

### Antitrust law in times of of the Corona pandemic

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The Corona crisis (SARS-CoV 2/Covid-19 pandemic) has changed economic life in Germany and all over the world with immediate impact. Supply chains have been interrupted, employees are working largely from their homes and some businesses and production facilities are closing down completely. This poses considerable challenges for executive board members and managing directors. Even, and especially in this state of emergency, they have to fulfil their legal duties and must comply with antitrust laws.

#### 1. Antitrust laws generally continue to apply unchanged

Antitrust laws continue to apply in the Corona crisis. The Corona crisis should therefore not be understood as a "carte blanche" for restrictive practices and agreements.

The American Department of Justice (**DOJ**) has even explicitly warned against cartel agreements during the Corona crisis. The European competition authorities have issued a joint statement within the European Competition Network (**ECN**). In the statement, the competition authorities assure that they will interpret competition law flexibly and in the light of the crisis. The International Competition Network (**ICN**), the most important association of competition authorities worldwide with 140 competition authorities from 129 countries (including Germany), reacted similarly in a separate statement. The competition authorities are aware that the Corona crisis makes the formation of temporary cooperation agreements economically indispensable in many areas.

#### 2. Cooperations and joint ventures may be permitted under certain circumstances

In principle, antitrust law permits the formation of co-operations that ensure the more efficient distribution of goods and thus strengthen competition.

Especially in the current crisis situation, joint ventures between businesses should be permissible if the businesses involved are not (or no longer) able to meet a specific demand on the market on their own. Such a situation could arise particularly if there is a lack of personnel or financial difficulties.

Other permissible cooperations are those for the purpose of efficient supply of goods that are necessary for the citizen supply (in particular food as well as pharmaceutical and medical products). For example, the joint organisation of storage and logistics work by competitors should be permissible, if supplying citizens with these goods cannot be guaranteed otherwise. This includes also permitting the exchange of information connected with the organisation of the warehouse or logistics between the competitors.

Moreover, joint research and development should also be allowed in the form of joint exploitation.

The joint reduction of production capacity is likely to be problematic. This usually constitutes a restraint of competition and each business should decide for itself about the reduction of capacity and not collectively try to "eliminate" competition on the market. However, the coordinated reduction of production capacity could be necessary and permissible from a competition point of view if an industry has been severely affected by the crisis and at the same time the reduction of capacity is necessary so that small and medium-sized enterprises (**SMEs**) can remain on the market after the crisis. Otherwise, a (potential) failure of such SMEs would result in fewer competitors remaining active on the market after the crisis, thus worsening the competitive situation.

### 3. Prohibition of abuse and in particular of price abuse

The provisions on abuse control (§ 18 *et seq.* of the German Act against Restraints on Competition (**ARC**) and Art. 102 of the Treaty on the Functioning of the European Union (**TFEU**)) also still apply and, in the current situation, protect in particular SMEs from businesses with a dominant or strong market position.

In particular, businesses with a dominant or strong market position are prohibited from charging abusively excessive prices. However, it is very difficult to determine when this is the case, since the Corona crisis is a unique situation that has no historical economic comparison.

For this reason, many cartel authorities in Europe have organised so-called task forces to deal with the particularities of the Corona crisis. In particular, in the joint ECN and ICN statements, the competition authorities signalled that they will under no circumstances tolerate the enrichment of companies as a result of the Corona crisis, and will examine all situations in which there could potentially be an abusive price increase or other unlawful restraints of competition.

However, in this context it is made clear that not every price increase during the Corona crisis is abusive. In particular, objective reasons could lead to a price increase and thus justify it - e.g. loss of suppliers in the supply chain, late delivery of raw materials, short-term bottlenecks, short-term procurement of materials at a higher price, short-term hiring of new employees, etc. This (non-exhaustive) list of the potential reasons for the price increase should show that price increases, even in the case of businesses with a strong market position, are not prohibited *per se*, but depend on a case-by-case assessment.

In connection with potential abusive price increases at the wholesale/retail level, the competition authorities expressly point out that manufacturers of goods are permitted under the antitrust laws in the EU to contractually fix a maximum selling price (at least during the Corona crisis) for the resale of goods.

### 4. European Commission hotline and other authorities

The current crisis has led to the need for certain types of cooperation in the form of joint ventures and working groups. Nevertheless, some types of cooperation could possibly give rise to antitrust concerns. In order to dispel such concerns in the context of the Corona crisis, a large number of antitrust authorities (including the German *Bundeskartellamt*) have openly communicated that the doors of the antitrust authorities should remain open and that businesses should contact the respective antitrust authority if there is uncertainty about the legal permissibility of certain economic cooperations under antitrust laws. The competition authorities - as communicated in the ECN and ICN statements - are prepared to clarify such ambiguities and uncertainties with the businesses concerned as quickly as possible and provide binding legal information and clarification.

The European Commission has also set up a special e-mail hotline (for cases with EU dimensions) to provide legal certainty for businesses, at:

[COMP-COVID-ANTITRUST@ec.europa.eu](mailto:COMP-COVID-ANTITRUST@ec.europa.eu)

The Commission has also published on its own website a number of guides in the past, which are a further support for businesses when assessing antitrust issues.

### 5. Conclusion

In the current special situation of the Corona pandemic, management has certain freedoms offered by antitrust law, especially regarding cooperation for the purpose of securing supplies. Nevertheless, antitrust law remains applicable and the cooperations that businesses agree on amongst themselves must be for the purpose of overcoming the crisis and for reasons of efficiency, and not for the purpose of restricting competition.

## Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Vorname Nachname on +49 123 456789-11 or by email to [jsonnenschein@goerg.de](mailto:jsonnenschein@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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