

ARTICLE

THE EUROPEAN COMMISSION SUPPORTS THE COMBAT AGAINST SHORTAGE IN COMPLIANCE WITH COMPETITION LAW

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On 23 March 2020, competition authorities members of the European Competition Network, including the European Commission (hereinafter the « **Commission** »), had underlined that the current circumstances were not an excuse to implement anti-competitive practices, in particular with cooperation that restrict competition.

Aware of the need for information and guidance for companies, the Commission launched on 30 March 2020 a website to help businesses that want to collaborate legally[1].

It has also created a dedicated e-mail address[2] that can be used to seek informal guidance on specific initiatives.

On 8 April 2020, the Commission took a further step forward by publishing a Communication on the establishment of a Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current Covid-19 outbreak[3] (hereafter the « **Communication** »).

Since the entry into force of Council Regulation (EC) No 1/2003, companies must carry out a self-assessment of their agreements in order to ensure that they do not restrain competition.

Nevertheless, in this unprecedented period, the Commission has understood that companies need specific guidance on their cooperation initiatives.

Margrethe Vestager stated that the Commission should: « (...) *make sure that there is sufficient supply of the critical hospital medicines used to treat coronavirus patients.* ».

She has underlined that: « *To avoid the risk of shortages of essential and scarce products and services because of the unprecedented surge in demand due to the pandemic, we need businesses to cooperate and do it in line with European Competition rules.* ».

For that reason, the Communication: « *explains when and how firms can obtain guidance or written comfort in line with our competition rules.* ».

The present Communication covers possible forms of cooperation between undertakings in order to ensure the supply and adequate distribution of essential scarce products and services during the COVID-19 outbreak and thus address the shortages of such essential products and services.

These agreements may, at this stage, include notably companies producing medicines and medical equipment necessary to overcome the Covid-19 but also companies active in other sectors (such as certain undertakings converting part of their production lines to start producing scarce products).

The purpose of this Communication is to explain :

- the main criteria that the Commission will follow in assessing these possible cooperation projects, and in setting its enforcement priorities during this crisis; and
- temporary process that the Commission has exceptionally set up to provide, where appropriate, ad hoc written comfort to undertakings in relation to specific and well-defined cooperation projects in this context.


1) Main criteria for the antitrust assessment of business cooperation projects

Different measures may contribute to bridging the gap between demand and supply: a very significant rapid increase of production for products that are needed but in short supply, a reduction in the production of other products, the reallocation of stocks, or the switch of production lines for some non-essential/non-shortage medicines (or other products) to medicines (or other products) necessary to address the outbreak. Thus, output could be increased further and more efficiently if, at a certain site, only one medicine was produced.

Based on recent experience, the Commission understands that cooperation in the health sector might for instance be limited to entrusting a professional association (or an independent advisor, or independent service provider, or a public body), to e.g.:

- coordinate joint transport for input materials;
- identify those essential medicines for which there are risks of shortages;
- aggregate production and capacity information, without exchanging individual company information;



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- work on a model to predict demand on a Member State level, and identifying supply gaps;
 - share aggregate supply gap information, and request participating undertakings, on an individual basis and without sharing that information with competitors, to indicate whether they can fill the supply gap to meet demand (either through existing stocks or increase of production).

According to the Commission, such activities do not raise antitrust concerns, provided that they are subject to sufficient safeguards (such as no flow of individualised company information back to competitors)[4].

In addition, measures designed to adapt production, stock management and, potentially, distribution in the industry may require exchanges of commercially sensitive information and a market sharing. Such exchanges and coordination between undertakings are in normal circumstances problematic under EU competition rules. Nevertheless, in the current exceptional circumstances, such measures would not be problematic under EU competition law to the extent that such measures would be:

- designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat Covid-19 patients;
- temporary in nature (i.e. to be applied only as long there is a risk of shortage or in any event during the Covid-19 outbreak); and
- strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.

The Commission also indicates that a cooperation encouraged or coordinated by a public authority would not be problematic under EU competition law.

In any case, undertakings should document all exchanges, and agreements between them and make them available to the Commission on request. In other words, probes are probable.

2) An exceptional procedure to provide ad hoc guidance on specific cooperation projects

The Communication is not the only instrument deployed by the Commission.

It re-introduces an *ex ante* validation procedure for certain specific agreements, which will lead to comfort letters[5].

It thus intends to provide specific and direct guidance to companies to ensure that adequate measures will be carried out as soon as possible to tackle Covid-19, in respect of competition law.

Undertakings may contact the Commission where there remains uncertainty about the compatibility of their initiatives with competition law.

This procedure was implemented immediately: on 8 April 2020, the Commission delivered its first comfort letter.

This letter addressed to « Medicines for Europe » (association of generic pharmaceutical companies) deals with a specific voluntary cooperation project among pharmaceutical producers that targets the risk of shortage of critical hospital medicines for the treatment of Covid-19 patients. Generic pharmaceutical companies produce the largest part of the critical hospital medicines that are now urgently needed in large scale volumes to avoid shortages.

Medicines for Europe outlined a project to develop a list of products needed in intensive care units and to identify risks of shortages. This was done in coordination with the European Medicines Agency and DG Health.

Based on publicly available information, under exemption granted by the Commission in two days, companies would be allowed to share active pharmaceutical ingredients ("APIs") along with "intermediates", which are semi-finished versions of medicines.

Companies may also need to communicate when deciding whether to transfer production of a medicine from one site to another in order to increase production capacity. Distribution may also be coordinated on an ongoing basis.

That being said, the letter to Medicines for Europe is not a blank cheque. Only indispensable information should be exchanged (any discussion on prices or other non-essential matters is likely to result in an investigation by the Commission), the project should be open to all companies that wish to participate and all meetings should be reported. This cooperation should only last during the pandemic and the Commission will inform Medicines for Europe when it is necessary to end it.

[1] <https://www.august-debouzy.com/fr/blog/1468-covid-19-lautorite-de-la-concurrence-a-larret-la-commission-europeenne-poursuit-ses-travaux-pour-linstant>

[2] COMP-COVID-ANTITRUST@ec.europa.eu

[3] https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf

[4] See also Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union

[5] See also Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis (https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf)

