

JUNIOR COMPETITION NETWORK
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COVID-19 & COMPETITION LAW



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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 Framework

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/anonymous data.

Relevant Links

EU:

- [Temporary Framework](#)
- [MFE Comfort Letter](#)
- [ECN Joint Statement](#)

CMA:

- [Covid Guidance](#)
- [Warning letters](#)
- [Merger Guidance](#)
- [CMA Mergers Failing firms](#)

Thank You

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