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ABSTRACT

No country, business, organisation or individual has been unaffected by the COVID-19 pandemic. This is also true for competition law and, in particular, cooperation and collaboration arrangements between competitors (co-opetition) to address challenges created by the pandemic. This article surveys the guidance given, and other actions taken, by multilateral organisations and individual competition authorities in relation to these arrangements. It also looks at the impact this experience is likely to have in the future as the world starts to return to the – new – normal.

Aucun pays, entreprise, organisation ou individu n'a été épargné par la pandémie de COVID-19. Cela est également vrai pour le droit de la concurrence et, en particulier, pour les accords de coopération et de collaboration entre concurrents (co-opétition) visant à relever les défis créés par la pandémie. Cet article passe en revue les orientations données, et les autres mesures prises, par les organisations multilatérales et les autorités de concurrence individuelles en ce qui concerne ces accords. Il examine également l'impact que cette expérience est susceptible d'avoir à l'avenir, alors que le monde commence à revenir à la – nouvelle – normale.

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I. Introduction

1. A year and a half after the start of the global COVID-19 pandemic, it is appropriate to look at what the impact has been on competition law around the world, especially in the area of cooperation and collaboration arrangements.

2. Immediately after the start of the pandemic, countries, economies, businesses and other organizations as well as individuals—indeed, our entire ways of living—were adversely affected by lockdowns and other social restrictions, medical systems on the brink of collapse, economic recessions and other implications all around the world. Reflecting the interconnected nature of the world we live in, it is probably true to say that no country, business, organization or individual has been unaffected by the pandemic. This is also true of competition law.

3. The impact was not uniform. Different parts of the economy were affected in different ways. Some sectors saw a steep decline in demand. The travel industry and the hospitality sector were among those hardest hit by the pandemic. As people started to stay at home and contacts started being restricted, planes stopped taking off, restaurants closed and events ranging from concerts to trade shows were either postponed or canceled entirely.¹ By contrast, the digital and e-commerce sectors received a huge boost from the pandemic. It is estimated that digitization accelerated by years.² The medical sector also witnessed a surge in demand. The need for medical masks, gowns and gloves, hand sanitizer, medical-grade oxygen and ventilators skyrocketed, putting pressure on producers as well as their suppliers and distributors.

4. The European Commission summarized the situation in a communication published on 8 April 2020. It described the situation as a “*general supply shock resulting from the disruption of supply chains, combined with an asymmetric demand shock caused by either an abrupt decline in consumer demand for certain products and services or a steep rise in demand for other products and services.*”³

5. Some areas of competition law enforcement were affected more significantly than others. Different jurisdictions were affected in different ways and at different

1 These industries were highlighted by European Commission Executive Vice-President Margrethe Vestager in a statement on State aid measures: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_467.

2 See McKinsey Global Survey of executives: <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-covid-19-has-pushed-companies-over-the-technology-tipping-point-and-transformed-business-forever>.

3 See Communication from the Commission, 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 (available here: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0408\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0408(04)&from=EN)), para. 2.

times. But, one way or another, competition law enforcement around the world was affected by the pandemic, as this article explains. One area—on which this article focuses—cooperation and collaboration arrangements (“cooperation agreements”)—was particularly affected. This included cooperation between governments, between competition (and other) agencies, and between individual companies and other organizations. Particularly notable are the cooperation agreements that went into place in response to the pandemic between parties that were usually each other’s direct competitors. This occurred in both the private and the public sectors and included lifesaving research, development, manufacture and distribution of vaccines and other medicines, as well as arrangements to overcome disruption to supply chains in many areas of the economy. Such “co-opetition”⁴ gave rise to challenges for competition law enforcement, as this article explains.

6. Although cooperation agreements between competitors have the potential to provide significant economic benefits to both the companies involved and consumers, they can also be detrimental to competition by facilitating the unlawful exchange of information, price fixing, market sharing or output limitations, as well as decreasing the incentive to innovate.⁵ Whether to uphold this basic tenet of competition law and where to set the boundaries between lawful and unlawful cooperation and collaboration was one of the major challenges that competition authorities around the world faced during the pandemic.

7. In the past few months, some economies around the world have started to return to normal—or at least a “new normal.” So this article also considers what the lasting impact of the pandemic is likely to be for competition law and specifically how cooperation agreements will likely be treated by competition law in the future.

II. Global competition law responses to the pandemic

8. The start of the pandemic saw a slew of announcements by individual competition authorities and multilateral organizations emphasizing the importance of competition law compliance during the crisis and related economic downturn. On 23 March 2020, the European Competition Network (“ECN”) of national competition authorities in the European Union (“EU”) released a

statement acknowledging that companies might see the need to cooperate with each other to “ensure the supply and fair distribution of scarce products to all consumers.”⁶ The statement indicated some flexibility in the enforcement of competition law, stating that the ECN competition authorities “will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.”⁷ Some two weeks later, on 8 April 2020, the International Competition Network (“ICN”) also issued a statement underlining the importance of competition law and warning companies not to use the pandemic as a cover for anticompetitive conduct.⁸ The ICN acknowledged that the pandemic “may trigger the need for competitors to cooperate temporarily in order to ensure the supply and distribution of scarce products and services that protect the health and safety of all consumers”⁹ and that it was critical during the pandemic that “[c]ompetition agencies (...) engage in direct and open communication.”¹⁰ Also on 8 April 2020, the UN Conference on Trade and Development (“UNCTAD”) issued a statement urging competition authorities to fight the consequences of COVID-19 and suggested competition authorities allow temporary cooperation agreements if they were necessary to ensure the supply and distribution of essential products to avoid shortages.¹¹

9. Acknowledging in a communication issued on 26 May 2020¹² that “[i]n 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 [such] collaborations,” the Competition Division of the Organisation for Economic Co-operation and Development (“OECD”) issued guidance to governments and competition authorities on how to address the pandemic, pointing to the potential benefits of cooperation agreements between competitors while also addressing the challenges for competition authorities to deal with such agreements effectively.¹³

10. The ASEAN Expert Group on Competition released a joint statement on 9 June 2020 calling for more collaboration between competition authorities in the ASEAN region on the enforcement of competition law and warning companies not to take advantage of the crisis for their own benefit.¹⁴ The BRICS countries issued a state-

4 See A. M. Brandenburger and B. J. Nalebuff, *Co-opetition: A revolutionary mindset that combines competition and cooperation* (New York, Doubleday, 1996).

5 See Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (available here: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN)), paras. 2, 3.

6 See <https://www.concurrences.com/en/bulletin/news-issues/march-2020/the-european-competition-network-issues-a-joint-statement-on-application-of>.

7 Ibid.

8 See <https://www.internationalcompetitionnetwork.org/featured/statement-competition-and-covid19>.

9 Ibid.

10 Ibid.

11 See <https://unctad.org/fr/node/2371>.

12 See <https://www.oecd.org/daf/competition/competition-policy-responses-to-covid-19.htm>; <https://www.oecd.org/competition/Co-operation-between-competitors-in-the-time-of-COVID-19.pdf>.

13 Ibid.

14 See <https://otcc.or.th/activities-en/2020/06/09/otcc-had-1st-online-meeting-with-the-asean-experts-group-on-competition-aegc/?lang=en>.

ment on 23 July 2020 pointing to the significant impact of COVID-19 on economic stability in developing countries to explain why the competition authorities in those countries were extending their interagency cooperation to combat the negative effects on competition caused by the pandemic.¹⁵

III. National competition law responses to the pandemic

11. Countless national competition authorities, including those in Australia, Canada, Finland, Hong Kong, Japan, Mexico, Spain, the U.K. and the U.S.A., also released statements emphasizing that their competition laws would continue to apply during the pandemic, particularly to attempts to exploit the crisis, while, at the same time, stressing that some flexibility in the application of competition law to cooperation among companies might be necessary.¹⁶ Some examples follow.

1. The EU: European Commission provides comfort

12. As hospitalization rates began to rise, the European Commission introduced a new Temporary Framework designed to address the impact of COVID-19.¹⁷ The Temporary Framework not only laid out the criteria the European Commission would use to assess cooperation agreements but also announced that the European Commission would be willing to provide informal guidance to the parties on the lawfulness of such agreements. This was particularly important as collaborating companies had to react quickly to the crisis and needed to be able to do so with confidence about the lawfulness of their arrangements. The Communication noted that the European Commission had received several requests for such informal guidance since the start of the pandemic and before the Temporary Framework was introduced.¹⁸

13. This was not the first time the European Commission had to act in a time of crisis: so-called “crisis cartels” have been a repeated feature in EU competition law practice and theory.¹⁹ In relation to the pandemic, the Temporary Framework provided that the European Commission would be willing to review some cooperation agreements and issue written comfort letters, on an ad hoc basis, to companies planning to work together to address shortages of essential services and scarce products such as medicines and medical equipment to address the effects of the pandemic.

14. Comfort letters were once an important tool in the European Commission’s arsenal as a means of providing informal individual exemptions from Article 101²⁰ of the Treaty on the Functioning of the European Union (“TFEU”) for companies and their pro-competitive cooperation initiatives. But the European Commission ceased to grant comfort letters with the “modernization” of EU competition law and the entry into force of Council Regulation (EC) No. 1/2003 on 1 May 2004. (Although Article 10 of Regulation 1/2003 provides the European Commission with the power to issue guidance, the European Commission had not used that power prior to the pandemic.) Instead of requesting the European Commission for an individual exemption, companies had to consult a wide array of Block Exemption Regulations and Guidelines²¹ and self-assess their cooperation agreements for their lawfulness under EU competition law.²²

15. During the pandemic, the European Commission accepted that overcoming critical supply shortages, particularly in the healthcare sector, “*might also require the re-allocation of stocks, which would require that undertakings agree to exchange/communicate information on sales and stocks.*”²³ As such a level of cooperation would normally raise questions about violation of Article 101 TFEU, the European Commission stated that, given the “*current exceptional circumstances, such measures would not be problematic under EU competition law or (...) would not give rise to an enforcement priority for the Commission*”²⁴ provided that the cooperation was “(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 (...); (ii) temporary in nature (...)* and (iii) *not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of sup-*

15 See <https://www.concurrences.com/en/bulletin/news-issues/july-2020/the-brics-competition-authorities-issue-a-statement-on-covid-19>.

16 See, e.g., Finland (<https://www.kkv.fi/en/current-issues/press-releases/2020/23.3.2020-exceptional-circumstances-caused-by-the-coronavirus-to-affect-the-application-of-the-competition-act>); Japan ([https://uk.practicallaw.thomsonreuters.com/w-025-7817?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-025-7817?transitionType=Default&contextData=(sc.Default)&firstPage=true)); Australia (<https://www.accc.gov.au/speech/managing-the-impacts-of-covid-19-disruption-on-consumers-and-business>); U.K. (<https://www.gov.uk/government/publications/cma-to-investigate-concerns-about-cancellation-policies-during-the-coronavirus-covid-19-pandemic/the-coronavirus-covid-19-pandemic-consumer-contracts-cancellation-and-refunds>).

17 See Communication from the Commission, Temporary Framework of 8 April 2020 (n. 3).

18 Ibid., para. 8 et seq.

19 See C. Ritz and M. Schlaue, “Crisis Cartel” in times of Covid-19: Lessons from former crises teach a cautious approach, in Competition law and health crisis, *Concurrences* No. 2-2020, art. No. 94262 (available here: https://www.unige.ch/coronavirus/files/8915/9050/5708/03.concurrences_2-2020_on-topic-health_crisis.pdf), p. 99 et seq.

20 See ex Article 81 of the EC Treaty.

21 See Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n. 5).

22 See C. Gauer, L. Kjolbye, D. Dalheimer, E. de Smijter, D. Schnichels and M. Laurila, Regulation 1/2003 and the Modernisation Package fully applicable since 1 May 2004, *Competition Policy Newsletter*, No. 2 – Summer 2004 (available here: https://ec.europa.eu/competition/publications/cpn/2004_2_1.pdf), p. 5 et seq.

23 See Communication from the Commission, Temporary Framework of 8 April 2020 (n. 3), para. 10.

24 Ibid., para. 15.

ply.”²⁵ This statement was designed to define the corridor within which certain cooperations during the pandemic would be deemed to comply with EU competition law but not to leave space for companies to attempt to exploit the pandemic as a cover for unlawful practices.²⁶

16. Two comfort letters, which the European Commission issued during the pandemic and which are publicly accessible, illustrate the balance the European Commission sought to strike:

- A comfort letter²⁷ was issued to Medicines for Europe (“MfE”), an association representing the pharmaceutical industry, on 8 April 2020. MfE sought comfort from the European Commission for a cooperation among its members and other pharmaceutical manufacturers to increase production and improve distribution, by modeling demand and identifying spare production capacity and existing stock of certain medicines needed to treat the growing number of COVID-19 patients. The European Commission confirmed that such cooperation would not raise concerns under Article 101 TFEU, as it served the overall purpose of increasing the production and supply of much-needed COVID-19 medicines.

However, the European Commission required that certain safeguards be put in place to ensure that the cooperation did not harm competition. Specifically, MfE had to accept that any cooperation must be open to all manufacturers interested in participating. In addition, minutes of all meetings between the cooperating parties had to be kept, details of all agreements had to be shared with the Commission, and competitors had to observe the need-to-know principle in relation to the sharing of sensitive business information. The European Commission also required that any information provided by manufacturers had to be gathered by MfE or another neutral party and shared with the parties only in aggregated form. The cooperation was required to be time-limited and end when the risk of shortages due to COVID-19 ceased, with the European Commission reserving the right to decide when that occurred.

- A comfort letter²⁸ was also issued on 25 March 2021 to Sociedade Portuguesa de Inovação (SPI) and Ecorys Europe, two European consulting firms. The letter concerned a matchmaking event hosted by the European Commission on 29 and 31 March 2021 and co-organized by the two recipients of the comfort letter with the purpose of encouraging and supporting participating companies to accelerate vaccine production in the EU. This was to be achieved by matching vaccine manufacturers with providers of rare raw materials and companies with free production capacities to match demand and supply of those

scarce inputs. The event’s co-organizers requested guidance on the exchange of sensitive business information between competitors which might occur for matchmaking purposes. The European Commission expressed the view that such matchmaking did not raise EU competition law concerns as the event would facilitate coordination to boost production of much-needed COVID-19 vaccine.

However, as in its first comfort letter, the European Commission stipulated a set of rules the participants had to abide by. All participants, whether competitors or operating at different levels of the supply chain, were to adhere to the need-to-know principle when sharing confidential information; records were required to be kept of the topics discussed; and where information exchange was considered indispensable for achieving the matchmaking event’s aim, participating companies were offered additional bilateral guidance from the European Commission. The comfort letter’s scope was explicitly limited to information exchange taking place during the matchmaking event, leaving subsequent exchanges subject to the usual scrutiny of EU competition law.

17. What can be inferred from these two comfort letters?

- First, the European Commission has only rarely made use of comfort letters during the pandemic despite the statements in its Temporary Framework.²⁹ Comfort letters seem unlikely to make a major comeback as a regular feature of the European Commission’s toolbox, but may become a more frequent tool in specific areas such as cooperation agreements with a sustainability focus.
- Second, both comfort letters concern the medical sector, which is consistent with the European Commission’s reasons for introducing the Temporary Framework—concern about increasing demand for COVID-19 medication and its availability.
- Third, both comfort letters set out limitations to make sure that (i) the cooperation would be open to any company interested in participating; (ii) competitively sensitive information would, where possible, be shared only through an independent third party and passed on to competitors only in aggregate form; (iii) the scope of cooperation would not go beyond what was strictly required for achieving the purposes of the cooperation, and (iv) the cooperation would be limited in duration.

²⁵ Ibid.

²⁶ Ibid., para. 20.

²⁷ See https://www.concurrences.com/IMG/pdf/medicines_for_europe_comfort_letter.pdf.

²⁸ See https://ec.europa.eu/competition/antitrust/comfort_letter_coronavirus_matchmaking_event_25032021.pdf.

²⁹ See Communication from the Commission, Temporary Framework of 8 April 2020 (n. 3), para. 18.

2. The U.S.: Cooperation agreements enabled by an expedited business review process

18. In the U.S., the Department of Justice (“DOJ”) released a statement on 9 March 2020³⁰ in which it announced that it would hold accountable anyone violating U.S. antitrust law at the expense of U.S. consumers and patients by the manufacture, distribution or sale of healthcare products. Like the European Commission, the DOJ did not stop there. The initial statement was followed by a joint statement³¹ from the DOJ and the Federal Trade Commission (“FTC”) on 24 March 2020.

19. In their joint statement, the DOJ and FTC outlined ways in which companies could cooperate during the pandemic without violating U.S. antitrust law. To that end, the DOJ’s Antitrust Division announced that it would significantly ramp up its business review process, a procedure designed to lay out “*a way for businesses to determine how the Division may [react] to proposed (...) business conduct.*”³² DOJ business review letters are similar to the European Commission’s comfort letters mentioned above—both provide guidance but not exemption from the competition (or antitrust) law. The European Commission “*is not precluded from subsequently examining [the] same agreement or practice (...) in particular following a complaint*”³³ and comfort letters do not bind EU Member States’ competition authorities or courts. Business review letters express the DOJ’s enforcement intentions at the time they are issued, and the DOJ can “*bring whatever action it subsequently comes to believe is required by the public interest.*”³⁴ However, the DOJ has “*never subsequently brought a criminal action (...) if there was full disclosure at the time the business review request was presented*” to the DOJ.³⁵

20. Typically, the process of receiving a business review letter from the DOJ can take anywhere from 30 business days³⁶ to several months,³⁷ on receipt of all necessary information. To provide individuals and businesses with a quick assessment during the pandemic, the statement announced that this time frame would be reduced to just seven calendar days.³⁸ In turn, business review letters issued in accordance with this expedited procedure would remain in effect for only one year, although a second application can be made.³⁹ For companies that wanted some guidance even faster,⁴⁰ the statement provided some general guidance on cooperation projects, particularly in the field of research and development, pointing at the need for sharing technical know-how (as opposed to company-specific, sensitive commercial information) to achieve pro-competitive effects. Since March 2020, the DOJ has issued and published several business review letters under the expedited procedure, four of which are summarized below:

- The first business review letter⁴¹ issued under the expedited, temporary review procedure went to a group of healthcare distributors⁴² of personal protective equipment (“PPE”) and medications on 4 April 2020. The requesting parties sought guidance on a planned cooperation to accelerate and increase the manufacturing, sourcing and distribution of PPE, as well as medication used in the treatment of COVID-19 patients. The cooperation was set into motion by requests from the Federal Emergency Management Agency (“FEMA”) and the Department of Health and Human Services (“HHS”), which asked the requesting parties to use their industry expertise to address shortages in the supply of PPE and to assess potential laboratory and medication supply shortages. Although not all communications between the requesting parties were set to take place under direct supervision of government officials, the DOJ’s review letter emphasized the role this factor had played in its assessment. It noted that “*collaborations will be focused on, and limited to, facilitating the U.S. Government’s efforts to respond to the unprecedented COVID-19 pandemic*”⁴³ and that private parties’ conduct may be exempt from antitrust scrutiny if the cooperation is (i) compelled by an agreement with a

30 See U.S. DOJ press release, Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products, 9 March 2020 (available here: <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>).

31 See Joint Antitrust Statement regarding COVID-19, Federal Trade Commission and Department of Justice, 24 March 2020 (available here: <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure>; https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf).

32 See U.S. DOJ, Introduction to Antitrust Division Business Reviews (available here: <https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf>), p. 1.

33 See Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2004/C 101/06 (available here: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0078:0080:EN:PDF>), para. 24.

34 See U.S. DOJ, Introduction to Antitrust Division Business Reviews (n. 32), p. 2.

35 Ibid.

36 Ibid.

37 See Joint Antitrust Statement regarding COVID-19, Federal Trade Commission and Department of Justice, 24 March 2020 (n. 31), p. 1.

38 Ibid.

39 This information is not provided in the joint statement from the DOJ and FTC but instead included on the face of all business review letters making use of the expedited procedure.

40 See Joint Antitrust Statement regarding COVID-19, Federal Trade Commission and Department of Justice, 24 March 2020 (n. 31), p. 1 et seq.

41 See Letter in response to Business Review Request by McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc. pursuant to COVID-19 expedited procedure of 4 April 2020 (available here: <https://www.justice.gov/atr/page/file/1266511/download>).

42 McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc.

43 See Letter in response to Business Review Request by McKesson Corporation, and others of 4 April 2020 (n. 41), p. 6.

federal agency or a clearly defined federal government policy and (ii) supervised by a federal agency.⁴⁴ In its assessment, the DOJ was satisfied that most of the cooperation would meet these conditions.

Similar to the European Commission, the DOJ required certain safeguards to ensure that direct exchange between the parties in the absence of government officials would not raise antitrust concerns. This involved requesting parties to agree (i) not to participate in COVID-19 profiteering, (ii) to share sensitive information only with government agencies and not directly with competitors, and (iii) to limit cooperation strictly to the duration necessary to assist the U.S. government in its response to COVID-related shortages. This demonstrates that even in the case where the proposed conduct does not meet all conditions, the business review letter would at least ensure that no sensitive information is exchanged and that pro-competitive effects would outweigh any potential harm.

- In another business review letter issued on 15 May 2020,⁴⁵ the DOJ responded to a proposal from the National Pork Producers Council (“NPPC”) to assist, along with its members, the U.S. Department of Agriculture (“USDA”) in humanely depopulating hogs that had become unmarketable following a decrease in pork packing capacities due to COVID-infections shutting down entire facilities. The planned cooperation, which also included plans by the NPPC to share information with its members about best practices when depopulating hogs, did not raise anti-trust concerns, as it would take place at the direction and under the supervision of the USDA—a U.S. federal agency. Moreover, safeguards were put in place ensuring that no competitively sensitive information would be shared directly between competitors.
- Another cooperation covered by a business review letter issued on 23 July 2020⁴⁶ was aimed at exchanging limited information on the manufacturing of monoclonal antibodies required for COVID-19 treatment. It was suggested that starting the time-consuming process of calibrating production sites should be done in parallel to the testing and approval of the drug or vaccine for which the antibodies would be required, as this could significantly accelerate the overall process. This required significant coordination between all parties involved, not least because all aspects of the supply chain would have to be prepared much sooner than usual. The business review letter included a number of safeguards, limiting its duration, banning the exchange of competitively sensitive information about pricing, and specifically restricting the information competitors would be allowed to ex-

change to information that was strictly required to achieve the project’s goal.

- One of the most recent⁴⁷ business review letters issued on 12 January 2021⁴⁸ concerned efforts by multiple pharmaceutical companies to assist the Biomedical Advanced Research and Development Authority (“BARDA”) in developing a single, standardized set of quality assurance parameters to be implemented by blood banks under contract with BARDA. The aim of this standardization was to ensure that COVID-19 convalescent plasma collected by the blood banks would meet each of the participating manufacturers’ requirements for their production of hyperimmune globulin therapies. Once more, the DOJ stated that it did not intend to challenge the planned cooperation, mainly because direct communication between the parties would occur only in the presence of BARDA representatives and because the requesting companies submitted that no competitively sensitive information would be discussed.

21. These business review letters share some common features.

- First, the DOJ would deem a cooperation to be compliant with U.S. antitrust law when the cooperation was compelled by an agreement with a federal agency or a clearly defined federal government policy, as well as subjected to direct agency oversight; a view shared by the European Commission in the communication of its Temporary Framework.⁴⁹
- Second, the cooperation initiatives were “*limited in scope and duration, necessary to address COVID-19-related scarcity, and will not extend beyond what is required to facilitate the availability of needed supplies.*”⁵⁰
- Third, most of the cooperation initiatives⁵¹ proposed to the DOJ were aimed at improving the supply of products that were in high demand due to the pandemic.

47 There were other business review letters not mentioned in this article, like the letter sent out to ecoHair Braiders Association on 27 October 2020; a full list is available at <https://www.justice.gov/atr/business-review-letters-and-request-letters>.

48 See Letter in response to Business Review Request of 12 January 2021 (available here: <https://www.justice.gov/atr/page/file/1352826/download>).

49 See Communication from the Commission, Temporary Framework of 8 April 2020 (n. 3), para. 15.

50 See <https://www.justice.gov/atr/page/file/1266511/download>, p. 9; see also <https://www.justice.gov/atr/page/file/1297161/download>, p. 9 et seq. (“*The scope of the Proposed Conduct is limited to only facilitating the rapid production of safe and effective COVID-19 mAbs. (...) The exchange of information is limited in duration to extend only as long as necessary to address the COVID-19 crisis*”), <https://www.justice.gov/atr/page/file/1352826/download>, p. 7 (“*In terms of scope, only technical specifications will be discussed, and only for the purpose of ensuring the Blood Banks collect COVID-19 convalescent plasma (...). In terms of duration, (...) the results of the Requesting Parties’ collaboration will terminate when those contracts terminate*”), and <https://www.justice.gov/atr/page/file/1276981/download>, p. 4 et seq. (“*[T]he conduct is limited to the depopulation of hogs that become unmarketable due to a reduction in processing plant capacity*”).

51 With the exception of the NPPC’s proposed cooperation, subject of the letter sent out on 15 May 2020, which became necessary due to an oversupply of hogs that could not be processed due to the pandemic shutting down the pork packing industry.

44 *Ibid.*, p. 7.

45 See Letter in response to Business Review Request by National Pork Producers Council pursuant to COVID-19 expedited procedure of 15 May 2020 (available here: <https://www.justice.gov/atr/page/file/1276981/download>).

46 See Letter in response to Business Review Request pursuant to COVID-19 expedited procedure of 23 July 2020 (available here: <https://www.justice.gov/atr/page/file/1297161/download>).

3. The U.K.: Cooperation to avoid empty grocery stores

22. In the first phase of the pandemic, the large gap between supply and demand left many customers roaming through the aisles of grocery stores looking at empty shelves. The U.K. was no exception to this experience, which is why, in March 2020, the U.K. government reacted by announcing ways in which grocery stores would be allowed to cooperate without infringing U.K. competition law.⁵² It was announced that legislation would be introduced exempting certain forms of cooperation in the food sector from otherwise applicable U.K. competition law. As a result, grocery stores would be allowed to exchange sensitive information about stock levels, share distribution depots and delivery vans, and pool staff. The U.K. government's press release warned, however, that this was a “*specific, temporary relaxation to enable retailers to work together for the sole purpose of feeding the nation*” and that the government would “*not allow any activity that does not meet this requirement.*”⁵³

23. On 19 March 2020, the Competition and Markets Authority (“CMA”) welcomed⁵⁴ the government's initiative and, on 25 March 2020, the CMA published further guidance detailing its approach to business cooperation in response to COVID-19.⁵⁵ The CMA reaffirmed that cooperation between competing businesses may be necessary to tackle the consequences of COVID-19 and assured that, even where the government's exemption did not directly apply, the CMA would not take action against cooperation “*provided that any such coordination is undertaken solely to address concerns arising from the current crisis.*”⁵⁶

4. Japan: Focus on medical equipment

24. In Japan, some companies facing the burden placed on them by the pandemic asked the Japan Fair Trade Commission (“JFTC”) in 2020 about the agency's view on the legality of certain cooperation projects.⁵⁷ The JFTC confirmed to a group representing medical whole-

salers of face masks and other medical products, that their cooperation to provide available information to healthcare institutions did not raise antitrust concerns as long as the information was not shared directly between the companies and the institutions received the names of all companies able to supply face masks.⁵⁸

IV. Back to normal?

25. As parts of the world start to return to the—new—normal, what have the experiences during the COVID-19 pandemic shown us about cooperation?

26. First, the value of cooperation whether in relation to the development of vaccines and other medicines or other necessities in combating the pandemic is undeniable. Such cooperation has not been confined to governments or businesses—it has crossed the public/private sector divide at many levels and has also included academic institutions around the world.

27. Second, the value of cooperation between competition authorities around the world was underlined by the statements and guidance issued rapidly after the start of the pandemic by one multilateral organization after another—including the ECN, ICN, OECD and UNCTAD.

28. Third, the emphasis put on continued enforcement of competition law by those organizations—and individual competition authorities around the world—was a strong feature of the pandemic period.

29. Fourth, the guidance issued on what constituted lawful cooperation was remarkably consistent. This is also illustrated by the comfort letters and business review letters summarized in this article—they share the common feature that the cooperation agreements entered into between competitors were to be limited both in scope and time to what was necessary to achieve the aim of fighting COVID-19 and its economic and social consequences.

30. Fifth, exiting such cooperation agreements also requires attention to competition law. When any comfort letters and business review letters that have been issued cease to have effect, the full rigors of competition law are again applicable. Cooperation agreements should therefore be reviewed and reassessed by the parties and their advisers to find a way for companies to exit the pandemic crisis and move forward in an antitrust compliant manner.⁵⁹

31. Sixth, although the outbreak of the COVID-19 pandemic sent economic and social shockwaves across the globe and led to rapid responses by competition autho-

52 See <https://www.concurrences.com/en/bulletin/news-issues/march-2020/the-uk-government-allows-supermarkets-to-work-together-without-infringing>; https://www.concurrences.com/IMG/pdf/supermarkets_to_join_forces_to_feed_the_nation_-_gov.uk-4.pdf.

53 See https://www.concurrences.com/IMG/pdf/supermarkets_to_join_forces_to_feed_the_nation_-_gov.uk-4.pdf, p. 2.

54 See <https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation>.

55 See <https://www.concurrences.com/en/bulletin/news-issues/march-2020/the-uk-competition-authority-publishes-guidance-on-cooperation-between>; <https://www.concurrences.com/IMG/pdf/ukcma.pdf>.

56 See <https://www.concurrences.com/IMG/pdf/ukcma.pdf>, p. 4; <https://www.concurrences.com/en/bulletin/news-issues/march-2020/the-uk-competition-authority-publishes-guidance-on-cooperation-between>.

57 See Annual Report on Competition Policy Developments in Japan (2019) (available here: https://www.jftc.go.jp/en/about_jftc/annual_reports/oeed_files/japan2019.pdf), p. 20 et seq.

58 See T. Sekiguchi, Japan's antitrust consultations reveal business information sharing concerns under Covid-19, *MLex*, 11 June 2021 (available here: <https://content.mlex.com/#!/content/1300442>). Available for subscribers only.

59 See C. Ritz and F. von Schreitter, Post-pandemic antitrust – what to expect and what to do, *GCR* July 2021 (available here: <https://globalcompetitionreview.com/post-pandemic-antitrust-what-to-expect-and-what-to-do>), or here: <https://www.hoganlovells.com/en/publications/post-pandemic-antitrust-what-to-expect-and-what-to-do>), p. 4.

rities around the world, no changes were made to the underlying antitrust or competition laws in either the U.S. or the EU (as distinct from practical changes to day-to-day operation necessitated by remote working). This means that no special rights were granted to, for example, the companies that applied for business review or comfort letters. Rather, the guidance documents, comfort letters and business review letters issued by the competition authorities helped to provide greater legal certainty in times of unprecedented cooperation between competitors. (The European Commission also adopted a Temporary Framework⁶⁰ for State aid measures to enable EU Member States to use the flexibility foreseen under State aid rules to support their economies in the context of the COVID-19 pandemic.⁶¹)

32. Seventh, it is too soon to know whether the assessments of COVID-induced forms of cooperation will have any lasting effect on how competition authorities around the world deal with competitor cooperation in the future. What is already clear is that competition authorities are keen to send strong messages about enforcement. In June 2021, the CMA chair, Jonathan Scott, warned that post-COVID, the CMA “*will carry responsibility for coming down like a ton of bricks on anyone attempting to stifle the economic recovery and damage consumer confidence through anti-competitive or unfair activity. (...) Part of our role in helping the UK economy rebuild following the pandemic is by acting quickly and decisively against breaches of competition and consumer law, protecting consumers and confidence in markets.*”⁶² In August 2021, the president of the German Federal Cartel Office (“FCO”), Andreas Mundt, said the FCO will ensure that cooperation agreements which the FCO had tolerated during the pandemic, but which it would probably otherwise not have accepted, are terminated after the crisis has ended.⁶³

33. Eighth, it also remains to be seen whether the use of expedited business review letters by the DOJ and comfort letters by the European Commission during the pandemic results in their greater use (in the case of business review letters) and continued use (by the European Commission) in the future. The European Commission has indicated that it may, at least in specific areas such as sustainability-focused cooperation agreements. In September 2020, the director-general of the European Commission’s Competition Directorate, Olivier Guersent, said “*I know we have been carefully avoiding to give guidance for a number of years, and I think it was necessary because we need a cultural change of the notification system, (...) I do think, as [Margrethe] Vestager also alluded to, that probably this*

era should now reach an end.”⁶⁴ It is also noteworthy that the German FCO introduced a provision into the new German Act Against Restraints of Competition (“German ARC”) which entered into force on 19 January 2021 that allows companies to ask the FCO for informal confirmation that it will use its discretion not to investigate a proposed cooperation.⁶⁵ Although this assessment is not legally binding on the FCO, it can create legally protected reliance for the parties and thus make it more difficult for the FCO to potentially impose fines on the parties.

34. As well as the pandemic, the last 18 months have coincided with the European Commission’s most extensive review ever of EU competition law⁶⁶ in the mergers, dominance, and State aid fields⁶⁷ and several important block exemption regulations that fall due for review. Specific to this article is the review of the European Commission’s guidelines on horizontal agreements (“Horizontal Guidelines”).⁶⁸ (The Commission considers that the principles it applied in assessing COVID-induced cooperation agreements are consistent with the current Horizontal Guidelines.⁶⁹)

35. The Commission’s consultation of stakeholders about the review of the Horizontal Guidelines has shown that the Guidelines “*are still relevant, as they provide legal certainty to businesses with respect to their horizontal cooperation agreements and they simplify administrative supervision by the Commission, the national competition authorities and national courts.*”⁷⁰ This is unsurprising as one of the lessons of the pandemic is that companies value legal certainty and guidance from competition authorities on how they can cooperate in a competition law compliant manner. However, the consultation also identified aspects of the Horizontal Guidelines that could be improved and “*need to be adapted to economic and societal developments, such as [digitalization] and the pursuit of sustainability goals. In addition, some of the provisions in the [related block exemption regulations] are viewed as rigid and complex, while others are considered unclear and difficult to interpret by businesses.*”⁷¹

64 See Climate cooperation should get ‘comfort’ from EU antitrust officials, Guersent says, *MLex*, 14 September 2020.

65 See Sec. 32c(2) German ARC, which states: “*Irrespective of the conditions set out in subsection (1), the competition authority may also declare that it refrains from initiating proceedings in accordance with its discretionary powers.*”

66 New legislation regulating digital platforms and services has also been proposed. For more information on “The Digital Services Act package,” see <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>. For more on “The Digital Markets Act,” see https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

67 See European Commission, press release IP/20/2008 of 30 October 2020, State aid: Commission publishes results of evaluation of EU State aid rules (available here: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2008).

68 See Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n. 5).

69 See Communication from the Commission, Temporary Framework of 8 April 2020 (n. 3), para. 13.

70 See European Commission, press release IP/21/2094 of 6 May 2021, Antitrust: Commission publishes findings of the evaluation of rules on horizontal agreements between companies (available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2094).

71 Ibid.

60 See Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020 (available here: https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf).

61 See https://ec.europa.eu/competition-policy/consumers/state-aid-time-coronavirus-pandemic_en.

62 See <https://www.gov.uk/government/speeches/jonathan-scott-keynote-speech-to-the-law-society-2021>.

63 See interview with Andreas Mundt conducted by C. Herwartz, T. Stiens, J. Olk and K. Stratmann, *Monopolisten wachsen nach*, *Handelsblatt*, 26 August 2021, pp. 8–9.

36. It is noteworthy that the European Commission made no specific reference to the experience of the pandemic in announcing the upshot of its consultation on the Horizontal Guidelines.

37. However seismic the pandemic's effects have been on the world, it seems likely that developments such as digitalization (itself heavily impacted by the pandemic) and sustainability may over time have at least as much impact on competition law's treatment of cooperation agreement.⁷² But there are also lessons from the pandem-

ic in at least two respects. Limited duration cooperation agreements between competitors for specific purposes of benefit to society and the economy could be encouraged by governments, and competition authorities could expand the use of guidance instruments including business review and comfort letters. This might encourage cooperation between companies with the expertise needed to address the climate change, income inequality, medical and other challenges our world faces. ■

⁷² See Inception Impact Assessment, published in June 2021 (https://ec.europa.eu/competition-policy/system/files/2021-06/HBERs_inception_impact_assessment.pdf), which does not mention COVID-19; public consultation started on 13 July 2021, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13058-Horizontal-agreements-between-companies-revision-of-EU-competition-rules_en.

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