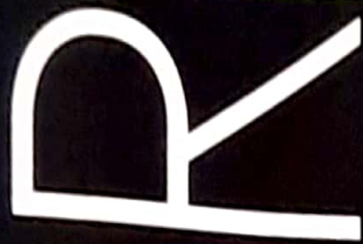

EUROPEAN COMPETITION LAW REVIEW

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ARTICLES

- European tacit collusion theory and its application to price algorithms
  Jan Kupčík
- The current status of data portability in personal data and competition law
  Robert Walters
- Autonomous vehicles at the antitrust crossroads
  Shaurya Aron and Shweta Murarka

COMMENT

- EU merger control: the novelties in gun-jumping
  Konstantina Sideri
- Exemptions and guidelines under antitrust law during Covid-19: a global review
  Shreya Chandhok
- The indirect route of securing interest of consumers and competitors under the EU competition law
  Krusha Bhatt

BOOK REVIEWS

NEWS

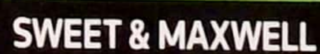

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Table of Contents

Editorial
ALEXANDER M. WAKSMAN

Editorial: Issue 11 531

Articles
JAN KUPČÍK

European tacit collusion theory and its application to price algorithms 533
The debate about a tacit collusion of price algorithms is widespread. However, not every alignment of prices that are set by algorithms is a tacit collusion. The author theoretically analyses the case law of the Court of Justice defining an agreement, a concerted practice and a collective dominance as opposed to the notion of a tacit collusion. The analysis allows us to formulate the relevant aspects of these concepts that differentiate them from a tacit collusion and, therefore, determine whether the conduct in question is legal or illegal. Furthermore, these theoretical conclusions are applied to both existing and expected collusive conduct inflicted by the use of algorithms. Conditions for the various types of an algorithmic collusion becoming illegal under arts 101 or 102 TFEU are identified. In the light of the findings, the author elaborates on viability and effectivity of suggestions presented in theory, aiming to address the suboptimal outputs caused by a tacit collusion.

ROBERT WALTERS

The current status of data portability in personal data and competition law 546
This article explores the current status of data portability in Australia, the European Union (EU), the United Kingdom (UK) and the United States (US). The right to data portability was introduced to provide consumers with greater choice to manage their personal data. It enables consumers to obtain a copy of their personal data, and the transfer of data from one controller to another controller. Thus, the resulting effect from exporting data between controllers is to facilitate and maximise competition. This comes at a time when significant fines have been handed down by the EU and the US for breaches in data protection law, and states in the US are implementing privacy laws that resemble the EU legal framework. Investigations have been carried out by various governments that have revealed monopoly type behaviour from large internet entities such as Google and Facebook. This article also explores some of the recent investigations and makes the point that the government will need to balance carefully the protection of personal data, while providing competition in the internet economy. However, it must be noted that these entities were some of the first in this new economy to emerge. There are calls for these entities to be broken up. Yet, one of the most pressing issues that will need to be managed, should it be the policy direction by governments to break these entities up, is the impact on the end consumer and the possibility of higher prices to access certain platforms over the internet. With Brexit looming, this article will also look at what impact this might have on the UK. In addition to these jurisdictions, this article will also look at what the US are proposing in the area of data protection and competition law. The article will demonstrate that the gap is closing between competition and data protection law, however, it will take a lot more work to close the gap permanently. It may never be settled.

SHAURYA ARON & SHWETA MURARKA

Autonomous vehicles at the antitrust crossroads 564
Autonomous vehicles are expected to bring a number of productivity and technological benefits. KPMG has concluded that India ranks 20th globally in the Autonomous Vehicles Readiness Index. Much of it can be attributed to the lack of central government's enthusiasm to enact a set of rules or guidelines which might facilitate the introduction of autonomous vehicles in the country as government believes that the introduction of self-driving cars will take away the jobs of the people. These vehicles might have to overcome a major hurdle under the legal regime of the country on account of the behaviour of manufacturers and service providers. There is also a threat to competition as entry barriers can be created by the owner of "SEP" by commanding its dominant position and also by "OEM" who has the access to data. The Indian competition enforcement authority has already inquired into the allegations of vertical restraints against the manufacturers of traditional vehicles. This article tries to look into the potential anti-competitive actions of the manufacturers of autonomous vehicles which might have an adverse effect on the consumer sovereignty in the market, protection of which is one of the primary objectives of the Indian Competition Act. It analyses how the conduct of manufacturers of autonomous vehicles may adversely affect competition by imposing vertical restraints and the evolution of economic thinking regarding vertical restraints, and also suggests some procedures for developing investigation into the cases of vertical restraint with respect to autonomous vehicles.

Comment

KONSTANTINA SIDERI

EU merger control: the novelties in gun-jumping 571

The Commission's latest decisional practice in gun-jumping stressed that, despite the fact that gun-jumping is not a new phenomenon, it has become a topic of current interest, especially following the recent Commission decision in the *Canon* case in June 2019 and the more recent ECJ judgment in the *Marine Harvest* case in March 2020.

SHREYA CHANDHOK

Exemptions and guidelines under antitrust law during Covid-19: a global review 574

The Covid-19 pandemic has not only affected the health of individuals but has had a perceptible impact on both consumers and businesses. The severity of the present circumstances has directed many jurisdictions to introduce new guidelines and exemptions for businesses. The author through this article has analysed the various exemptions and guidelines provided by five different jurisdictions, namely, the EU, the UK, Australia, India, and the US, and has further provided some suggestions for a future course of action.

KRUSHA BHATT

The indirect route of securing interest of consumers and competitors under the EU competition law 578

This article delivers the notion that to enforce competition rules which are aimed at maintaining a balance between profitability of the competitors and welfare of the consumers, the crucial aspect is a healthy competitive market. To convey the notion of the article, evidence is taken from the case of *GlaxoSmithKline v Commission*, and other relevant cases pertaining to arts 101 and 102 TFEU.

Book Reviews

MATEUSZ BŁACHUCKI

Global Competition Enforcement: New Players, New Challenges 583

National Reports

Canada

MERGERS
Animal health treatments N-111

Canada

MERGERS
Data communications N-111

Czech Republic

ANTI-COMPETITIVE AGREEMENTS
E-cigarettes N-112

Denmark

ANTI-COMPETITIVE AGREEMENTS
Clothing retailers N-112

Denmark

ABUSE OF DOMINANT POSITION
Unaddressed mail market N-113

Germany

PROCEDURE
Waste disposal sector N-114

Portugal

ANTI-COMPETITIVE AGREEMENTS
Food retailing sector N-116

Portugal

ANTI-COMPETITIVE PRACTICES
Telecommunications sector N-117

Portugal

ANTI-COMPETITIVE PRACTICES
Merger notification N-117

Switzerland

PROCEDURE
Civil antitrust proceedings N-118

Turkey

MERGER
Gun-jumping N-119

COMMENT

EU merger control: the novelties in gun-jumping

Konstantina Sideri*

EU law; Gun-jumping; Merger control; Notification

A. Introduction

The Commission's latest decisional practice in EU merger control and, in particular, in gun-jumping stressed that, despite the fact that gun-jumping is not a new phenomenon, it has attracted a lot of attention, because of the Commission's interest in infringements of the notification and standstill obligations. Especially, following the recent Commission decision in the *Canon* case in June 2019 and the more recent ECJ judgment in the *Marine Harvest* case in March 2020, gun-jumping has become a topic of current interest.

B. The gun-jumping infringement

In case of concentrations, the Commission carries out a control based on the European Union Merger Regulation (EUMR)[1] and provides that those transactions must be notified to the Commission before being implemented, as the Commission has to examine their compatibility with the internal market. More specifically, concentrations subject to art.4 EUMR have to be notified, prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest, and, according to art.7(1) EUMR, they should not be implemented before their notification or until their declared compatibility with the internal market by a Commission decision.

These provisions are referred to as the notification and the standstill obligation, respectively.[2] Proceeding with a transaction by infringing either (or both) of the obligations defines the so called "gun-jumping". These types of violations are often in minority investments in publicly-listed companies and joint ventures, as it is not easy to consider whether there is an acquisition of control or whether a joint venture is a notifiable "full function" venture.[3] According to art.8(4) EUMR, gun-jumping constitutes an infringement of EU merger control, and results in fines and other suitable corrective measures based on the principle of ex ante control,[4] conditions that may be difficult to meet.[5] According to art.14 EUMR, the penalties for gun-jumping are up to 10 per cent of the merging parties' worldwide turnover.

Nevertheless, the EUMR includes limited derogations from the notification and standstill obligation, which may be accepted by the Commission subject to specific conditions.[6] Article 7(2) EUMR creates an exception in the case of a public bid or of a series of securities transactions, which may be implemented provided that the concentration has been notified without delay and that the acquirer does not exercise the voting rights attached to the shares concerned.[7] Article 7(3) EUMR mentions that, following a request by the parties, the Commission will address the negative effects of the suspension on the parties or third parties and the threat to competition post-transaction, and it can decide to permit (or not) the implementation of the concentration prior to its final decision.[8]

Generally, it is clear that the notion of "gun-jumping" is not defined properly in EU law. Some clarifications of this kind of infringement can be met in the gun-jumping decisions, the examination of which contributes to the definition of the term "gun-jumping" and indicates the novelties in the enforcement of these rules. So far, the Commission has imposed five fines for gun-jumping and, in one case, the ECJ in a preliminary ruling addressed the matter directly.

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1 Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR).

2 R. Whish and D. Bailey, *Competition Law*, 9th edn (Oxford: Oxford University Press, 2018), p.914; J. Modrall and S. Ciullo, "Gun-Jumping and EU Merger Control" [2003] E.C.L.R. 424.

3 J. Modrall, "The EU Gets Tough on Gun-Jumping" (2017) 21(8) *The M&A Lawyer* 12.

4 A. Gutermuth, "Gun-jumping in merger control—Introduction" (2019) 5(1) *Competition Law & Policy Debate* 23.

5 K. Fountoukakos, "'Unscrambling the eggs': dissolution orders under Article 8(4) of the Merger Regulation" (2004) 1 *Competition Policy Newsletter* 63–69, *https://ec.europa.eu/competition/publications/cpn/2004_1_63.pdf* [Accessed 3 September 2020].

6 D. Hull and C. Gordley, *Gun Jumping in Europe: An Overview of EU and National Case Law*, Concurrences, 2018, N°85642.

7 See COMP/M.2283—*Schneider/Legrand*, Commission decision of 10 October 2001; COMP/M.2416—*Tetra Laval/Sidel*, Commission decision of 30 October 2001.

8 See COMP/M.8553—*Banco Santander/Banco Popular Group*, Commission decision of 7 June 2017.

C. The Commission's first decisional practice in gun-jumping cases

The Commission's first fine for failure to notify and for breaching the standstill obligation was for €33,000 and it was imposed in the *Samsung* case in 1998.[9] The Commission indicated that fines can be imposed not only in the case of intentional failure to notify, but also in cases of negligence.[10] Following, in the *AP Møller* case,[11] the Commission found also that there had been "qualified negligence" and imposed a larger fine of €219,000 for failure to notify. The Commission imposed relatively low fines because it considered the mitigating factor of no damage to competition.[12]

The Commission's next fine for gun-jumping was imposed 10 years later, in 2009, in the *Electrabel/CNR* case.[13] Electrabel notified the Commission of its acquisition of de facto control over CNR in 2008. The Commission cleared unconditionally the transaction, but later imposed a fine of €20 million, as it found that Electrabel acquired the de facto sole control over CNR six years earlier, in December 2003, even with a minority shareholding, without any final approval from the Commission.[14] This was the first case of gun-jumping examined and was confirmed by the GC[15] and ECJ on appeal.[16]

D. The novelties in gun-jumping

Since 2014, the interest in gun-jumping cases has become increasingly stronger. The Commission has been more cautious with the application of notification and standstill obligation and the ECJ has provided very important clarifications for the topic.

i. Marine Harvest case

In 2014, the Commission imposed a combined fine of €20 million in the *Marine Harvest* case,[17] €10 million for failure to notify a transaction and €10 million for implementing that transaction prior to clearance, as Marine Harvest acquired de facto control over Morpol by purchasing 48.5 per cent of Morpol's shares without notifying the Commission. It was the first time that the Commission had imposed a fine on an undertaking for failure to notify a transaction which raised competition concerns and serious doubts as to its compatibility with the internal market.[18]

Marine Harvest appealed the Commission's decision at the General Court by arguing that the Commission erred in not applying the exception of art.7(2) EUMR for certain public binds or series of securities transactions. The GC dismissed that argument and upheld the Commission's ruling that the large minority shareholding already conferred de facto control, as Marine Harvest had sole control of Morpol once the acquisition was implemented and the subsequent public bid was not carried out with the intention of acquiring control over Morpol.[19]

In March 2020, the ECJ on appeal concluded the same result.[20] The ECJ further stated that the GC did not err in finding that art.7(2) EUMR "is irrelevant in a situation in which control is conferred in the context of an initial private transaction even if that transaction is followed by a public bid, since the latter is not necessary to achieve a change of control of an undertaking concerned by the concentration at issue".[21] The ECJ rejected the parties' allegations for misinterpretation of the concept of "single concentration" and agreed with the GC that, as Marine Harvest launched the public bid after the de facto change of control over Morpol, it did not have to examine the conditionality between the two transactions.[22] Concerning the application of the principle "ne bis in idem", the ECJ first mentioned that, in EU competition law, there are no specific rules concerning concurrent offences. EU legislature has not defined one offence as being more serious than the other and infringements of notification and standstill obligations are subject to the same level of fines.[23] It concluded that both provisions are different objectives and the Commission was entitled to impose two separate fines for violations of art.4(1) and art.7(1) EUMR obligations.[24]

ii. Altice case

On 24 April 2018, the Commission fined Altice for gun-jumping, as it acquired and exercised decisive influence over PT Portugal without receiving a prior merger control clearance.[25] It was the first case in which the Commission imposed a fine for an alleged "partial

[9] COMP/M.920—*Samsung/AST*, Commission decision of 18 February 1998.
[10] COMP/M.920—*Samsung/AST*, at [10].
[11] COMP/M.969—*AP Møller*, Commission decision of 10 February 1999.
[12] Whish and Bailey, *Competition Law*, 9th edn (2018), p.914.
[13] COMP/M.4994—*Electrabel/Compagnie Nationale du Rhône (CNR)*, Commission decision of 10 June 2009.
[14] COMP/M.4994—*Electrabel/Compagnie Nationale du Rhône (CNR)*, at [40]; B. Alomar, S. Moonen, G. Navea and P. Redondo, "Electrabel/CNR: the importance of the standstill obligation in merger proceedings" (2009) 3 *Competition Policy* 58–60, *https://ec.europa.eu/competition/2009_3_11.pdf* [Accessed 3 September 2020].
[15] *Electrabel v Commission* (T-332/09) EU:T:2012:672.
[16] *Electrabel v Commission* (C-84/13 P) EU:C:2014:2040.
[17] COMP/M.7184—*Marine Harvest/Morpol*, Commission decision of 23 July 2014.
[18] COMP/M.7184—*Marine Harvest/Morpol*, at [150]–[158]; M. Kadar and J. C. Mauger, "Harvesting salmon, jumping guns: the Marine Harvest early implementation case", Competition Merger Brief 1/2014, Article 1, *https://ec.europa.eu/competition/publications/cmb/2014/CMB2014-01.pdf* [Accessed 3 September 2020].
[19] *Marine Harvest v Commission* (T-704/14) EU:T:2017:753 at [229]–[230].
[20] *Marine Harvest v Commission* (C-10/18 P) EU:C:2020:149 at [64].
[21] *Marine Harvest v Commission* EU:C:2020:149 at [52].
[22] *Marine Harvest v Commission* EU:C:2020:149 at [64].
[23] *Marine Harvest v Commission* EU:C:2020:149 at [98]–[101].
[24] *Marine Harvest v Commission* EU:C:2020:149 at [111]; J. Dewispelaere, "CJEU Confirms Double Trouble for Gun Jumpers" (6 May 2020) *Kluwer Competition Law Blog*, *http://competitionlawblog.kluwercompetitionlaw.com/2020/05/06* [Accessed 3 September 2020].
[25] COMP/M.7993—*Altice/PT Portugal*, Commission decision of 24 April 2018.

implementation". In its decision the Commission noted that the concentration infringed art.7(1) EUMR because the transaction agreement granted to Altice veto rights to exercise decisive influence over some aspects of PT Portugal's business immediately after its signing; and Altice actually exercised decisive influence over parts of PT Portugal's business, including instructions for a marketing campaign and exchange of commercially sensitive information against the confidentiality agreement and its safeguards.[26]

Considering the amount of fine, the Commission took into account the need to ensure that the fine must have a sufficiently deterrent effect and it imposed the significant fine of €124.5 million based on the size of Altice and on the implementation before the Commission's clearance of a transaction which raised serious doubts as to its compatibility with the internal market.[27] Following that, Altice appealed the Commission's decision before the GC alleging inter alia that the Commission erred in law and in establishing the existence of the infringements of arts 4(1) and 7(1) EUMR and it denied that it actually exercised decisive influence over PT Portugal.[28]

iii. Ernst & Young case

In May 2018, the ECJ issued a judgment in the *Ernst & Young* case, which constitutes a guidance of what gun-jumping means.[29] In November 2013, KPMG Denmark and Ernst & Young agreed to merge and, on the same day, and based on the merger agreement, KPMG Denmark terminated its exclusive co-operation agreement with KPMG International. The Danish Competition Council cleared the transaction on May 2014, but it found later that KPMG Denmark had violated the suspension obligation of para.12c(5) of the Danish Competition Law, which is relevant with the standstill obligation under the EUMR. The Danish Maritime and Commercial Court, on appeal, requested a preliminary ruling by the ECJ on the definition and scope of the standstill obligation.[30]

The ECJ examined the proper scope of the standstill obligation and whether the market effects of the termination of the co-operation agreement by KPMG Denmark raised competition law concerns. The ECJ refrained from the Commission's approach and accepted an approach that was closer to Advocate General (AG) Wahl's opinion.[31] It concluded that art.7(1) EUMR

> "must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking. The termination of a co-operation agreement, in circumstances such as those in the main proceedings, which it is for the referring court to determine, may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects".[32]

The important issue was which transaction can be characterised as "partial implementation". The ECJ, as did the AG Wahl, concluded that "partial implementation" of a concentration within the meaning of art.7 EUMR arises "as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking".[33] The ECJ found that the transaction concerned only one of the merging parties and a third party, namely KPMG International, which means that Ernst & Young did not acquire the possibility of exercising any influence on KPMG Denmark by that termination and the later companies were independent both before and after that termination.[34]

An important element stressed in this judgment was that the preparatory actions for a transaction might not contribute to the change in control of the target undertaking and, therefore, they cannot constitute gun-jumping, but they "are nevertheless capable of leading to coordination between undertakings in breach of Article 101 TFEU".[35]

iv. Canon case

The gun-jumping in the *Canon* case was based on the so-called "warehousing" two-step transaction structure used by Canon. The first step involved an interim buyer acquiring 95 per cent of the share capital of Toshiba Medical for €800 and Canon directly acquired the remaining 5 per cent and share options over the interim buyer's stake for €5.28 billion. In June 2019 the Commission fined Canon the amount of €28 million for gun-jumping, in particular because Canon partially implemented its acquisition of Toshiba Medical without prior notification and approval by the Commission.[36]

The Commission unconditionally cleared the merger in September 2016, but, in its later decision of June 2019, it found that the transaction raised serious concerns about the warehousing structure. In particular, the first step was

[26] A. Gutermuth and C. Simphal, "Gun-jumping and Related Antitrust Risks in M&A transactions—EU Update after Altice and Ernst & Young" (2019) 5(1) *Competition Law & Policy Debate* 25.
[27] See Gutermuth and Simphal, "Gun-jumping and Related Antitrust Risks in M&A transactions—EU Update after Altice and Ernst & Young" (2019) 5(1) *Competition Law & Policy Debate* 25, para.620.
[28] Action brought on 5 July 2018, *Altice Europe v Commission* (T-425/18).
[29] *Ernst & Young PS v Konkurrencerådet* (C-633/16) EU:C:2018:371.
[30] T. Caspary and J. Flandrin, "Ernst & Young: First Guidance on Gun-jumping at EU Level" (2018) 9(8) *Journal of European Competition Law & Practice* 516; B. Opi and A. Boitos, "Gun Jumping in the European Union: An Analysis in Light of Ernst & Young" (2019) 10(5) *Journal of European Competition Law & Practice* 269.
[31] Opinion of Advocate General Wahl of 18 January 2018, *Ernst & Young* (C-633/16) EU:C:2018:23.
[32] *Ernst & Young PS v Konkurrencerådet* (C-633/16) EU:C:2018:371 at [62].
[33] *Ernst & Young* EU:C:2018:371 at [46]–[47].
[34] *Ernst & Young* EU:C:2018:371 at [61].
[35] *Ernst & Young* EU:C:2018:371 at [51]–[58].
[36] COMP/M.8179—*Canon/Toshiba Medical Systems Corporation*, Commission decision of 27 June 2019.

implemented before notification and the Commission's approval. Following the Commission's approval, and at the second step, Canon exercised its share options, acquiring 100 per cent of the shares of Toshiba Medical. The Commission found that both steps in the transaction structure constituted a single notifiable merger, as the first step was the prerequisite in order for Canon to gain full control over Toshiba Medical and, for that reason, the Commission concluded that Canon violated the notification requirement and the standstill obligation.[37]

On September 2019, Canon appealed the Commission's decision at the GC, alleging that the Commission committed a manifest error of law by misapplying the legal test for the assessment of art.4(1) and art.7(1) EUMR.[38]

E. Final remarks

The most recent gun-jumping cases indicate that the Commission focuses on gun-jumping issues more now than in the past and it makes it crucial for the Commission to provide more clarification concerning the application of the notification and standstill obligation provisions.

The examination of the *Ernst & Young* judgment reminds us that the actions as preparatory steps for a transaction may not constitute gun-jumping, as there is lack of change of the control, but they can lead to coordinated practices subject to art.101 TFEU. It is also important that, in the *Altice* case, the Commission considered the notion of the "partial implementation" prior to the closing of the transaction, but, as this decision was prior to the *Ernst & Young* judgment, the Commission's approach and the *Ernst & Young* ruling will be challenged in the *Altice* appeal. The recent ECJ judgment in the *Marine Harvest* case determined that the procedural obligations under EU merger control are of great importance, but the *Canon* judgment should determine properly the unclear parts of the topic.

All in all, the parties must be extremely cautious when implementing preparatory measures prior to the relevant approval of a transaction. In the pre-closing stage, the parties shall not exchange any competitively sensitive information and they have to continue acting as independent entities on the market without coordinating their competitive behaviour. In the case of a transaction that would require notification and relevant approval, it is crucial for the parties to be very cautious and to avoid any de facto control over the target undertaking. They have to ensure that, prior to a clearance being granted, there will not be any management changes, such as the acquirer's involvement in the target's business or in its strategic decisions.

Exemptions and guidelines under antitrust law during Covid-19: a global review

Shreya Chandhok*

Australia; Comparative law; Competition law; Co-operation; Coronavirus; EU law; Exemptions; India; Pandemics; United States

Introduction

The ongoing Covid-19 pandemic has affected both customers and businesses. It is a type of economic shock that is bound to increase a company's risk of class action antitrust litigation suits in the post-pandemic period. While companies are still defending their 12-year-old civil conspiracy antitrust claims which followed after the great recession,[1] they will now have to deal with building Covid-19-specific strategies to navigate the economic impacts of the present pandemic. After the great recession, the companies had to change their business policies, to deal with the changing economy. For example, some businesses planned to reduce production as a reaction to reduced demand, which caused an increase in prices. Industries that were dealing in similar products also adapted similar policies on an individual level, in the same way people decide to individually carry an umbrella while walking in the rain. Later, various industries around the world were lashed with class action suits, claiming that these industries indulged in anti-competitive activities to favour their businesses. In a nutshell, these companies were held liable for using umbrellas together while walking in the rain. Despite their actions being obviously to protect their own businesses, they had to face long-standing investigations and bear the unnecessary costs.

Considering the present circumstances, it is logical for many businesses to reduce their supply in order to respond to the reduced demand, and some might be tempted to come together and work, considering the high demand in the healthcare sector. Therefore, antitrust authorities around the world are conditioning the lawfulness of these agreements to the positive impact they have on the consumers,[2] and therefore, are providing exemptions to

[37] M. Hickey, "European Commission fines Canon EUR 28 million for Gun Jumping" (31 July 2019) *Kluwer Competition Law Blog*, *http://competitionlawblog.kluwercompetitionlaw.com/2019/07/31* [Accessed 3 September 2020].
[38] Action brought on 9 September 2019, *Canon v Commission* (T-609/19).
* Student, National Law Institute University, Bhopal (India).
[1] Philip Lowe, "Competition Policy and the Global Economic Crisis" (*Competition Policy International*, 2009), *https://ec.europa.eu/competition/speeches/text/cpi_5_2_2009_en.pdf* [Accessed 3 September 2020].
[2] See ICN Steering Group Statement on Competition during and after the Covid-19 Pandemic (April 2020), *https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf* [Accessed 11 September 2020].