

# EU law in the time of COVID-19

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# Executive summary

The response of the EU institutions to the COVID-19 crisis has been criticised as too slow and inadequate. But there are legal limits on what the Union can do. Essentially, the EU institutions must act within the limits of the powers conferred on them by the Treaties—the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU)—and they must do so with due regard to the principles of subsidiarity and proportionality.

The powers ('competences') of the EU institutions relevant to COVID-19 fall into two broad categories: those where the Council and Commission could be **proactive** in taking steps to deal with cross-border problems of public health (both before and after the outbreak of the virus); and those where the Council, but especially the Commission, can **react** to measures taken by member states, or by companies or firms, in response to the virus.

A substantial range of measures have been put in place, before and after the outbreak, to **coordinate** the response to public health emergencies and COVID-19 in particular. These measures seem unlikely to give rise to contentious legal problems, unless a member state were to fail to offer support, or to engage with the necessary coordination required by EU law, in which event the issue might go to the Court of Justice.

The **'reactive'** powers of the institutions are more extensive, and potentially more intrusive. This is especially so in ensuring compliance with the rules of the Treaties and those of the internal market, which constrain the freedom of action of member states, companies and firms. The rules are subject to exceptions and derogations that are designed to achieve legitimate ends. There are tried and tested methods for determining whether the use made of these exceptions and derogations is legitimate, appropriate and proportionate. But these processes – rightly - take more time than a global pandemic allows.

In this paper, we deal with these problems in detail. Here are the main points:

- The COVID-19 emergency has caused unprecedented legal challenges to the EU institutions and the member states across a wide spectrum of areas.
- The powers of the EU institutions in the field of public health are limited in their scope and in the type of measures that can be taken. The legislature has made the most of its powers by adopting a wide range of measures, while in some cases finding the source of the power to act in the rules governing the functioning of the internal market.
- Within those limits, the Commission has adopted extensive guidelines to coordinate member states' efforts during the pandemic across and beyond matters related to the internal market.

- Within its competences, the EU has sought to unleash financial support to foster solidarity between member states.
- Part of the EU's response has consisted in relaxing existing rules, particularly in relation to free movement and competition law.
- As the threat of the virus (hopefully) diminishes, the EU institutions will have to monitor national governments' use of 'public health' as a justification for derogations from EU law. Invoking emergency powers may, in particular, have serious implications for the preservation of the rule of law.
- Member states are encouraging firms to work together—for example, on the distribution of vital products and services and research—notwithstanding the highly developed rules of EU competition law that prohibit sharing markets and know-how.
- Both the Commission and national competition authorities assure firms that cooperation is permissible because 'there are good reasons for it', but they don't explain how these 'good reasons' justify departure from the rules of a system that is notoriously resistant to justification (and one that, in truth, is not designed for the problems created by COVID-19).
- The penalties for transgression of the rules can be very high; promises from the administrative authorities to look benignly on collaboration cannot guarantee immunity, both because their promises lack reliable certainty and because they alone do not enforce the rules: competitors and consumers do so through the courts.
- EU rules on mergers and takeovers may be put to the test in the aftermath of the pandemic.
- The unprecedented sums already being spent and promised for future rebuilding of economies put the procedural and substantive EU rules on state aid under serious strain and threaten to destabilise the level playing field they are meant to protect.

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# Introduction

The response of the EU institutions to the COVID-19 crisis has been criticised as too slow and inadequate. But there are legal limits on what the Union can do, and it is important to spell out what they are. Essentially, the EU institutions must act within the limits of the powers conferred on them by the Treaties—the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU)—and they must do so with due regard to the principles of subsidiarity and proportionality.

The powers (‘competences’) of the EU institutions relevant to COVID-19 fall into two broad categories:

- those where the Council and Commission could be **proactive** in taking steps to deal with cross-border problems of public health (both before and after the outbreak of the virus); and
- those where the Council, but especially the Commission, can **react** to measures taken by member states, or by companies or firms, in response to the virus—possibly, in the long term, taking the matter to the Court of Justice.

The Treaties give limited scope for the institutions to be proactive in the field of public health. Nevertheless, a substantial range of measures have been put in place, before and after the outbreak, to **coordinate** the response to public health emergencies and COVID-19 in particular. These measures seem unlikely to give rise to contentious legal problems, unless a member state were to fail to offer support, or to engage with the necessary coordination required by EU law, in which event the issue might go to the Court of Justice.

The ‘reactive’ powers of the institutions are more extensive, and potentially more intrusive. This is especially so in ensuring compliance with the rules of the Treaties and those of the internal market, which constrain the freedom of action of member states, companies and firms. The rules are subject to exceptions and derogations that are designed to achieve legitimate ends. There are tried and tested methods for determining whether the use made of these exceptions and derogations is legitimate, appropriate and proportionate. But these processes – rightly - take more time than a global pandemic allows.

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Strict respect for the rules may have the unintended effect of hindering a prompt and efficient response to the crisis. It may take months to test whether measures adopted today should be approved, disapproved, or even penalised. Where, in the intervening period, they have been relied and built upon, there could be very serious practical consequences—not least in cases where state aid has been disbursed and spent but is found subsequently to have been unlawful.

COVID-19 has churned up the level playing field that the rules of the internal market seek to maintain. Measures taken by member states in response to the outbreak, however necessary at the time, may in the long term prove to be incompatible with the basic principles of free movement and economic interdependency and possibly, in some cases, with the fundamental principles of democracy and rule of law. Combatting the economic effects of the lockdown and other restrictions also challenges the rules on competition, merger control and state aids.

It is too early to assess how this may work out in the long term, but if anything can be said with confidence, it is that many uncertainties assail us now and that more lie in wait.

Certainly, there are lessons that the Union and its institutions can learn from having had to deal with a public health crisis of such magnitude, especially when it comes to the logistics of the response to the outbreak of the pandemic: better cross-border coordination; quicker support to member states’ healthcare services under pressure; and a joint policy on inbound travel from third countries depending on their level of risk. Bearing in mind that the virus has presented urgent problems to which strict application of EU law could offer no immediate answer, it will be necessary to consider how legal normality and certainty can be restored.

In this paper, we deal with these problems in detail. Here are the main points:

- The COVID-19 emergency has caused unprecedented legal challenges to the EU institutions and the member states across a wide spectrum of areas.
- The powers of the EU institutions in the field of public health are limited in their scope and in the type of measures that can be taken. The legislature has made the most of its powers by adopting a wide range of measures, while in some cases finding the source of the power to act in the rules governing the functioning of the internal market.
- Within those limits, the Commission has adopted extensive guidelines to coordinate member states’ efforts during the pandemic across and beyond matters related to the internal market.

- Within its competences, the EU has sought to unleash financial support to foster solidarity between member states.
- Part of the EU’s response has consisted in relaxing existing rules, particularly in relation to free movement and competition law.
- As the threat of the virus (hopefully) diminishes, the EU institutions will have to monitor national governments’ use of ‘public health’ as a justification for derogations from EU law. Invoking emergency powers may, in particular, have serious implications for the preservation of the rule of law.
- Member states are encouraging firms to work together— for example, on the distribution of vital products and services and research—notwithstanding the highly developed rules of EU competition law that prohibit sharing markets and know-how.
- Both the Commission and national competition authorities assure firms that cooperation is permissible

## 1. The Treaty framework

The Treaties are now more explicit about the limits of the competences [powers] of the EU institutions. Competences not conferred on the Union in the Treaties remain with the member states.<sup>1</sup> Amongst the competences shared between the EU and the member states are “common safety concerns in public health matters, for the aspects defined in this Treaty”.<sup>2</sup> In defining and implementing its policies and activities, the Union must seek to promote a high level of protection of public health.<sup>3</sup>

Article 122 empowers the Council to provide financial and other support to deal with exceptional economic problems, including the supply of products, and difficulties caused by natural disasters or exceptional occurrences beyond the control of member states.

Public health is dealt with in a single Article, 168 TFEU, taking up less than two pages.<sup>4</sup> Action by the EU is to complement national policies, encourage cooperation between member states, and promote coordination of policies and programmes.<sup>5</sup> Specifically, there is provision for the Parliament and Council to “adopt incentive measures designed to protect and improve human health and in particular to combat major cross-border health scourge [and] measures concerning monitoring, early warning of and combatting serious cross-border threats to health...”<sup>6</sup>

Although Article 168 standing alone offers limited scope for action, it has been used in conjunction with Article 114 as the legal basis for including health provisions in internal market legislation, where the

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- The penalties for transgression of the rules can be very high; promises from the administrative authorities to look benignly on collaboration cannot guarantee immunity, both because their promises lack reliable certainty and because they alone do not enforce the rules: competitors and consumers do so through the courts.
- EU rules on mergers and takeovers may be put to the test in the aftermath of the pandemic.
- The unprecedented sums already being spent and promised for future rebuilding of economies put the procedural and substantive EU rules on state aid under serious strain and threaten to destabilise the level playing field they are meant to protect.

legislator is expressly required to “take as a base a high level of protection”.<sup>7</sup>

The chapters of the Treaty that deal with the working of the internal market provide that member states may derogate from the rule of free movement of goods for “the protection of health and life of humans, animals or plants”. But this must not “constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.<sup>8</sup> In relation to freedom of establishment and services, national provisions may allow “special treatment for foreign nationals on grounds of public health”.<sup>9</sup> Member states’ reliance on this public health exception is subject to control through action on the part of the Commission,<sup>10</sup> and through other member states and affected firms and individuals bringing cases before the Court of Justice.<sup>11</sup>

State aid “to make good the damage caused by natural disasters or exceptional circumstances” is declared to be compatible with the internal market.<sup>12</sup>

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## 2. Measures taken before the onset of COVID-19

### 2.1. MEASURES ADOPTED UNDER ARTICLE 168 TFEU

Before the virus struck, the Union had already put in place an extensive system of networks, committees and agencies for early warning and response to cross-border threats to public health. These included the following:

- 1998: Decision of the Parliament and Council (amplified in 2013) providing the legal basis for action by the Commission, on serious cross-border threats to health, laying down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health, including preparedness and response planning related to those activities, in order to coordinate and complement national policies;<sup>13</sup>
- 1998: Scientific Committee on Consumer Safety (SCCS), the Scientific Committee on Health and Environmental Risks (SCHER), the Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) and the Pool of Advisors;<sup>14</sup>
- 1999: Early Warning and Response System (EWRS) for the prevention and control of communicable diseases;<sup>15</sup>
- 2001: Health Security Committee (HSC);<sup>16</sup>
- 2004: European Centre for Disease Prevention and Control (ECDC).<sup>17</sup> Its core functions cover a wide spectrum of activities: surveillance, epidemic intelligence, response, scientific advice, microbiology, preparedness, public health training, international relations, health communication;<sup>18</sup>
- 2013: New Decision of the Parliament and Council making more extensive provisions to deal with cross-border threats to health.

### 2.2. MEASURES PROMOTING PERSONAL FREEDOM OF MOVEMENT

As noted above, the Treaty chapters on free movement of persons, goods and services all provide for the possibility of restrictions on grounds of public health, subject to the general principle of proportionality.

In the field of secondary law, the Services Directive (2006/123/EC) allows member states to impose restrictions on service providers on grounds of public health. However, these restrictions are always subject to the principles of non-discrimination, necessity and proportionality.<sup>19</sup>

The Citizenship Directive (2004/38/EC)<sup>20</sup> aims to ensure a tighter definition of the circumstances under which Union citizens and their family members may be denied permission to enter a member state, or may be expelled on grounds of public health, as well as the procedural safeguards to be observed.<sup>21</sup> These are:

- The only diseases justifying restriction of freedom of movement are (i) diseases with epidemic potential as defined by the WHO and (ii) other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host member state;<sup>22</sup>
- Diseases occurring after a three-month period from the date of arrival do not constitute grounds for expulsion;<sup>23</sup>
- Where there are serious indications that it is necessary to do so, member states may, within three months of arrival, require persons entitled to the right of residence to undergo a medical examination, free of charge, to certify that they are not suffering from any of the prescribed conditions. This may not be done as a matter of routine.<sup>24</sup>

Exceptionally, family members other than spouses, registered partners, direct descendants and dependants under the age of 21, or direct dependants in the ascending line, may be allowed entry “where serious health grounds strictly require the personal care of the family member by the Union citizen”.<sup>25</sup>

Comparable provisions appear in the Long-Term Residents Directive, which applies to third country nationals who have acquired the status of long-term resident.<sup>26</sup>

The Family Reunification Directive applies to third country or refugee members of the family of third country nationals who hold a residence permit valid for one year or more and who have reasonable prospects of obtaining the right of permanent residence.<sup>27</sup> In their case, applications for entry or residence, or for renewal of a residence permit, may be refused or withdrawn on grounds of public health, but not on the sole grounds of illness or disability suffered after the issue of the residence permit.<sup>28</sup>

## 3. Proactive measures: The EU’s response to the outbreak of COVID-19

The measures taken in response to the outbreak of COVID-19 fall into three broad categories:

- coordination through ‘soft power’ (communications and guidance);
- use of funding to support member states’ economies;
- relaxation of existing rules in areas only indirectly connected to the health crisis (mostly, free movement and competition law).

In some cases, the Commission has been able to act on the basis of existing powers. In others, legislation has been necessary by the Council alone or together with the Parliament. The relaxation of existing rules is addressed below (under reactive measures) as this is where the Union might have to step in to review states’ action.

### 3.1. COMMUNICATIONS AND GUIDELINES

The Commission communication on emergency assistance in cross-border cooperation in healthcare related to the COVID-19 crisis provides a useful overview of the comprehensive nature of the role EU law can play in a health emergency, from financial assistance to operational coordination through to know-how sharing.<sup>29</sup>

Important guidance has been issued in the following areas:

- repatriation of EU citizens stranded abroad;<sup>30</sup>
- free movement of goods and essential services;<sup>31</sup>
- recommendations on free movement of health professionals and minimum harmonisation of training;<sup>32</sup>
- resumption of tourism services and travelling;<sup>33</sup>
- European roadmap towards lifting COVID-19 containment measures.<sup>34</sup>

### 3.2. JOINT PROCUREMENT

Under powers granted by the Parliament and Council Decision of 2013, the Commission successfully launched four joint procurements of personal protective equipment and medical devices with member states.<sup>35</sup>

### 3.3. FINANCIAL SUPPORT

The Commission has adopted packages to support small and medium-sized businesses;<sup>36</sup> and a banking package to facilitate lending to households and businesses in the EU.<sup>37</sup>

In addition, the Commission has agreed to a temporary waiver of customs duties and VAT on the import of medical devices, and protective equipment.<sup>38</sup>

In its capacity as initiator of legislation, the Commission has put forward an unprecedented set of measures to ensure the recovery of the EU economies. The details of this ‘*Repair and Prepare for the Next Generation*’ strategy are set out in a comprehensive communication,<sup>39</sup> which supports an extensive range of sectoral<sup>40</sup> and more general proposals.<sup>41</sup>

Effect will now have to be given to the historic breakthrough made by the European Council last July, where the member states agreed—*inter alia*—that the Commission will be authorised to borrow funds on the capital markets on behalf of the Union.<sup>42</sup>

### 3.4. LEGISLATIVE MEASURES

Under Article 122 TFEU, the Council has adopted a Regulation to establish a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.<sup>43</sup>

The Parliament and Council have enacted measures on:

- exceptional flexibility for the use of the European Structural and Investments Funds;<sup>44</sup>
- response to the coronavirus outbreak via the Fund for European Aid to the Most Deprived;<sup>45</sup>
- the mitigation of the impact of the pandemic in the fishery and aquaculture sector;<sup>46</sup>
- the continuous availability of medical devices on the EU market;<sup>47</sup>
- the Coronavirus Response Investment Initiative and the extension of the Solidarity Fund;<sup>48</sup>
- investments in the Healthcare systems of member states and in other sectors of their economies (Coronavirus Response Investment Initiative).<sup>49</sup>

The coming weeks and months will be key to defining the extent to which member states are willing to pursue common action in the field of public health and create instruments to react to (and prevent) future health emergencies more effectively.

## 4. Reactive measures: What limit to states' action?

Part of the Union's actions has been characterised by flexibility in applying the existing rules, especially concerning free movement of persons; competition law and state aid. The primary and secondary law of free movement and competition are at the heart of the internal market. Compliance with those rules is enforced by the Commission and the member states, but also by competitors, consumers and other affected individuals through the national courts and, where necessary, the Court of Justice.

It is too early to assess how far the Commission will have to go in challenging measures (or the continuation of measures) taken by the member states, or how it will react to challenges brought by other member states or affected businesses or individuals. The economic rebound in the wake of the virus may well create situations in which measures taken to control the spread of the virus hinder or interfere with the freedom of economic operators to reassert enjoyment of the Treaty freedoms.

### 4.1. PUBLIC HEALTH, THE RULE OF LAW AND DEROGATIONS FROM FREE MOVEMENT

Protection of the rule of law within the EU against challenges posed by the COVID-19 crisis is an issue perhaps of a higher order than those of free movement and the internal market. The pandemic has resulted in the widespread use of emergency powers by member state governments and formidable restrictions on individual liberty. While in many EU states the situation is slowly going back to normal, we have also witnessed the attempt, by Viktor Orbán in Hungary, to assert unlimited ruling power until further notice. The CJEU has been relentlessly defending the independence of the Polish judiciary, ruling after ruling.<sup>50</sup> The need for further action—and possibly a more concerted effort on the part of the EU's institutions—against authoritarian measures cannot be ruled out.

Free movement of EU citizens across the frontiers of the member states, enshrined in Article 45 of the Charter of Fundamental Rights, has been one of the foremost features of the *acquis communautaire*, enhanced for some member states and some non-member states by the Schengen *acquis*. While it is understandable that the Union has supported relaxation of the rules on cross-border movement, the question arises: What are the limits of the leeway granted to member states and the level of scrutiny that the EU can exercise?

Exercising the power to derogate from the rules of free movement on grounds of public health is open to challenge in the courts, and the EU cannot insulate the member states from the legal consequences of disproportionate reliance on the public health exception.

In any event, the Commission is expressly enjoined by the Treaty to monitor compliance of the member states with their obligations and, where appropriate, to bring the matter before the Court of Justice.<sup>51</sup>

Challenges may arise from disproportionate and possibly discriminatory measures taken at national level: restrictions to free movement (refusing entry); the use of the public health exception by member states, and its consequences for persons *already* living in a state other than that of their nationality where the cross-border movement has already occurred. It is to be noted that the restrictions on public health grounds provided for in the Citizenship Directive—unlike those based on public security and public policy—do not seem to be tied to any need for individual assessment.

A related issue is the application of the Schengen rules, to be read in conjunction with (and not conflated with) the scenarios just mentioned. Membership of the EU and of the Schengen area are not completely aligned, as there are EU states that are not in Schengen (Ireland) and there are non-EU countries that are fully part of the Schengen *acquis* (Switzerland). There are three main provisions that allow for derogation from the principle that no border controls shall be in place within Schengen:<sup>52</sup>

- Where there is a serious threat to public policy and public security, controls can be reintroduced for up to a maximum of six months;<sup>53</sup>
- Where a serious threat to public policy or internal security in a member state requires immediate action to be taken, controls can be reintroduced for a total period of up to two months;<sup>54</sup>
- In exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control, controls can be reintroduced and extended up to two years.<sup>55</sup>

Thus, the Schengen Border Code lays down defined time limits for the application of internal border control, and the longest extension can take place only in case of deficiencies at the external border, which is not the case of COVID-19. By contrast, the Citizenship Directive (whose territorial scope is not linked to membership of the Schengen area) does not provide for time limits on restrictions on entry for public health reasons. The Commission has proposed a coordinated approach to lifting travel restrictions and resumption of visa requirements.<sup>56</sup> Legal questions may arise from the coordination of restrictive powers allowed by the Citizenship Directive and the Schengen Border Code, as the Directive seems to leave a wider scope to states than the Code.

### 4.2. COMPETITION LAW AND STATE AID

The pandemic raises important issues for the Union and the member states regarding the free movement rules as well as the rules on competition. The two fields are closely linked and overlap: according to Professor Gil Carlos Rodríguez Iglesias, past President of the Court of Justice, “the rules on free movement and competition ... constitute the core and best established layer of the Community legal order”.<sup>57</sup> As national measures spring up to address the pandemic, companies and firms<sup>58</sup> operating in one member state might be forgiven for asking why their freedom of action is constrained, when their competitors next door are free to act without restriction. That is a distortion to the level playing field prompted by public action, which even if Treaty-compatible, can in the normal course of events be remedied by appropriate harmonisation of national law adopted under Article 114 TFEU. Prevention of distortions to the internal market caused by *private* action is the very purpose of EU competition law. Yet ironically it is that law, made for different times, which may hinder a rational approach by private businesses that are called upon by governments to play their part in combatting the virus.

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COVID-19 presents challenges to each of the four pillars of EU competition law: Article 101, Article 102, merger control, and the control of state aid.

Competition law is suspicious of collaboration between economic operators. As Adam Smith said long ago: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>59</sup> The difficulty now is that, if they have collaborated for a wholesome purpose (development of a vaccine, for example),<sup>60</sup> the law that is designed to prevent it cannot so easily be set aside. Firms are right to be wary, for the penalties for breaching the rules can be fierce. Add to that the time lag in enforcement. Speedy injunctive relief can be secured to neutralise the rules on free movement of goods, as happened during the mad cow disease crisis.<sup>61</sup> This is less so when it comes to enforcement of the competition rules. The march of COVID-19, *accelerando*, is measured in days and weeks, whereas competition law often has to labour, *largo e*

*grave*, over the course of months and years. When the dust of COVID-19 has settled, competition law may find itself in a new environment of greater public participation (or interference) in economic life.

The European Competition Network (ECN) is an informal (soon to be formalised) arrangement for cooperation and collaboration between and amongst the 28<sup>62</sup> national administrative competition authorities (NCAs) and the Commission, *as primus inter pares*. It has declared that:

“The ECN understands that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers.”<sup>63</sup>

Some NCAs have expressly endorsed the ECN declaration, while some have issued their own notices.<sup>64</sup> The Commission has offered further guidelines on the optimal and rational supply (again, the competition law antennae twitch!) of medicines during the crisis,<sup>65</sup> and took the view that “[t]he exceptional circumstances of this time and its related challenges may trigger the need for undertakings to cooperate with each other”.<sup>66</sup>

None of them seems to be troubled about the capacity of competition law, without being tweaked, to adapt to the circumstances. The ECN claims these ‘adaptation measures’ are ‘unlikely to be problematic’,<sup>67</sup> and the President of the *Bundeskartellamt* thinks that “competition law permits extensive cooperation between undertakings if there are—as in the present situation—good reasons for it”.<sup>68</sup>

Companies and firms considering a course of action which might fall foul of competition law (and attract serious penalties) might not be comforted by being told that it is ‘unlikely to be problematic’ or will ‘most likely outweigh any’ legal prohibition. There are other vague promises, across the board, to abstain from enforcement proceedings<sup>69</sup> which prudence requires to be taken with a pinch of salt.

EU competition law is not something which can be turned off like a light switch. National authorities can perhaps react quickly,<sup>70</sup> the Union cannot: that would require recourse to the laborious process of legislation and, perhaps, Treaty amendment. Promises not to intervene, even were they legally binding upon their authors, are only part of the story: it is not the Commission and the NCAs alone which enforce EU competition law.

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#### 4.2.1. ARTICLE 101

The purpose of Article 101 is to prevent collaboration between or amongst undertakings which results in the “prevention, restriction or distortion of competition within the internal market”.<sup>71</sup> A simple illustration of the target and the risks is that, just before the lockdown, the UK Competition and Markets Authority (CMA) found a concerted practice, contrary to both Article 101 and its equivalent provision in the UK Competition Act, in the exchange of competitively sensitive strategic information on pricing, volumes, timing of supplies and entry plans in relation to the supply of antidepressant tablets in the UK—a breach ‘by object’ which had resulted in price fixing and market sharing, and imposed penalties totalling £3.4 million and a settlement obligation to reimburse £1 million to the National Health Service.<sup>72</sup> Yet such collaboration is what undertakings are now being invited to do.

The challenge to undertakings posed by Article 101 would be removed if the member states were to require, by law, undertakings to discharge specific responsibilities in response to COVID-19, since compliance with a legal obligation absolves (or shields) undertakings from a duty of compliance with competition law.<sup>73</sup> But mere encouragement, even direct complicity, by government will not suffice.<sup>74</sup> Indeed, in certain circumstances it could leave a minister in the frame as a ‘cartel facilitator’. In any event, enforcement of Article 101 does not lie only in the hands of governments or regulators. As the Court has said:

“The principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article [101](1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article [101](3) of the Treaty.”<sup>75</sup>

The pivotal issue is therefore likely to lie in the application of Article 101(3), which offers a basis for escaping the rigours of Article 101(1). As a result of the fundamental change wrought by the entry into force of Regulation 1/2003 (the ‘modernisation regulation’) in 2004<sup>76</sup>, this is now, in the first instance, in the hands of undertakings themselves. As the Court found:

“[S]ince the entry into force of Regulation No 1/2003 it has been the responsibility of undertakings to assess agreements themselves.... In principle it is now for the undertakings concerned—if necessary with the assistance of a legal advisor—to examine whether the conditions under Article [101](1) EC and Article [101](3) EC are satisfied.”<sup>77</sup>

Article 101 as a whole can thus now be succinctly stated as prohibiting agreements or practices that restrict competition without redeeming virtue.<sup>78</sup> The key question here is how this ‘redeeming virtue’ will be recognised, tested and applied.

The best the ECN can offer is the possibility to reach out (sic) to the Commission or a national competition

authority for informal guidance,<sup>79</sup> which will be of limited assistance to undertakings facing pressing decisions or civil litigation. NCAs have no power formally to declare agreements free of the prohibition of Article 101(1),<sup>80</sup> and such agreements remain open to challenge in the courts. The Commission has the power under Regulation 1/2003 to make a ‘finding of inapplicability’,<sup>81</sup> but has never used it.

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#### In any event cooperation between firms in the present situation would not be a ‘crisis cartel’ in the normal sense of a short-term suspension of the rules to save a faltering industry.

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An undertaking caught in the crosshairs will be likely to justify its conduct by referring to the coronavirus crisis. The Commission, when it was in sole charge of Article 101(3), once looked kindly, or at least tolerantly, upon coordination between undertakings to address crisis cartels, at least in exceptional circumstances.<sup>82</sup> The Court of Justice was less enthusiastic but was careful not to close the door to the application of Article 101(3), exceptionally and in an appropriate case.<sup>83</sup> Both may be said to have distanced themselves from that view since.<sup>84</sup> In any event cooperation between firms in the present situation would not be a ‘crisis cartel’ in the normal sense of a short-term suspension of the rules to save a faltering industry. It is action taken to serve a wider public good, and that is something for which Article 101(3), in its primarily economically orientated bias, was not designed.

The better option might be reliance upon the *Wouters* case law.<sup>85</sup> That involved a rule adopted by the Dutch Bar, which limited the freedom of *Advocaten* to enter into associations with members of other professions (in this case, accountants). The question was whether the rule was an infringement of Article 101. Relying on a possibly new interpretation Article 101(1), the Court found that, although competition was restricted in a number of ways, there was no breach of Article 101. The restrictions were deemed necessary, appropriate and proportionate to protecting the integrity of legal services in the Netherlands.

The principles of *Wouters* have yet to be properly explored and defined, but it is thought to incorporate into Article 101 the reasoning of *Cassis de Dijon*<sup>86</sup> and the doctrine of ‘imperative reasons in the public interest’ which leavens the rules on the free movement of persons and services.<sup>87</sup> This implies an acceptance that there are considerations which may legitimately be safeguarded in the public interest, and so insulated from the rigours of Article 101 (provided, presumably, that they are objectively necessary and proportionate).

The transposition of *Wouters* to present circumstances would be interesting, albeit problematic. COVID-19 has churned up the playing field, and the authorities are inviting private industry to play a part in restoring it and so to serve a public good. It would be invidious if undertakings entering into arrangements for that purpose, at the behest of governments, and in good faith, found themselves censured by competition law as a result. But competition law applies objective, not subjective, economic tests,<sup>88</sup> of which good faith is not a recognised element. It is anticipated/hoped that this may provide an opportunity for a fuller exploration and development of a *Wouters* principle.

#### 4.2.2. ARTICLE 102

Article 102 prohibits exploitation by a powerful firm of its market power (‘abuse of a dominant position’). Its purity is not compromised by COVID-19 in the same way as Article 101 is; it may in fact bring it into sharper focus.

The competition authorities offer no emollients to powerful firms in adopting conduct which might fall within Article 102 during in the pandemic. To the ECN “it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices.”<sup>89</sup>

The coronavirus opens up a myriad of possibilities for dominant undertakings to profit. Most obviously, where there are shortages, especially of vital products or services which consumers will buy irrespective of price and where there is limited competition in supplying them, there is an opportunity for profiteering. Article 102 may also lurch into view in the event of undertakings rationing essential supplies, as many suppliers (down to retail shops) have done and will do.

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#### Market power in a crisis can emerge, and erode, weekly, even daily, and its abuse can be as transient.

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Refusal by a dominant firm to deal or supply is generally an abuse of that dominance, even if it results in commercial disadvantage for the dominant firm.<sup>90</sup> But the Court established some time ago that rationing of supplies by a dominant undertaking in the context of a crisis (the 1973/74 oil crisis) is not an abuse of a dominant position so long as it is done rationally and upon a non-discriminatory basis.<sup>91</sup> Any patents or related intellectual property rights which grow out of the accelerating research now underway—should, for example, a vaccine be developed—are likely to produce a dominant position, the proprietor of which will have to be alive to the burdens which adhere to that fortunate position. A further

unresolved question is how to react to a situation where the government of a third country compels a dominant supplier to supply that country first, or even exclusively.<sup>92</sup>

The difficulty for Article 102, perhaps more acute than for Article 101, is the speed of events. Market power in a crisis can emerge, and erode, weekly, even daily, and its abuse can be as transient. If a virus emerges, develops and shifts over periods of days and weeks, competition law—certainly its enforcement—operates in terms of months and years. The Commission could order interim remedies, a power assumed in 1980<sup>93</sup> and codified in Regulation 1/2003.<sup>94</sup> But it takes time. It is available only in the course of a formal investigation. *That* also takes time. Then it must be properly reasoned, which cannot be hurried.

A countervailing consideration, given that an Article 102 investigation can last for years, is that interim measures can have far-reaching consequences for an undertaking made subject to them.<sup>95</sup> The power was used in 2001<sup>96</sup> (but overturned by the Court of First Instance)<sup>97</sup> and then not again until late 2019.<sup>98</sup> It is a power more commonly used by some NCAs, but even they have difficulty in reacting efficiently to quickly moving events.

#### 4.2.3. MERGERS AND TAKEOVERS

The third pillar of EU competition law, merger control, has to operate under very tight timetables. The Merger Regulation<sup>99</sup> applies to any merger or takeover (‘concentration’) which has a ‘Community dimension’.<sup>100</sup> Following compulsory notification, the Commission has 25 working days to approve it<sup>101</sup> or, to raise ‘serious doubts’ as to its propriety, or to launch a ‘Phase II’ investigation, which must be completed within 90 working days.<sup>102</sup> Failure to meet a deadline results in approval.<sup>103</sup> This recognises the great importance of speedy approval of mergers (if granted).

The Commission has undertaken to keep the system ticking over, with no relaxation of the tests by which they are assessed. At the same time, it has made clear that “due to the complexities and disruptions caused by the Coronavirus, companies are encouraged to delay merger notifications originally planned until further notice, whenever possible”.<sup>104</sup> It is not alone in this. NCAs dealing with their own merger control (for concentrations lacking a Community dimension) have issued similar appeals.<sup>105</sup>

With cooperation from undertakings the system may stay afloat. But some may be unable and/or unwilling to delay. The Commission comes down very hard on ‘gun jumping’,<sup>106</sup> so this may not attract generous sympathy. It is not uncommon for a Commission decision approving or rejecting a concentration to be the subject of review before the General Court, and the Court holds the Commission (sometimes) to a high standard.<sup>107</sup>

Broader questions will arise in the aftermath of the coronavirus, and the jockeying (circling?) of firms in the wave of corporate mergers and acquisitions that it may kick off. There may be a legislative response as a short-

term prophylactic.<sup>108</sup> Otherwise the Union’s significant impediment of effective competition (SIEC) test<sup>109</sup> for approval (or not) of a concentration is sometime criticised for being inflexible. In particular, it takes insufficient account of ‘failing firm’ considerations as part of a counterfactual analysis. A new test of its adequacy may come only after the dust has settled.

#### 4.2.4. STATE AID

Any subvention granted to an undertaking by a member state gives that undertaking a comparative advantage over its competitors, and could subvert the level playing field within the internal market, the maintenance and protection of which is recognised to be a principal objective of EU competition law and policy.<sup>110</sup> Because they differ from the other rules on competition, being concerned with distortions through the competitive advantage to be had from the allocation of public funds, the rules are addressed to the member states. They are constructed and have developed differently, and there is now an extensive body of case law on the distinctive character of Articles 107 to 109 TFEU.

The basic rule is that all state aid is prohibited.<sup>111</sup> However the Treaties go on to recognise categories of aid which ‘shall be’ permitted<sup>112</sup> and others which ‘may be’ permitted.<sup>113</sup> Any ‘plans to grant or alter aid’ (a ‘new’ aid) must be notified by the disbursing member state to, and approved by, the Commission.<sup>114</sup> So unlike Articles 101 and 102, the Commission has yielded no enforcement ground to national authorities.

The procedure for acquiring approval is set out in the ‘Procedural Regulation’<sup>115</sup> which requires the Commission to respond to a notification within two months following a ‘preliminary investigation’ and, should it choose to initiate a ‘formal investigation procedure’, within an additional 18 months.<sup>116</sup> No aid may be disbursed before the Commission has taken, or is deemed to have taken, a decision authorising it.<sup>117</sup> Finally, as part of the state aid modernisation (SAM) programme launched in 2008 the Commission introduced a ‘general block exemption regulation’ (GBER)<sup>118</sup> which accords *ex ante* Commission approval to a state aid scheme falling within the parameters and thresholds set without need of notification.

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### With COVID-19, a response is required within weeks, if not days.

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Some public expenditure related to COVID-19 will fall outside the scope of EU state aid control, where it is channelled to health or other public services, either because they are not ‘undertakings’<sup>119</sup> (the rules apply only subventions to undertakings) or because they gain

immunity through being engaged in ‘the operation of services of general economic interest’.<sup>120</sup> But even within the sector there may be competitive markets in which this exclusion does not apply, and of course much of the funding is to go to firms divorced from health/social services but struggling nonetheless owing to the economic repercussions of the pandemic. Where there is no exclusion a simple relaxation of the rules may appear expedient, but the need for the principles to which the rules give effect remains: so long as there is barrier-free export to all member states guaranteed by the rules of the internal market, undertakings in those member states that have the resources to underwrite massive subsidies may enjoy a great advantage at the expense of undertakings in those that do not.

The Commission takes the view that state aid can be justified in the context of COVID-19 under Article 107(3) (b), “to remedy a serious disturbance in the economy of a Member State”. One might also invoke Article 107(2)(b) under which aid “shall be” permitted “to make good the damage caused by natural disasters or exceptional occurrences”. But in neither case is it simply a question of inadequate Commission resources; it is the impossibility of the task.

The Procedural Regulation anticipates a period of up to 18 months for the Commission properly to evaluate a state aid measure which merits a formal investigation procedure. With COVID-19, a response is required within weeks, if not days. Clearly the Commission cannot examine a notification properly, meet the procedural steps required (request necessary information from member states and undertakings, seek the views of the member states and interested parties<sup>121</sup>) and fashion a decision which meets the test required of all Union legislation (that it be adequately reasoned)<sup>122</sup> in the time required.

A state aid decision, whether it is positive, approving an aid, or negative, rejecting an aid,<sup>123</sup> normally contains many dozens of pages of detailed economic analysis. Yet the first state aid notified to the Commission in relation to COVID-19, a Danish plan to compensate organisers of large events that were cancelled because of the pandemic, was approved (under Article 107(2) (b)) within 24 hours.<sup>124</sup> The Commission has since announced 60 state aid decisions adopted on one day (30 April), 49 on another (5 June). Not even the Commission would pretend these decisions were fully reasoned—unless the adequacy of the reasoning varies owing to the circumstances. If it was not, the decision is subject to annulment under Article 263 TFEU as a breach of an essential procedural requirement.<sup>125</sup> It may well be tested, as Mr O’Leary of Ryanair—no stranger to state aid litigation—has already lodged, or intends to lodge, review proceedings before the General Court challenging ‘bailouts’ provided by the French, Dutch, Danish, Swedish and German governments to their national flag carriers, which were approved by the Commission.

Instead the Commission has adopted a communication entitled Temporary Framework for State aid measures to support the economy in the current COVID-19

outbreak<sup>126</sup> in which it argues that state aid is justified on the basis of Article 107(3)(b), for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability, especially of SMEs.<sup>127</sup> But the Framework, “justified by the current exceptional circumstances”,<sup>128</sup> is *not* a regulation, it is a communication, an instrument not recognised in Article 288 TFEU as one which may produce legal effects. The member states are still obliged to notify state aid to the Commission and show they are necessary, appropriate and proportionate,<sup>129</sup> though any test of that is likely to be ‘light touch’. As of 29 May the Commission had approved COVID-19 state aid allocated in excess of €200 billion.<sup>130</sup> A few cases fall under Article 107(2)(b), a few under Article 107(3)(b), but most under the Temporary Framework.

The practical solution may lie in the Procedural Regulation. The Commission must reply to a notification with its initial assessment within two months. Where it has failed to take a decision within that time, “the aid shall be deemed to have been authorised by the Commission”,<sup>131</sup> and may thereupon be disbursed, becoming an ‘existing’ (as opposed to ‘new’) aid, subject only to ongoing review by the Commission.<sup>132</sup> So the Commission could authorise all these notified aids simply by doing nothing. Whether this would constitute a failure to discharge its duties under Article 108 and so leave it open to censure under Article 265 remains an open question.

A final point, for the near future, relates (as does so much else) to Brexit. The EU is adamant that the United Kingdom (UK) maintain close regulatory alignment on state aid (*inter alia*) to maintain access to the internal market (in whatever form, should that be agreed) as this is necessary to protect the level playing field. But

## 5. Conclusions

The EU’s response to COVID-19 has not been an unalloyed success, but it cannot reasonably be described as a failure either. Public health is seen primarily, and universally, to be a local (national and sub-national) matter. The Union is hamstrung by both its lack of competences in the field and its own basic rules, which do not anticipate, and are poorly designed for, a global pandemic.

Pending the parliamentary negotiations of the most significant financial plans now approved by the European Council, one would expect the Union to take the initiative—or at least explore the possibility—of establishing stronger mechanisms of coordination on public health-related issues. The aim should be quicker cross-border support in terms of equipment and personnel where necessary and also a more integrated policy on restrictions to, and conditions on, free movement and entry within Schengen—tests at arrival, self-isolation policies and the like.

this can cut both ways; and not only on the malleability that the Commission has imparted to Article 107. At the end of May it announced a post-COVID-19 recovery plan<sup>133</sup> which includes a ‘recovery instrument’ (Next Generation EU) that promises €750 billion in investment support (€500 billion in grants, €250 billion in loans). Combined with already agreed ‘safety nets’ for workers, undertakings and governments, the exceptional targeted and front-loaded support for EU recovery has a projected cost of €1.29 trillion.<sup>134</sup> The European Council reached an agreement in principle at the end of July.<sup>135</sup>

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### The member states are still obliged to notify state aid to the Commission and show they are necessary, appropriate and proportionate, though any test of that is likely to be ‘light touch’.

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These vast sums are not ‘state aid’, because they are not “granted by a Member State or through State resources”.<sup>136</sup> But things might look very different on the other side of the Channel, and elsewhere. In June, the Commission published its long-awaited White Paper detailing its ‘anti-subsidy tool’ aimed at rectifying supposed distortions in the internal market as a result of foreign subsidies.<sup>137</sup> It seems little aware of the Union’s own track record here. The WTO rules on countervailing duties might come sharply to the fore!

The Union has at least served as a pivot around which national responses can coalesce. It has stuck together despite the difficulties—witness the hard four-day slog at the European Council in July—and has produced rational responses where it can: movement of persons; coordination by means of guidance across many fields; prompt approval of national support; the financial support package and an agreement on much more to come; all the while defending and promoting solidarity and persuading those who might decry the Union’s achievements or even wish it ill. It has made much of what little it can do. Some slips may in time come out in the wash. But ironically, time may also show, to those who care to look, that the Union’s response may be compared favourably to the muddle and chaos that has marked the national response in more than one member state.



<sup>1</sup> TEU, art. 4(1).

<sup>2</sup> TFEU, art. 4(2)(k).

<sup>3</sup> TFEU, art. 4(2)(k).

<sup>4</sup> TFEU, title XIV, art. 168.

<sup>5</sup> TFEU, art. 168(1) and 168(2).

<sup>6</sup> TFEU, art. 168(5).

<sup>7</sup> TFEU, art. 114(3).

<sup>8</sup> TFEU, art. 36.

<sup>9</sup> TFEU, art. 52 (establishment, applied to services by art. 62).

<sup>10</sup> For example, the Commission might start infringement proceedings if it is believed that a member state has relied on public health to restrict or derogate from free movement in manners not consistent with what is prescribed by the Treaties.

<sup>11</sup> See, for example, at the time of the mad cow disease crisis, the measures taken by the Council and Commission to combat the disease, and the cases brought before the Court of Justice against the UK and France: e.g. Commission Decision 96/239/EC on emergency measures to protect against BSE, OJ L 78, 28.3.1996, p. 47, challenged unsuccessfully in Case C-180/96R *United Kingdom v Commission*, EU:C:1996:308 (judgment of 12 July 1996); Case C-1/00 *Commission v France*, EU:C:2001:687 (judgment of 13 December 2001).

<sup>12</sup> TFEU, art. 107(2)(b).

<sup>13</sup> Decision 1082/2013/EU on serious cross-border threats to health and repealing Decision 2119/98, OJ L 293, 5.11.2013, p. 1.

<sup>14</sup> Commission Decision 2008/721/EC setting up an advisory structure of Scientific Committees and experts in the field of consumer safety, public health and the environment, OJ L 241, 10.9.2008, p. 21.

<sup>15</sup> Commission Decision 2009/547, OJ L 181/57, 14.7.2009, p. 57, amending Decision 2000/57. The Decision has been amended by Commission Implementing Decision (EU) 2017/253, OJ L 37, 14.2.2017, p. 23.

<sup>16</sup> The committee was set up informally in 2001 at the request of EU health ministers and formalised by Decision 1082/2013/EU.

<sup>17</sup> Regulation (EC) No 851/2004 establishing a European Centre for Disease Prevention and Control, OJ L 142, 30.4.2004, p. 1.

<sup>18</sup> For details, see the European Commission's website at [Live, work, travel in the EU > Public Health](#).

<sup>19</sup> Directive 2006/123/EC on services in the internal market, OJ L 376, 27.12.2006, p. 36, art. 16(3) read with art. 16(1).

<sup>20</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77.

<sup>21</sup> *Ibid.*, recital 22.

<sup>22</sup> *Ibid.*, art. 29(1).

<sup>23</sup> *Ibid.*, art. 29(2).

<sup>24</sup> *Ibid.*, art. 29(3).

<sup>25</sup> *Ibid.*, art. 3(2)(a).

<sup>26</sup> Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.01.2004, p. 44, art. 18.

<sup>27</sup> Council Directive 2003/86/EC on the right to family reunification, OJ L 251, 3.10.2003, p.12.

<sup>28</sup> Art. 6.

<sup>29</sup> Communication from the Commission, *Guidelines on EU Emergency Assistance in Cross-Border Cooperation in Healthcare related to the COVID-19 crisis*, C (2020) 2153 final, 3 April 2020.

<sup>30</sup> Communication from the Commission, *Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships*, OJ C 119, 14 April 2020, p. 1.

<sup>31</sup> Communication from the Commission, *Implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, OJ C 961, 24 March 2020, p. 1.

<sup>32</sup> Communication from the Commission, *Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC*, C(2020) 3072 final, 7 May 2020.

<sup>33</sup> Communication from the Commission, *COVID-19: EU Guidance on the progressive resumption of tourism services and for health protocols*

*in hospitality establishments*, C(2020) 3251 final, 13 May 2020. See also European Commission, [Tourism and transport: Commission's guidance on how to safely resume travel and reboot Europe's tourism in 2020 and beyond](#), press release, 13 May 2020, and European Commission's [website](#).

<sup>34</sup> European Council and European Commission, [Joint European Roadmap towards lifting COVID-19 containment measures](#).

<sup>35</sup> More details can be found in European Commission, ["Coronavirus: Commission bid to ensure supply of personal protective equipment for the EU proves successful"](#), press release, 24 March 2020.

<sup>36</sup> European Commission, [Coronavirus: Commission and European Investment Fund \(part of EIB Group\) unlock €8 billion in finance for 100,000 small and medium-sized businesses](#), press release, 6 April 2020.

<sup>37</sup> European Commission, ["Coronavirus Response: Commission adopts banking package to facilitate lending to households and businesses in the EU"](#), press release, 28 April 2020.

<sup>38</sup> European Commission, [Coronavirus: Commission waives customs duties and VAT on the import of medical equipment from non-EU countries](#), press release, 3 April 2020.

<sup>39</sup> European Commission, [Europe's Moment: Repair and Prepare for the Next Generation](#), press release, 27 May 2020; see fn. 133 below and accompanying text.

<sup>40</sup> European Commission, [Sectoral Acts](#), May 2020.

<sup>41</sup> European Commission, [Files on MFF](#), May 2020.

<sup>42</sup> European Council, [Council Conclusions](#), EUCO 10/20, Brussels, 21 July 2020.

<sup>43</sup> Council Regulation 2020/672, OJ L 159/1, 20 May 2020, p. 1.

<sup>44</sup> Regulation (EU) 2020/558 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, OJ L 130, 24 April 2020, p. 1.

<sup>45</sup> Regulation (EU) 2020/559 amending Regulation (EU) No 223/2014 as regards the introduction of specific measures for addressing the outbreak of COVID-19, OJ L 130, 24 April 2020, p. 7.

<sup>46</sup> Regulation (EU) 2020/560 amending Regulations (EU) No 508/2014 and (EU) No 1379/2013 as regards specific measures to mitigate the impact of the COVID-19 outbreak in the fishery and aquaculture sector, OJ L 130, 24 April 2020, p. 11.

<sup>47</sup> Regulation (EU) 2020/561 amending Regulation (EU) 2017/745 on medical devices, as regards the dates of application of certain of its provisions, OJ L 130, 24 April 2020, p. 18.

<sup>48</sup> European Council, [COVID-19: Council adopts measures for immediate release of funds](#), press release, 30 March 2020.

<sup>49</sup> Regulation (EU) 2020/460 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative), OJ L 99, 31 March 2020, p. 5.

<sup>50</sup> Case C-216/18 PPU *LM* EU:C:2018:586 (judgment of 25 July 2018); Cases C-558/18 and C-563/18 *Miasto Łowicz* EU:C:2020:234 (judgment of 26 March 2020); Case C-585/18 *AK* EU:C:2019:982; Case C-192/18 *Commission v Poland* EU:C:2019:924 (judgment of 5 November 2019); Case C-619/18 *Commission v Poland* EU:C:2019:531 (judgment of 2 August 2019).

<sup>51</sup> TFEU, art. 258. Pursuant to art. 259 TFEU, and subject to the requirement that the matter be brought before the Commission first, a member state which considers that another member state has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice.

<sup>52</sup> Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 77, 23.3.2016, p. 1, Title III, Chapter II.

<sup>53</sup> Regulation (EU) 2016/399, art. 25.

<sup>54</sup> Regulation (EU) 2016/399, art. 28.

<sup>55</sup> Regulation (EU) 2016/399, art. 29.

<sup>56</sup> See European Commission, ["Coronavirus: Commission recommends partial and gradual lifting of travel restrictions to the EU after 30 June, based on common coordinated approach"](#), press release, 11 June 2020; Communication from the Commission to the European Parliament, the European Council and the Council, [Assessment of temporary restrictions of non-essential travel](#), COM(2020) 399 final, 11 June 2020. ; Communication from the Commission, [Guidance for a](#)

[phased and coordinated resumption of visa operations](#), C(2020) 3999 final, 11 June 2020.

<sup>57</sup> G.C. Rodríguez Iglesias, "inaugural address to the FIDE XX Congress", London, 2002.

<sup>58</sup> 'Undertakings' is the term used in the Treaties to cover all types of economic operator, including individuals and unincorporated firms.

<sup>59</sup> Smith, Adam (1776), *An Inquiry into the Nature and Sources of the Wealth of Nations*, I.X.82.

<sup>60</sup> There are reports of collaboration between GlaxoSmithKline and Sanofi: "By combining our science and our technologies we believe we can help accelerate the global effort to develop a vaccine to protect as many people as possible from COVID-19". Whilst few would argue with the desirability of the end result, the opening half of the proposition could be purposely designed to set competition law alarm bells ringing.

<sup>61</sup> See fn. 11 above.

<sup>62</sup> At least until 31 December 2020.

<sup>63</sup> European Competition Network, [Antitrust: Joint statement by the European Competition Network \(ECN\) on application of competition law during the Corona crisis](#), undated.; undated.

<sup>64</sup> See e.g.: CMA, "CMA approach to business cooperation in respect to COVID-19", CMA118, 25 March 2020; Rozcestník ÚOHS ke Koronavirové krizi, 30. dubna 2020; Document d'orientation à destination des entreprises: Impact du Covid-19 sur les actions du Conseil [luxembourgeois] de la concurrence, 31 March 2020; Comunicazione dell'AGCM sugli accordi di cooperazione e l'emergenza COVID-19, 24 April 2020.

<sup>65</sup> Communication from the Commission, [Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak](#), OJ C 1161, 8 April 2020, p. 1.

<sup>66</sup> 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](#), OJ C1161, 8 April 2020, p. 7.

<sup>67</sup> ECN Joint Statement, footnote 63 above, point 4.

<sup>68</sup> Dr A. Mundt, "Interview", *Lebensmittel Zeitung*, 20 March 2020.

<sup>69</sup> ECN Joint Statement, footnote 63 above point 3; CMA118, footnote 64 above, para 5.

<sup>70</sup> See e.g. Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/369, adopted 28 March, effects backdated to 1 March, by which the UK government excluded from the Chapter I prohibition (= Article 101) any notified agreement between two or more groceries-chain suppliers, discharging a 'qualifying activity' which prevents or mitigates disruption to the supply of groceries to consumers in any part of the U.K. 'caused by a reason relating to coronavirus'. It does not, of course, set aside or mitigate the application of art. 101.

<sup>71</sup> TFEU, art. 101(1).

<sup>72</sup> CMA, Case 50507.2 (*Nortriptyline Tablets*), decision of 4 March 2020; under review in *Lexon (UK) Ltd v Competition and Markets Authority and Patel v Competition and Markets Authority*, pending.

<sup>73</sup> Cases C-359 & 379/95P *Commission & France v Ladbroke Racing*, EU:C:1997:531 (judgment of 11 November 1997). Although there is no direct authority, the principle would presumably apply equally to legal compulsion in a third country—for example, an international firm compelled by American law to supply a vaccine there first. But this could be countered by a 'blocking statute' adopted by the Commission (see Regulation 2271/96, OJ L 309, 29.11.1996, p. 1) which could lead to much international unpleasantness, to put it at its lowest.

<sup>74</sup> Decision 2003/600 (*French Beef*), OJ L 209, 19.8.2003, p. 12; Case C-209/07 *Competition Authority v Beef Industry Development Society and anor*, EU:C:2008:643 (judgment of 20 November 2008).

<sup>75</sup> Case 453/99 *Courage v Crehan* EU:C:2001:465 (judgment of 20 September 2011 at para 22).

<sup>76</sup> Regulation 1/2003, OJ L 1, 4.1.2003, p. 1.

<sup>77</sup> Case C-209/07 *Beef Industry Development Society*, fn. 72 above, per A-G Trstenjak at paras 31 and 41 of her Opinion.

<sup>78</sup> Wils, W.P.J. (2011), "EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay Between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights", (2011) 34 *World Competition* 189.

<sup>79</sup> ECN Joint Statement, footnote 63 above, point 4.

<sup>80</sup> Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów w Tele2 Polska*, EU:C:2011:270 (judgment of 3 May 2011).

<sup>81</sup> Regulation 1/2003, art. 10.

<sup>82</sup> See e.g. Decision 84/380 (*Synthetic Fibres II*) OJ L 207, 2.8.1984, p. 17; Decision 88/87 (*Enichem/ICI*) OJ L 50, 24.2.1988, p. 18; Decision 94/296 (*Stichting Baksteen*) OJ L 131, 26.5.1994, p. 15.

<sup>83</sup> Cases C-238 etc/99P *Limburgse Vinyl Maatschappij and ors v Commission* EU:C:2002:582 (judgment of 15 October 2002) at paras 487-488.

<sup>84</sup> Decision 2003/600 (*French Beef*), at para 130; Case C-209/07 *BIDS*, fn. 72 above.

<sup>85</sup> Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98 (judgment of 19 February 2002)

<sup>86</sup> Case 120/78 *Rewe -Zentrale v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42 (judgment of 20 February 1979).

<sup>87</sup> See Baily, David and Whish, Richard (2018), *Competition Law*, OUP, 9th edition, Oxford: Oxford University Press, p. 139.

<sup>88</sup> Case T-450/05 *Automobiles Peugeot and Peugeot Nederland v Commission*, EU:T:2009:262, at para 55. (Judgment of 9 July 2009),

<sup>89</sup> ECN joint statement, footnote 62 above, point 5.

<sup>90</sup> Case 27/76 *United Brands v Commission*, EU:C:1978:22 (judgment of 14 February 1978); Cases T-69, 70 & 76/89 *RTE, BBC & ITP v Commission*, EU:T:1991:39, 40, 41 (judgments of 10 July 1991).

<sup>91</sup> Case 77/77 *British Petroleum v Commission*, EU:C:1978:141 (judgment of 29 June 1978).

<sup>92</sup> See fn. 73 above.

<sup>93</sup> Case 792/79R *Camera Care v Commission*, EU:C:1980:18 (judgment of 17 January 1980).

<sup>94</sup> Regulation 1/2003, art. 8.

<sup>95</sup> With a view to this the interim measures ordered in *Broadcom* apply for three years (still an extended period of time) or the date of adoption of a final decision if earlier.

<sup>96</sup> Case COMP/38.004 (*NDC Health/IMS Health: Interim Measures*), OJ 2002 L9/18.

<sup>97</sup> Case T-184/01R *IMS Health v Commission*, EU:T:2001:259 (judgment of 10 March 2005), upheld on appeal as Case C-481/81P(R) *NDC Health v Commission*, EU:C:2002:223 (judgment of 11 April 2002).

<sup>98</sup> Case AT.40608 (*Broadcom*), decision of 16 October 2019.

<sup>99</sup> Regulation 139/2004 OJ L 24, 29.1.2004, p. 1.

<sup>100</sup> Regulation 139/2004 Art. 1.

<sup>101</sup> *Ibid.*, arts. 6(1), 10(1).

<sup>102</sup> *Ibid.*, arts. 6(1), 10(3).

<sup>103</sup> *Ibid.*, art. 10(6).

<sup>104</sup> European Commission website, ["Competition - mergers"](#).

<sup>105</sup> KFST, Frister for fusionskontrol afbrydes i 14 dage, pressemeddelelse 1. marts 2020; BKartA, Kommunikation mit dem Bundeskartellamt (Corona-Maßnahmen), Meldung vom 17. März 2020; CCPC, *COVID-19 Temporary Merger Notification Process*, 18 March 2020.

<sup>106</sup> See Case M.7184 (*Marine Harvest/Morpol*) OJ C 455, 18 December 2014, p. 5; Case M.7993 (*Altice/PT Portugal*), decision of 24 April 2018; Case M.8179 (*Canon/Toshiba Medical Systems Corp*), decision of 27 June 2019.

<sup>107</sup> See in particular Case T-342/99 *Airtours v Commission*, EU:T:2002:146 (Judgment of 6 June 2002) in which the Court was excoriating of the Commission's economic and legal analysis. It recently rediscovered its vigour in annulling another Commission decision prohibiting an acquisition (of Telefónica UK by Hutchison 3G) in Case T-399/16 *CK Telecoms UK Investments v Commission*, EU:T:2020:217 (judgment of 28 May 2020).

<sup>108</sup> See e.g. the Enterprise Act (Specification of Additional Section 58 Consideration) Order 2020, S.I. 2020/627, amending the UK Enterprise Act 2002 to allow for government intervention in a merger or takeover with public health considerations, with a view to ensuring UK firms critical to tackling the coronavirus pandemic (protective equipment manufacturers, those in the food supply chain) are less susceptible to hostile foreign takeovers arising in an economic downturn.

<sup>109</sup> 'Significantly impede effective competition'; Regulation 139/2004, art. 2(2) and (3). To be compared with the SLC (significant lessening of competition) test used in some other jurisdictions.

<sup>110</sup> See the Opinion of A-G Szpunar in Case C-579/16P *Commission v FIH Holding and anor*, EU:C:2017:911, at para 58.

<sup>111</sup> TFEU, art. 107(1).

<sup>112</sup> TFEU, art. 107(2).



- <sup>113</sup> TFEU, art. 107(3).
- <sup>114</sup> TFEU, art. 108(3).
- <sup>115</sup> Regulation 2015/1589, OJ L 248, 24 September 2015, p. 9.
- <sup>116</sup> *Ibid.*, Arts. 4, 6, 9.
- <sup>117</sup> *Ibid.*, Art. 3.
- <sup>118</sup> Now Regulation 651/2014, OJ L 187, 26 June 2014, p. 1.
- <sup>119</sup> There is significant case law on this. See most recently Cases C-262 & 271/18P *Commission and Slovak Republic v Dóvera zdravotná poisťovňa*, EU:C:2020:450 (judgment of 11 June 2020).
- <sup>120</sup> So via art. 106(2) TFEU; see Case C-280/00 *Altmark Trans and anor v Nahverkehrsgesellschaft Altmark*, EU:C:2003:415 (judgment of 24 July 2003) and Commission Decision 2012/21 on the application of Article 106(2) to State aid for SGEIs, OJ L 7, 11 January 2012, p. 3.
- <sup>121</sup> Regulation 2015/1589, arts. 5-7.
- <sup>122</sup> TFEU, art. 296.
- <sup>123</sup> Regulation 2015/1589, art. 9.
- <sup>124</sup> European Commission, "[State aid: Commission approves €12 million Danish scheme to compensate damages caused by cancellations of large public events due to COVID-19 outbreak](#)", press release, IP/20/454, 11 March 2020.
- <sup>125</sup> Case C-367/95P *Commission v Sytraval & Brink's France*, EU:C:1998:154, (judgment of 2 April 1998) at para 67; Case T-168/01 *GlaxoSmithKline Services v Commission*, EU:T:2006:265 (judgment of 27 November 2006) at para 54; Case T-112/05 *Akzo Nobel and ors v Commission*, EU:T:2007:381 (judgment of 12 December 2007) at para 94.
- <sup>126</sup> OJ C 191, 23 March 2020, p. 1. It has been amended three times (see Informal [Consolidated Version](#)).
- <sup>127</sup> Temporary Framework, Communication, para 18.
- <sup>128</sup> *Ibid.*, para 39.
- <sup>129</sup> *Ibid.*, para 19.
- <sup>130</sup> The link to a Commission Press Release announcing this has since been withdrawn.
- <sup>131</sup> Regulation 2015/1589, art. 4(6).
- <sup>132</sup> TFEU, art. 108(1), (2).
- <sup>133</sup> Communication from the commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Europe's Moment: Repair and Prepare for the Next Generation*, COM(2020) 456 final, 27 May 2020. See fn. 39 above.
- <sup>134</sup> Communication from the commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The EU Budget powering the recovery plan for Europe*, COM(2020) 442 final, 27 May 2020, part 1.
- <sup>135</sup> European Council, [Council Conclusions](#), EUCO 10/20, 21 July 2020. NGEU funding was rejigged so that €360 billion is earmarked for loans, €390 billion for expenditure, and a maximum Multiannual Financial Framework (MFF) to 2027 of €1.074 billion agreed, with an extra €20.1 billion outside the MMF. The revenue will come from the Commission borrowing on behalf of the Union from capital markets.
- <sup>136</sup> TFEU, art. 107(1).
- <sup>137</sup> European Commission (2020), White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final.





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