

## U.S. and European Insight: Approaches to Anti-Competitive Practices During the COVID-19 (Coronavirus) Pandemic

As a result of the COVID-19 pandemic, people around the world are witnessing shortages of consumer goods, from hygiene products such as hand sanitizer and toilet paper, to protective equipment like face masks and gloves, to food staples such as pasta and rice. Governments are racing to purchase enough medical tests and develop effective treatments and vaccines. Meanwhile, some providers have taken advantage of this situation by raising their prices on goods that are in short supply, or by placing deceptive products in the market.

Such anti-competitive and fraudulent activities have caught the attention of authorities across the globe, which have acted quickly to prosecute wrongdoing while at the same time permitting some collaboration for the greater good.<sup>1</sup> This alert provides an overview of competition authorities' approaches to anti-competitive practices during the pandemic, with a focus on the United States and Europe.

### 1. Unilateral Practices, including Price Gouging

In the United States, authorities at the state and federal levels have announced efforts to prevent price gouging and to prosecute those responsible for engaging in such practices. At the state level, thirty-three attorneys general have signed letters urging online marketplaces including Amazon, Facebook, Craigslist, and Walmart to monitor price gouging by online sellers.<sup>2</sup> Many attorneys general have established online resources for

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<sup>1</sup> See, e.g., Portuguese Competition Authority, AdC assures vigilance of anticompetitive practices that exploit current situation (Mar. 16, 2020), [http://www.concorrenca.pt/vEN/News\\_Events/Comunicados/Pages/PressRelease\\_202003.aspx?lst=1&Cat=2020](http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202003.aspx?lst=1&Cat=2020); Luxembourg Competition Authority, Coronavirus: the liability of undertakings is not diminished (Mar. 13, 2020), <https://conurrence.public.lu/fr/actualites/2020/coronavirus-responsabilite-entreprises.html>; U.S. DOJ, Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products (Mar. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

<sup>2</sup> Josh Shapiro, Attorney General of Pennsylvania, Amazon, Facebook, Ebay, Walmart, Craigslist Must Stop Site Price Gouging by Online Sellers, (Mar. 25, 2020), <https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-amazon-facebook-ebay-walmart-craigslist-must-stop-site-price-gouging-by-online-sellers/>.

residents to report price gouging they have encountered,<sup>3</sup> and some have opened investigations and prosecutions.<sup>4</sup>

At the federal level, both the Executive and Legislative Branches have taken action against price gouging. On March 23, the president signed Executive Order (“E.O.”) 13910,<sup>5</sup> which grants the Secretary of Health and Human Services (“HHS”) the authority to limit the accumulation of health and medical resources and designate important materials as scarce, in part to prevent the resale of those resources “at prices in excess of prevailing market prices,” pursuant to the Defense Production Act of 1950, 50 U.S.C. § 4501 *et seq.*<sup>6</sup> Once an item is designated, the Act makes it a crime for any person to accumulate that item either (1) in excess of his or her reasonable needs or (2) for the purpose of selling it in excess of prevailing market prices. The Department of Justice (“DOJ”) established the COVID-19 Hoarding and Price Gouging Task Force to enforce these measures.<sup>7</sup> Penalties can include fines up to \$10,000 and/or imprisonment for up to one year.<sup>8</sup>

On April 24, the U.S. Attorney’s Office for the Eastern District of New York announced that it had filed a criminal action against a Long Island man, alleging that he had stocked up on materials including N95 masks and other personal protective equipment and sold them at significant markups.<sup>9</sup> The action was the first to invoke the Defense Production Act during the COVID-19 pandemic.<sup>10</sup>

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<sup>3</sup> See, e.g., Xavier Becerra, Attorney General of California, COVID-19 Consumer Information and Resources, <https://www.oag.ca.gov/consumers/COVID-19#price> (Apr. 29, 2020); Ken Paxton, Attorney General of Texas, How to Spot and Report Price Gouging, <https://www.texasattorneygeneral.gov/consumer-protection/disaster-and-emergency-scams/how-spot-and-report-price-gouging> (Apr. 29, 2020).

<sup>4</sup> See, e.g., Job Ferguson, Attorney General of Washington State, Statement on price gouging in public-health emergency, (Mar. 4, 2020), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-statement-price-gouging-public-health-emergency>; Andrew Cass, Ohio Attorney General’s Office settles with man accused of respirator mask price gouging, News Herald, (Apr. 27 2020) [https://www.news-herald.com/news/ohio-attorney-generals-office-settles-with-man-accused-of-respirator-mask-price-gouging/article\\_0077484e-8887-11ea-8262-9bb62230c1e5.html](https://www.news-herald.com/news/ohio-attorney-generals-office-settles-with-man-accused-of-respirator-mask-price-gouging/article_0077484e-8887-11ea-8262-9bb62230c1e5.html).

<sup>5</sup> E.O. 13910 of Mar 23, 2020, Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, 85 Fed. Reg. 17,001.

<sup>6</sup> *Id.*

<sup>7</sup> U.S. DOJ, Combatting price Gouging and Hoarding, (last updated April 21, 2020) <https://www.justice.gov/coronavirus/combattinpricegouginghoarding>, (containing HHS Secretary’s Notice designating categories of health and medical supplies that must not be hoarded or sold for exorbitant prices) <https://www.justice.gov/file/1264276/download>.

<sup>8</sup> 50 U.S.C. §4513.

<sup>9</sup> United States DOJ, U.S. Attorney’s Office, Eastern District of New York, Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective

Legislative activity has included the introduction of the COVID-19 Price Gouging Prevention Act (H.R. 6472) in the House of Representatives on April 7. The bill is intended to provide the Federal Trade Commission and state attorneys general with the enforcement tools to target price gougers.<sup>11</sup> It has 28 cosponsors and has been referred to the House Committee on Energy and Commerce.<sup>12</sup>

Private stakeholders are also addressing anti-competitive practices by suppliers that affect their reputation. 3M, the U.S.'s largest producer of N95 masks, has filed two trademark lawsuits in federal court in California and New York.<sup>13</sup> The lawsuits do not allege that the defendant companies violated 3M's trademark by selling counterfeit goods. Rather, they claim that the companies purported to have 3M's authorization to sell N95 masks at much higher prices than usual, and that this price-gouging—which 3M did not authorize—harmed 3M's brand. On April 24, the judge in the New York case issued a preliminary injunction prohibiting the defendant from using the 3M trademarks in any way.<sup>14,15</sup>

European competition authorities have also taken an active approach against unilateral practices. For instance, the Italian Competition Authority has opened two investigations against online platforms Amazon and eBay, for claims made regarding the effectiveness of health and sanitizing products (such as face masks and disinfectants) and their

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Equipment, (April 24, 2020) <https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0>.

<sup>10</sup> Emile Ruscoe, Law360, NY Sneaker Salesman Charged With COVID-19 Price Gouging, (April 24, 2020) [https://www.law360.com/newyork/articles/1267289/ny-sneaker-salesman-charged-with-covid-19-price-gouging?nl\\_pk=7f3a708a-6417-4486-9c46-190e42687557&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newyork](https://www.law360.com/newyork/articles/1267289/ny-sneaker-salesman-charged-with-covid-19-price-gouging?nl_pk=7f3a708a-6417-4486-9c46-190e42687557&utm_source=newsletter&utm_medium=email&utm_campaign=newyork).

<sup>11</sup> Schakowsky, Cicilline, Pallone & Nadler Introduce Bill to Protect Americans from Price Gouging During COVID-19 Health Crisis (April 4, 2020) <https://schakowsky.house.gov/media/press-releases/schakowsky-cicilline-pallone-nadler-introduce-bill-protect-americans-price>.

<sup>12</sup> See All Information (Except Text) for H.R.6472 - COVID-19 Price Gouging Prevention Act <https://www.congress.gov/bill/116th-congress/house-bill/6472/all-info> (last visited April 29, 2020).

<sup>13</sup> *3M Company v. Performance Supply, LLC*, 20-cv-02949-LAP-KNF (SDNY); *3M Company v. RX2LIVE, LLC*, 20-cv-00523-SAB (E.D. Cal.).

<sup>14</sup> Bill Donahue, Law360, 3M Wins Restraining Order In Price-Gouging Case, (Apr. 24, 2020), [https://www.law360.com/newyork/articles/1267281/3m-wins-restraining-order-in-price-gouging-case?nl\\_pk=7f3a708a-6417-4486-9c46-190e42687557&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newyork](https://www.law360.com/newyork/articles/1267281/3m-wins-restraining-order-in-price-gouging-case?nl_pk=7f3a708a-6417-4486-9c46-190e42687557&utm_source=newsletter&utm_medium=email&utm_campaign=newyork).

<sup>15</sup> On May 3, 2020, New York Governor Cuomo announced a partnership with six States (NY, NJ, CT, PA, DE, RI and MA) as regional purchasing consortium to jointly procure PPE, tests, ventilators and other medical equipment. The partnership will increase the States market power and prevent “price-gouging”. CBS, Cuomo announces 7-State coalition for purchasing medical equipment, (May 4, 2020), <https://www.cbsnews.com/news/andrew-cuomo-7-state-coalition-ppe-medical-equipment-coronavirus/>.

sudden price increase.<sup>16</sup> The same authority has also issued a request for information from private health facilities and testing laboratories in the Lazio Region that are advertising COVID-19 antibody tests at exorbitant prices.<sup>17</sup> The Antimonopoly Committee of Ukraine has opened an investigation against manufacturers, suppliers, and pharmacy chains in and around Kyiv, given a significant rise in prices of medical masks in the region.<sup>18</sup> Competition authorities in the UK,<sup>19</sup> the Netherlands,<sup>20</sup> and Turkey<sup>21</sup> are likewise monitoring price hikes in pharmaceutical and food industries and have warned against exploitative practices during the pandemic.

## 2. False Advertising

In addition to taking action against price gouging, competition authorities are working to prevent misleading and aggressive advertising, and the sale of counterfeit or unapproved products related to the pandemic.

The U.S. DOJ and the Federal Bureau of Investigation have established webpages dedicated to “combatting COVID-19 fraud,” which includes warnings about fraudulent

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<sup>16</sup> Italian Competition Authority (AGCM), the Authority begins investigating Amazon and eBay for misleading claims and excessive price increases, (Mar. 12, 2020), <https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-begins-investigating-Amazon-and-eBay-for-misleading-claims-and-excessive-price-increases>.

<sup>17</sup> Italian Competition Authority (AGCM), DC9877 - ICA: coronavirus emergency, inquiry launched following reports by the Lazio Region against Roman private health facilities and testing laboratories advertising CoVid-19 antibody tests (Apr. 17, 2020) <https://en.agcm.it/en/media/press-releases/2020/4/ICA-Coronavirus-emergency-inquiry-launched-following-reports-by-the-Lazio-Region-against-Roman-private-health-facilities-and-testing-laboratories-advertising-CoVid-19-antibody-tests>.

<sup>18</sup> Kyiv Post, Competition agency opens case on rise in prices of medical masks, (Mar. 31, 2020), <https://www.kyivpost.com/business/competition-agency-opens-case-on-rise-in-prices-of-medical-masks.html?cn-reloaded=1>.

<sup>19</sup> UK Competition and Markets Authority (CMA), CMA open letter to pharmaceutical and food and drink industries (Mar. 20, 2020), <https://www.gov.uk/government/publications/covid-19-cma-open-letter-to-pharmaceutical-and-food-and-drink-industries>. More recently, the UK has published an update to its COVID-19 taskforce where it noted that (i) as of 19 April it has received over 21,000 complaints related to COVID-19; (ii) it had written over 187 firms accounting for 2,500 complaints regarding large price increases over personal hygiene products, such as hand sanitiser and food products. UK Competition and Markets Authority (CMA), CMA publishes update on COVID-19 Taskforce (Apr. 24, 2020), <https://www.gov.uk/government/news/cma-publishes-update-on-covid-19-taskforce>.

<sup>20</sup> Dutch Authority for Competition and Markets (ACM), ACM’s oversight during the Coronavirus crisis (Mar. 18, 2020), <https://www.acm.nl/en/publications/acms-oversight-during-coronavirus-crisis>.

<sup>21</sup> Turkish Competition Authority, Public announcement as to prices in the food market (Mar. 23, 2020) (Turkish), <https://www.rekabet.gov.tr/tr/Guncel/kamuoyuna-duyuru-3b18d865266dea11811700505694b4c6?AspxAutoDetectCookieSupport=1>.

testing and treatment schemes.<sup>22</sup> Indeed, Justice Department attorneys in Utah brought civil charges against a companies that were selling silver products that would purportedly prevent and treat COVID-19; a federal court issued an injunction against the activity and froze the defendants' assets.<sup>23</sup> In Los Angeles, the city attorney announced a settlement with a company that was selling fraudulent COVID-19 at-home testing kits and claiming that they were approved by the Food and Drug Administration.<sup>24</sup> Private entities, too, are taking action against others. CoronaCide LLC, a company that makes real COVID-19 tests for use by healthcare practitioners, sued another company in Florida for falsely offering to sell CoronaCide's test kits for at-home use.<sup>25</sup>

The Italian Competition Authority has already taken action against: (i) the sale of a generic drug and antiviral for the treatment of HIV infections which was marketed as the "only remedy to fight against COVID-19"<sup>26</sup>; and (ii) the sale of testing kits for home diagnosis of coronavirus by ContextLogic Inc, the US company that owns the www.wish.com platform and its subsidiary ContextLogic B.V.<sup>27</sup> In addition to this, the Italian Competition Authority has asked major Internet search engines (Google, Apple, Italiaonline, Microsoft, Verizon (Yahoo), Mozilla, and DuckDuckGo) to remove 361 URLs corresponding to websites that redirect visitors to sixty "abusive pharmacies" that lack the necessary authorization to sell products online.<sup>28</sup>

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<sup>22</sup> United States DOJ, Combatting COVID-19 Fraud, <https://www.justice.gov/coronavirus/combattinfraud> (last visited Apr. 29, 2020); Federal Bureau of Investigation, FBI Sees Rise in Fraud Schemes Related to the Coronavirus (COVID-19) Pandemic, (Mar. 20, 2020) <https://www.ic3.gov/media/2020/200320.aspx>.

<sup>23</sup> Italian Competition Authority (AGCM), Press release PS11723 - Coronavirus, sospesa la commercializzazione di un farmaco antivirale venduto a più di 600 euro e disposto l'oscuramento del sito (17 March, 2020) (Italian), <https://www.agcm.it/media/comunicati-stampa/2020/3/PS11723>.

<sup>24</sup> NPR, LA Reaches Legal Settlement With Company For 'False Advertising' Of COVID-19 Test, (Mar. 25, 2020), <https://www.npr.org/2020/04/25/844777708/1-a-reaches-legal-settlement-with-company-for-false-advertising-of-covid-19-test>.

<sup>25</sup> Bloomberg Law, Covid-19 Test Maker Sues Company for Falsely Advertising Kits, (April 8, 2020) <https://news.bloomberglaw.com/ip-law/covid-19-test-maker-sues-company-for-falsely-advertising-kits>.

<sup>26</sup> Italian Competition Authority (AGCM), Press release PS11723 - Coronavirus, sospesa la commercializzazione di un farmaco antivirale venduto a più di 600 euro e disposto l'oscuramento del sito (17 March, 2020) (Italian), <https://www.agcm.it/media/comunicati-stampa/2020/3/PS11723>.

<sup>27</sup> Italian Competition Authority (AGCM), Press release PS11734 - Antitrust: proceedings initiated against the www.wish.com platform ContextLogic / Wish, (Mar. 31, 2020). <https://en.agcm.it/en/media/press-releases/2020/4/Antitrust-proceedings-initiated-against-the-www.wish.com-platform>.

<sup>28</sup> Italian Competition Authority (AGCM), Press release PS11746 - ICA-Authority asks the operators of the major search engines and browsers to take action against unauthorised online sales of COVID-19 drugs (April 21, 2020). <https://en.agcm.it/en/media/press-releases/2020/4/ICA-Authority-asks-the->

### 3. Mergers

In the area of mergers, competition authorities have generally suspended in-person filing and meeting obligations in favor of online submissions and phone or video meetings.<sup>29</sup> Apart from these procedural changes, however, merger regulations continue to apply to their full extent, even to sectors affected by the pandemic.<sup>30</sup>

The UK's Competition and Markets Authority ("CMA") announced in April that it would block a proposed merger between online airline booking software providers Sabre and Farelogix. CMA acknowledged that its decision came at a time of "uncertainty and disruption in the global travel industry due to the COVID-19 pandemic," but emphasized the importance of protecting competition between businesses that provide services to airlines.<sup>31</sup> The U.S. DOJ, likewise, had attempted to block the merger by taking the two companies to court. Although a Delaware federal court decided in early April to permit the deal,<sup>32</sup> the parties announced on May 1 that they had called off the merger because of CMA's opposition.<sup>33</sup>

Regulators have continued to impose sanctions for antitrust violations, as evidenced by the €155,000 fine imposed by the Portuguese competition authority on one hospital for acquiring another (before the pandemic) without notifying or obtaining authorization from the antitrust regulator—although the regulator has agreed to accept payment of the

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[operators-of-the-major-search-engines-and-browsers-to-take-action-against-unauthorised-online-sales-of-COVID-19-drugs%20%20C2%A0.](#)

<sup>29</sup> EU Commission, Mergers Practical Information Guidance (Mar. 16, 2020),

[https://ec.europa.eu/competition/mergers/information\\_en.html](https://ec.europa.eu/competition/mergers/information_en.html). See also Federal Trade Commission, Guidance for filing parties adopted by US FTC and DOJ in response to the novel coronavirus (COVID-19), (April 15, 2020), <https://www.ftc.gov/enforcement/premerger-notification-program/guidance-filing-parties>.

<sup>30</sup> See, e.g., Ian Conner, FTC, Antitrust review at the FTC: staying the course during uncertain times (Apr 6, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain>.

<sup>31</sup> UK Competition and Markets Authority (CMA), CMA blocks airline booking merger (April 9, 2020) <https://www.concurrences.com/fr/bulletin/news-issues/preview/the-uk-competition-authority-blocks-merger-between-online-airline-booking>.

<sup>32</sup> United States DOJ, Statement from Assistant Attorney General Makan Delrahim on District Court Decision in U.S. v. Sabre Corp. and Farelogix Inc. (Apr. 8, 2020), <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-district-court-decision-us-v-sabre-corp>.

<sup>33</sup> Bryan Koenig, Law360, UK Opposition Forces Sabre, Farelogix To Drop Merger, (May 1, 2020) [https://www.law360.com/trials/articles/1269449/breaking-uk-opposition-forces-sabre-farelogix-to-drop-merger?nl\\_pk=fffb0e4b-6cec-46de-acd8-5744279b44db&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=trials](https://www.law360.com/trials/articles/1269449/breaking-uk-opposition-forces-sabre-farelogix-to-drop-merger?nl_pk=fffb0e4b-6cec-46de-acd8-5744279b44db&utm_source=newsletter&utm_medium=email&utm_campaign=trials).

fine in installments, to avoid affecting the hospitals' provision of services during the outbreak.<sup>34</sup>

Authorities are also taking into account the market changes that the crisis has caused to certain sectors and to individual businesses. In December 2019, the UK's CMA launched an investigation into Amazon's acquisition of a stake in restaurant delivery company Deliveroo.<sup>35</sup> This past month, the CMA provisionally cleared the transaction, because it found that as a result of the pandemic, Deliveroo's business would fail without Amazon's investment and it would exit the market, thereby reducing competition.<sup>36</sup> This is the first time the UK CMA has recognized a "failing firm" defense.

#### 4. Permitted Collaboration

Multiple competition authorities have issued guidance on the necessary and temporary collaboration between competitors in the face of the situation caused by the coronavirus.

In the United States, the DOJ and FTC have adopted an expedited process to review proposed competitor collaborations relating to COVID-19 within seven days.<sup>37</sup> Although there is no requirement to report transactions unless they fall within the existing scope of the Hart-Scott-Rodino Act, the participating companies can voluntarily request a review in order to get assured that their transaction is in line with antitrust rules. A joint statement by the two authorities directs individuals and businesses to their existing online tools and resources to evaluate potentially anticompetitive conduct (the DOJ Antitrust Division's Business Review Process and the Federal Trade Commission's Advisory Opinion Process).<sup>38</sup> As a practical example, the DOJ has announced that it will not challenge the collaborative efforts of AmerisourceBergen Corporation (AmerisourceBergen) to identify global supply opportunities, ensure product quality,

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<sup>34</sup> Portuguese Competition Authority, Press release 04/2020, AdC fines Hospital Particular do Algarve for gun-jumping, (Mar. 19, 2020)

[http://www.concorrenca.pt/vEN/News\\_Events/Comunicados/Pages/PressRelease\\_202004.aspx](http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202004.aspx).

<sup>35</sup> The Guardian, Amazon's deal with Deliveroo faces in-depth inquiry, (Dec. 2019),

<https://www.theguardian.com/business/2019/dec/27/amazon-deliveroo-inquiry-regulator-london-food>.

<sup>36</sup> UK Competition and Markets Authority (CMA), Notice of provisional findings relating to the anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo (April 17, 2020) [https://assets.publishing.service.gov.uk/media/5e99983cd3bf7f031b0cc9be/Amazon-Deliveroo\\_Notice\\_of\\_PFs\\_FOR\\_PUBLICATION\\_---.pdf](https://assets.publishing.service.gov.uk/media/5e99983cd3bf7f031b0cc9be/Amazon-Deliveroo_Notice_of_PFs_FOR_PUBLICATION_---.pdf).

<sup>37</sup> DOJ/FTC, Joint Antitrust Statement Regarding COVID-19, (Mar. 24, 2020)

<https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

<sup>38</sup> *Id.*

and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients.<sup>39</sup>

Likewise, the European Competition Network (“ECN”) announced that it would not actively intervene to prevent temporary collaboration to correct shortages in supplies of scarce products.<sup>40</sup> Similar guidelines have been issued by the European Commission, as well as by individual countries.<sup>41</sup>

In line with the above, certain countries have granted exemptions or have temporarily eliminated authorization requirements for specific industries. The Norwegian government has granted the transportation sector a three-month temporary exemption from the prohibition against anticompetitive agreements and practices in the Norwegian Competition Act, in order to secure access to goods and services for the population.<sup>42</sup>

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<sup>39</sup> United States DOJ, Justice Department Issues Business Review Letter to AmerisourceBergen Supporting Distribution of Critical Medicines Under Expedited Procedure for COVID-19 Pandemic Response (April 20, 2020), <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-amerisourcebergen-supporting-distribution>.

<sup>40</sup> European Competition Network, Joint Statement on Competition Law during COVID-19, (Mar. 23 2020) [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf). A similar notice has been issued by the International Competition Framework, ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic, (April 9, 2020): <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf>.

<sup>41</sup> EU Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, C(2020) 3200 final, (April 8, 2020) [https://ec.europa.eu/info/sites/info/files/framework\\_communication\\_antitrust\\_issues\\_related\\_to\\_cooperation\\_between\\_competitors\\_in\\_covid-19.pdf](https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf). Individual countries that have made similar announcements include the UK (UK Competition and Markets Authority (CMA), CMA approach to business cooperation in response to COVID-19, (Mar. 25, 2020) <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19>); Mexican Competition Authority (COFECE), COFECE’s position for enforcing the Federal Economic Competition Law in light of the current health emergency, Press Release COFECE-012-2020, (Mar. 27, 2020), [https://www.cofece.mx/wp-content/uploads/2020/03/COFECE-012-2020\\_COFECE-COVID-19.pdf](https://www.cofece.mx/wp-content/uploads/2020/03/COFECE-012-2020_COFECE-COVID-19.pdf); Canada, Competition Bureau statement on competitor collaborations during the COVID-19 pandemic, (April 8, 2020) <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html>.

<sup>42</sup> Norwegian Competition Authority, Transportation sector is granted temporary exception from the Competition Act (Mar. 19, 2020), <https://konkurransetilsynet.no/transportation-sector-is-granted-temporary-exception-from-the-competition-act/?lang=en>. Similar exceptions have been granted by the governments of New Zealand and Finland. *See, e.g.*, New Zealand Competition Authority, Government statement on commercial cooperation during COVID-19, (Mar. 22, 2020), <https://www.beehive.govt.nz/release/government-statement-commercial-cooperation-during-covid-19> and Finnish Competition Authority, Exceptional circumstances caused by the coronavirus to affect the

And the UK adopted a package of measures allowing for cooperation between supermarkets, including the ability to share data with each other on stock levels, coordinate to keep shops open, and share distribution depots and delivery vans.<sup>43</sup>

## 5. Public Procurement Rules

Government contracting authorities have faced the need to conduct procurement processes much more quickly in the context of the pandemic, to build additional hospitals, acquire personal protective equipment (“PPE”) for health care workers, and meet other urgent needs.

Generally, existing public procurement rules, which typically require a public tender process that complies with the principles of transparency and equality, continue to apply. However, as these processes can be time consuming, several countries have issued guidance for contracting authorities explaining possible alternatives while warning against risks involved by public procurement infringements, including court challenges and declarations of inefficiency of public contracts.

In the United States, the federal agencies have each developed their own procedures for hastening procurement. For example, the Department of Energy announced that it has increased the micro-purchase threshold and simplified the acquisition threshold specifically in response to the COVID-19 emergency.<sup>44</sup> The Department of Defense, meanwhile, has established the COVID-19 Joint Acquisition Task Force (JATF) to coordinate medical resource supply information, forecast gaps that can be filled by industrial suppliers, and connect suppliers to other agencies as needed.<sup>45</sup> The DOJ, meanwhile, continues to operate the Procurement Collusion Strike Force, established in November 2019 to investigate price fixing and bid rigging for government contracts.

Ireland and the UK have both issued guidance for government acquisitions of COVID-19-related goods. Both Information Notes provide a discussion of options available under their implementation of the EU Directive 2004/18/EC on procedures for the award of public contracts. Specifically, the alternatives listed include (i) the direct award of a contract through the negotiated procedure due to extreme urgency

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application of the Finnish Competition Act, (Mar. 23, 2020): <https://www.kkv.fi/en/current-issues/press-releases/2020/23.3.2020-exceptional-circumstances-caused-by-the-coronavirus-to-affect-the-application-of-the-competition-act/>.

<sup>43</sup> UK Government, Competition Laws relaxation: Supermarkets to join forces to feed the nation (Mar. 19, 2020), <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>.

<sup>44</sup> United States Department of Energy, PF 2020-19 Emergency Acquisition Flexibilities for Coronavirus Disease 2019 (COVID-19) (March 24, 2020) <https://www.energy.gov/management/downloads/pf-2020-19-emergency-acquisition-flexibilities-coronavirus-disease-2019-covid>.

<sup>45</sup> United States Department of Defense, COVID-19 Joint Acquisition Task Force Fact Sheet <https://www.acq.osd.mil/fo/acq/docs/COVID-19-Joint-Acquisition-Task-Force-Fact-Sheet.pdf>.

(Regulation 32(2)(c) of Directive 2004/18/EC<sup>46</sup>); (ii) the direct award in a context of absence of competition or protection of exclusive rights; (iii) call for competition using a standard procedure with accelerated timescales; (iv) social and other specific services; and (v) extension or modification of a contract during its term.<sup>47</sup>

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<sup>46</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.

<sup>47</sup> Irish Office of Government Procurement, Information Note – Covid-19 (Coronavirus) and Public Procurement (March 22, 2020) <https://ogp.gov.ie/information-note-covid-19-coronavirus-and-public-procurement/>. Also, UK Government, Procurement Policy Note - Responding to COVID-19, Report PPN 01/20, (Mar. 18, 2020), <https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>.