COVID-19 & COMPETITION LAW

Anneli Howard
MA BCL
Barrister
Article 101 TFEU

• Prohibition on price fixing and market sharing or restricting competition between competitors
• Horizontal Guidelines – gateways for certain types of cooperation for R&D, joint production, distribution commercialisation etc
• Only within safe harbour and certain permitted “white” measures – not blacklist
EU Commission
Temporary Frame work

Specific guidance on cooperation initiatives
Informal guidance
Ad hoc comfort letters

- Covers essential cooperation
- Not price fixing or market sharing
- Not price exploitation or reduction of output/refusal supply under Art 102
- Comfort letters not binding on national courts
Joint statement by the European Competition Network (ECN)

• ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply
• Outside Art 101 as no restriction or Art 101(3) efficiency defence
• Warning re exploitative pricing of scarce goods
• Recommend use of manufacturers’ maximum retail price or RRP to prevent downstream charging
CMA

• **Chapter 1:** Applies exemption s.9 CA98
• Not outside Chapter 1 altogether – no comfort
• Guidance on cooperation

• **Chapter II:** COVID-19 taskforce – Art 102/Chap II and market review
• Warning re excessive pricing 5.3.2020
• Warning to pharma and food & drink manufacturers 20.3.2020

• **Litigation:** No protection from litigation
Types of Covid Cooperation

- Increase production of products in demand
- Reduce output of non-essential products
- Reallocate stocks or production to 1 undertaking
- Coordinate joint distribution or transport

Exchange information:
- Sales/stocks
- Capacity/production and demand forecasts
- Costs and customers
- Regional markets
- Prices
Medicines for Europe (MFE Comfort letter) 8.4.2020

• Need to increase production of C-19 medicines (e.g. sedatives, antibiotics and adjuvants)
• Pharma companies want to (i) cooperate to model demand and predict capacity shortages, (ii) allocate production and (iii) coordinate distribution
• Commission comfort letter – outside Art 101:
  • Requested by authorities DG SANTE
  • Necessary to increase production & improve supply
  • Open to all manufacturers
  • Time limited
  • Safeguards against info exchange
Self assessment and Risk Mitigation

• Limit to “essential” products and services
• Demonstrate Efficiencies:
  • Appropriate measures
  • Public interest
  • Improve consumer wellbeing
  • Temporary – duration of the pandemic
  • Not go beyond what is strictly necessary
• Document all exchanges and agreements
• Defence if encouraged by public authority
• Limits on info exchange : (i) no pricing (ii) via 3P (iii) secure platform or forum (iv) aggregate/anonymouse data.
Relevant Links

EU:

- Temporary Framework
- MFE Comfort Letter
- ECN Joint Statement

CMA:

- Covid Guidance
- Warning letters
- Merger Guidance
- CMA Mergers Failing firms

www.monckton.com
+44 (0)20 7405 7211
Thank You

ANNELI HOWARD
ahoward@monckton.com