

Over-priced facemasks? Impacts of Covid-19 on Competition Law

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The Covid-19 pandemic is causing far-reaching changes in every area of life and business. Almost all companies and industries are affected and the legal situation changes almost daily in some areas.

The European Competition Network (ECN) emphasized in a recent [joint statement](#) that the current competition rules are flexible enough to adapt to changing economic situations and need no substantial modification. This briefing provides an overview on how the Corona crisis affects competition law – and what remains unchanged – and where to find further information (see the links throughout the document). BLOMSTEIN will closely monitor and inform about further developments. If you have any questions, [Anna Huttenlauch](#) and [Max Klasse](#) will be happy to assist you at any time.

Mergers

Mergers must be notified in times of crisis as usual. However, companies should be prepared for longer waiting periods as the staff at most competition authorities are currently working from home and [some agencies](#) have partially or completely shut down.

A number of authorities including the [European Commission](#), the [German Federal Cartel Office](#), and the [Irish Competition and Consumer Protection Commission](#) have asked companies and their representatives to delay submitting notifications where possible. In the US, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have [announced](#) that they will not grant requests for early termination of the required waiting period.

Others, like the [Austrian](#) and the [Danish](#) authorities have already suspended certain deadlines. Companies therefore have to take into account that almost all transactions will take longer than usual. However, the substantial outcome of merger reviews should not be affected.

Competitor Cooperation

Although restrictive agreements remain prohibited, competition authorities have indicated that they will have due regard to the economic and social situation. For example, [national competition authorities throughout Europe](#) have affirmed that they will adopt a lenient approach to temporary cooperation arrangements aimed at avoiding a shortage of supply.

The UK government has already temporarily [relaxed competition law](#) to allow such cooperation. Supermarkets are now permitted to, inter alia, share data on stock levels or to pool staff, distribution depots and delivery vans.

In the US, the FTC and the DOJ have issued some [guidance](#) for individuals and businesses that want to collaborate in order to address the pandemic. They have promised to respond to Corona-related requests within seven days. The European Commission has launched a dedicated [website](#) and [email address](#) for companies seeking informal guidance on a specific planned collaboration and its compatibility with EU law.

But even without explicit waivers, collaborations which genuinely address the challenges companies face in times of crisis will probably be acceptable. Even if they restrict competition, they are, in any case, very likely to generate efficiencies. Still, companies should always ensure that the cooperation itself and all its aspects are *necessary* for the aimed purpose. Companies must be mindful that even the Corona crisis does not allow for hardcore restrictions like price fixing or bid rigging!

Abuse of Dominance

Competition authorities are already investigating whether companies may be taking advantage of the current shortage of supply, e.g. by terminating contracts on personal protective equipment with hospitals in order to raise prices.

Following complaints from consumers, the Italian Autorità Garante della Concorrenza e del Mercato launched investigations against Amazon and eBay with regard to the significant price increase for hand disinfection and respiratory masks. Similar investigations concerning abusive pricing of medical and pharmaceutical products are ongoing in Brazil and Thailand.

Furthermore, the authorities are increasingly focusing on automated pricing tools, as used on online marketplaces, which automatically adjust prices according to pre-set algorithms.

The ECN and the US DOJ have stressed that they are determined to pursue companies exploiting the crisis, particularly with respect to facemasks, hand sanitizing gels and respirators.

State Aid

The Commission issued a [Temporary Framework for State aid measures \(TF\) to support the economy in the current COVID-19 outbreak](#), describing how the European Commission will apply EU State aid rules. The Commission [draws on its experience](#) from the 2008/2009 financial crisis although it seems to be moving much faster in the current situation, both with regard to the adoption of the TF itself and clearance of individual schemes.

At the moment, Member States are allowed to compensate companies in sectors that have been particularly affected, such as transport, tourism or culture. In addition, Member States can adopt the following measures under Article 107(3)(b) TFEU:

- Aid in the form of direct grants, repayable advances or tax advantages;
- Aid in the form of guarantees on loans;
- Aid in the form of subsidised interest rates for loans;
- Aid in the form of guarantees and loans channeled through credit institutions or other financial institutions;
- Short-term export credit insurance.

The Commission has already [announced](#) to extend the TF. It proposes to include support measures for Coronavirus related research and development, the construction and upgrading of testing facilities, and the production of relevant products, for example vaccines, medical equipment, and disinfectants. Furthermore, the Commission considers facilitating targeted support in the form of tax payment deferrals and/or suspensions of social security contributions and wage subsidies for employees.

The TF will be in force until the end of 2020. The Commission has already approved a number of Member State measures, including an [Italian debt moratorium to SMEs](#), a [German direct grant scheme](#), and a [French scheme for small enterprises](#).

The EIB Group, consisting of the European Investment Bank and the European Investment Fund, have [proposed](#) creating a financing package of EUR 40 billion for SMEs affected by the Corona crisis. Through domestic intermediaries such as commercial banks and national promotional banks, the EIB group would provide for loans, credit holidays, and other measures mitigating liquidity problems.

In times of crisis, everyone must adapt to changing circumstances. But with all the omnipresent bad news we would like to finish on a happy note and with a positive aspect: We are pretty confident that with all the social (or physical) distancing and self-isolation initiatives, at least, this is not a time for companies to worry about dawn raids! That said, companies should of course be mindful that whatever they do now can be subject to scrutiny once the overall situation takes a turn for the better.