

Competitor Collaboration in Times of Crisis

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Collaboration between competitors may be needed to address the COVID-19 pandemic. This memorandum summarizes antitrust considerations that businesses may want to consider before engaging with their competitors in the current circumstances.

First, we provide an overview of the European and U.S. rules on horizontal agreements, which allow for the weighing of consumer benefits of collaboration against any anti-competitive effects.

Second, we summarize adjustments to antitrust law enforcement that European and U.S. agencies have introduced in the context of the COVID-19 crisis, to clarify and, in some cases, complement existing rules. These responses include: (i) new guidelines to address the situation; (ii) re-stated enforcement priorities; (iii) an increased willingness to provide guidance on specific proposals; and (iv) temporary exemptions from antitrust rules. Notably, the European Commission just established a temporary framework for the assessment of horizontal agreements that seek to increase supplies of medical products. Likewise, the U.S. FTC and DOJ are offering an expedited review of pandemic-related inquiries.

Finally, we provide practical guidance for businesses. To reduce risk, businesses should where possible limit competitor cooperation to temporary arrangements that aim to resolve supply shortages, and avoid collaborations that impact long-term industry structure. Regardless of the scope of the collaboration, businesses should document the scope and purpose of any agreements and monitor executives' and employees' communications with competitors. Finally, businesses should monitor agency communications so they can, where possible, fit their conduct into temporary exemptions and/or agency guidelines.

This memorandum continues a series on antitrust topics that we expect to be particularly relevant at this time. It supplements the materials available on our [Resource Center](#), including our previous [COVID-19 antitrust](#) update and our [agency status](#) tracker.

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I. Competitor collaboration under European law

European antitrust law prohibits agreements and concerted practices that have as their object or effect the restriction of competition. A non-exhaustive list of precluded practices under Article 101(1) TFEU includes price-fixing, coordinated output reduction, market-sharing, discrimination, and imposing unfair contract terms. The prohibition also captures exchange of competitively sensitive information if it leads to a restriction of competition.

An agreement or a concerted practice captured by Article 101(1) may be exempt under Article 101(3) TFEU if it meets four cumulative criteria: (i) it generates production or distribution efficiencies, or promotes technical or economic progress; (ii) consumers are allowed a fair share of the resulting benefit; (iii) the restrictions are indispensable to achieving those objectives; and (iv) the arrangement does not eliminate competition. At its heart, this exemption relies on a balancing test: agreements with more severe restrictions require more significant countervailing benefits to justify them. At the end of the spectrum, it is generally not possible to justify particularly serious restrictions (e.g., price-fixing, production-limiting agreements, or restriction on passive sales) in this way.

The European Commission has not issued any block exemptions that address crisis situations (as it has, for example, for joint research & development agreements), still less the current COVID-19 pandemic. Accordingly, at least as a legal matter, competitor collaboration should be assessed in the normal way, albeit with regard to a temporary framework announced by the Commission on April 8.

In doing so, it is useful to distinguish between: (i) collaboration that may benefit from the Commission's temporary framework; (ii) other collaboration that seeks to increase production or

facilitate supplies (goals that might be directly expected to benefit customers and consumers in the short run); and (iii) collaboration that seeks to ensure the long-run survival of the participants (where any consumer benefit would be indirect and more remote).

Collaboration that benefits from the Commission's temporary framework

On April 8, 2020, the Commission published a temporary framework for the assessment of horizontal cooperation during the COVID-19 outbreak.¹ The framework applies to conduct that is necessary to ensure the supply and adequate distribution of essential scarce products and services, which “*includes notably medicines and medical equipment that are used to test and treat COVID-19 patients or are necessary to mitigate and possibly overcome the outbreak.*”

Substantively, the framework appears to cover the following three areas:

- Certain types of coordination by manufacturers are not problematic under EU competition law and do not give rise to an enforcement priority for the Commission. Specifically, this applies to coordination of production, stock management, and distribution, to the extent suppliers do not allocate specific products between them and agree to each focus on one product, or arrangements that enable them to take advantage of scale economies. To benefit from the framework, coordination must: (i) increase output; (ii) be temporary; and (iii) be indispensable for achieving the stated objective. The framework requires that companies keep records of relevant agreements and communications.
- The Commission will permit competing firms to coordinate their activities where mandated by an “imperative request” of a public authority.²

¹ European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, April 8, 2020, available at: https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

² In fact, the Commission has also published guidelines for EU Member States on the optimal and rational supply of medicines, which suggest that national governments may need to coordinate joint industry efforts to mitigate the consequences of the COVID-19 outbreak. European Commission, Guidelines on the optimal and rational supply of medicines to avoid shortages during

- Finally, the framework notes that cooperation facilitated by a trade association or another third party should not raise concerns, provided the parties set up sufficient safeguards (e.g., by preventing sharing individualized information), especially to the extent the cooperation relates to: logistics for input materials; identifying essential medicines for which there are risks of shortages; the exchange of aggregated information on production and capacity; predicting demand at a Member State level; and the exchange of aggregated information to address supply gaps.

To increase legal certainty, the Commission has also promised to issue *ad hoc* “comfort” letters with informal guidance on specific arrangements.³

Although not a block exemption, the framework provides for a material deviation from the Commission’s previous statements on the assessment of horizontal cooperation under EU competition law. It bears mention, however, that it does not provide a blanket shield against any private damages actions that could be taken by third-parties.

Collaboration that seeks to increase production or facilitate supplies

Many other agreements that seek to mitigate supply disruptions or increase production will not infringe European antitrust law, even if they do not benefit from the Commission’s temporary framework. Relevant conduct may include coordination on how best to allocate scarce resources, exchange of information on stock levels, and discussion on best practices (e.g., optimization of logistics or production processes).

In many cases, collaboration of this nature will not have any anti-competitive object or effect (and so will not fall under Article 101(1) TFEU to start with). But even where it does, in many cases it will be a good candidate for exemption under Article

the COVID-19 outbreak, April 8, 2020, available at: <https://ec.europa.eu/info/sites/info/files/communication-commission-guidelines-optimal-rational-supply-medicines-avoid.pdf>.

³ Until 2004, the Commission used to issue “comfort” letters with assessment of cooperation arrangements. In 2004, a new regulation implementing Article 101 TFEU came into force, which abolished the *ex ante* review of

101(3) TFEU, as its customer benefits may outweigh any restrictions on competition.

- Agencies may well be prepared to accept that the mitigation of supply disruptions is efficiency-enhancing, because it facilitates downstream access to products and/or reduces distribution costs. For example, in *Metro v Commission*, the Court of Justice considered that ensuring “*stability in the supply of the relevant products*” satisfied the first condition under Article 101(3) TFEU.⁴
- Consumers are more likely to benefit from these measures, as increasing production and/or smoothing supply should directly increase output. For example, in assessing an alliance agreement between Austrian Airlines and Lufthansa, the Commission found that consumers would benefit through a higher frequency of flights.⁵
- Agreements of this nature may have limited (if any) restrictions on competition. It should, therefore, be easier to demonstrate that any restrictions that do apply, not go beyond what is necessary to achieve the stated goal of collaboration.
- Provided the terms of the agreements do not seek to restrict direct competition between the participants, it would seem unlikely that they would be considered as eliminating all competition.

Accordingly, while the analysis will always turn on the facts of each case, there may be strong arguments to defend collaboration of this nature.

Collaboration that seeks to ensure long-term solvency

In contrast, collaboration that aims to ensure long-term solvency (still less profitability) is less likely to find agency support. Relevant conduct may, for

non-merger agreement. It allowed “findings of inapplicability” under Article 10 of Regulation 1/2003, which has not been used in practice.

⁴ Case 26-76, *Metro v Commission*, ECLI:EU:C:1977:167, para. 43.

⁵ COMP/37.730, *AuA/LH*, Commission decision of July 5, 2002.

example, include attempts at coordinating reductions in capacity across firms in response to falls in demand.

Interestingly, there are precedents where the European Commission has approved coordinated reduction of production capacity. However, all the relevant cases predate the issuance of the Commission's Horizontal Cooperation Guidelines.⁶ In each case, the Commission concluded that coordination of this nature would be efficiency-enhancing, as it would allow the parties to retire obsolete capacity and increase utilization of other assets. In doing so, the Commission found that consumers would receive a fair share of those benefits, in one case because the cooperation would ensure they would continue to deal with a "healthy industry offering competitive supplies," and in another that they would not suffer from disruption caused by suppliers exiting the market.

We are, however, not aware of recent cases of this nature at a European level, and the Commission has explicitly rejected the application of Article 101(3) TFEU in more recent times of economic distress. Notably, the Commission emphasized the importance of strict enforcement of Article 101 TFEU for the efficient economic recovery from the 2008 financial crisis.⁷ And in its contribution to OECD's 2011 forum on crisis cartels, the

⁶ See Case IV/30.810, *Synthetic Fibres*, Commission decision of July 4, 1984 (where nine major European manufacturers of synthetic fibers collectively defined a maximum production capacity); Case IV/34.456, *Stichting Baksteen*, Commission decision of April 29, 1994 (where Dutch brick manufacturers collectively agreed to reduce surplus capacity and stockpiles); and Case IV/31.846, *Enichem/ICI*, Commission decision of December 22, 1987 (where the parties agreed on an asset swap that amounted to a *de facto* specialization agreement, together with concerted action to reduce capacity).

⁷ See, e.g., Neelie Kroes, EU Commissioner for Competition, Tackling cartels – a never-ending task, October 8, 2009, available at: https://ec.europa.eu/commission/presscorner/detail/en/SP_EECH_09_454 ("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. No-one wins, today's softness is tomorrow's nightmare.").

⁸ In particular, there may conceivably be a situation where, instead of adjusting their own capacity, all market

Commission was at pains to stress that economic theory would rarely support the efficiency-enhancing effects of industrial restructuring agreements.⁸ Similarly, in its amicus brief in the *Irish Beef* case, the Commission submitted that industrial restructuring agreements imposing restrictions on output or entry barriers are very unlikely to fulfil conditions of 101(3) TFEU.⁹

This position reflects the following considerations, amongst others:

- Agencies might, in theory, accept that an industrial restructuring agreement enhances efficiency if the capacity being retired is the least efficient in the market and the remaining capacity is sufficient to maintain output at the same level. However, parties to an agreement of this nature should expect a very rigorous analysis of such an argument, including with respect to the potential for future demand growth.
- Reductions in capacity typically decrease fixed costs rather than variable costs. European agencies may take the view that these types of saving are less likely to reduce downstream prices and, therefore, may not result in customer benefits.

participants are holding their positions in an attempt to induce others to leave the market. In such circumstances the market forces alone may not suffice to ensure that the manufacturers operate at an optimal level, which warrants some form of competitors' coordination. See EU Contribution to OECD Global Forum on Competition, "Crisis Cartels," January 27, 2011, available at https://ec.europa.eu/competition/international/multilateral/2011_feb_crisis_cartels.pdf.

⁹ In *Irish Beef*, the European Court of Justice found that a scheme by ten beef producers to reduce industry capacity restricted competition by object, stating it was irrelevant that the parties intended to remedy the effects of a crisis in their sector (Case C-209/07, *Beef Industry Development and Barry Brothers*, ECLI:EU:C:2008:643). While the Court was not asked to consider if the agreement should be exempted due to procompetitive benefits, the Commission has opined that this was unlikely (see the Commission's observations of March 30, 2010 in *Beef Industry Development Society Ltd*, available at: https://ec.europa.eu/competition/court/amicus_curiae_2010_bids_en.pdf).

- Agencies will be skeptical about the necessity of coordination for this purpose. As the Commission explained in its paper on crisis cartels, in the majority of situations, markets should naturally arrive to the optimal level of available capacity, without explicit coordination.
- Capacity-reducing agreements are also more likely to eliminate competition, in particular, if they reduce total output below an efficient level or lead to some suppliers effectively exiting the market.

Accordingly, firms should expect very close and sceptical scrutiny of any proposed collaboration of this nature. That said, if such agreements are demonstrably necessary to maintain efficient production capacity that would otherwise disappear, due to the extraordinary circumstances, an *ad hoc* exemption cannot be excluded if less restrictive measures or State aid are unavailable, although firms should consider explicit clearance with the Commission.

II. Competitor collaboration under U.S. law

While U.S. antitrust laws allow joint ventures and other competitor collaboration that are likely to have competitive benefits, they can prohibit agreements between competitors that limit competition without offsetting benefits and in some cases prohibit agreements completely. While neither U.S. enforcers nor courts are blind to the exigencies imposed by COVID-19, they will still apply the antitrust laws to competitor collaboration.

Specifically, Section 1 of the Sherman Act declares that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”¹⁰ is illegal.

Agreements among competitors that fix prices, allocate markets or customers, or restrict output are treated as *per se* unlawful under the Sherman Act, meaning these types of agreements are viewed as so inherently anticompetitive as to be considered

unlawful without need for further inquiry into the effects on competition.

Other agreements among competitors are judged under the “Rule of Reason” when they have plausible efficiency justifications. The Rule of Reason weighs the potential anticompetitive effects of the agreement against its procompetitive benefits. While it is not always clear when an agreement should be subject to *per se* treatment or the Rule of Reason, the Rule of Reason generally should apply when the competitor collaboration has a plausible efficiency justification and is not simply a “sham” for otherwise *per se* illegal conduct.

As with Europe, crisis situations do not, in and of themselves, trigger a different standard for antitrust laws in the U.S., nor do they create a defense for otherwise improper activity. However, times of crises can impact how competitor collaboration is analyzed and treated.

- **Rule of Reason analysis.** Perhaps most importantly, crises can directly impact the weighing analysis under the Rule of Reason, which is applied to competitor arrangements that are not otherwise treated illegal *per se*. Greater weight would likely be put on procompetitive benefits designed to address the crisis, for example supply of ventilators and respirators to address the COVID-19 pandemic.
- **Enforcement discretion.** The DOJ, FTC, and state enforcers can always exercise prosecutorial discretion. The agencies may be less inclined to pursue conduct that seems designed to address needs relating to the emergency. For example, in the wake of Hurricanes Katrina and Rita, DOJ acknowledged the need for “[j]oint efforts of limited duration” to restore disrupted supply chains and bolster essential business sectors, and noted that collaboration in that vein “*should not generally raise concern under the antitrust laws*” due to their consumer benefits.¹¹ However, the agencies could also be skeptical of collaboration that may, in fact, be improper, but operates on the guise of serving a public good.

¹⁰ 15 U.S.C. § 1.

¹¹ U.S. Department of Justice, “Antitrust Guidance: Hurricane Katrina and Rita” (June 25, 2015), available at:

<https://www.justice.gov/atr/antitrust-guidance-hurricanes-katrina-and-rita>.

- **Executive branch influence.** The executive branch has historically intervened in antitrust enforcement under unusual circumstances. For instance, during World War II, the Secretary of Interior helped coordinate American oil companies on production and sought an exemption from the DOJ.¹² Perhaps most pertinent is the Defense Production Act (DPA),¹³ which affords the President the power to allow voluntary horizontal agreements that help provide for the national defense and makes agreements made under the Act immune from federal and state law civil antitrust enforcement actions. Importantly, though, the implementation of the DPA involves significant administrative complexities that may cause delays and/or inefficiencies, including oversight by the DOJ or FTC and the promulgation of rules incorporating standards and procedures around the agreements.
- **Other relevant statutes.** The Pandemic and All-Hazards Preparedness Act (the “PAHPA”)¹⁴ may offer antitrust protection with fewer procedural hurdles than the DPA. The PAHPA authorizes the Secretary of Health and Human Services to provide an antitrust exemption for collaborative meetings and agreements related to the development of pandemic-related products, such as therapeutic drugs and medical devices, as long as the Attorney General, in consultation with the FTC Chairman, approves the activity and the requirements of the statute are satisfied. Agreements also do not need to go through any formal rulemaking requirements, and advance notice of meetings is not required. Covered activities are defined broadly, and include “*any activity relating to the development, manufacture, distribution, purchase, or storage of a countermeasure or product.*”¹⁵

For parties that seek to collaborate without government involvement, there is statutory

authority that, while not creating an exemption, can limit a firm’s liability under the Clayton Act to actual damages. Such a limitation is particularly relevant given the risk of trebled damages in antitrust cases. The National Cooperative Research and Production Act (the “NCRPA”),¹⁶ designed to promote innovation and trade by reducing antitrust liability, applies to joint research and development (“R&D”) or U.S.-based production ventures (as well as standard development organizations). The NCRPA mandates the use of the Rule of Reason for joint R&D and production ventures and allows such ventures that prevail over bad faith antitrust claims to recover attorneys’ fees. Further, ventures that file a timely notification with the FTC and DOJ are exempt from treble damages liability. While it does not shield joint ventures from all antitrust liability, the limits imposed by the NCRPA can provide some comfort to firms looking to collaborate quickly in order to solve problems caused by the pandemic, such as critical supply shortages and the immediate need for new therapeutic treatments. The NCRPA, however, explicitly does not apply to information sharing beyond what is reasonably required to carry out the venture’s purpose or to agreements to restrict the sale of products other than those developed through or produced by the venture.

III. Agency approaches to collaboration during the COVID-19 pandemic

As explained above, the current situation does not trigger any generalized deviation from established antitrust rules. However, antitrust agencies around the world are taking a more flexible approach to competitor collaboration related to the COVID-19 outbreak, in particular, where it is necessary to address shortages in medical supplies required for COVID-19 treatment or grocery retail.

¹² See Daniel Yergin, *The Prize: The Epic Quest For Oil, Money & Power* (1990). Similarly, during the Iranian oil crisis, President Truman asked the Department of Justice to drop a criminal investigation against the oil companies and pursue only a civil investigation. See Burton I. Kaufman, *Oil and Antitrust: The Oil Cartel Case and the Cold War*, *BUS. HIST. REV.*, Vol. 51, No. 1 (Spring,

1977), at 35, available at:

<https://www.jstor.org/stable/3112920>.

¹³ 50 U.S.C. § 4501 *et seq.*

¹⁴ 42 U.S.C. § 201 *et seq.*

¹⁵ 42 U.S.C. § 247d-7f(c)(3)(A).

¹⁶ 15 U.S.C. §§ 4301–4306.

These responses vary in form, but tend to fall in the following four categories: (i) new guidelines on application of antitrust rules; (ii) re-stated enforcement priorities; (iii) individual exemptions; and (iv) temporary exemptions.

Guidance from enforcers on the application of competition law during COVID-19

A variety of agencies have issued guidance on the application of antitrust rules during the COVID-19 pandemic.

Most prominently, the European Commission has issued the temporary framework described above.

This has been complemented by several developments at the national level. For example, the UK CMA explained how the four conditions for the application of the individual exemption under Article 101(3) TFEU will apply in the current circumstances.¹⁷ In particular, the CMA confirmed that it will consider horizontal cooperation to be efficiency-enhancing if it: (i) avoids a shortage, or ensures security, of supply; (ii) ensures a fair distribution of scarce products; (iii) continues essential services; or (iv) provides new services such as food delivery to vulnerable consumers, “*provided that any such coordination is undertaken solely to address concerns arising from the current crisis and*

does not go further or last longer than what is necessary.” The Dutch competition agency¹⁸ and German Federal Cartel Office¹⁹ have offered similar guidance, albeit informally.

These guidelines do not amend the existing law.²⁰ Rather, they clarify the application of Article 101 TFEU in the current circumstances. As such, the guidelines that have been issued by certain European agencies may inform the approach that other agencies in Europe may take.

Re-stated enforcement priorities

Several agencies have recognized that antitrust law should not chill nor delay the immediate efforts to resolve critical issues caused by the rapid outbreak of COVID-19.

In the U.S., the DOJ and FTC jointly announced an expedited review process for COVID-19-related inquiries. Specifically, for collaboration designed to address public health and safety issues borne out of the pandemic, the agencies will aim to resolve all antitrust requests within seven days of receiving the necessary information.²¹ Indeed, the DOJ has already announced that it will not challenge the collaboration among five medical supplies distributors to expedite the manufacturing and distribution of personal-protective equipment and

¹⁷ CMA approach to business cooperation in response to COVID-19 (Section 3), March 25, 2020, available at: <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19>.

¹⁸ The Dutch agency will allow certain competitors in affected sectors (such as supermarkets, logistic service providers, trade associations, and wholesalers who supply medicinal products) to exchange information such as stock quantities in order to ensure supply to consumers and the healthcare system in a timely manner. See Job Woudt, *ACM versoepelt concurrentieregels vanwege coronacrisis*, March 19, 2020, available at <https://fd.nl/economie-politiek/1338378/acm-versoepelt-concurrentieregels-vanwege-coronacrisis>. See also ACM, *Toezicht ACM tijdens coronacrisis*, March 18, 2020, available at: <https://www.acm.nl/nl/publicaties/toezicht-acm-tijdens-coronacrisis>.

¹⁹ The German government has announced that cooperation between the food industry and retailers to regulate the flow of supplies and avoid shortages during the crisis would be assessed in light of the special circumstances. The German competition authority clarified that there is no need for emergency regulation to

adapt the competition rule, as public authorities have the tools at their disposal to take flexible temporary measures to cope with the COVID-19 crisis. See Arezki Yaïche, *German retailers to be allowed to coordinate supply to avoid Covid-19 shortages*, March 20, 2020, available at: <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1172429&siteid=190>.

²⁰ As the head of the German competition authority explained, “*Competition law permits extensive cooperation between companies if there are good reasons for this — which is the case in the current situation.*” (Arezki Yaïche, *German retailers to be allowed to coordinate supply to avoid Covid-19 shortages*, March 20, 2020, available at: <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1172429&siteid=190>).

²¹ U.S. Federal Trade Commission, “Federal Trade Commission and Justice Department Announce Expedited Antitrust Procedure and Guidance For Coronavirus Public Health Efforts” (March 24, 2020), available at: <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure>.

pandemic-related medication.²² The federal antitrust agencies have also signaled that they might be more lenient in their review of other COVID-19-related combinations and collaboration.²³

European agencies have gone further. Prior to the European Commission's temporary framework, the European Competition Network—an association of competition agencies of EU Member States—published a joint statement that its members would not take action against competitor collaboration necessary to avoid a shortage of supply of essential products (e.g., face masks and hand sanitizers).²⁴ The statement suggests that, for at least for now, agencies will not investigate *bona fide* efforts to resolve supply shortages even (though this is implied rather than stated) if they would not have technically benefited from exemption under Article 101(3) TFEU.

European agencies have endorsed the joint statements and, in some instances, provided further clarification. The UK CMA, for instance, has pledged to refrain from taking enforcement action against temporary coordination arrangements between competitors that: “(a) are appropriate and necessary in order to avoid a shortage, or ensure security, of supply; (b) are clearly in the public interest; (c) contribute to the benefit or wellbeing of consumers; (d) deal with critical issues that arise as a result of the COVID-19 pandemic; and (e) last no

*longer than is necessary to deal with these critical issues.”*²⁵

It bears mention that these moves are limited to agency enforcement and would not shield collaborators from private damages claims—they merely reflect the agencies' prosecutorial discretion. That said, private plaintiffs typically face more challenges in bringing cases when enforcers have not acted.

Review of requests for individual exemptions

Several EU Member States continue to offer *ex-ante* review of potentially anticompetitive agreements. This procedure allows companies planning to implement a horizontal agreement to have it reviewed by a national competition agency. If cleared, the companies will be protected from a challenge under competition law, providing additional certainty.

For example, the Icelandic competition authority has pledged to review requests related to the COVID-19 outbreak within 48 hours. As of March 19, 2020, the authority had granted six exemptions related to the pandemic.²⁶ For example, the authority temporarily allowed travel agents, hotels, and tour operators to cooperate in order to reduce customer cancellations and increase demand for tourist services, though it has warned against discussing pricing or business terms.²⁷ Competition agencies in other countries

²² U.S. Dep't of Justice, “Department of Justice Issues Business Review Letter to medical Supplies Distributors Supporting Project Airbridge Under Expedited Procedure for COVID-19 Pandemic Response” (April 4, 2020), available at: <https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting>.

²³ *Id.* (“Other businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed. These sorts of joint efforts, limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, may be a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise.”)

²⁴ Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, March 20, 2020, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

²⁵ CMA approach to business cooperation in response to COVID-19 (Section 2), March 25, 2020, available at: <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19>.

²⁶ Iceland competition authority, Beiting samkeppnisreglna og samkeppnisefirlits í efnahagserfiðleikum vegna COVID-19, available at: <https://www.samkeppni.is/utgafa/i-brennidepli/upplysingasida-vegna-covid-19>.

²⁷ Icelandic Competition Authority, Decision No. 9/2020 on exemption for tourism organizations due to the COVID-19 outbreak, March 4, 2020, available at: <https://www.samkeppni.is/media/akvardanir-2020/9-2020.pdf>.

also follow an expedited procedure for review of request related to the pandemic.²⁸

A large number of antitrust agencies have also offered informal guidance on competition law assessment of proposed cooperation schemes. For example, the ECN's joint statement encourages companies to contact the European Commission, the EFTA Surveillance Authority, or the national competition authorities for informal guidance. The European Commission has set up a process for requesting informal guidance on cooperation²⁹ and, as discussed above, may exceptionally issue "comfort" letters addressing the compatibility of a cooperation arrangement with EU competition law.

Under the circumstances, we expect that agencies are likely to be responsive to the requests, though it remains to be seen how willing they will be to offer firm comfort in borderline cases in the absence of detailed market data and sufficient time to conduct a review.

Temporary exemptions

Some countries have introduced legislative or administrative exemptions from competition law for certain categories of competitor collaboration during the outbreak.

For example, Norway—where SAS and Norwegian were particularly badly hit—introduced a three month exemption for the transport industry, allowing companies to coordinate the routes served by each other.³⁰ Similarly, the UK Government temporarily relaxed competition law for cooperation between grocery retailers, allowing supermarkets to exchange data on stock levels, cooperate in logistics, and pool staff to meet demand spikes.³¹ Other countries have introduced similar exemptions or may do so in the coming weeks.³²

IV. Practical guidance for businesses

Recognizing that the situation is likely to continue to evolve in the coming weeks, we conclude with providing some practical considerations for businesses contemplating collaboration with their rivals.

First, as highlighted in most statements released by agencies in relation to the COVID-19 outbreak, antitrust law does continue to apply at this time. As Commissioner Vestager bluntly put it in a recent speech, "*crisis is not a shield against competition law enforcement.*"³³ This includes restrictions on agreements between competitors.³⁴ Other than where agencies have granted specific dispensations,

²⁸ For example, the Australian Competition and Consumer Commission ("ACCC") has authorized the Australian Banking Association ("ABA") to cooperate on the implementation of a small business relief package, which will allow for the deferral of principal and interest repayments for loans to small businesses impacted by the pandemic. ACCC, Australian Competition Authority, Australian Banking Association small business relief package, Press release, 20 March 2020, available at: <https://www.accc.gov.au/media-release/australian-banking-association-small-business-relief-package>.

²⁹ European Commission, Antitrust Rules and Coronavirus, available at: <https://ec.europa.eu/competition/antitrust/coronavirus.htm>. National competition agencies have set up similar procedures. See, e.g., CNMC, Special mailbox for complaints and queries related to the pandemic - COVID-19, March 31, 2020, available at: <https://www.cnmc.es/novedad/buzon-denuncias-consultas-centralizadas-covid19>.

³⁰ Norwegian Government, Regulation on temporary exemptions from Section 10 of the Competition Act for cooperation in the transport sector (March 19, 2020), available at:

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

³¹ Supermarkets to join forces to feed the nation, March 19, 2020, available at:

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

³² For example, the South African government has introduced a block exemption for agreements and practices in the healthcare sector which would otherwise run afoul of antitrust provisions. South Africa Department of Trade and Industry, *COVID-19 Block Exemption for the Healthcare Sector*, March 19, 2020, available at:

https://www.gov.za/sites/default/files/gcis_document/202003/4311419-3dti.pdf.

³³ Lewis Crofts, Covid-19 crisis 'not a shield against competition enforcement,' Vestager warns, MLex, March 27, 2020, available at:

<https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1174458&siteid=190&rdir=1>.

³⁴ In fact, several agencies have already started investigations of potential collusion related to COVID-19. For example, the Polish Competition Authority has already initiated proceedings against two wholesalers in personal protective equipment for allegedly terminating

there is no clear basis to depart from established antitrust rules.

Second, to the extent agencies do take a more tolerant approach as an enforcement matter, this does not provide a shield against future private damages claims. That said, in the absence of an agency prohibition decision, plaintiffs are likely to face greater challenges in bringing actions.

Third, in assessing whether the circumstances related to the COVID-19 pandemic justify competitor collaboration, the following basic principles will likely be useful in grey-area cases.

- Antitrust authorities are likely to look more favorably on collaboration required to address the immediate consequences of the crisis, particularly to the extent that arrangements intend to increase production or facilitate supplies that are necessary for medical treatment or addressing shortages of necessary goods.
- By contrast, efforts aimed at long-term recovery of the business or the industry are less likely to receive favorable treatment.
- Temporary coordination is more likely to benefit from applicable exemptions. Companies should frequently re-assess whether the implemented measures are still required.
- Any information sharing should be limited to what is necessary for the coordination and should generally not include forward-looking information (*e.g.*, long-term business strategy, future pricing plans, or market share projections). Information sharing related to sharing best practices in light of COVID-19 should carry a low risk of enforcement.

Fourth, companies should regularly monitor competition agencies' announcements regarding new enforcement priorities, block exemptions, and guidelines on application of competition law rules to horizontal cooperation. We are keeping track of these developments in our [COVID-19 Resource Center](#).

contracts with hospitals to obtain significantly higher prices for certain products, which may amount to illegal price fixing. See Polish Competition Authority, *UOKiK's proceedings on wholesalers' unfair conduct towards*

Fifth, businesses may want to carefully document their decision-making regarding competitor collaboration and the exchanges that form part of it. What seems obviously justified today in the middle of the crisis could look different to an agency or plaintiff after the pandemic is over. Accordingly, it may be particularly important to establish and document the procompetitive rationale for any collaboration, such that they cannot be misunderstood or misrepresented later.

Sixth, companies may consider contacting agencies for informal guidance on the proposed collaboration (or, where available, for a formal *ex-ante* review). As noted above, many agencies have proactively offered to review collaboration necessary to address the COVID-19 crisis. In doing so, companies should balance the incremental legal certainty that such consultation may add against the timing implications and potential consequences from an unhelpful answer.

Seventh, governments and other regulators may encourage coordination. While this might provide helpful context in an investigation or damages action, it may not provide an absolute shield against enforcement, where it takes the form of encouragement rather than a legal obligation. For example, in *French Beef*, the European Commission found an industry-wide agreement between cattle farmers and slaughters to have infringed Article 101 TFEU, despite the “*intervention of the French Minister for Agriculture in favour*” of such agreement.³⁵ Thus, companies facing such encouragement may wish to consider taking steps to achieve actual protection, such as invoking the DPA in the United States.

Finally, companies should ensure their compliance strategies are sufficiently robust for dealing with the current crisis. In our first antitrust memorandum, we

hospitals, March 4, 2020, available at https://www.uokik.gov.pl/news.php?news_id=16277.

³⁵ Case COMP/C.38.279/F3, *French Beef*, Commission decision of April 2, 2003.

shared some thoughts on the most immediate steps companies can take.³⁶

In conclusion, businesses will face new and challenging commercial issues as the situation develops. Many of those issues may be addressed via collaboration with rivals. Antitrust agencies are working hard to permit collaboration that will benefit consumers; the guidance issued by the European Commission and other agencies is helpful and bold. But there remains important limitations on what is permissible under antitrust rules, even in the current circumstances. Of course, we stand ready to help with any points of difficulty at this time.

...

CLEARY GOTTlieb

³⁶ Antitrust & COVID-19, Section V, March 23, 2020, available at: <https://www.clearygottlieb.com/news-and-insights/publication-listing/antitrust-covid19>.

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