

# Can the cooperation of undertakings during the COVID-19 crisis be exempted and can authorities give guidance thereon?

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According to the a Joint Statement of 23 March 2020 of the European Competition Network (ECN), in the case of **temporary cooperation aimed at ensuring security of supply**, it can be assumed that forms of cooperation in relation to the COVID-19 crisis will help to improve the production or distribution of goods.

Such forms of cooperation can therefore **benefit from the exception in Article 101(3) TFEU** according to which agreements and concerted practices between undertakings which contribute to improving the production or distribution of goods, or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which do not:

1. a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
2. b) nor afford them the possibility of eliminating competition in respect of a substantial part of the products in question,

are exempted from the prohibition in Article 101(1) TFEU on restrictive agreements or concerted practices. Article 4 of the Luxembourg Law of 23 October 2011 on competition contains a similar exemption.

In this regard, the Luxembourg Competition Council clarified in its Guidelines adopted on 31 March 2020 concerning the enforcement of competition law during the COVID-19 crisis that in order to apply the exemption, **it is essential that the coordination between undertakings does not cause**

**prejudice to consumers or the economy in general.** Therefore, in the exceptional circumstances of the pandemic, the actions which:

1. a) avoid a shortage, or ensure security of supply;
2. b) ensure an equitable distribution of rare products;
3. c) maintain essential services; or
4. d) provide new services, such as food delivery to vulnerable consumers

are not prohibited by competition law.

**In case of doubt about the compatibility with competition law of temporary cooperation linked to the current crisis**, the Council can be contacted electronically at: [info@concurrence.public.lu](mailto:info@concurrence.public.lu). The contact page of the website of the Council can also be used.

At EU level, the European Commission has set up a dedicated mailbox COMP-COVID-ANTITRUST@ec.europa.eu that can be used to seek informal guidance on specific initiatives. In order to facilitate a swift follow-up, companies are asked to provide upfront as much detail as possible on the initiative, including: (i) the firm(s), product(s) or service(s) concerned; (ii) the scope and set-up of the cooperation; (iii) the aspects that may raise concerns under EU antitrust law; and (iv) the benefits that the cooperation seeks to achieve, and an explanation of why the cooperation is necessary and proportionate to achieve those benefits in the current circumstances.

Moreover, according to the well-established principle in EU competition law of companies' self-assessment, they are themselves responsible for assessing the legality of their agreements and practices.

However, in its Temporary Framework Communication of 8 April 2020 the Commission states that, with a view to increasing the degree of legal certainty as regards antitrust guidance within a timeframe that is compatible with the urgency of certain situations related to the current COVID-19 outbreak, it stands ready, **exceptionally and at its own discretion, to provide such guidance by means of an ad hoc “comfort” letter** on the legality of specific cooperation initiatives.

For any further information please contact us or visit our website at [www.elvingerhoss.lu](http://www.elvingerhoss.lu).

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

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