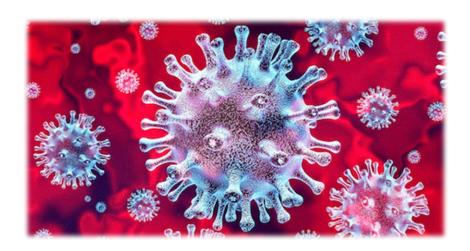
JUNIOR COMPETITION NETWORK 7 MAY 2020 COVID-19 & COMPETITION LAW



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/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

ANNELI HOWARD

ahoward@monckton.com

