



BRUSSELS À JOUR

## Managing the Crisis through Coordination?

**Joint Statement by the European Competition Network on the Application of the EU Competition Laws in the COVID-19 Crisis**

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Joachim Burger report on  
the latest developments  
from the European capital  
of competition law.

While public life is almost coming to a stop across the EU, and the severe impact of the COVID-19 pandemic on the Continent's economy is becoming ever more apparent, the eyes are turning to the European Commission and the National Competition Authorities ("NCA") – What can the EU competition laws do to help companies and consumers coping with the crisis? Quite something, it turns out! While adapting to the challenges of working from home, the European Commission has – in record time – revived the State Aid toolbox first developed during the financial crisis of 2008/2009, and approved much needed financial support schemes in several Member States. At the same time, as an antitrust enforcer, the European Commission is warning companies not to take advantage of the crisis, neither by cartelizing nor by abusing their market power – echoing enforcement action undertaken by the Italian NCA against price increases for sanitizing products and masks.<sup>1</sup> A joint statement published by the European Competition Network ("ECN") on 23 March 2020<sup>2</sup> now shifts the focus from what companies must not do under the EU competition rules to how they may legitimately cooperate, in accordance with these rules, to cope with the pandemic's impact on their business.

### Cooperating to Mitigate the Immediate Impact of the Crisis in the Crisis

Competition authorities are increasingly willing to accept some forms of coordination as a crisis response tool to ensure a fair distribution of goods to consumers and to maintain a stable level of supply during the crisis. Just last week, antitrust regulators in Germany<sup>3</sup> and the UK<sup>4</sup> announced that they would not intervene in certain forms of cooperation which retailers had engaged in to that end. The UK's CMA, for example, allowed retailers

1 <https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-intervenes-in-the-sale-of-sanitizing-products-and-masks>.

2 [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).

3 <https://www.handelsblatt.com/25665812.html>.

4 <https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation>.



to exchange information on stock levels and to coordinate on the opening times of their shops<sup>5</sup>, and Iceland exempted similar information exchanges on inventories between importers and distributors of pharmaceuticals.<sup>6</sup> In the same vein, ECN's joint statement holds that forms of cooperation that help to avoid a shortage of supplies either do not give rise to a restriction of competition under Article 101(1) TFEU or can be justified under Article 101(3) TFEU.

While these statements very much focus on food retailing, pharmaceuticals and other essential (consumer) goods, their underlying rationale may be sufficiently broad to apply to other industries as well. For example, where the lock-down interrupts companies' supply chains, results in shortages of raw materials, or disrupts their logistics operations, companies may obtain the antitrust regulators' blessing to coordinate – provided such coordination benefits consumers and is limited to the time of the immediate crisis.

### **Cooperating in the Crisis to Survive the Crisis**

A recent decision adopted by the Norwegian NCA raises the issue whether more far-reaching forms of cooperation may be admissible in the crisis. Last week, the NCA issued a three-month waiver from the competition rules for the transport sector, enabling the transport sector to effectively coordinate its services.<sup>7</sup> The decision was mainly motivated by the fact that transport companies are necessary for supply of goods to consumers and, in that regard, fits well with the rationale set out in the ECN's joint statement. However, the carve-out from the competition rules is significant as it effectively allows, e.g., Norwegian and SAS to coordinate their routes, and there is an – at least implied – acknowledgment that such coordination will offer “competitive relief” for two airlines. This latter notion arguably goes beyond the rationale of allowing coordination as a crisis response tool to ensure security of supply in the current crisis. In other words, may competitors coordinate, and restrict competition between them, in order to ensure that they stay afloat in the crisis?

Companies might try to argue that such coordination, while restrictive of competition in the crisis, creates efficiencies in the longer term by virtue of ensuring that the crisis does not force some competitors out of business and that vigorous competition can resume after the crisis. This could offer a path to a justification under Article 101(3) TFEU. However, competition agencies will be highly alert when key parameters of competition are restricted. Companies will need to provide convincing evidence that the proposed coordination is indispensable to preserve the current competitive landscape, and that customers will benefit in the long-run. Moreover, the competition must not be eliminated, but maintained as much as possible. In addition, there will likely need to be certain safeguards protecting customers also short-term such as, e.g., a commitment not to raise prices during the crisis. Companies are well-advised not to pursue such strategies without seeking informal guidance from the European Commission or one of the NCAs. After all: The ECN's joint statement only allows cooperation to avoid shortages of supply and the question remains whether the preservation of undertakings and market structures is not a genuine task of the State Aid rules.

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<sup>5</sup> <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>.

<sup>6</sup> <https://en.samkeppni.is/published-content/news/covid-19-application-of-competition-rules-and-competition-enforcement-in-financial-crisis>.

<sup>7</sup> <https://konkurransetilsynet.no/transportation-sector-is-granted-temporary-exception-from-the-competition-act/?lang=en>.



### Cooperating in the aftermath of COVID 19

As the European Commission and NCAs are – arguably – slackening the reins with respect to the competition rules in the crisis, some industries might want to maintain or extend these “benefits” post-crisis in order to be able to cope with longer-term economic impacts. The European Commission is unlikely to be overly receptive to such approaches. Similar demands to relax the enforcement of antitrust rules were put forward during the financial crisis in 2008/2009. At that time, then Competition Commissioner, Neelie Kroes, swiftly dismissed such requests: *„If I may quickly mention the issue of so-called ‘crisis cartels’... There may be many temptations in 2009 to cut corners, but encouraging cartelists and others would be guaranteeing disaster. It would drag down recovery, increase consumer harm and create more cartel and cartel cases into the future“*<sup>8</sup>

Under the EU competition rules, overcapacities resulting from an – even significant – decrease in demand as a result of a crisis, are generally insufficient to justify a coordination, e.g., on capacities or the exchange of related competitively sensitive information. Rather, cooperation in or after a crisis can only be justified under Article 101 (3) TFEU if the market forces cannot correct long-term capacity problems on their own. It remains to be seen whether these rules will survive COVID-19.

### Conclusion

The pandemic confronts everyone, companies and consumers alike, with entirely novel challenges. However, the competition authorities will unlikely accept the COVID-19 crisis as a pretext to justify far-reaching and long-lasting distortions of competition during or after the crisis. The substantial scale of the pandemic and its impact on the internal market may allow for limited temporary exemptions, as proposed by the ECN’s joint statement. However, the European Commission and NCAs will remain vigilant to enforce the EU competition rules if and where companies overreach. In other words: An illegal cartel remains an illegal cartel, even in the COVID-19 crisis.



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<sup>8</sup> Speech of Neelie Kroes , 08 October 2009; retrievable at: [https://ec.europa.eu/commission/presscorner/detail/pt/SPEECH\\_09\\_454](https://ec.europa.eu/commission/presscorner/detail/pt/SPEECH_09_454).