



International  
Competition  
Network



## **ICN Cartel Working Group**

### ***“Horizontal Cooperation and Crisis Cartels at times of COVID-19” Project***

### **Interim Report**

Presented at the 21<sup>st</sup> ICN Annual Conference  
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## Foreword

At the outbreak of the COVID-19 pandemic, the global economy faced supply chain disruption and a significant drop in consumer demand. For example, a global shortage of personal protective equipment (PPE) such as hospital gowns, gloves, surgical masks, and respirators caused policymakers around the world to panic. Manufacturing and chemical companies have faced sagging demand, supply disruptions and potential plant closures, with an impact on wholesale and retail prices. Air and transport companies around the world have been hit hard by a significant drop in demand for freight and passenger services.

The economic consequences of the COVID-19 pandemic has required swift and sometimes non-traditional government actions to keep markets and the economy functioning. To do so, jurisdictions undertook some extraordinary measures, including those limiting competition and enabling horizontal agreements generally prohibited under normal economic conditions.

On April 8<sup>th</sup>, 2020, the Steering Group of the International Competition Network (ICN) issued a [statement](#) addressing key considerations related to competition law enforcement during and after the COVID-19 pandemic. The statement recognizes this extraordinary situation as a factor that 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. For this reason, it recognizes the ability of competition agencies to evaluate and consider good faith efforts and a degree of collaboration among competitors, while remaining vigilant against conduct which is a cover for anti-competitive collusion.

Following the ICN Chair invitation to discuss the implications of the health and economic emergency stemming from the coronavirus pandemic, the Cartel Working Group (CWG) decided to undertake in 2020 a new multiyear project on “Horizontal Cooperation and Crisis Cartels at times of COVID-19”. This Project is aimed at exploring the challenges faced by competition authorities in a) ex-ante assessing horizontal cooperation projects that are deemed to be essential to face the emergency of the COVID-19 pandemic and b) ex-post detecting and assessing the so-called “crisis cartels”, that is, cartels that might emerge as a response to alleviate the economic shocks brought about the pandemic.

Based on discussions held through ICN webinars and input from members and Non-governmental Advisors (NGAs) of the CWG during 2020-2021, the CWG has prepared this interim report focusing on the first part of the project, i.e., the assessment of horizontal cooperation projects.

In 2022-2023, the Project will focus on crisis cartels at times of COVID-19, addressing also anticompetitive conducts in global or supranational supply chains, vis-à-vis rising prices of certain inputs and increasing costs of distribution.

April 2022  
The CWG co-chairs (Italy’s AGCM and Chile Fiscalía Nacional Económica)

# Part I - The assessment of horizontal cooperation agreements at times of COVID-19

## 1. Introduction

Part I illustrates the main features of the policy statements and guidelines released by competition agencies with respect to horizontal cooperation during the health emergency. It also gathers public information about their application and the informal guidance to specific cooperation projects with a view to highlighting similarities/differences and trends (if any) in the approaches with respect to both substantive assessment and procedural aspects.

Part I is organised as follows. Section 2 provides an overview of the agencies' policy statements and guidelines issued during the COVID-19 outbreak, outlining the main elements such as the types of cooperation allowed, the sectors involved as well as the safeguards introduced to limit the risks for competition in the medium and long term. Section 3 describes the experiences of those jurisdictions which introduced block or sector exemptions. Section 4 contains some concluding remarks.

## 2. Guidelines and policy statements on the compatibility with competition law of horizontal cooperation in response to the COVID-19 emergency

In the aftermath of the COVID-19 outbreak, several international organizations and regional networks of competition agencies issued policy statements to provide guidance to their member agencies on the role of competition policy<sup>1</sup>. Similarly, in recognition of the extraordinary circumstances, competition authorities issued policy statements and general guidance in order to reduce legal uncertainty for businesses willing to undertake temporary horizontal cooperation projects aimed at tackling supply and shortage issues for essential products and services. Such horizontal cooperation projects would not be considered problematic under competition law or, alternatively, would not be an enforcement priority if certain safeguards are in place, described in section 2.2. All competition agencies that issued general guidance have also offered to provide informal guidance on specific collaboration projects in a more expeditious way compared to ordinary procedures.

Table 1 below offers a non-exhaustive overview of the policy statements and guidelines published by ICN members, whose main characteristics are described in the following paragraphs<sup>2</sup>.

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<sup>1</sup> Joint statements on the application of competition policy during the COVID-19 pandemic have been issued by regional networks or forums of competition agencies such as: [ACF](#) (African Competition Forum), [ASEAN](#) Experts Group on Competition, [BRICS](#) (Brazil, Russia, India, China and South Africa), [CARICOM](#) (Caribbean Community) and [ECN](#) (European Competition Network - European Union).

<sup>2</sup> A short description of the policy statements and guidelines issued by competition agencies around the world can be found in: Anderson, D. & Apfel, P. [Maps & COVID-19: The global impact of COVID-19 on competition law enforcement](#), e-Competitions Special Issue Competition Law & COVID-19, 23 July 2020 (with the Map available [here](#)) and Latham & Watkins LLP [Impact Of COVID-19 New Exemptions Under Antitrust Law](#), February 2021.

**Table 1 – Overview of policy statements and guidelines on horizontal cooperation at times of COVID-19 emergency**

	Country	Policy statement or guidelines	Focus sectors or products
1	Austria	<a href="#">Policy Statement</a>	Health sector
2	Barbados	<a href="#">Guidelines</a>	General
3	Brazil	<a href="#">Guidelines</a>	General
4	Bulgaria	<a href="#">Policy Statement</a>	General
5	Canada	<a href="#">Policy Statement</a>	General - products and services critical to Canadians
6	Channel Islands	<a href="#">Policy Statement</a>	General
7	Chile	<a href="#">Policy Statement</a> (in Spanish)	General
8	Colombia	<a href="#">Policy Statement</a> (in Spanish)	General
9	Costa Rica	<a href="#">Guidelines</a>	General
10	Czech Republic	<a href="#">Policy Statement</a>	General
11	Dominican Republic	<a href="#">Policy Statement</a> (in Spanish)	General
12	European Union	<a href="#">Guidelines</a>	General - essential scarce products and services
13	Finland	<a href="#">Policy Statement</a>	Health sector, mainly medicines and medical equipment
14	Greece	Policy statements ( <a href="#">1</a> & <a href="#">2</a> )	General
15	Hong Kong	<a href="#">Policy Statement</a>	General
16	India	<a href="#">Policy Statement</a>	Essential products (medical and healthcare products) and services (logistics, testing)
17	Italy	<a href="#">Guidelines</a>	Health sector, pharma (medicine and medical equipment) and the agri-food sector
18	Indonesia	<a href="#">Guidelines</a>	Public procurement of goods in the health and pharma sector and distribution of social assistances and social safety nets
19	Lithuania	<a href="#">Policy Statement</a>	General
20	Luxembourg	<a href="#">Guidelines</a> (in French)	General
21	Japan	<a href="#">Policy Statement</a> (In Japanese)	General
22	Mauritius	<a href="#">Policy Statement</a> and <a href="#">Guidelines</a>	General
23	Mexico	<a href="#">Policy Statement</a>	General
24	Netherlands	<a href="#">Policy Statement</a>	General
25	New Zealand	<a href="#">Guidelines</a>	General
26	Peru	<a href="#">Policy Statement</a> (in Spanish)	General
27	Romania	<a href="#">Policy Statement</a>	General, in particular <a href="#">medicines</a>
28	Russia	<a href="#">Policy Statement</a>	Essential goods like medicines, medical products and food.

29	Singapore	<a href="#">Guidelines</a>	General
30	South Africa	<a href="#">Policy statement</a>	Essential products in particular some food, healthcare and hygiene products
31	Spain	<a href="#">Policy Statement</a>	General
32	United Kingdom	<a href="#">Guidelines</a>	General
33	United States	<a href="#">Policy Statement</a>	Health sector
<i>Source: competition agencies' websites and references in footnote n. 2</i>			

## **2.1 Main elements: sectors and forms of cooperation**

While the majority of policy statements and guidance is applicable to the distribution of essential products and services and to the economy in general, several competition agencies have focused their attention on the supply chains and sectors mostly affected by the COVID-19 outbreak, for example medical equipment, pharmaceuticals, the agri-food sector and the retail sector for consumer goods.

In some instances, competition agencies have provided examples of the cooperation between competitors that would not attract scrutiny. These examples point to the importance of ensuring that the production and supply chain of raw materials, as well as distribution chains of essential products which had been disrupted by the global health-related crisis, are restored or maintained.

For instance, in their joint statement of March 2020, the ECN authorities specified that they will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. The guidelines of the **European Commission and Italy's AGCM**, under certain conditions, consider as unproblematic any form of cooperation initiatives aimed at: coordinating the transport and distribution of raw materials; identifying for which medicine or medical devices (or foodstuffs) shortage problems may arise; providing aggregated information on available production and capacity or on possible supply gaps; and increasing and 'optimising' production.

Other examples focus on new goods and services “generated” by the pandemic. For instance, **Brazil's CADE**, in its guidelines, has mentioned that companies may adopt collaborative measures to develop new products, particularly those related to the treatment of patients affected by the virus, or to mitigate the side-effects caused by it. **Singapore's Competition and Consumer Commission**, in its policy statement, mentioned cooperation projects in order to increase total production of COVID-19 testing kits or their components. **Luxembourg's Competition Council** included the delivery of food to vulnerable consumers as an example of the provision of new services. **US competition agencies** in their joint statement have recognised that standard development organizations and joint ventures might be necessary to expand capacity or develop new products or services during the pandemic. They have also reminded businesses that when collaborating on research and development, the resulting “efficiency-enhancing integration of economic activity” is typically procompetitive.

## 2.2 Main elements: safeguards

Competition agencies have envisaged safeguards to ensure that horizontal cooperation projects implemented during the COVID-19 pandemic do not generate risks for competition in the medium and long term, that is, that horizontal agreements allowed during the emergency phase of the pandemic would not provide the basis for the exchange of sensitive information or other cartel-like practices or for reducing incentives to compete. Such safeguards are necessary as the line between necessary cooperation and non-essential restrictions can become blurred.

Competition agencies have imposed severe limitations in relation to (i) scope/objectives, (ii) duration and (iii) means of cooperation<sup>3</sup>.

As for the **scope/objective**, competition agencies have clarified that the proposed collaboration must be in response and directly related to the COVID-19 situation: in other words, cooperation projects should aim to address issues caused by COVID-19 in respect of production, acquisition, and supply of essential goods and services in the given jurisdiction. The proposed collaborations should be necessary and not exceed what is strictly necessary to achieve legitimate objectives such as avoiding a shortage, ensuring security of supply or any other benefit to consumers or the public interest.

As for **duration**, all guidelines and policy statements underlined the temporary nature of such collaborations that should not last longer than necessary.

In terms of the **means of cooperation**, hard-core restrictions such as price fixing or output reduction were typically not permissible. On the contrary, some competition agencies (e.g., European Commission) have explicitly required that the proposed collaboration must be designed (and objectively necessary) to actually increase output.

All three above safeguards are inspired by the principle of necessity and proportionality which dominate the policy statements and guidelines issued by competition agencies. Some of them have explicitly requested an exit clause in the cooperation agreements. For instance, New Zealand has stated that the collaboration should include an ongoing and regular review of whether the collaboration remains necessary, and a process for bringing the collaboration to an end when it is no longer required.

Competition agencies paid particular attention to the **issue of information exchange**. On the one hand, the exchange of aggregated information through an independent third party (on supply and demand) is not considered problematic if aimed at identifying potential shortages (e.g., see the guidelines of the European Commission and Italy); on the other hand, when cooperation entails the exchange of disaggregated and sensitive information, which generally raise competition concerns in normal times, some competition agencies (see, for instance, Italy and New Zealand) have shown a more flexible approach when the information exchange is strictly necessary to achieve the legitimate objective.

Some competition agencies have provided further guidance on this matter. New Zealand's Commerce Commission has stated that it would not expect businesses to be sharing commercially sensitive information on future pricing or business strategies unrelated to the

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<sup>3</sup> See also OECD Note "[Co-operation between competitors in the time of COVID-19](#)", 26 May 2020.

COVID-19 crisis<sup>4</sup>. In Brazil, restrictions on the access to the confidential information by cooperating companies continued to be prohibited, by forbidding the exchange of commercially sensitive information between competing companies, such as the customer database.

### *2.3 Other factors considered in the assessment*

Apart from limitations on scope, duration and means of cooperation, some competition agencies have introduced other factors to consider when deciding whether cooperation is not problematic under competition law or would not be an enforcement priority.

For instance, Mauritius and New Zealand have required that cooperation initiatives are “**inclusive**”, that is, open to all interested businesses. The Mauritius Competition Commission has stated that a request for an exemption is only to be considered if it is acknowledged by all parties to the proposed collaboration. New Zealand has explicitly indicated that cooperation projects should not exclude smaller or independent businesses from any efforts to co-operate or deny competing businesses access to goods or services. Japan has also made it clear that a company that forces another company to cooperate and obey its rules or treats a specific company in a discriminatory way is likely to be violating competition law.

Other competition agencies, like Brazil and New Zealand, have stressed how **transparency and good faith** from businesses could play an important role when assessing cooperation projects brought forward by companies. According to CADE, “[a] way to present good faith, when seeking the decision of the antitrust authority by any of the available means, is to provide transparency and present all documents and information that assist the authority’s provisional decision and prove the emergency and need for the strategy”.

The **support from other public institutions and regulators** is also a relevant factor in the assessment of cooperation. For instance, the European Commission has stated in its guidelines that “[t]he fact that a cooperation is encouraged and/or coordinated by a public authority (or carried out within a framework set up by the latter) is also a relevant factor to be taken into account to conclude that such cooperation would not be problematic under EU competition law or would not be an enforcement priority for the Commission”.

For New Zealand, a relevant factor in the assessment is also the extent to which a collaboration is supported by the government agency or agencies with relevant regulatory competences (including those responsible for relevant aspects of the COVID-19 response) or by affected parties, such as major suppliers and customers, end consumers, employees, or their representatives.

### *2.4 Procedural aspects*

Competition agencies have generally set up simpler and fast-track procedures aimed at providing timely guidance to businesses with respect to their intended collaboration during

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<sup>4</sup> <https://comcom.govt.nz/news-and-media/media-releases/2020/COVID-19-commerce-commission-approach-to-essential-goods-and-services-business-cooperation>.



the emergency phase of the pandemic. Some competition agencies have created a COVID-19 specific page on their website to gather all applicable regulations and guidance; some have set up dedicated taskforces to address all the queries and an ad-hoc functional mailbox to collect them.

In approaching competition agencies with their requests for guidance, businesses have been asked to provide key information about cooperation projects so as to allow expeditious assessment. Such key information generally would include a description of the scope, nature and duration of the agreements and their parties and an explanation of the intended benefits with respect to the disruptions brought about by the COVID-19 crisis.

For instance, the **European Commission** has envisaged that the request for guidance specify the following elements: (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 competition 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.

Similarly, the **Competition Bureau of Canada** requires a detailed description of the firms involved in the collaboration, the proposed scope and duration of the collaboration and how it is intended to achieve a clearly identified COVID-19 related objective in the public interest, i.e., an explanation of why the collaboration is necessary to meet this objective; moreover, it solicits a description of any guidance sought from relevant authorities on whether the collaboration contemplated will actually further Canada’s response to COVID-19.

The **US competition agencies** have required a description of the nature and rationale of the proposal (including the names of the participants, the product(s) or service(s) covered, and the temporal and geographic scope of the arrangement); any proposed contractual or other arrangements among the parties (including written evidence documenting the contract or arrangement), and the names of the major expected customers, and any available information regarding the competitive significance of other providers of the product(s) or service(s) to be offered.

The **Mauritius Competition Commission** has also requested parties to specify the role of each participant in the collaboration, in addition to the common elements mentioned above.

### *2.5 Examples of application of COVID-19 guidelines*

Table 2 below lists examples of guidance provided by some competition agencies with respect to collaborations and projects related to COVID-19 emergency. Some examples are further described in the following paragraphs.

**Table 2 – Examples of application of COVID-19 guidelines**

Country	Link to the relevant opinion/guidance
Brazil	<a href="#">Collaboration among Ambev, BRF, Coca-Cola, Mondelez, Nestlé and Pepsico</a>



European Union and Member States	<ol style="list-style-type: none"> <li>1. <a href="#">Comfort letter to Medicines for Europe</a> (8 April, 2020)</li> <li>2. <a href="#">Comfort letter coronavirus Matchmaking Event</a> (25 March 2021)</li> <li>3. <a href="#">Germany’s automotive industry crisis management measures (9 July 2020)</a></li> <li>4. <a href="#">Romania’s pharmaceuticals production, stock and distribution of medicines (April 2020)</a></li> <li>5. <a href="#">France on options of a professional association for dealing with its members’ rent (April 2020)</a></li> <li>6. <a href="#">Italy’s guidance to two associations of drugs distributors (May 2020) and to one association of financial institutions for consumer credit (May 2020)</a></li> <li>7. <a href="#">Netherlands’ guidance on health insurers to provide financial support to health care providers</a> (click also <a href="#">here</a> and <a href="#">here</a>)</li> </ol>
United States	<ol style="list-style-type: none"> <li>1. <a href="#">Expedite Business Review Letter to McKesson Corporation (“McKesson”), Cardinal Health, Inc. (“Cardinal”), Owens &amp; Minor, Inc. (“OMI”), Medline Industries, Inc. (“Medline”), and Henry Schein, Inc. (“Henry Schein”) (April 4, 2020)</a></li> <li>2. <a href="#">Expedite Business Review Letter to AmerisourceBergen Corporation (“AmerisourceBergen”) (April 20, 2020)</a></li> <li>3. <a href="#">Expedited Business Review Letter to National Pork Producers Council (“NPPC”) (May 15, 2020)</a></li> <li>4. <a href="#">Expedited Business Review Letter to Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK, (July 23, 2020)</a></li> <li>5. <a href="#">Expedited Business Review Letter to ecoHair Braiders Association (“ecoHair”) (October 27, 2020)</a></li> <li>6. <a href="#">Expedited Business Review Letter to Baxalta, Emergent BioSolutions, Grifols Therapeutics, and CSL Plasma (January 12, 2021)</a></li> </ol>
<i>Source: competition agencies’ websites</i>	

### Brazil

In Brazil, the companies Ambev, BRF, Coca-Cola, Mondelez, Nestlé and PepsiCo have entered into an agreement aimed at providing measures to foster the economic recovery of food and beverage small retailers in Brazil, through the project “Movimento Nós”. The companies voluntarily reported the agreement to CADE, which was not mandatory according to the emergency and temporary legal framework due to the COVID-19 pandemic.

The companies alleged to CADE that, with the pandemic outbreak, many establishments, particularly those related to the commerce and services sector, temporarily suspended their activities as a measure to prevent contamination. These measures had severe economic impacts on small and medium-sized retailers - which in Brazil comprises a significant portion of the distribution channels for consumer goods, such as beverages, food, personal care and household products - thus jeopardizing the survival of many of these companies. In this context, in the face of the protracted crisis, isolated actions would not have the capacity to produce effective results and on the scale necessary to assist commercial establishments to resume their activities.

The “Movimento Nós” aimed to promote actions in favor of small traders, through the granting of discount, credit, and differentiated payment conditions. On May 28, 2020,

CADE decided to authorize the collaboration among this group of competing companies<sup>5</sup>. CADE concluded there was a reasonable economic justification for the agreement, adopted on an emergency basis, as an exceptional measure, in order to overcome the adversities resulting from the crisis.

Moreover, CADE considered that the envisaged measures would not be classified as possible competitive illicit acts and would not violate the Brazilian competition law. Other than having a limited term to be in force, the agreement does not include the coordination of commercial initiatives, which shall be established and implemented individually by the companies without any interaction between the participants of the initiative. The activities also do not involve the exchange of competitively sensitive information between the parties, as for instance, customer databases between companies. In addition, the fact that the parties voluntarily reported the agreement to CADE was also viewed as positive.

Therefore, CADE ruled favourably to “Movimento Nós” based on the following assumptions: i) the participating companies individually would not be able to support retailers in the scale necessary to resume their activities; ii) the collaboration agreement was temporary; iii) the exceptional nature of the economic scenario, and the causal relationship between the crisis and the intended cooperation; iv) an extension of the agreement should be communicated to CADE in advance for its assessment; v) the agreement did not involve coordination of commercial initiatives, which were established and implemented individually by the companies and without any interaction between the competitors; vi) the activities carried out by the “Movimento Nós” did not involve the exchange of competitively sensitive information between the parties (price policy, customer databases, lists of strategic suppliers, etc.); and, vii) the collaboration agreement would generate market efficiencies and promote competition.

It is important to point out that this sort of agreement, accepted as a temporary measure, could have long-term effects that should have been considered for the decision. The parties informed CADE that the project cost around BRL 370 million and they achieved its socioeconomic objective by donating health kits (masks and alcohol gel) to around 300,000 small businesses, thus offering incentives for the resumption of activities, with an estimated direct impact to 1 million workers. The project had a limited term (from May to October 2020) and was extended for 30 days due to the size and the duration of the economic crisis, with prior notice to CADE.

### European Union

The European Commission’s Communication *Temporary Framework to provide antitrust guidance to companies cooperating in response to urgent situations in relation to COVID-19 pandemic* (“the [Temporary Framework](#)”) explains in detail the criteria that the Commission would use to assess cooperation aimed at addressing shortages of supply of essential goods and services. It also introduces a new, temporary tool allowing the Commission to provide adequate comfort for individual arrangements within a timeframe that is compatible with the urgency. The first such *ad hoc* ‘comfort letter’ was issued on the same day as the Temporary Framework (8 April 2020) to the European Generic Medicines Association “Medicines for Europe” addressing a specific voluntary cooperation project among pharmaceutical producers – both members and non-members of the

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<sup>5</sup> [Administrative Proceedings No. 08700.002395/2020-51](#)

association – that targets the risk of shortage of critical hospital medicines for the treatment of COVID-19 patients.

In issuing the *ad hoc* comfort letter, the Commission looked at the necessity for cooperation between undertakings (this need being supported by the Commission who invited pharmaceutical companies to cooperate to address the increased demand for those medicines)<sup>6</sup>. As recently as March 2021, the Commission issued an *ad hoc* comfort letter for cooperation at a Matchmaking Event aimed at upscaling production of COVID-19 vaccines<sup>7</sup>. Both *ad hoc* comfort letters were accompanied by a strict set of conditions, such as limiting the exchange of confidential information for the purpose set out in the *ad hoc* comfort letter, only allowing the use of aggregated data, requiring minutes for all meetings and copies of any agreements, available at the Commission's request.

Member States followed a similar approach. The Autorité de la Concurrence, in **France**, provided guidance to a professional association of opticians concerning an initiative to send a letter to a number of lessors to request an adjustment of its members' commercial rents. This cooperation did not raise any antitrust concerns as it was not in the association's intention to collectively negotiate on behalf of its members but only to offer general recommendations and legal and factual arguments in support of its members' requests.<sup>8</sup>

In **Germany**, the *Bundeskartellamt* issued a comfort letter to the German Association of the Automotive Industry addressing a framework in the automotive industry setting out conditions for restarting automotive production and a model for restructuring suppliers. In its letter, the *Bundeskartellamt*, provided a set of accompanying measures to ensure compliance with competition law: limiting the scope and the handling of data; requiring aggregation of data; limiting the duration of the agreement; requiring that individuals involved in negotiations do not participate in future sales negotiations with the relevant supplier for a limited period of time; and that at all times the suppliers maintain their right to self-determination<sup>9</sup>.

In **Italy**, the AGCM received a request for guidance on a cooperation initiative in the **financial sector** (cooperation initiative implementing the Guidelines of European Banking Authority on legislative and non-legislative moratoria on loan repayments in the context of COVID-19) and in the **pharma sector** (cooperation initiative to overcome the shortage of supply of masks). Taking into account the exceptional health emergency situation and the limited duration of the cooperation agreements, the AGCM considered that these agreements were unproblematic. In its reply related to the cooperation agreement in the financial sector, the AGCM indicated that the agreement should not involve direct or indirect exchange of sensitive information between businesses and invited the association to keep track of information exchanges which are objectively necessary and proportionate to achieving the aims of the agreement, so that such information can in future be made available to the Authority on request.

In **the Netherlands**, the ACM gave guidance on a cooperation initiative among health insurers to share the costs incurred as a result of the Coronavirus (COVID-19) outbreak. Taking into account the particularities of the health system in the Netherlands and the

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<sup>6</sup> [Comfort letter to Medicines for Europe \(8 April, 2020\)](#)

<sup>7</sup> [Comfort letter to Matchmaking Event \(March 2021\)](#).

<sup>8</sup> [France on options of a professional association for dealing with its members' rent \(April 2020\)](#)

<sup>9</sup> [Germany's automotive industry crisis management measures \(9 July 2020\)](#)

exceptional circumstances due to the COVID-19 crisis, the necessity of the proposed cooperation to avoid unwanted repercussions to the functioning of the health system and its temporary nature, the ACM decided that the planned cooperation did not give any reasons to take further steps.

In conclusion, the European Commission and the national competition authorities in the ECN have proved their ability to quickly guide and support undertakings and consumers in tackling the unique circumstances posed by the COVID-19 pandemic. Following their joint statement in March 2020, the ECN authorities provided coordinated responses throughout the pandemic to assist companies in shaping competition compliant schemes during the crisis. However, the willingness to assist and allow short-term cooperation did not come with a blanket approval, but was accompanied by a strict set of conditions and requirements.

### 3. Ex-ante authorization and exemptions

Other ICN members have used different mechanisms to deal with cooperation requests during the COVID-19 emergency (see **Table 3** below).

In some jurisdictions, the competition agency may grant an **ex-ante authorization** to a proposed cooperation agreement when it is content that the public benefit from the agreement outweighs any detriment to competition. This is the case of **Australia**, where the ACCC has granted interim authorization to several industry-wide cooperation projects. Such interim authorizations enable parties to engage in the proposed conduct while the ACCC makes a full assessment of the application for authorization (by also conducting a public consultation). When confirmed by a final determination made by the ACCC (which can impose conditions on the conduct), the ACCC authorisation provides statutory protection from court action for conduct that might otherwise raise concerns under Australian competition law.

**Table 3 – Sector/block exemption regulations for cooperation agreements at times of COVID-19**

Country	Sectors/companies exempted
Australia	Supermarkets (click <a href="#">here</a> and <a href="#">here</a> ) <a href="#">Hospitals</a> Supply and manufacture of <a href="#">medical equipment</a> Banks (click <a href="#">here</a> and <a href="#">here</a> ) <a href="#">Airlines</a> <a href="#">Internet service providers</a> Companies in the gas, electricity, and fuel sectors (click <a href="#">here</a> and <a href="#">here</a> ); supply of essential medicines (click <a href="#">here</a> and <a href="#">here</a> ); <a href="#">Private health insurance</a> Rental relief measures for SME tenants facing hardships (click <a href="#">here</a> and <a href="#">here</a> ); <a href="#">Mining companies</a>
Colombia	Transport sector, in particular cargo (click <a href="#">here</a> and <a href="#">here</a> )
European Union	Agricultural and food sectors affected by COVID-19, namely <a href="#">potatoes</a> , <a href="#">live plants</a> , <a href="#">milk</a> and <a href="#">wine</a>

Kenya	<a href="#">Manufacturing, private healthcare, aviation, travel &amp; hospitality, horticulture farming and export, and health research</a>
Iceland	<a href="#">Pharmaceutical, health, travel, and financial sectors</a>
Nigeria	<a href="#">Essential goods and services, health-care sector</a>
Norway	<a href="#">Transportation</a>
South Africa	<a href="#">Healthcare, banking, retail property, hotels</a>
United Kingdom	Grocery sector <a href="#">(1)</a> and <a href="#">(2)</a> <a href="#">Dairy produce, Solent ferries, England healthcare, Wales healthcare</a> (general information about the UK exclusion orders can be found <a href="#">here</a> )

Other jurisdictions have used the tool of **block/sector exemptions** from competition law, issued in some cases by the government (e.g., Colombia, Norway, South Africa and United Kingdom) and other cases by the competition authorities themselves (e.g., Kenya, Iceland and Nigeria).

In Colombia and Norway, governments have granted an exemption to the transport sector. In particular in **Norway**, a three-month temporary exception was granted to transportation of passengers and goods in Norway, in order to secure the population's access to necessary goods and services. Businesses wishing to rely on this exception are obliged to notify their practices to the competition agency. The exception was subsequently extended.

In **South Africa**, the Ministry of Trade, Industry and Competition, after consultation with the Competition Commission, approved a COVID-19 block exemption regulation for the following sectors: healthcare, banking, retail property and hotels.

Similarly, in the **United Kingdom** the government, after consultation with the UK CMA, has issued exclusion orders for health, groceries, dairy produce and sea transport to certain islands. In this case, to benefit from the exemption, notification to the Secretary of State is necessary. The dairy produce and the initial groceries exclusion orders were revoked respectively in September and October 2020. A second groceries exclusion order<sup>10</sup> came into force in January 2021 and expired on 29 July 2021<sup>11</sup>. The Solent maritime crossings order was revoked in July 2021, as were the orders covering health services for patients in England and Wales.

**Nigeria's Federal Competition and Consumer Protection Commission** has issued [guidelines](#) exempting categories of agreements or practices, recognising the importance of collaborations that involve agreements to engage in joint research and development.

In the **European Union**, the European Commission announced on 22 April 2020 several derogations from the EU competition rules to support the agricultural and food sectors

<sup>10</sup> [Competition Act 1998 \(Groceries\) \(Public Policy Exclusion\) Order 2020](#)

<sup>11</sup> [The Competition Act 1998 \(Coronavirus\) \(Public Policy Exclusions\) \(Revocations\) Order 2021 \(legislation.gov.uk\)](#)

affected by COVID-19, namely [potatoes](#), [live plants](#), [milk](#) and [wine](#). The measures allows operators to self-organise, to privately store aid for the dairy and meat sectors and implement market measures at their level for a maximum period of 6 months. The Commission also proposed to allow Member States to use rural development funds to compensate farmers and small agri-food businesses with amounts of up to €5,000 and €50,000, respectively<sup>12</sup>. On 7 July 2020, the European Commission adopted an additional package of exceptional measures to support the wine sector, allowing operators to temporarily self-organise market measures. The measures also include the increase of the EU's contribution for wine national support programmes, and the introduction of advance payments for crisis distillation and storage<sup>13</sup>.

The [block exemption guidelines](#) of the **Competition Authority of Kenya** (CAK) focus on sectors considered key for the economic recovery of the country: manufacturing, private healthcare, aviation, travel & hospitality, horticulture farming and export and health research. Furthermore, the CAK has provided indications of possible cooperation initiatives which are considered important not only for the emergency but also for the recovery phase (e.g., collaborations to boost the licensing and distribution of vaccines or to boost exports of farming products or tourism). Such block exemptions are valid for a period of two years but can be revised if there are major changes in the market that may warrant a review of the guidelines and/ or exit/expiry of the guidelines. The general principles underlying the block/sector exemptions are very similar to those issued by other competition agencies in their policy statements and guidelines (see section 2.2 above).

In **Iceland**, the sector exemptions granted by the competition agency concerned pharmaceutical, health, travel, and financial sectors, and envisaged a key role for sector regulators in monitoring collaboration in these sectors so that such oversight can lead to a more coherent and sensible response to the COVID-19 pandemic across markets.

### *3.1 Examples of ex-ante authorization or block/sector exemptions*

#### Australia

The Australian Competition and Consumer Commission (ACCC) has powers to give limited, competition law exemptions to businesses so they can collaborate if the likely benefits to the public outweigh the likely detriments from any potential lessening of competition. This power is called authorisation. Using this power, the ACCC granted authorisations to allow limited cooperation between competitors in the sectors most affected by the pandemic. These sectors included supermarkets, energy, telecommunications, hospital services, pharmaceuticals and banking.

Importantly, as mentioned earlier, the ACCC can grant authorisation on an interim basis before it makes a final determination on the proposed cooperative arrangement. In the wake of COVID-19, this allowed the ACCC to grant urgent, tailored exemptions with specific limits and monitoring mechanisms. This ensured necessary collaboration during the crisis did not have a permanent impact on markets and consumer welfare, and was of great benefit in Australia during the COVID-19 pandemic. Interim authorisations can be revoked at any

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<sup>12</sup> [Coronavirus: agri-food sector \(europa.eu\)](#)

<sup>13</sup> [New support measures for the wine sector \(europa.eu\)](#)



time if the arrangement is not delivering the expected net benefits, or if it is no longer necessary.

Australia's authorisation framework enabled an agile and measured response to business cooperation in the wake of COVID-19. It quickly enabled necessary collaboration between companies, and at the same time the ACCC had oversight of the arrangements. Authorisations provided confidence and certainty to businesses who engaged in essential cooperation without fear of repercussions, while also ensuring Australia's economy was not exposed to harmful effects of unduly broad or long-term anti-competitive conduct.

All authorisations granted by the ACCC are published on [its website](#). Examples of the types of cooperation permitted through interim authorisations in the wake of the pandemic include:

- Major Australian supermarkets [coordinating to ensure the supply and fair and equitable distribution](#) of retail products to consumers
- Private health insurers [coordinating on providing financial relief to policyholders during the COVID-19 pandemic, and broadening insurance coverage](#) to include COVID-19 treatment, tele-health and medical treatment provided at home.
- Medicine manufacturers [coordinating to support the supply of essential medicines](#) during the COVID-19 pandemic.

In April 2021 the ACCC [produced a report](#) on the use of authorisations in the wake of COVID-19.

### Iceland

The Icelandic Competition Authority played an active role in the immediate economic response to the COVID-19 pandemic in Iceland, in the early months of 2020, as it had the power to grant individual exemptions from the Icelandic Competition Law Act. The Authority opened a dedicated COVID-19 webpage, on its website, which included information and guidance for companies that were considering its response to the pandemic. During 2020, the Authority adopted numerous exemptions from the Competition Law Act. All the exemptions had certain conditions, for example they were limited in time, and the Authority included the relevant sector regulator, if applicable. In practice, this meant that the relevant sector regulator, or the relevant industry association was involved and to some extent monitored the execution of the cooperation which was subject to individual exemption. The Authority granted exemptions for horizontal cooperation in markets, for instance financial services, tourism, and transport of individuals and medicines.

### Kenya

In June 2020, the Competition Authority of Kenya (CAK) received information that an Association of Travel Agents (KATA) was recommending to its members a 'No Credit' policy to ensure business sustainability during and post COVID-19 pandemic. The adoption of this policy meant that travel agents ceased to extend credit facilities for travel to their customers. This would especially affect corporate companies, government agencies, non-governmental organizations, and traders who book for travel and pay over an extended



period of time. Noting the prevailing challenging economic times facing the travel industry at the time and given that this was a move by the Association to ensure their survival in the market, the CAK settled for a soft enforcement of competition law and issued a cease and desist order. The CAK advised KATA to ensure it retains the independence of members to negotiate and determine the credit period with their different clients and therefore create room for competition. Consequently, KATA reviewed their policy to ensure compliance with the competition law.

Further, in a bid to promote the economic recovery process post the pandemic, the Authority developed *Post COVID-19 Economic Recovery Block Exemption Guidelines (PCBEG)*. These guidelines (upon Ministry approval) are expected to run for a period of three years and are specifically intended to issue guidance to support the economic survival and required growth of specific critical sectors to sustain the continuous availability and accessibility of essential goods and services in line with the Government of Kenya's Economic Recovery Strategy. They define the forms of cooperation that benefit from the exemptions. They also explain the analytical framework the Authority may use in determining whether an undertaking qualifies for an exemption during the post COVID-19 period.

The specific sectors which the Authority exempts include manufacturing to allow collaboration between undertakings for the manufacture and distribution of specialized COVID related protective gear, medical equipment and consumables. The guidelines also allow private healthcare to collaborate in relation to procurement of various COVID-19 related consumables and pharmaceutical equipment such as diagnostics equipment, medicines and personal protective equipment, essential and emergency supplies to ensure that they are procured in an efficient manner. Additionally, the health research firms will benefit through collaboration towards acquisition and improvement of medical research laboratories for production of vaccines, diagnostics equipment and medicines. The guidelines have also cushioned the aviation industry by allowing collaborations between airlines to aid them to the path to economic recovery.

### Nigeria

On account of national public health concern (Coronavirus) and compliance with extant law, the Federal Competition and Consumer Protection Commission (FCCPC) of Nigeria, on March 1, 2020 (72 hours after the COVID-19 index case was confirmed and announced), issued a [statement](#) prohibiting unconscionable trade practices and price gouging by businesses. The Commission took [further steps](#) to prosecute offenders and businesses who were found to hoard critical and essential hygiene products and charge exorbitant prices for them.

Further, in April 2020, the FCCPC issues its *Business Guidance Relating to COVID-19 on Business Co-operation/Collaboration and Certain Consumer Rights Under the Federal Competition and Consumer Protection Act (FCCPA)*. This [Guidance](#) was to address the unprecedented challenge for businesses and consumers as well as the global and local economy.

The [Guidance](#) exempted a category of coordination or cooperation agreements or practices which would have typically been presumed to prevent, restrict or distort competition by companies or undertakings engaged in the supply of essential goods and services that have

been put under threat by the pandemic. In particular, it is worth noting that the [Guidance](#) exempted collaborations on joint research and development that might involve sharing of information on technical know-how.

### United Kingdom

Schedule 3(7) of the Competition Act 1998 allows the Secretary of State for Business, Energy and Industrial Strategy to exclude certain agreements from competition law where there exists an exceptional and compelling reason of public policy. During the COVID-19 outbreak, the UK government brought forward a series of exclusion orders that covered the healthcare sector, the groceries and dairy produce sector, and ferry operators operating in the Solent (the strait between the Isle of Wight and the mainland) in the south of England. The CMA also issued general guidance on how it would approach cooperation between businesses in response to the pandemic<sup>14</sup>.

The relevant Orders covering healthcare in England and Wales applied to certain agreements that aimed to help the National Health Service (NHS) deal with the impact of COVID-19<sup>15</sup>. The orders permitted agreements between one or more NHS bodies and one or more independent suppliers or an association of independent suppliers, or between two or more independent suppliers. Activities covered by the Health Service orders covered information sharing; coordination on staff deployment (covering both NHS and independent providers); the sharing or loaning of facilities; joint purchasing arrangements; and coordination on the provision of healthcare services.

Similar provisions covering information sharing, staff coordination and the sharing of facilities were covered in the groceries and dairy produce orders, which intended to alleviate supply chain pressures during the peak of the pandemic. The Solent maritime order allowed permitted collaboration (such as agreeing on routes and coordinating staff resourcing) between three ferry operators to help maintain key links for workers and patients between the Isle of Wight and the mainland, and to ensure transport of food, freight, and medical supplies to the island remained viable.

The CMA recognised that these exclusion orders had to be carefully managed and implemented: while the exceptional circumstances of the pandemic justified the temporary disapplication of competition law, the enhanced cooperation permitted by the orders risked becoming a potential platform for unacceptable collusion between firms. As such, the activities permitted were specifically and carefully set out within the orders, and the CMA provided advice and assistance to the government to ensure any risks were kept to a minimum. While it was clear that the pandemic's impact would last many months, the CMA was also aware that the risk of consumer detriment increased the longer that such orders were in place, and that the orders should be terminated promptly when no longer required.

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<sup>14</sup> CMA (2021) [CMA approach to business cooperation in response to coronavirus \(COVID-19\)](#).

<sup>15</sup> [The Competition Act 1998 \(Health Services for Patients in England\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2020](#) and [the Competition Act 1998 \(Health Services for Patients in Wales\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2020](#), respectively.

#### **4. Some considerations**

Competition authorities around the world have quickly reacted to the COVID-19 crisis by making it clear in public statements and guidance that collaborative activities between manufacturers, distributors, or purchasers (such as research and development, information exchanges, joint production or purchasing agreements) may be compatible with competition rules where basically two conditions are met:

- these collaborations benefit consumers by increasing output or overcoming disruptions in the supply chain of vital products and services (such as medication, medical equipment, transport, food, energy, and broadband);
- and they are limited in scope and duration to that really needed under pandemic conditions.