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## **How a crisis can change the law**

**Competition law**

**Free movement law**

**State aid law**

**Overpricing by exploiters**

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## Competition law

Preventing parties collaborating?

### 23 March 2020 – ECN Joint Statement

- the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply
- 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. The ECN will therefore not hesitate to take action...
- ...the ECN would like to point out that the existing rules allow manufacturers to set maximum prices for their products. The latter could prove useful to limit unjustified price increase at the distribution level

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## Competition law

Preventing parties collaborating?

### 8 April 2020 – Commission Temporary Framework

- The exceptional circumstances of this time and its related challenges may trigger the need for undertakings to cooperate with each other in order to overcome or at least to mitigate the effects of the crisis to the ultimate benefit of citizens.
- The present Communication covers possible forms of cooperation between undertakings in order to ensure the supply and adequate distribution of essential scarce products and services during the COVID-19 outbreak and thus address the shortages of such essential products and services resulting first and foremost from the rapid and exponential growth of demand

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## Competition law

Preventing parties collaborating?

### 8 April 2020 – Comfort letter for Medicines for Europe (fka EGA)

- cooperation to model demand for all medicines facing increased demand in the context of COVID-19
- identify production capacity and existing stocks, and to adapt or to reallocate, based on projected or actual demand, production and stocks, and to potentially also address the distribution of COVID-19 medicines
- in the present exceptional circumstances the cooperation practices as set out above do not raise concerns under Article 101
- does not cover any discussion of prices; subject to participating undertakings not unduly increasing prices beyond what is justified by possible increases in costs

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## Free movement law

Protecting national supplies?

### 13 March 2020 – Commission Communication

- Unilateral national restrictions to the free movement of essential supplies to the healthcare systems create significant barriers and affect dramatically Member States' capacity to manage the COVID-19 outbreak.
- Price regulations may be helpful to avoid soaring and abusive prices

### 14 March – 16 May 2020 – PPE export authorisations (third countries)

PPE	Masks	Gowns	Glasses
Authorised	13.5m	1m	0.4m
Rejected	4m	0.1m	0.3m

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## Free movement law

Protecting national supplies?

### MHRA guidance – medicines that cannot be exported to EEA or third countries

- **25 February 2020:** 3 medicines added (Lopinavir + Ritonavir, Chloroquine phosphate and Azathioprine)
- **13 March 2020:** 1 medicine added (Hydroxychloroquine)
- **20 March 2020:** 82 medicines added
- **23 April 2020:** 33 medicines added

## State aid law

Preventing governments supporting?

**Decisions Mar-May 2019:** 64

**Decisions Mar-May 2020:** 240

### Commission Temporary Framework for State Aid, amendment 3 April 2020

- it is also essential to facilitate COVID-19 relevant research and development, to support the construction and upgrade of testing facilities of COVID-19 relevant products, as well as the setting up of additional capacities for the production for products needed to respond to outbreak
- The aid beneficiary shall commit to grant non-exclusive licences under non-discriminatory market conditions to third parties in the EEA

## Overpricing by exploiters

What is the answer?

### Competition law

- existing rules allow manufacturers to set maximum prices for their products
- subject to participating undertakings not unduly increasing prices
- CMA “lobbied the government for emergency powers to crack down on companies profiteering from the pandemic after finding itself hamstrung by existing laws” (FT, 17 May 2020)

### Free movement law

- price regulations may be helpful to avoid soaring and abusive prices

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## Overpricing by exploiters

What is the answer?

### Trade mark law?

*3M v Performance Supply*

- Defendant alleged to have offered 7m N95 respirators to NY for 500% over list price on 30 March 2020
- Filed SDNY on 10 April 2020
- Temporary restraining order 24 April 2020
- Preliminary injunction 4 May 2020

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## How a crisis can change the law

**Competition law – cooperation means price control**

**Free movement law – hard to limit within trade area**

**State aid law – price of aid may be NEND**

**Overpricing by exploiters – are trade marks the answer?**

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