



Co-operation between competitors in the time of COVID-19

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In the extraordinary circumstances of the COVID-19 crisis, there are a number of reasons that may push competing companies to collaborate with one another and a number of ways in which consumers and the economy may benefit from these collaborations. This note examines some typical situations where co-operation between competitors may be lawful or pro-competitive and discusses the main challenges that competition authorities face in analysing or dealing with them. The note also raises some open questions that will be explored on a webinar meeting between competition authorities on 28 May 2020. This publication is part of a series of COVID-19 related pieces prepared by the OECD Competition Division to assist governments and competition authorities in the challenging times of this epidemic.

In times of a severe crisis such as the one provoked by COVID-19, co-operation between competing firms may benefit consumers in many ways, for example, by assuring an essential service (e.g. transport) or by distributing scarce but essential goods (e.g. maintaining the food chain). Co-operation may be necessary to R&D projects related to the development of vaccines and medicines, activities which can entail substantial investments and risks for a single firm. While co-operation between firms, particularly during the immediate and urgent phase of the crisis, may be beneficial for specific purposes, competition authorities are required to strike the right balance between allowing such private initiatives to address market failures in the short-run and avoiding distortion of competition in the long-run.

This note analyses a number of examples of co-operation agreements from different jurisdictions and identifies some common criteria of lawful co-operation. It also identifies some emerging challenges and solutions that competition authorities have developed during the crisis, as well as open issues that may require further research and discussion.



1. Introduction

The COVID-19 crisis has led to a sharp increase in the demand for certain products. At the same time, difficulties in the production or distribution of essential products has led to shortages, as a direct consequence the confinement measures applied to many workers to contain the spreading of the virus. Healthcare, brick-and-mortar retail commerce, tourism, transportation sectors and international trade are amongst the areas most impacted, but indirect effects are felt across the board.

Next to Government interventions,¹ co-operation between private firms may be one of the easiest and fastest way to address one major short-run market failure characterising this particular crisis: the sudden and severe disconnect between demand and supply. Such agreements may effectively overcome shortages of essential products and fix disruptions of supply or logistics chains, without any need for State intervention or other costly remedy. Whilst the market may self-correct and markets will go back to equilibrium in the long-run, this may take time and may result in very significant negative economic and social externalities.²

In addition to overcoming demand and supply shocks, co-operation may allow the private sector to temporarily pool resources and to join investment efforts for research & development (R&D) projects in the health industry to develop a new vaccine, new treatment or medical equipment to treat severe and urgent cases. These kinds of agreements have the potential to yield significant benefits for consumers, which would be lost if, in fear of falling foul of competition provisions, companies would refrain from entering into efficient and lawful co-operation agreements.

To avoid this chilling effect and to increase legal certainty for business, since the beginning of the COVID-19 crisis, many jurisdictions have already provided guidance on the types of co-operation that take place between actual or potential competitors, either by stating their general understanding on the matter, or by issuing specific clearances in concrete cases. While wishing to promote a wider range of efficiencies that such agreements may generate, competition authorities remain watchful that such co-operation does not spill over into hard-core restrictions of competition, such as price-fixing cartels.³

This note will first clarify the forms of co-operation that are unlikely to be problematic from the competition viewpoint during this COVID-19 crisis, identifying under which conditions this is the case. It will then discuss some of the challenges in the assessment of co-operation proposals by firms and possible solutions that competition authorities may consider. In doing so, the note will present selected national experiences that may be useful examples of how to tackle those challenges. The note will conclude with recommendations for competition authorities. It will not deal with hard-core restrictions of competition.

2. The analytical framework for the evaluation of the risks posed by co-operation between competitors

Restrictive horizontal practices may i) reduce actual or potential competition; ii) reduce firms' ability and incentives to compete and thus increase the likelihood of collusive outcomes; and iii) put the parties' actual

¹ See, for further reference, OECD Competition Policy Responses to Covid-19 (2020), https://read.oecd-ilibrary.org/view/?ref=130_130807-eqxqniyo7u&title=OECD-competition-policy-responses-to-COVID-19.

² Frédéric Jenny, Competition Law and Health Crisis, Concurrences, No 2-2020.

³ OECD Recommendation on Hard Core Cartels, 2019, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>.



or potential competitors at a disadvantage leading to market foreclosure.⁴ For these reasons, such practices are often subject to close scrutiny by competition authorities.

Competition authorities consider horizontal practices as by object or per se infringements or as restrictions by effect depending on their nature. For the most serious infringements (hard core restrictions) they apply a by object approach which makes it easier to prove the anticompetitive nature of the conduct but, at the same time, makes it more difficult or unavailable for firms to argue that the conduct creates efficiency gains. Such efficiencies are more easily considered for other (non-hard core) forms of co-operation between competitors.

This framework remains valid throughout the COVID-19 crisis. Many competition authorities have stated that co-operation involving co-ordination or discussion on future prices, costs and wages are unlikely to be lawful or justified by pro-competitive effects.⁵

In cases where efficiency gains may outweigh the anti-competitive effects created by the agreement,⁶ any evaluation of the efficiencies deriving from an agreement is usually determined by the legal and economic context, and the current COVID-19 crisis is no exception.

Within the traditional analytical framework, therefore, many competition authorities have suggested that temporary measures adopted to the purpose of addressing specific short-run market failures resulting from the current crisis are unlikely to constitute a restriction of competition or, if they do, they are likely to generate efficiency gains apt to outweigh their potential harm.⁷ Some competition authorities have also expressed openness to consider lawful, given the extreme short-run circumstances, conduct that might contravene competition law in normal times.⁸

⁴ OECD Roundtable on Information Exchanges between Competitors, 2010, <http://www.oecd.org/daf/competition/cartels/48379006.pdf>.

⁵ For instance, the European Commission explicitly carves out from the allowed co-operation “any discussion of prices or any other possible co-ordination on issues which are not strictly necessary for effectively achieving the aims set out”, see Comfort letter of 08 April 2020, COMP/OG – D(2020/044003), https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf. See also CMA, Guidance on the approach to business cooperation in response to COVID-19, <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-to-covid-19> and DoJ and FTC, Joint Antitrust Statement regarding Covid-19, <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

⁶ Efficiencies often include improvement in the production and distribution processes, increased product quality or reductions in variable costs and eventually fixed costs. In jurisdictions where the consumer welfare is the standard, such efficiencies must accrue to consumers.

⁷ See, for instance, the Joint statement by the European Competition Network (ECN) on application of competition law during the Corona-crisis, March 2020, https://ec.europa.eu/competition/ecn/index_en.html.

⁸ See, for instance, the Italian Competition Authority’s “Communication on co-operation agreement and the Covid-19 emergency”, <https://www.agcm.it/dotcmsdoc/allegati-news/Testo%20Comunicazione%20cooperazione%20e%20COVID-19.pdf>, para. 16. In the same sense, the Romanian Competition Council, in relation to production and distribution of medicines, stated: “In the current crisis situation caused by the coronavirus pandemic, companies may need to coordinate in terms of production, stock management and possibly medicines distribution [...]. Such coordination would be contrary to competition rules under normal conditions, but in the context of the coronavirus pandemic, it can bring significant benefits to citizens”, http://www.consiliulconcurrentei.ro/uploads/docs/items/bucket15/id15853/masuri_medicamente_apr_2020_english.pdf.



3. Different forms of co-operation between competitors during the COVID-19 crisis

Collaboration between competing firms may take various forms and pursue different objectives.

Under the present COVID-19 crisis, in many cases the collaboration will be aimed at maintaining or reviving in the short-run the manufacturing, supply and distribution of a product or preserving the functioning of supply and distribution chains, typically in the form of a formal co-operation agreement (“**co-operation as a response**” type). In other cases, the co-operation will be aimed at creating a new product or providing an innovative response to the crisis (“**innovative co-operation**” type), in which case it may take the form of an R&D agreement or of a co-operative joint venture.

4. Examples of lawful co-operation agreements during COVID-19

Examples of potentially lawful co-operation given by competition authorities or governments during this emergency have included so far:

- “Collaborative buying groups or share supply chain resources such as distribution facilities to ensure access to the necessities of life for all Canadians” (Canadian Competition Bureau in its “[Statement on competitor collaborations during the COVID-19 pandemic](#)”);
- Groceries chain suppliers to co-ordinate on limiting purchases by consumers of particular groceries, co-ordinate on the range of groceries to be supplied, share information on the day to day stock position and shortages of groceries, share information on services provided by logistics service providers, share labour or facilities, co-ordinate on temporary closure or opening hours of stores, co-ordinate on maintaining supply to consumers living in areas vulnerable to shortages, co-ordinate on providing assistance to vulnerable consumers and workers during the disruption period (UK Government, [Public Policy Exclusion Order 2020 No. 369](#));
- Logistics services providers to share information on labour availability, share labour or facilities, share information on storage and warehouse capacity, share information on storage and warehouse services, share information on delivery vehicle capacity, size and destination during the groceries supply disruption period (UK Government, [Public Policy Exclusion Order 2020 No. 369](#));
- Pharmaceutical manufacturers to co-ordinate on the “cross-supply of API(s) (active pharmaceutical ingredients), possibly including intermediates, and jointly identifying where to best switch production”, as well as on the need to “rebalance and adapt capacity utilisation, production and supply” of essential medicines for the treatment of the COVID-19 infections (European Commission, [comfort letter to “Medicines for Europe”](#) of 8 April 2020);
- Healthcare providers setting “standards for patient management developed to assist providers in clinical decision-making – that also may provide useful information to patients, providers, and purchasers” as well as joint purchasing agreements between healthcare providers designed to increase efficient procurement and reduction of transaction costs (US DoJ and FTC, [Joint Antitrust Statement Regarding COVID-19](#), 24 March 2020);
- Co-operation between Australian Banking Association (ABA) and banks to provide supplementary relief packages for individuals and businesses affected by COVID-19, by agreeing to defer payments for loans of up to AUD 10 million by commercial property owners that do not terminate leases, and to ensure customers’ access to various services (ACCC, <https://www.accc.gov.au/media-release/banks-authorized-to-co-operate-on-loan-relief-and-services>);
- Members of the Australian Securitisation Forum (ASF) to work together to assist smaller lenders to maintain liquidity and issue loans to consumers and small businesses during the economic disruption caused by the COVID-19 pandemic (ACCC, <https://www.accc.gov.au/media-release/co-operation-on-funding-to-aid-smaller-lenders-during-covid-19>).



Box 1. Co-operation in previous crises and emergencies

A clear understanding of what competition authorities may consider as examples of lawful co-operation can be also found in responses to previous global or regional crises.

In the aftermath of the Fukushima 2011 earthquake, for instance, the JFTC published guidance on acceptable forms of co-operation, in a document entitled “Examples of Antimonopoly Act Applications during the Earthquake Disaster and other Emergencies” (March 2012, https://www.jftc.go.jp/soudan/shinsaikanren/index_files/souteijirei.pdf). The examples are particularly interesting in the context of the COVID-19 crisis because they mainly concern situations where supply is interrupted or significantly reduced due to a natural disaster and they focus on how to maintain in place production of critical inputs by way of co-ordination (Reiko Aoki, Antitrust in Time of National and Global Emergencies, *CPI*, April 2020, https://www.competitionpolicyinternational.com/antitrust-in-times-of-national-and-global-emergencies/#_ednref2).

The examples include, *inter alia*:

- the case of a manufacturer, whose production had been disrupted by a natural disaster, asking competitors to supply a specific product to its customers, in its stead, in order to meet contractual requirements entered into prior to the disaster. The manufacturer would be in this case allowed to share the necessary information with the competitors (e.g. identity of customers, quantity and specifications) but not price, which would be determined independently by the competitors and the customers; and
- the case of an industry association requested by the competent ministry to collect data relating to the production capacity and the stock of each of its members for a specific product and to publish the aggregated data on its website to reassure customers that there would not be shortages of the specific product.

More recently, in 2017, in the context of the emergency provoked by hurricanes Harvey and Irma, the US DoJ clarified that “For example, hospitals or other health care facilities temporarily may need to combine certain resources or services to meet the health care needs of affected communities. Similarly, two or more firms might combine their distribution networks to better or more quickly bring needed products or services to their customers.” ([DoJ and FTC, Antitrust Guidance, Hurricanes Harvey and Irma, September 2017, https://www.justice.gov/atr/page/file/996516/download](https://www.justice.gov/atr/page/file/996516/download)). Analogous guidance was provided in 2015 in the occasion of the hurricanes Katrina and Rita ([DoJ and FTC, Antitrust Guidance, Hurricanes Katrina and Rita, June 2015, https://www.justice.gov/atr/antitrust-guidance-hurricanes-katrina-and-rita](https://www.justice.gov/atr/antitrust-guidance-hurricanes-katrina-and-rita)).

5. Common criteria of lawful co-operation agreements during COVID-19

The analysis of co-operation between competitors in the current pandemic crisis requires an assessment of the scope of the agreement, including its geographic scope, together with the need for the co-operation to overcome the market disruptions created by the crisis, its duration in time as well as the objective or purpose that the parties had with the agreement.

While different jurisdictions have adopted different approaches, one can identify some common elements in the initiatives already taken by competition authorities and governments to distinguish between lawful and unlawful co-operation during the current crisis.



The necessity of the co-operation agreement to address a specific market disruption due to the COVID-19 crisis

Many competition authorities (e.g. Italy,⁹ Japan,¹⁰ Mexico,¹¹ Spain,¹² UK,¹³) have issued general guidance stating that, when co-operation between competitors is considered as necessary to maintain or increase supply, ensure security of supply chains, meet the requirement of increased demand, or avoid the negative effects of stock-piling, hoarding and consequent shortages of products, it may be unlikely to attract antitrust enforcement action.

Box 2. Examples of public announcements with general guidance on co-operation between competitors during the COVID-19 crisis

European Competition Network (ECN): “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.” ([Joint statement by the European Competition Network \(ECN\) on application of competition law during the Corona crisis](#), 23 March 2020).

UK Competition and Markets Authority (CMA): “(...) the types of co-ordinated actions that, in the exceptional circumstances of the COVID-19 pandemic: (a) avoid a shortage, or ensure security, of supply; (b) ensure a fair distribution of scarce products; (c) continue essential services; or (d) provide new services such as food delivery to vulnerable consumers, are most likely to be unproblematic from a competition law perspective based on the exemption criteria – provided that they do not go further than what can reasonably be considered necessary” ([CMA approach to business co-operation in response to COVID-19](#), 25 March 2020).

Mexico’s Federal Economic Competition Commission (COFECE): COFECE announced it would not prosecute “collaboration agreements between economic agents that, in the current context, are necessary to maintain or increase supply, satisfy demand, protect supply chains, avoid shortages or hoarding of goods, and which are not intended to displace your competitors” ([Postura de la COFECE en términos de la aplicación de la Ley Federal de Competencia Económica ante la emergencia sanitaria](#), 27 March 2020).

They all stress that co-ordination should be limited in scope whilst maintaining its effectiveness. For instance, an agreement may involve sharing of information on a specific parameter of competition that may be strictly necessary to solve a shortage (e.g. capacity) but allow competition on other parameters (e.g.

⁹ The Italian Competition Authority’s “Communication on co-operation agreement and the Covid-19 emergency”, <https://www.agcm.it/dotcmsdoc/allegati-news/Testo%20Comunicazione%20cooperazione%20e%20COVID-19.pdf>, para. 15.

¹⁰ JFTC’s response to business conduct relating to the new coronavirus infections, April 2020, <https://www.jftc.go.jp/houdou/pressrelease/2020/apr/200428.html>.

¹¹ COFECE, Postura de la COFECE en términos de la aplicación de la Ley Federal de Competencia Económica ante la emergencia sanitaria, March 2020, <https://www.cofece.mx/en/postura-cofece-ante-emergencia-sanitaria/>.

¹² CNMC, COVID-19 complaints and queries related to the application of competition rules, April 2020, <https://www.cnmc.es/prensa/buzon-covid19-pautas-20200424>.

¹³ CMA, Guidance on the approach to business cooperation in response to COVID-19, <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-to-covid-19>.



price). Similarly, an agreement should be limited to only those products or geographic areas that need to be covered to address the specific issue (e.g. UK).¹⁴

The consumer welfare goal

Many competition authorities condition the lawfulness of the agreement to the positive impact of the co-operation on consumers.¹⁵ The CMA applies this criterion in the analysis of anti-competitive agreements and arrangements (i.e. the arrangements must “allow consumers a fair share of the resulting benefit”) and, in the context of this crisis, clarified that, for instance, if kept to the minimum necessary, collaborations aimed at the provision of “new services, such as food delivery to vulnerable consumers, are most likely to be unproblematic from a competition law perspective”.¹⁶ The European Commission also stated the lawfulness of co-operation “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”.¹⁷ The US agencies similarly clarified that co-operation “necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath” may be considered as necessary and therefore lawful under a competition law analysis.¹⁸

The limited duration of the collaboration

Many competition authorities (e.g. Canada,¹⁹ Hong Kong,²⁰ Spain,²¹ UK²²) have also highlighted that any co-operation must be strictly limited in time, and usually last only until the exceptional circumstances of the

¹⁴ CMA approach to business cooperation in response to COVID-19, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-_pdf.

¹⁵ See ICN Steering Group Statement on Competition during and after the Covid-19 Pandemic, April 2020, <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf>

¹⁶ CMA, Guidance on the approach to business cooperation in response to COVID-19, <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-to-covid-19>.

¹⁷ Communication from the European Commission on the Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, 8 April 2020, <https://www.google.com/search?client=firefox-b-d&q=Communication+from+the+Commission+on+Temporary+Framework+for+assessing+antitrust+issues+related+to+business+cooperation+in+response+to+situations+of+urgency+stemming+from+the+current+COVID-19+outbreak>.

¹⁸ US DoJ and FTC Joint Antitrust Statement Regarding Covid-19, <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

¹⁹ Competition Bureau Statement on Competitor Collaborations during the Covid-19 Pandemic, April 2020, <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html>.

²⁰ Hong Kong Competition Commission issues statement on application of Competition Ordinance during COVID-19 outbreak, March 2020, https://www.compcomm.hk/en/media/press/files/20200327_PR_CC_issu es_statement_on_application_of_CO_during_COVID19_outbreak_EN.pdf.

²¹ CNMC, COVID-19 complaints and queries related to the application of competition rules, April 2020, <https://www.cnmc.es/prensa/buzon-covid19-pautas-20200424>.

²² CMA approach to business cooperation in response to COVID-19, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-_pdf.



crisis in the specific sector will subside. This will be typically linked to the short-term disruptions deriving from the crisis, for instance, in order to re-establish production and supply chains or until the objective of the innovative co-operation is achieved. Guidance provided by competition authorities may have to be reviewed after an initial time period.

6. Challenges faced by competition authorities in determining the lawfulness of the agreement during COVID-19

Competition authorities requested to assess the lawfulness of a co-operation during COVID-19 crisis may face a number of challenges when they are applying some of the common criteria mentioned above within the limited timeframes presented by the crisis.

Some of the main challenges identified are:

- the need for prompt guidance to businesses and speedy decision-making;
- determining the necessity of the agreement;
- determining the correct time-frame.

Need for prompt guidance to businesses and speedy decision-making

Competition authorities will be required to react extremely quickly to the request for guidance by businesses. The risk of chilling effect may sometimes be even higher than that of a lack of enforcement. In order to ensure effective business operation during the crisis, many governments and competition authorities choose, to the extent that it is possible, to favour self-assessment by private companies.

This is done, for instance, by way of **general guidance** to help companies determine *ex ante* whether a proposed collaboration may raise issues (see Box 2) or by **adopting block exemption regulations** to exempt the application of competition law to a given sector for a period of time.

While this approach has the advantage of not requiring a time-consuming case-by-case analysis, in these cases competition authorities do not retain control over possible wrong interpretations of the general guidance or over possible abuses of the exemptions granted. A good practice could be to impose on the private companies the obligation to notify the co-operation to the competition authority, providing details of the agreement. In this way, competition authorities may be able to verify *ex post* the lawfulness of the co-operation, without creating an *ex ante* barrier to its implementation. Norway, for example, has opted for this solution in the transport sector (see Box 3 below).

Box 3. Block exemptions by governments on co-operation between competitors during the COVID-19 crisis: the example of Norway

In response to the COVID-19 crisis, Norway applied a block exemption to the entire transportation sector for three months, with an obligation to inform the competition authority.

Norwegian Competition Authority: “Following the corona epidemic, the Norwegian government has as of today granted the transportation sector a three months temporary exception from the prohibition against anticompetitive agreements and practices in the Norwegian Competition Act. (...). The Authority must be notified if the exception is relied on” ([Transportation sector is granted temporary exception from the Competition Act](#), 19 March 2020).

Whilst giving a positive message to the market, general guidance may fail to re-assure companies that their line of conduct is permissible in less clear-cut cases and therefore may not entirely avoid the risk of a chilling effect. In such cases, **specific guidance** may be required. To ensure that their response is timely,



many authorities have put in place mechanisms for speedy *ad hoc* guidance, in the form of comfort letters or similar means. These mechanisms may be accompanied by the creation of a dedicated team within the agency to provide timely responses to the requests submitted (for instance, the ACCC).²³

Box 4. Examples of fast-track mechanisms for specific guidance on co-operation between competitors during the COVID-19 crisis

Australian Competition and Consumer Commission (ACCC): The Australian Competition and Consumer Commission (ACCC) is able to grant interim authorisations for firms to co-operate in certain markets. The ACCC has already used this system several times during the COVID-19 crisis, including in the following sectors: health, supermarkets, air transportation, banking, fuel supply, energy supply, and shopping centre tenants. During the crisis, interim authorisations have been granted in a matter of days (ACCC, Rod Sims's Speech of 8 April 2020, *Managing the impacts of COVID-19 disruption on consumers and business*, <https://www.accc.gov.au/speech/managing-the-impacts-of-covid-19-disruption-on-consumers-and-business>).

European Commission: The European Commission can offer informal guidance on specific initiatives in a short timeframe in the form of an ad hoc "comfort" letter. (*Communication from the Commission on Temporary Framework for assessing antitrust issues related to business co-operation in response to situations of urgency stemming from the current COVID-19 outbreak*, 8 April 2020).

U.S. Federal Trade Commission (FTC) and Department of Justice (DoJ): "The Agencies are committed to providing individuals and businesses in any sector of the economy that are responding to this national emergency expeditious guidance about how to ensure their efforts comply with the federal antitrust laws. (...)" (*Joint FTC-DOJ Antitrust Statement Regarding COVID-19*, 24 March 2020).

Icelandic Competition Authority (ICA): The ICA opened an information centre and has stated that it will process applications for exemptions in less than 48 hours from the receipt of the application. A number of such exemptions have already been granted including in the tourism sector, distributors of pharmaceuticals, financial services and distributors of fuel (ICA, COVID-19: Application of competition rules and competition enforcement in crisis, 30 March 2020, <https://en.samkeppni.is/published-content/news/covid-19>).

In order to benefit from expedited processes, competition authorities usually require a description of the nature and rationale of the proposal (including temporal and geographic scope of arrangement), and other relevant information and documents (e.g. copy of the agreement).

Some competition authorities, when issuing individual guidance letters, may require or advise that the parties keep a track record of the detail of the co-operation (such as any exchange of information) and are prepared to make such documents promptly available to the authority upon request (e.g. Spain).²⁴

²³ ACCC, ACCC response to COVID-19 pandemic, <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic>.

²⁴ CNMC, COVID-19 complaints and queries related to the application of competition rules, April 2020, <https://www.cnmc.es/prensa/buzon-covid19-pautas-20200424>, <https://www.cnmc.es/en/node/380011>.



Open issues

- Is it practical for competition authorities to set up dedicated COVID-19 response teams and, if so, should they be multi-skills team formed by staff with different backgrounds and experience?
- Is it practical for competition authorities to receive notification and details of co-operation between competitors in those cases where the competition authority does not provide an ex ante authorisation, in order to expedite possible future investigations if necessary?
- What tools should competition authorities adopt to increase legal certainty for business willing to co-operate and should these tools be tailored to the specific type of co-operation and/or the specific sector involved?

Determining the necessity of the agreement

The second challenge is the assessment of the necessity of the agreement to obtain the sought benefits. This analysis essentially requires comparing the scenario with the co-operation as envisaged by the parties, at the time at which it was entered into and implemented, with one where there would be no co-operation. It also involves determining the pro-competitive effects deriving from the collaboration, as well as examining whether any less restrictive alternatives could be put in place by the business without the co-operation agreement.

In the words of the CMA, “In determining whether the co-operation is indispensable to achieve the efficiency, the key factor will be whether in the circumstances and limited time available to consider alternatives, the co-operation can *reasonably be considered necessary*”.²⁵

This analysis, however, may be difficult for competition authorities, which are under time pressure to issue a decision quickly and may have very little visibility over the alternative solutions available at the time of the implementation of the agreement.

Competition authorities may want to analyse the necessity criterion by making a comparison with the ‘but for’ scenario, such as it is done in merger control. In this way, they could consider the legal and economic context in which the business is operating, to determine what would have happened or what would happen in the absence of the collaboration. The counterfactual analysis may also be used to determine whether the alternative scenarios would have been less anticompetitive. Importantly, this should take into account the degree of uncertainty that surrounds the crisis scenario and can therefore be expected to lead to different outcomes than if the analysis were run in normal times.

More specifically, the need for companies to find solutions in the short timeframe imposed by the COVID-19 crisis affects the assessment concerning the necessity of the agreement entered into by the companies, which needs to be evaluated by the competition authorities relative to the possible alternatives existing at *the specific time of* when the agreement was being entered into.

If sensitive information needs to be exchanged, and in order to ensure that the exchange is kept to the strictly necessary, competition authorities may consider adopting procedure analogous to those used in merger control for the exchange of information pre-merger, such as the use of clean teams, strict confidentiality clauses, “Chinese walls” to business activities that are not closely related to the co-operation and independent monitoring trustees. For instance, the European Commission in its comfort letter of 8

²⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-_pdf, p. 10.



April 2020 stated that it would make available for the parties ‘a controlled forum for exchanging sensitive information’.²⁶

Box 5. Specificities of assessing the necessity of innovative co-operation agreements

The DoJ and FTC have reiterated that efficiency-enhancing R&D collaborations and the sharing of technical know-how are likely to be pro-competitive (DoJ and FTC, *Joint Antitrust Statement Regarding Covid-19*, <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>). Some pharmaceutical companies in the US have indeed entered co-operation agreements to fight COVID-19, such as in the case of the co-operation agreement between Eli Lilly and AbCellera for the research and development of antibody products for the prevention and the treatment of COVID-19 infections or the agreement between GSK and Sanofi for the development of a vaccine (<https://www.abpi.org.uk/medicine-discovery/covid-19/what-are-pharmaceutical-companies-doing-to-tackle-the-disease>).

Like for the other types of ‘co-operation as a response’ agreements, an important challenge for competition authorities in relation to ‘innovative co-operation’ agreements consists in verifying that the exchange of information involved in the innovative co-operation is strictly limited in scope and timeframe to what is required by the objective of the collaboration.

In determining the necessity of these agreements, competition authorities may want to look more favourably at agreements that do not include the joint exploitation of the outcome of the R&D projects, provided that they do not significantly affect innovation incentives. Indeed the further away from the market such R&D agreements are, the less likely they will be problematic from a competition viewpoint. R&D between competitors with complementary skills and know-how are also usually less problematic.

Competition authorities might also take into account the fact that a co-operation is encouraged or co-ordinated by a public authority. For instance, the EU Commission’s comfort letter of 8 April 2020 indicates that the risk of shortages had been identified by the Commission itself in collaboration with the European Medicines Agency and that the competent European Commissioners had invited market players to address the issue.

Open issues

- How can competition authorities ensure that the criteria for the assessment of the necessity of the co-operation are clear to businesses in order to provide increased legal certainty?
- Do competition authorities have the right tools and how should they assess the counterfactual scenario in times of great uncertainty like the COVID-19 crisis?
- How should the monitoring of the exchange of information be structured to ensure that there are no abuses and what types of safeguards should the competition authority and the parties put in place?

Determining the correct time-frame

Another significant challenge that competition authorities face is to determine the timeframe that is relevant to achieve the efficiency objectives of the co-operation as well as how to limit in time the collaboration. There are significant risks in both allowing an undue extension of the co-operation and in demanding its early termination. Therefore, competition authorities should be vigilant and act promptly to limit or withdraw

²⁶ Letter of 08/04/2020, COMP/OG – D(2020/044003), https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf.



an authorisation or to start antitrust actions when the negative impact of the crisis subsides and the collaboration is no longer strictly necessary.

An element to be considered in this respect is that time horizons for the assessment of consumer benefits may be significantly affected by the crisis, and the usual timeframes may not be apt to capture reality. The question competition authorities should ask themselves is, in other words, whether the proposed collaboration is beneficial to consumers or to the public interest at this specific time of crisis and when it will cease to be. In this sense, innovative co-operation may require a completely different timeframe than co-operation aimed, for instance, at addressing the issues arising out of lockdown periods. The first would have to extend for the full duration of the R&D activities, which may not coincide with the peak of the crisis, whereas the second one would be determined by the rhythms of government measures limiting movement. In a case-by-case approach, it will be fundamental for competition authorities to have all the facts necessary to take a decision concerning the duration of the collaboration.

One approach, followed by the US agencies, is to issue upon request a statement of enforcement intention not to challenge the conduct for a fixed period (e.g. one year, such as in the US) for all cases from the date of the statement letter. Parties are then allowed to request a prorogation of the statement upon its expiration, if the crisis or the recovery period still require it.²⁷ This solution has the advantage that it does not require a complex evaluation on a case-by-case basis of the duration of the effects of the crisis on the specific market affected by the collaboration.

Another, perhaps more burdensome, option is to monitor periodically the collaboration throughout or to impose on the parties a transparency and reporting obligation to ensure that enforcement actions can be taken in a timely fashion if necessary.

International co-operation might prove very helpful in allowing competition authorities to exchange experiences and best practices at the different stages of the exit from the crisis, identifying criteria that may assist in determining when the crisis has moved into another phase requiring adaptation of antitrust actions. The staggered impact of the COVID-19 pandemic should allow competition authorities to learn from each other's experience in this regard.

Open issues

- What tools and what criteria may competition authorities adopt in determining the appropriate duration of a collaboration under uncertainty?
- Would fixed deadline for all agreements be more efficient and preferable to a case-by-case approach? And if so, in which types of co-operation agreements?
- Is there a role for international co-operation between competition authorities in identifying criteria for the adequate duration of a collaboration?

7. Conclusion and recommendations

In the current COVID-19 crisis, which is affecting many sectors of the economy, competition authorities are called upon to respond to the difficult task of striking the right balance between being permissive enough to allow private initiatives address market disruptions and avoid distortions of competition. Given the severe impact of the crisis, and the great situation of uncertainty concerning the months to come,

²⁷ US DoJ and FTC Joint Antitrust Statement Regarding Covid-19, <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.



competition authorities should carefully take into account the market circumstances in their analysis of co-operation between competitors.

Many safeguards, such as the one suggested in this note, can be adopted to ensure that analysis conducted under uncertainty permits efficient collaboration whilst not encouraging abuses.

In the context of the current crisis, agreements dealing with production, supply or purchase arrangements seem to be more directly linked to solving the short-run market failures leading to scarcity of essential goods. Nonetheless authorities should consider that other types of agreements may also help to overcome the market disruptions resulting from the crisis. Competition authorities need to ensure that agreements between competitors are indeed necessary to help solve the crisis, proportionate to the objective they are pursuing and limited in time to impede the reduction of competition beyond the crisis period.

Competition authorities should:

- Provide guidance to businesses to encourage self-assessment and allow speedy decision-making where individual evaluation is required. Competition authorities should disclose their prioritisation criteria and the cases that they will consider unlikely to be problematic.
- Ensure that legitimate co-operation between competitors is necessary and limited in time, geography and scope. There may be a number of reasons why competitors may want to co-operate in this crisis, and many of these forms of co-operation will be lawful or beneficial to consumers and the economy. However, co-operation must take the form that is the least restrictive of competition, taking into consideration the extraordinary circumstances.
- Co-operate closely with other competition agencies to learn best practices in dealing with business co-operation during this crisis. The fact that jurisdictions are being affected by the pandemic at different moments allows authorities to benefit from the experiences of others, in particularly from those that are ahead in the curve.

Related OECD publications

[OECD Recommendation on Hard Core Cartels](#) (2019)

[OECD Roundtable on Safe Harbours and Legal Presumptions in Competition Law](#) (2017)

[OECD Roundtable on Crisis Cartels](#) (2011)

[OECD Roundtable on Information Exchanges between Competitors](#) (2010)

[OECD Roundtable on Competition, Patents and Innovation II](#) (2009)

[OECD Roundtable on Competition, Patents and Innovation](#) (2006)

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