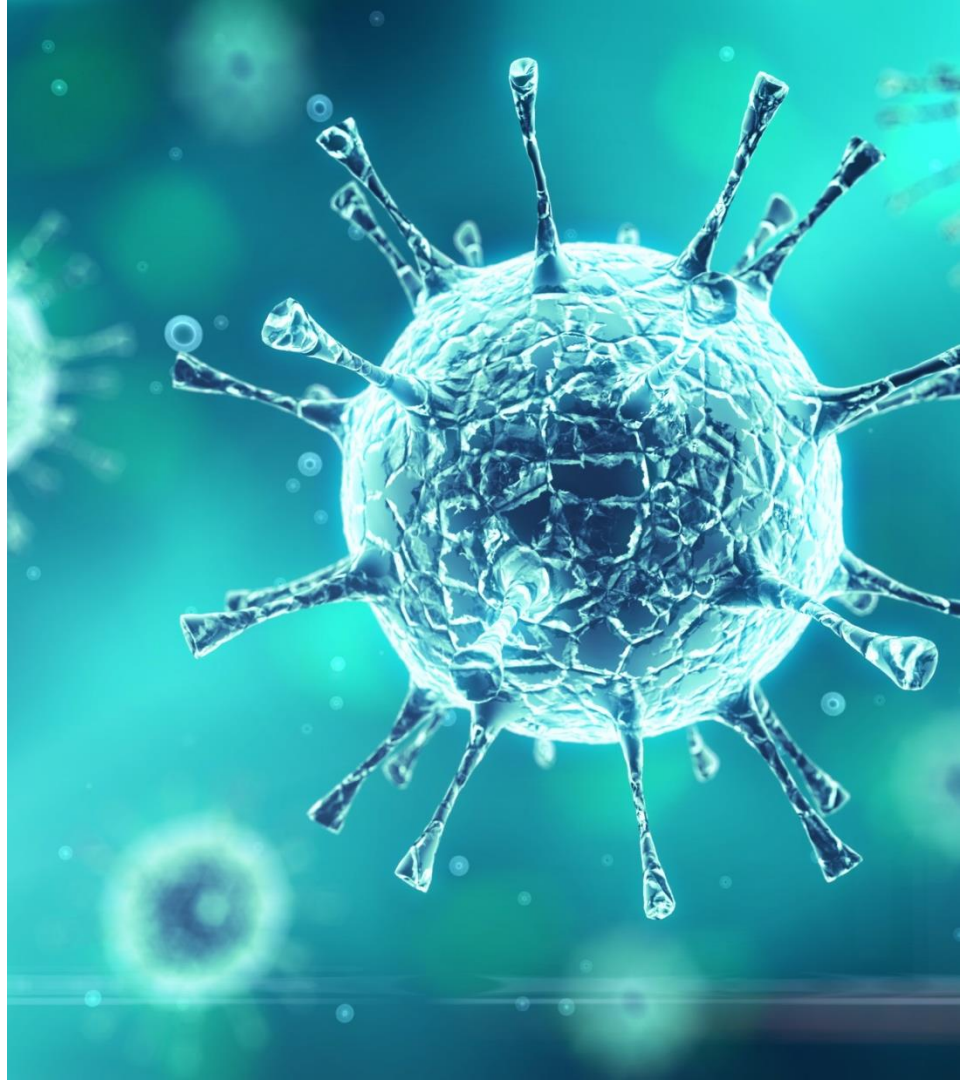


Cooperation agreements during the health crisis: European Commission's guidelines

April 2020



Cooperation agreements during the health crisis: European Commission's guidelines

On April 8, 2020, the European Commission published a communication setting out a temporary framework for analyzing agreements entered into between competitors whose purpose is to address the urgent needs arising from the health crisis (the **Temporary Framework**).

You will find below a summary of the main points of this Temporary Framework, which are also analyzed in light of the principles resulting from:

- The communication published on the same day laying down guidelines pertaining to the optimal and rational supply of medicines in order to avoid shortages during the COVID-19 outbreak (**Supply Guidelines**).
- The 2011 communication from the European Commission laying down guidelines on horizontal cooperation agreements, to which the Temporary Framework refers (**Cooperation Guidelines**).

We also provide you with an operational tool allowing a preliminary analysis of such cooperation agreements.

Temporary Framework – Key Takeaways

Purpose



- Facilitate the establishment of cooperation agreements between competitors to meet the needs deriving from the health crisis.
- In particular, this applies to agreements whose purposes is to manage disruptions in the supply of drugs, and the Temporary Framework seems to be largely inspired by the guidance requests received in this sector.
- However, the Temporary Framework is intended to apply to all agreements.

General conditions to be met by cooperation agreements



The Temporary Framework specifies that cooperation agreements are not an issue under competition law provided that such cooperation measures are:

- **Objectively necessary** to achieve the objective pursued (such as, for instance, an increase in the production of necessary drugs);
- **Limited to what is strictly indispensable** to achieve such objective, both:
 - From a **temporal** standpoint: the measures must be temporary in nature and not go beyond the necessary period of time; and
 - In terms of **type of measure**: the scope and nature of the contemplated measures must be clearly defined in order to strictly meet the objectives pursued.

An exceptional scheme



- Possibility for companies to submit their draft agreement to the European Commission and receive an informal validation (comfort letter).
- Exceptional as, since 2003, it has no longer been possible to notify agreements to the European Commission and companies must carry out a self-assessment.
- Even if this is not a formal decision, such comfort letter helps to secure the agreements.
- Dedicated webpage and contact address:
<https://ec.europa.eu/competition/antitrust/coronavirus.html>
COMP-COVID-ANTITRUST@ec.europa.eu

Multi-company cooperation the intervention of a trustworthy third party



In some cases, the implementation of agreements may require the intervention of a trustworthy third party (professional association, independent counsel, public body, etc.). In this context, the third party may, for instance:

- Coordinate the joint shipping of raw materials necessary for production;
- Collect and aggregate information on stocks, production and capacity without providing each company with individual information on its competitors;
- Help to identify drugs (or other products) for which a risk of shortage exists;
- Work on a template to forecast demand and monitor the risks of disruption at the level of each Member State;
- Collect and aggregate information on shortages and ask companies, without sharing this information with competitors, whether they may address such shortages, either with existing stocks or by increasing production.

Examples of agreements concerned: those having the following purposes



- Rapid increase in the manufacture of high-demand products – including by reducing the manufacture of other less sensitive products.
- Joint management of stocks which may involve exchanges of information between producers.
- Specialization of production sites: reorganizing production so that a site may focus on the manufacture of a single product.

Conditions to be met for the intervention of a trustworthy third party



- The Commission indicates that the intervention of the third party must be subject to certain precautions, in particular the fact that there should be no exchange of individualized information between competitors.
- Furthermore, joint cooperation shall, of course, comply with the general conditions aforementioned (i.e. objectively necessary cooperation limited to what is strictly indispensable).
- Any joint cooperation will also have to avoid antitrust risks which may result from any cooperation such as, for instance, anticompetitive foreclosure (§69 et seq. of the Cooperation Guidelines): in the context of health cooperation, it seems to us that the trustworthy third party will have to carry out its mission with neutrality and according to objective rules allowing not to discriminate between the companies participating in the cooperation system.

Agreements requested or encouraged by public authorities



The Temporary Framework distinguishes between two scenarios :

- If cooperation is merely **encouraged** by public authorities : no exemption from the application of competition rules. The intervention of the public authority is only an element taken into account in the analysis of the agreement;
- If cooperation is **imposed** on companies (in particular through a text providing for sanctions in the event of non-compliance with the latter), such cooperation may be considered to be authorized.

Therefore, it is paramount, in each case, to determine whether cooperation measures are voluntary or imposed: this will determine the framework for the application of competition law. This distinction is in line both with EU case law and the Cooperation Guidelines (§22).

It is worth noting that the Supply Guidelines encourage Member States to set up such cooperation structures.

Proof recommendation



The Temporary Framework recommends companies and entities in charge of cooperation agreements to properly document all agreements and exchanges so that the European Commission may, where appropriate, verify the application of the aforementioned conditions.

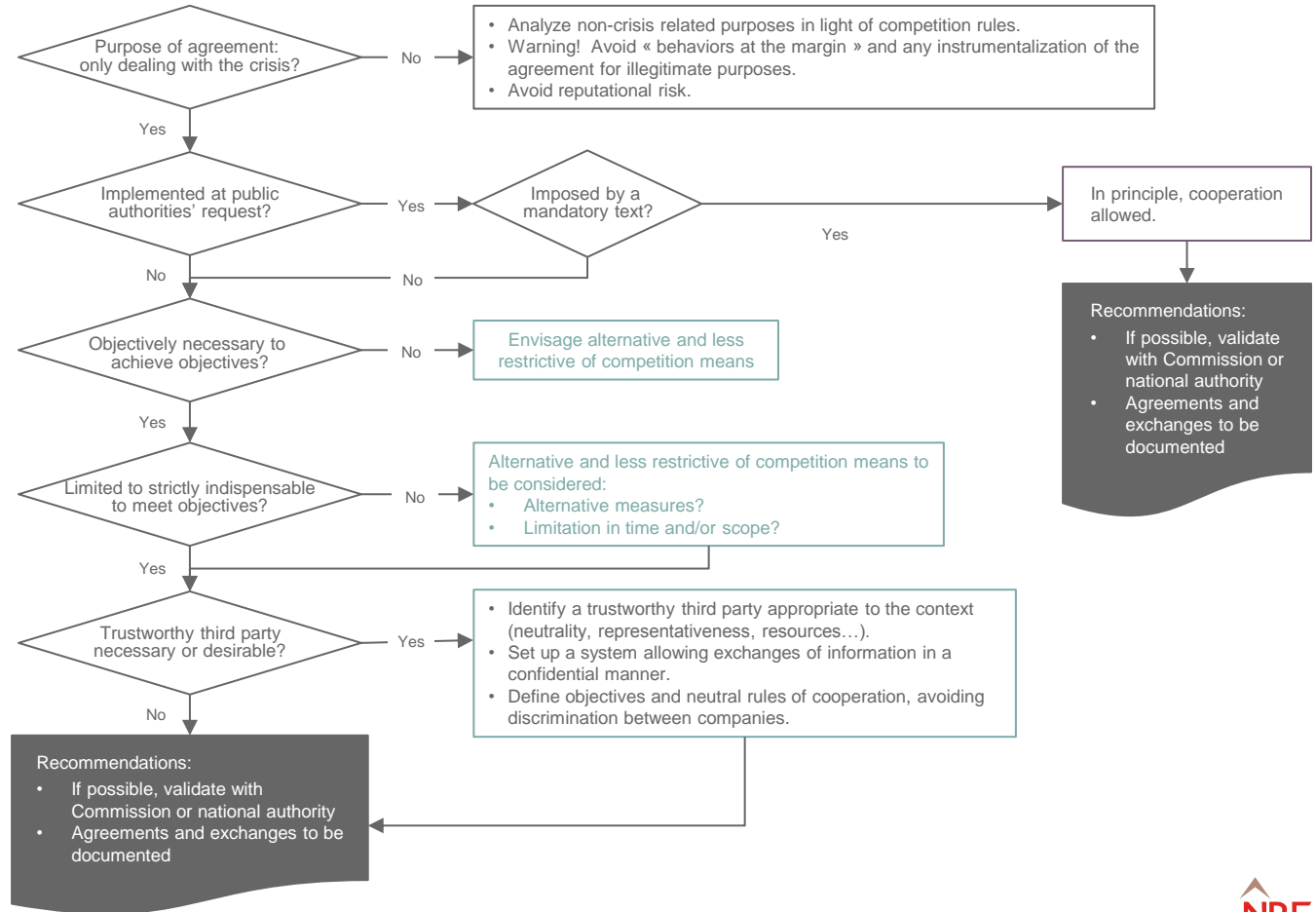
Duration



These provisions shall apply on a temporary basis from April 8, 2020 until further notice.

Decision Tree

This chart aims at making it easier for operational staff to understand the issues to be taken into account when setting up a cooperation agreement. It shall obviously not replace a complete legal analysis of an agreement.



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