

Alerts & Publications

European Antitrust in the Time of COVID-19

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As the escalation of the COVID-19 outbreak increases the tremendous strain on businesses, antitrust regulators around the world are issuing pandemic-specific enforcement guidance. In addition to the European Commission's State aid guidance on flexibility that Member States are given to help businesses under certain conditions, including, for example, through wage subsidies as well as the suspension of corporate and value added tax obligations or social levies (reported [here](#)), on March 23, the European Competition Network (ECN), a forum through which the European Commission and the national competition authorities of all EU Member States cooperate with each other, issued a [joint statement](#) on the application of antitrust laws during the COVID-19 crisis. The move followed similar steps taken by the German, UK and Norwegian authorities the week before.

The move came amid an intensifying debate about whether the Commission and national antitrust enforcers in Europe should take a more lenient approach with companies looking for ways to ease the pressure on their commercial operations even if this means accepting some harm to effective competition. Some argued that if there ever was a justification for creating national champions that might be better prepared to weather this viral storm, surely this is it.

At a first glance, national-champion proponents might be pleased to read that *"in the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply"*. Indeed, some speculated that this was an admission that Europe's competition laws were not fit for purpose during these extraordinary times. Yet, a closer look reveals something quite different: for European enforcers it is really just 'business as usual'. Even though the adoption of a joint statement heralded something big and new, the message's emphasis lies on the acknowledgement that *"competition rules ensure a level playing field between companies. This objective remains [sic] relevant also in a period when companies and the economy as a whole suffer from crisis conditions"*. While the ECN members vow to look favourably upon, for example, co-operation agreements between competitors to better cope with the challenges their supply chains are facing, the crucial question will be whether anti-competitive arrangements *"generate efficiencies that would most likely outweigh any such*

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restriction". A prime example would be the otherwise problematic exchange of commercially sensitive information between market operators with a view to improving supplies and deliveries at competitive prices, in particular, of critical medical supplies such as face masks and sanitising gel.

This focus on efficiencies, however, is not new by any account. It is the standard test under Article 101(3) of the Treaty on the Functioning of the European Union. Specifically, the provision assesses pro-competitive justification based on the efficiencies that businesses achieve and share with consumers. This focus benefits more than just consumers. Small- and medium-sized companies - that in another world might not be eligible for promotion to national champion - can also rest assured that Europe's antitrust agencies are committed to sticking with what quite arguably has proven to work.

This is not the first crisis Europe and its competition laws have had to endure. Prior crises such as the financial meltdown in 2007/2008 were weathered without suspending antitrust laws. Some even say that they were resolved in part *because* robust antitrust enforcement helped avoid the misallocation of scarce resources and fostered the re-emergence of viable, sustainable and strong businesses. With this hindsight, the ECN's statement may well be indicative also of how antitrust will be enforced in a post-Coronavirus Europe. For now at least, our competition laws appear immune to the virus.

Notably, antitrust regulators in Brussels and Athens have already sent out thousands of questionnaires to better understand what kind of co-operations companies are seeking and/or whether observed price hikes in certain critical goods are the result of anti-competitive price gouging practices.

In these turbulent times, with government agencies issuing clarification and guidance as circumstances shift, businesses must be vigilant in protecting themselves from antitrust risks.

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