

Newsalert

Pharma, Healthcare and Life sciences Business Unit
EU Commission allows a certain degree of coordination among pharma companies to avoid shortages during the COVID-19 pandemic

On April 8, 2020, the European Commission issued a *"Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak"* (Communication C(2020) 3200 final).

In this document, the Commission indicates that, while the COVID-19 outbreak is a *"major and unprecedented shock to the global and Union economies"* and there is still *"uncertainty ... on both the duration and intensity of the shock"*, it is also witnessing a steep rise in demand for pharma and health products and services. The Commission has thus come to the conclusion that the *"exceptional circumstances of this time and its related challenges may trigger the need for undertakings to cooperate with each other in order to overcome or at least to mitigate the effects of the crisis to the ultimate benefit of citizens"*.

In a nutshell, in its Temporary Framework, the Commission states that:

- a cooperation between healthcare companies entailing coordination and information exchange can be allowed provided that the cooperation is:
 - o related to the production, stock management and distribution of healthcare products necessary to deal with the COVID-19 outbreak;
 - o objectively necessary to cope with shortages or to ensure treatment of COVID-19 patients and not going beyond what strictly necessary to this end;
 - o set to last only until the end of the shortage at issue or of the COVID-19 outbreak;
 - o reflected in documents kept by the parties which can be shown to the Commission if it so requests;
- companies can submit their cooperation projects to the Commission to obtain informal guidance and specific authorization in form of comfort letters.

More in detail, the Temporary Framework illustrates:

- the main criteria which the Commission will follow in assessing the cooperation projects as well as its enforcement priorities during this crisis;
- a temporary process exceptionally set up by the Commission to provide, where appropriate, *ad hoc* written comfort to companies, in relation to specific and well-defined cooperation projects.

As to the criteria, the Commission indicates that cooperation in the health sector might occur by entrusting a trade association (or an independent advisor, or independent service provider, or a public body), to e.g.:

- a. coordinate joint transport for input materials;
- b. contribute to identifying those essential medicines for which, in view of the expected production, a risk of shortages exists;
- c. aggregate production and capacity information, without exchanging individual company information;
- d. work on a model to predict demand at a Member State level, and identify supply gaps;
- e. share aggregate supply gap information and request participating companies, on an individual basis and without sharing the information between competitors, whether they may fill the supply gap and meet demand (either through the existing stock or an increase of production).

These activities are deemed not to raise antitrust concerns provided that they are subject to the safeguards set forth by the Commission's Guidelines on the applicability of Article 101 of TFEU to horizontal co-operation agreements (e.g., no price-fixing, no output limitations, no raising of rivals' costs, no complete elimination of competition, flow of information limited to the strictly indispensable level).

In addition, cooperative measures to adapt production, stock management and, potentially, distribution, which require an exchange of commercially sensitive information and a certain coordination to establish which site should produce which medicines would, in light of the current exceptional circumstances, not be problematic under EU competition law, provided that such measures are:

- (i) objectively necessary to actually increase output in the most efficient way in order to address or avoid a shortage of supply of products or services to treat COVID-19 patients;
- (ii) temporary (i.e. linked to the permanence of the risk of shortage or the COVID-19 outbreak) and
- (iii) not exceeding what strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.

In any event, companies engaging in such cooperation should document all exchanges and agreements between them and make them available to the Commission on request. The fact that such cooperation may be encouraged and/or coordinated by a public authority would be a relevant factor to be taken favorably into account by the Commission, while cooperation required by an imperative request of such an authority in response to an urgency situation will always be accepted.

The temporary process is centered upon the creation of a dedicated mailbox (COMP-COVID-ANTITRUST@ec.europa.eu), which can be used by companies to seek informal guidance on specific cooperation initiatives.

The Temporary Framework will be applied by the Commission as of 8 April, could be reviewed on the basis of the evolution of the COVID-19 outbreak and shall remain applicable until the Commission withdraws it.

The Temporary Framework is available at the following [link](#).

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