

COMPETITION LAW IN THE DAYS OF COVID-19: EUROPE, THE UNITED STATES AND ISRAEL

Tadmor Levy Webinar of May 6, 2020

Christian Steinle

Some Headlines



Press release | 8 April 2020 | Brussels

Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak

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The European Commission [Communication](#) to provide : in response to urgent situa outbreak. In this context, t letter” concerning a specif situations of shortages of

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Gleiss Lutz

Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis

- The ECN is fully aware of the social and economic consequences triggered by the COVID-19 outbreak in the EU/EEA.
- The different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments. Competition rules ensure a level playing field between companies. This objective remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions.
- The ECN understands that this extraordinary situation may trigger the need for

Subject: *Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients*

Post-Covid-19, competitor collaborations may prove tough to unwind, state officials say
 21 Apr 20 | 20:00 GMT
 Author: Joshua Sisco

In Brief
 Companies pooling resources in response to the Covid-19 pandemic aren't likely to raise eyebrows from state antitrust enforcers, but problems in unwinding those ventures when the crisis ebbs does raise concerns, officials say.



JOINT ANTITRUST STATEMENT REGARDING COVID-19

Addressing the spread of Coronavirus Disease 2019 (“COVID-19”) will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans’ health and safety. The Antitrust Division of the Department of Justice (“the Division”) and the Bureau of Competition of the Federal Trade Commission (the “Bureau,” and collectively the “Agencies”) wish to make clear to the public that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws.

Coronavirus will likely lead to more cartels, ex-DOJ official warns



Credit: Shutterstock/ostalveneko
 The coronavirus pandemic is likely to lead to an increase in cartels and enforcement, a former enforcer at the US Department of Justice has said

German draft law to relax antitrust rules amid Covid-19 heads for parliamentary vote

Insight | 29 Apr 20 | 18:44 GMT
 By Arezki Yaiche

In Brief
 Companies fined by the German competition regulator for antitrust breaches are in line for temporary relief from interest payments if needed to deal with the impact of Covid-19, after the country's government endorsed a draft law that is now headed for a parliamentary vote.

Impact on Authorities and Merger Control Proceedings

European competition authorities still working mostly remotely

European Commission and NCAs

- Good news first: No dawn raids over the last weeks!
- Communication mostly by e-mail and phone.
- Investigations are ongoing, mostly by requests for information.
- Delays in getting responses from companies.
- Booming state aid to support struggling companies: More than 200 notifications of state aid measures by Member States so far. More than 60 decided by the EC until now.
- COVID-19 related queries can be sent to: COMP-COVID-ANTITRUST@ec.europa.eu for informal guidance.

Practical information regarding merger notifications

SPECIAL MEASURES DUE TO CORONAVIRUS / COVID-19: Update of 7th April 2020

DG COMP has put in place a number of measures to ensure business continuity and has continued to ensure the implementation of the EU Merger Regulation. The Commission has adopted a number of merger decisions and processed the notifications filed by companies.

In the current situation, DG COMP faces difficulties in some cases in collecting information from the notifying parties and third parties, such as their customers, competitors and suppliers, given the disturbances caused by coronavirus outbreak.

Impact on merger control proceedings

- Merging companies urged by EU and several NCA to delay filings due to difficulties in collecting information from companies.
- Significant decline in notifications in April 2020: Around 60 notifications before the Bundeskartellamt and around 70 clearances (compared to around 1.400 notifications in 2019: 1/12 = 116).
- Draft bill in Germany would extend merger review deadlines for deals notified between March 1 and May 31, 2020:
 - Phase 1: Two months instead of one month.
 - Phase 2: Six months instead of four months.

Increased Need for Cooperation During COVID-19

Competition law continues to apply but authorities show more flexibility

Coordination in the pharmaceutical industry

Aim: Increasing production and improving supply of urgently needed critical hospital medicines to treat COVID-19 patients

EC Comfort Letter of April 8, 2020

EC Communication of April 8, 2020*

Antitrust exemptions relating to the agricultural sector

Farmers are allowed to collectively plan production and withdraw products from the market.

Regulations (EU) 2020/594, 2020/599 of April 30, OJ L 140/17 (plants and flowers), 140/37 (milk), etc.



Blueprint for other industries?

Legitimate goals: Avoiding shortages and ensuring supply chains, e.g. in the retail sector or automotive industry

Potential means of cooperation: Joint logistic efforts, joint financial support for suppliers (liquidity, equity), coordination of purchasing volumes?

Caution:

Any restriction of competition must be indispensable to the attainment of the legitimate objectives.

Competition must not be eliminated in respect of a substantial part of the products in question.

Avoid spill-over effects on downstream or other markets (no price-fixing!)

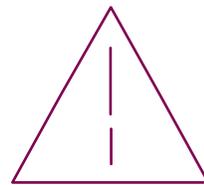
- Communication on a Temporary Framework for assessing antitrust issues related to business cooperation in response to urgency situations stemming from the current COVID-19 outbreak
- https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf

Outlook: Cooperation During the Recession?

Falling demand will lead to more crisis cartels



Demand has fallen drastically in many industries. Are there lawful means to jointly reduce production overcapacity?



- General rule: Agreements on capacities are illegal restrictions under EU competition law because they limit production.
- Possible justification during the recession due to efficiencies?
- EU case law on so-called structure crisis cartels.
- In particular, joint temporary mothballing of production capacities may be justified.
- Legitimate objective: If a higher number of suppliers survive the crisis competition will be better off.
- Such joint capacity reductions must be assessed on a case by case basis and discussed with competent competition authorities beforehand!

THANK YOU VERY MUCH FOR YOUR ATTENTION!
QUESTIONS?

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“One of the leading names in
competition/antitrust”
The Legal 500 Deutschland 2018

“Recommended for Competition”
Who's Who Legal Germany 2018

“extremely bright and highly thought of”
Who's Who Legal Germany 2018

“gets a lot of attention for the work he does
in the ECJ”
Who's Who Legal Germany 2018

COMPETENCES

Christian has considerable experience in European and international antitrust law. He focuses on cartel cases as well as private antitrust litigation, merger control, online- and distribution antitrust law, antitrust compliance programme and internal investigations. He co-heads Gleiss Lutz's interdisciplinary Compliance & Investigations focus group.

SELECTED CREDENTIALS

- **International online platform** represented before the Higher Regional Court of Düsseldorf in appeal proceedings against the prohibition of narrow MFN by the Federal Cartel Office
- **Several international manufacturers (automotive, pharmaceuticals, engines and propulsion):** Ongoing antitrust advise including extensive Compliance-audits, preparation of guides and training materials and on the introduction of a global antitrust compliance programme
- **Utility company** in relation to a compliance risk analysis and on the introduction of a compliance management system and further accompaniment of its implementation
- **Leading company for specialty chemicals** on the antitrust assessment of the exchange of information in the area of personnel issues, including remuneration topics and strategy for action under antitrust law
- **Several international companies (specialty chemicals, automotive, food industry etc.)** on the conduction of (tailored) antitrust audits
- **Multinational industrial manufacturer** in internal compliance investigation into alleged anticompetitive conduct following an anonymous complaint by a whistleblower
- **Large multinational** in several international cartel proceedings before the European Commission and the European Union courts as well as in defending against damage claims
- **Several global automotive suppliers** in cartel proceedings before the European Commission, the US Department of Justice, the Brazilian competition authorities and others
- **Global automotive supplier** on a joint venture with a competitor