

Competition law in the COVID-19 era | part 4 Relations with competitors

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In our recent alerts we have presented the main risks and challenges under competition law facing companies in the market situation related to the COVID-19 pandemic.

In this item we discuss issues involving agreements between undertakings, including the policy of “relaxing” the assessment of agreements by numerous European competition authorities, including, in Poland, the president of the Office of Competition and Consumer Protection (UOKiK).

1. Is competition law suspended during the crisis?

The Competition and Consumer Protection Act does not provide for exclusion of its application during economic crises, such as the crisis connected with the COVID-19 pandemic. Thus during the present crisis undertakings must still scrupulously comply with the provisions of Polish antitrust law. **But this does not mean a total ban on cooperation between undertakings**—even competitors, as we discuss below.

2. ECN position—a touchstone for every undertaking in the EU

On 23 March 2020 the European Competition Network (ECN), which is composed of the European Commission and all national competition authorities of the EU member states, including the President of UOKiK, issued a joint statement on application of competition law during the coronavirus crisis. According to that document, the competition authorities understand that **this extraordinary situation may trigger the need for companies to cooperate** to ensure the supply and fair distribution of scarce products to all consumers. **The ECN also declared that it will not intervene against necessary and temporary measures put in place to avoid shortages.** According to the ECN, in the current situation it is unlikely that such arrangements would restrict competition, and even if they did, the benefits would outweigh the negative consequences for the market. Significantly, this position doesn’t apply only to horizontal arrangements—it may also apply to vertical arrangements.

This position is consistent with earlier measures taken by numerous competition authorities. In recent days, many of them have liberalized their approach to competition regulations in light of the need to combat COVID-19.

For example:

- The Norwegian government admitted a temporary exemption from antitrust law to enable airlines (SAS and Norwegian) to cooperate on routes and flight schedules.
- In the UK, enforcement of competition law has been temporarily suspended against supermarkets cooperating to supply food to



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consumers. The Competition and Markets Authority even issued guidance on this approach to cooperation between companies to combat the effects of COVID-19.

- The German competition authority declared that it is willing to apply the regulations in a manner that helps avoid food shortages.
- In Australia, cooperation by suppliers of medical equipment has been permitted to avoid shortages of devices such as ventilators and personal protective equipment.
- In the Netherlands, supermarkets have been allowed to exchange information on their inventories, food distributors have been allowed to cooperate, and drug wholesalers have been allowed to share sales data.

However, the ECN has not presented detailed guidelines on any possible “exemption” from application of antitrust regulations. The network indicated that if companies have problems or doubts in applying this new approach, they can contact their national authorities for informal guidance. Nonetheless, as we write, so far no information has been released by the president of UOKiK on the possibilities and procedures for potential consultations. However, the European Commission has launched an email box where informal inquiries may be submitted for consultation with the EU authority.

This means that the rules for any cooperation that may be permitted must still be analyzed in the light of antitrust law, including prior to possible consultation on their terms with the competent authority.

3. When is cooperation between competitors allowed under “traditional” competition law?

The ECN statement is not the only way for arrangements or contacts between competitors to be lawful. Even within the bounds of “traditional” competition law, cooperation between undertakings is not absolutely prohibited. Competition law prohibits only cooperation with an anticompetitive aim or effect.

In any market situation—crisis or no crisis—competition law allows for the following arrangements between competitors under certain conditions:

- **Specialization agreements**, for example
 - Reciprocal specialization, where one party agrees to wholly or partially cease producing certain goods and to acquire them from the other party, which undertakes to produce such goods
 - Joint production, where the parties agree to manufacture certain products jointly.
- **R&D agreements**, e.g. to conduct shared research and development.

The following may also be permitted under competition regulations:

- **Purchasing groups** under which consumers can obtain lower prices or better products
- **Commercialization agreements**, i.e. cooperation in sale, distribution or promotion of selected products
- **Product standardization agreements** defining the technical or quality requirements for products.

Also, it should be borne in mind that **meetings between competitors** are also permitted, so long as they do not lead to exchange of sensitive information.

Nonetheless, given how easy it is to overstep the permitted bounds, any cooperation between competitors should be subjected to a thorough antitrust analysis.

4. What to pay attention to

- Selection of methods of cooperation compliant with rules of competition law

- Antitrust analysis prior to applying “traditional” forms of permitted cooperation
- Antitrust analysis of potential arrangements responding to the challenges arising in the market situation associated with the COVID-19 pandemic— prior to consultation of the arrangement with the competition authority
- Contacts between undertakings, e.g. during industry association events, which might touch on such issues as the current crisis, when special safety rules should be implemented and followed

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