



**KREAB**

## Harnessing antitrust enforcement in light of the **COVID-19** crisis

The sheer scale of the COVID-19 pandemic has had such far-reaching effects that we still do not know the full extent of its impact on so many aspects of our lives. Equally, its effect on competition law has already been unprecedented, prompting the European Commission (“Commission”) and several National Competition Authorities (“NCAs”) in Europe to rethink the market role that competition rules may play. This has included the way competition enforcement can be harnessed to optimise supply chains and deliver essential products and services to the market without exploiting consumers.

The European Commission has now released a [Communication](#) to assess antitrust issues related to business cooperation which is taking place in response to emergency situations stemming from the current COVID-19 outbreak. The Communication is Temporary in scope. In essence, its application will end once the Commission finds that the underlying exceptional circumstances are no longer present.

The Communication follows the [Joint Statement](#) by the European Competition Network on the application of competition law during the COVID-19 outbreak, as well intervention of individual competition authorities in the EEA.



But which type of coordinated behaviour is now considered legitimate but not prior to the crisis? According to the Communication, not all business activities will be able to benefit from the relaxation of antitrust rules: only producers of products considered essential to protect the health of consumers in the current situation (medicines producers or medical equipment operators) will be exempted, along with parties involved with the supply of food and agricultural products.

Some NCAs have temporarily exempted other specific sectors. For example in [Norway](#), the transport sector has been temporarily exempted from the application of competition rules.

What is clear is that flexible assessments of specific behaviours have well-defined limits. In particular, the Commission stressed that swift coordination of companies in order to overcome, or limit, the risk of shortages might require switching or up-scaling production. Coordination between undertakings for example on production stock management and distribution is now allowed – which would under normal circumstances infringe antitrust rules under Article 101 TFEU.

The Commission however makes it clear that undertakings should not take advantage of this temporary exemption by engaging in anti-competitive collusion or abusing their dominant position, thereby exploiting consumers. DG COMP has emphasised that it will continue monitoring and penalising any type of anti-competitive, exploitative behaviour.

Specifically, the Commission will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for anti-competitive collusion or abuses of their dominant position (including dominant positions conferred by the particular circumstances of this crisis) by, for example, exploiting customers and consumers (e.g. by charging prices above normal competitive levels) or limiting production to the ultimate prejudice of consumers (e.g. by obstructing attempts to scale up production to face shortages of supply).

## **What is newly permissible in light of these measures?**

As set out in the Communication, an independent body can be entrusted with the use of information provided by competing parties in order to identify essential medicines and how to bring them to the market overcoming risks of shortages. However, only aggregated data that is strictly necessary to identify shortages can be shared. No flow of individualised company information back to competitors is allowed.

The need for possible competitor collaborations to coordinate responses to the COVID-19 pandemic can be observed in a wide range of industries: from food and medicine suppliers, to travel and the services sectors, insurers, and manufacturers of personal protective equipment (PPE). Looking at the aviation industry, in Norway airlines have been granted a three-month exemption from competition rules to allow them to co-ordinate to ensure they maintain critical service. For example, SAS and Norwegian, the latter having struggled in recent times, will now be able to coordinate routes and thus stay afloat, at least for three months.

Competition authorities remain resolute in preventing cartelisation. Even during the state of emergency, the [Finnish Competition and Consumer Authority](#) will intervene in cartels between companies, which aim to raise prices to the detriment of consumers. The same will apply to abuse of a dominant position, which a company uses to exclude competitors from the market or to charge manifestly unfair prices.

At the same time, pharmaceutical and food and drink companies have been warned by NCAs like the UK's CMA not to capitalize on the coronavirus pandemic by charging unjustifiably high prices for essential goods or making misleading claims around their efficacy [in an open letter](#).

In this unprecedented period of crisis, businesses and governments are doing all they can to address a diverse array of emergent problems. For our context, the sheer extent of the coronavirus crisis is highlighting areas where cooperation between undertakings is becoming wholly essential and consequently, unprecedented measures are being put in place. Such measures reflect the enormity of economic consequences ensuing from this global pandemic.

## Share



## Key Contacts



### **Alberta Laschena**

Partner, Competition

t.: +32 495259646

e.: [alberta.laschena@kreab.com](mailto:alberta.laschena@kreab.com)



### **Theodoros Birmoutsoukis**

Associate Director

t.: +32 499920649

e.: [theodoros.birmoutsoukis@kreab.com](mailto:theodoros.birmoutsoukis@kreab.com)



### **John Bethell**

Associate

t.: +32 467821998

e.: [john.bethell@kreab.com](mailto:john.bethell@kreab.com)