

## Horizontal Cooperation during Covid-19

A strong competition is in the blood stream of any well-functioning free market. Still, as we know, the markets as well as consumers are better off with certain cooperation among competitors in e.g. developing new products or joint purchase, provided certain criteria are met. The benefits of horizontal cooperation become particularly obvious at times of a crisis, when the markets cannot function properly, and policy makers need to intrude in ensuring that the markets indeed serve their purpose of enabling consumers access the product and services they need, in an efficient way. With that in mind, the European Commission has softened its stance on horizontal co-operation in certain cases, as announced in a communication on temporary framework for assessing antitrust issues related to business cooperation stemming from the current COVID-19 outbreak, applicable as of 8 April 2020.

The communication underlines the awareness of the *major and unprecedented shock* that COVID-19 outbreak has been to the global and Union economies and the need for cooperation between undertakings arising from disruption of supply chains, due to unusually high demand of certain goods and services and decrease in demand of others. The document covers possible forms of cooperation between undertakings that will not be considered problematic and rendering of *ad hoc* comfort letters to undertakings in relation to specific cooperation initiatives/projects in this context. This applies especially to the health sector but can be extended to undertakings that are usually active in other markets and are now shifting their business activities towards production of essential scarce products.

### Permissible cooperation projects

The Commission has set out criteria for the antitrust assessment of such cooperation projects in order to facilitate the self-assessment obligation under the Regulation (EC) No 1/2003. The cooperation (established e.g. through a trade association or a public body) may consist in: (i) coordination of joint transport for input materials; (ii) identifying essential medicines for which a shortage is forecasted; (iii) aggregate production and capacity information; (iv) work on a model to predict demand on a national level and identify supply gaps; (v) sharing of aggregate supply gap information and request from undertakings, on an individual basis, to indicate whether they can fill the supply gap to meet demand or even (vi) coordinating the re-organisation of production with a view to increasing and optimising output so that not all firms focus on one or a few medicines, and other medicines remain in under-production.

Due to current exceptional circumstances, even commercially sensitive information may be exchanged to the extent that they are: (i) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients; (ii) temporary in nature; and (iii) not exceeding what is strictly necessary to avoid the shortage of supply.

Undertakings would be well advised to document all such exchanges as well as cooperation agreements, and it is worthwhile mentioning that the cooperation would be likely seen less problematic if encouraged and/or coordinated by a public authority.

## Commission's *ad hoc* comfort letters

The Commission introduced a particularly welcome tool, reminding of long forgotten individual exemptions: comfort letters. To increase the degree of legal certainty and keeping in mind the urgency of certain situations, the Commission will exceptionally provide guidance in form of “comfort letters” to undertakings, where there still may be uncertainty on whether a specific cooperation is compatible with EU competition law. To this end, a webpage (<https://ec.europa.eu/competition/antitrust/coronavirus.html>) and a dedicated mailbox (COMP-COVID-ANTITRUST@ec.europa.eu) have been set up for more information.

## Croatia

Croatian Competition Agency announced on its website that the communication was issued but has not undertaken any further steps. The CCA officials have generally been approachable and willing to discuss issues on informal basis, however it is yet to be seen whether the CCA would be willing to issue comfort letters similar to the EU Commission's, which would definitely be useful in providing a bit more comfort to undertakings. Nevertheless, even with such written communication in place, caution would be needed due to a currently limited legal effect that such letters would have.