tagesschau.de/wirtschaft/altmaier-kartellrecht-corona-101.html.](https://www.tagesschau.de/wirtschaft/altmaier-kartellrecht-corona-101.html)

[10] Commission Decision of 6 October 19994, Case IV/34.776 – *Pasteur Mérieux-Merck*, paragraphs 82-91.

[11] Commission Regulation (EU) No 1218/2010 of 14 December 2010.

[12] Commission Regulation (EU) No 1217/2010 of 14 December 2010.

[13] 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.

[14] Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis of 23 March 2020.

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