

Sustainability and competition law: A mésalliance or a force for good?

Competition regulators around the world have adopted common-sense approaches for companies seeking to cooperate in allaying the worst impacts of the coronavirus outbreak. Could these responses provide a template for aligning long-term environmental and sustainability goals in the future?

Competitor collaboration: From combatting COVID-19 to the climate crisis

Competition regulators worldwide have over the past months demonstrated their capacity to act quickly and decisively and assist efforts to allay the worst impacts of the coronavirus outbreak. Common-sense approaches have been adopted for companies seeking to collaborate in tackling the virus—but could these responses provide a template for a future approach to cooperation to achieve environmental and sustainability goals? **Jacquelyn MacLennan, Mark Gidley, Kathryn Mims and Kate Kelliher** discuss.

Competitor collaborations: The orthodoxy

Coronavirus is now a “known unknown,” to paraphrase Donald Rumsfeld. It has become a fact of life, but the continued effects of the virus globally are wholly unpredictable.

What has certainly become clear in the last few months is that in addition to fast and clear governmental decision-making, the actions of the private sector—PPE producers, medical suppliers, vaccine developers as well as supermarket operators and food distributors—are all central to maintaining public health and safety, and ultimately to supporting economic recovery.

Competition regulators, including the European Commission and US Department of Justice Antitrust Division (Antitrust Division) and Federal Trade Commission (FTC), have recognised that collaboration between competitors may be an effective means of addressing some part of the fallout from this systemic global threat. However, competitor collaboration ordinarily comes with high competition law risk.

The European approach

In the European Union (EU), the European Commission and national competition authorities are highly suspicious of any activity that brings competitors into contact. This principle is written into EU law: Article 101(1) of the Treaty on the Functioning of the EU (TFEU) prohibits agreements and practices between competitors that could do harm to competition.



For a long time, it can seem as though things are barely moving. And then suddenly, a new beginning transforms our beliefs about what is possible.

*Margrethe Vestager,
Executive Vice-President, European Commission*

However, Article 101(3) of the TFEU, recognises that some otherwise restrictive agreements or practices may be permissible, if they lead to improvements or efficiencies in the market or to promoting technical or economic progress. This is provided they allow consumers a fair share of the resulting benefit, and do not impose restrictions that are not indispensable or that eliminate competition for a substantial part of the products involved.

Yet competition law has changed (unsurprisingly) in the almost 20 years since self-assessment of companies' compliance with the agreements and practices in Article 101(1) was introduced. It has become, intentionally, far

more economics-focused. This brings additional flexibility, but at the cost of predictability.

Article 101(1) includes an ‘ancillary restraints’ doctrine which recognises that certain restraints do not restrict competition if they are required to protect parties’ legitimate interests—but it remains unclear to what extent this doctrine can provide a defence to an otherwise illegal agreement.

The European Commission has interpreted the phrase ‘consumer benefit’ in Article 101(3) fairly narrowly. It assumes that the promotion of technical or economic progress should be understood to mean ‘resulting in short-term economic growth’ and that consumer welfare ‘efficiencies’ refers to economic benefits to the consumer, such as lower prices or wider choice.

The achievement of sustainability objectives, including environmental benefits, leading to overall or longer-term public good or societal welfare, is not necessarily captured by these interpretations. Indeed, the incremental benefits of sustainability initiatives may only be realised by consumers decades after a measure is initiated.

The question remains whether an agreement between parties can demonstrate sufficient price benefits for consumers in order for the companies involved to feel comfortable that the agreement merits exemption under Article 101(3).

Given the Commission’s movement towards detailed economic scrutiny and increasingly high fines for



1957

The text of Article 101 was introduced in the Treaty of Rome

infringements, and the likelihood of private damages actions following from any regulator's condemnation, most companies are reluctant to engage in any practice approaching cooperation with competitors—no matter how worthwhile the objectives. While Commission guidance has elaborated on what is *not* allowed under Article 101(1), it is much less clear on the circumstances where an agreement *will* be considered to have sufficient consumer benefits to benefit from the Article 101(3) exemption.

The US experience

US antitrust laws recognise many collaborations among competitors and with customers and suppliers as pro-competitive and perfectly lawful. The US benefits from 130 years of Supreme Court case law and accumulated experience that has created some reliable guidance as to what constitutes pro-competitive behaviour.

However, some kinds of collaborations—such as price-fixing, bid-rigging, or market or customer allocations—are always illegal. Other types of coordinated behaviour with anticompetitive effects may be unlawful under a rule of reason evaluation, the agencies will consider potential pro-competitive benefits, anti-competitive harms and overall competitive effects when they are analysing competitor collaborations under the rule of reason. Pro-competitive benefits include lower prices, higher quality, more efficient business practices, new research and development, meeting unmet needs, or faster innovation and market introduction. Anti-competitive effects include higher prices and reduced innovation.

Generally speaking, even when collaborating in conjunction with governmental agencies, conduct would only be immune from antitrust scrutiny if the action is compelled by an agreement with the federal government or a clearly defined federal policy; and if the agency supervised the private party's actions. Several recent cases have attested to this.

Accordingly, while some competitor collaborations are permissible, businesses should take care to follow the agencies' guidance and general antitrust principles when working together, or risk facing enforcement action. Understandably,



130 years

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because the consequences of treble-damage consumer antitrust class actions or adverse governmental antitrust enforcement actions for anti-competitive behaviour can have a chilling effect on companies considering engaging in coordinated behaviour; obtaining clarity of government enforcement intentions is quite valuable.

Collaborating companies that seek clarity about whether their planned business activity is legal under antitrust laws can ask the agencies to provide a statement of current enforcement intentions, advising whether they would challenge the proposed conduct as anti-competitive, by requesting a business review letter.

After reviewing all information submitted by the parties, the Antitrust Division or FTC will issue a business review letter either stating that it does not intend to take enforcement action (known as a 'No Action' letter), or that it declines to currently advise on its intentions, or that it will probably challenge the conduct. Normally, this process takes several months and often involves the production of significant numbers of paper documents.

While a No Action letter does not prevent the Antitrust Division from bringing a later civil or criminal enforcement action, it can still provide a very substantial level of antitrust protection for companies who adhere to the guidance given. For example, the Division has never brought a criminal enforcement prosecution after issuing a No Action letter, and past cases have shown that a No Action letter can be strongly persuasive to courts in finding that the described conduct does not violate antitrust law.

Enter COVID-19: A new test for competitor collaboration rules

The COVID-19 pandemic has tested the way competition law operates around the world as regulators seek to ensure that competition law rules have not been a barrier to efforts to address the virus and assist recovery.

In the field of competitor collaboration, the European Commission published a temporary framework for assessing possible cooperation projects. This acknowledges that cooperation between competitors may help to address the shortage of essential products and services that the outbreak has caused.

The framework makes it clear that DG Competition is willing to provide informal 'comfort letters' to cooperating competitors who are concerned about compliance. This seems to recognise the legal risk associated with the self-assessment model, and is a return to the way things worked before 2004. Further informal guidance is also available through a dedicated webpage and mailbox.

The Commission has not been alone in recognising the value of making it easier for competitors to collaborate during the pandemic. In the UK, the Competition and Markets Authority has provided specific guidance on the types of collaboration that will be permitted. The UK's efforts have also included specific legislative orders to enable cooperation between grocery vendors, dairy suppliers, healthcare providers and ferry companies.

In Germany, the Bundeskartellamt announced its support for the Association of the Automotive Industry's plans for overcoming the pandemic, which include information-sharing and coordinated production plans.



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Systemic risk requires a systemic response and cooperation between companies has the potential to effect real change

The Authority for Consumers & Markets (ACM) in the Netherlands has specifically enabled cooperation and coordination between hospitals, hospital pharmacies, wholesale pharmaceutical suppliers and health insurance providers. Norway, meanwhile, has temporarily exempted certain airlines from the Norwegian equivalent of the Article 101(1) prohibition to allow them to coordinate for the provision of air transport.

In the US, the antitrust agencies have taken significant steps to encourage appropriate COVID-19-related collaborations. Firms seeking to work together in response to the pandemic may now request an expedited response to a business review letter, to which the agencies will respond within a record seven calendar days. Where companies previously had to wait months for advice, for COVID-19-related coalitions, the agencies are now providing rapid assurance to cooperating firms.

Parties may also submit their request and all enclosed documents via email to a dedicated COVID-19 inbox, making submitting business review letter requests substantially easier than the former process, which required paper copies.

The Antitrust Division has already issued several No Action letters under this new process, demonstrating its commitment to encouraging collaborations in aid of pandemic relief. It has even issued No Action letters after cooperation between parties had begun, signalling that, under the new COVID-19 policies, businesses no longer have to wait for the Antitrust Division's blessing before starting their collaboration.

In addition, the US Secretary of Health and Human Services has been empowered to initiate negotiations among direct competitors to conclude voluntary agreements to address the pandemic that will be immune from competitor collaboration rules.

All of these measures invariably require that cooperating entities

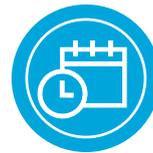
refrain from any behaviour that constitutes non-essential collusion for the purposes of distorting competition. Companies can demonstrate their compliance with this by, for example, agreeing to prohibit any discussion of pricing or future strategy in their collaboration.

A template for a sustainable future?

Looking beyond COVID-19 to the other threats to our future, it is evident that competitor collaboration is only one weapon in a great arsenal of options that will be needed to face a threat as pervasive and systemic as the climate crisis, and to realise the UN Sustainable Development Goals (SDGs) that are needed to address this and other fundamental global issues.

Nevertheless, cooperation between companies has the potential to effect real change. Systemic risk requires a systemic response and companies' understandable reluctance to engage in collaborative efforts for fear of first-mover disadvantage will inevitably hinder innovation. The coronavirus outbreak has demonstrated that competitor collaborations can be beneficial, and also that competition regulators can be flexible and show both dynamism and common sense when faced with a sufficiently serious threat.

The reaction to COVID-19 could well provide a template for an approach to sustainability-justified competitor cooperation, and the flexibility shown by antitrust regulators is encouraging. The European Commission, for example, has demonstrated an implicit recognition that the approach to assessing the effects of potentially restrictive agreements and their benefits for technical and economic progress and for consumers can evolve beyond pure economic welfare considerations to include environmental, social and societal objectives.



2030

The deadline for achieving the UN Sustainable Development Goals (SDGs)

That is not to say that the pandemic has provided a pre-packaged solution that can be perfectly transposed to help achieve sustainability goals. Regulators' efforts so far were necessarily reactive to the particular nature of the COVID-19 crisis, and nominally temporary. The immense challenge of climate change and the commitment made by many companies to work meaningfully to achieve the UN SDGs require a pre-emptive, more permanent solution.

In Europe, the Commission has now at least recognised in the coronavirus context that self-assessment does not provide sufficient legal certainty for companies seeking to develop and implement novel ideas requiring cooperation and cost-sharing with other competitors. The return to a comfort letter procedure is not a panacea, as there is unlikely to be sufficient administrative capacity to handle the number of requests the Commission could expect to receive. However, it is at least a starting point, and could be extended to provide a way for companies to protect themselves, particularly for novel or for reaching initiatives.

At the very least, concrete guidance is needed from the Commission and other competition authorities on how they will treat agreements and practices which are put in place for environmental or sustainability purposes. Agreements among competitors to develop and adhere to high environmental or welfare standards, or information-sharing mechanisms to reduce environmental impacts should not fall at the hurdle of competition law, nor should companies be able to point to competition restrictions, a justification for failure to move on green or other sustainability initiatives.

Explicit direction on how the wider societal benefits of cooperation agreements will be assessed is necessary, including detail on the kind of evidence that will be required to demonstrate the benefits of an initiative for it to be permitted under Article 101(3). This involves a movement away from a strictly economic review of consumer welfare towards a more holistic understanding of the concept.

The Commission recently began a review of its horizontal cooperation guidelines and the two exemptions currently in place for certain research and development and specialisation agreements. This is an ideal opportunity for a full-scale review of the current landscape.



Every crisis is an opportunity. The silver lining of the COVID-19 outbreak might be the accelerated adoption of a new approach by regulators to competitor collaborations

A block exemption covering certain sustainability-focused agreements would provide companies with the kind of practical, legal certainty on collaborative initiatives they need, while also leaving scope for self-assessment and the possibility for comfort letters to be sought in exceptional circumstances for something falling outside the block exemption guardrails.

The Netherlands is leading the way on adapting its rules on competitor collaboration to take account of sustainability initiatives. The Dutch ACM began a consultation in July 2020 on draft guidelines on sustainability agreements, in the wake of a few high-profile instances of apparently laudable initiatives being struck down under competition law—notably cooperation between supermarkets and meat producers over enhanced animal welfare conditions for the production of chicken meat in 2015.

The ACM guidelines provide examples of the kinds of sustainability agreements that will not fall under the prohibition in EU law and its equivalent Dutch legislation. The draft guidelines also provide some guidance on the assessment of agreements that would normally fall foul of the Article 101 prohibition, but which include certain sustainability efficiencies potentially giving rise to an exemption under Article 101(3). Crucially, they also make clear that the ACM will not impose fines for those initiatives if they later are found to have led to an infringement provided participants have followed the guidelines in good faith.

Encouragingly, the ACM proposes that the assessment of agreements will not be limited to the relevant parties' customers exclusively, but can also entail a review of the

societal sustainability benefits that these agreements may produce and that this assessment can be qualitative rather than quantitative in certain circumstances (e.g. where participants have a combined market share below 30%).

In the US, the encouragement of competitor collaborations to combat the pandemic has been narrower. There is currently no indication that the updated COVID-19 guidelines from the US antitrust agencies will apply to competitor collaborations relating to sustainability or climate change; the agencies specifically limited their guidance to joint efforts 'to address the spread of COVID-19 and its aftermath.'

Otherwise, US antitrust laws do not provide any special treatment for collaborations concerning sustainability. In an Article for USA Today published last September, the Assistant US Attorney General responsible for overseeing the Antitrust Division, Makan Delrahim said "laudable ends do not justify collusive means" and "antitrust laws should not render judgement on the 'moral' aspirations behind the conduct."

But if other global concerns were to emerge as national crises on par with this pandemic, the US agencies could conceivably issue similar guidance as issued with respect to COVID-19 collaborations to encourage joint responses to future emergencies.

Every crisis is an opportunity. The silver lining of the COVID-19 outbreak might be the accelerated adoption of a new approach by and other competition regulators globally to competitor collaborations aimed at meeting the challenge of climate change and achieving the UN SDGs by 2030.

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