

To Our Clients and Friends

Memorandum

May 5, 2020

European Commission Publishes Guidance for Permissible Collaboration in the Pharma Sector in Light of the COVID-19 Outbreak

1. Introduction

On 8 April 2020, the European Commission (“EC”) published a Temporary Framework Communication (“**Framework**”)¹ which provides guidance to companies seeking to cooperate temporarily to respond to urgent situations stemming from the COVID-19 outbreak. In addition to providing guidance on when such collaboration might be substantively acceptable, the Framework is also significant on the procedural front, as the EC has indicated its willingness to issue written comfort letters, in exceptional circumstances, for specific COVID-19 related cooperation projects.

2. Framework - key points to note

The Framework is intended to address collaboration between companies to ensure the adequate supply and distribution of essential products and services during the COVID-19 crisis. It particularly recognises the exponential demand for medicines and medical equipment used to test and treat COVID-19 patients or that are necessary to mitigate and overcome the crisis. However, while the Framework explicitly recognises its applicability to the health sector, it may also be applicable to collaboration in other essential sectors.

The key points to note from the Framework are:

- Certain types of conduct, such as coordination limited to entrusting a trade association, independent advisor, independent service provider or a public body with e.g., (1) coordinating joint transport of input materials, (2) identifying essential medicines for which there is a risk of shortages, (3) exchanging aggregate production and capacity information, (4) identifying supply gaps and sharing aggregated information in that regard with a view to filling them, do not raise antitrust concerns, provided they are subject to sufficient safeguards against the sharing of individualised company information with competitors.
- Other cooperation measures requiring the exchange of commercially sensitive information and coordination, which would typically raise competition concerns in the EU, will not be an enforcement priority for the EC to the extent that such measures are:

¹ EC's Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak issued on 8 April 2020, available here.

- 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
 - not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.
- The EC will have regard to whether the collaboration was encouraged or required by a public authority in deciding on its enforcement priorities vis-à-vis a particular case.
 - Companies should document all exchanges of information and agreements between them and make them available to the EC on request.
 - Interestingly, the EC is willing to provide oral feedback or, exceptionally, a comfort letter on the legality of specific cooperation initiatives. It has already issued one such letter to Medicines for Europe for a project designed to address the risk of shortage of critical hospital medicines for COVID-19 patients.² The comfort letter route is ordinarily not available to companies in the usual course of business as they are required to self-assess their agreements for compliance with EU competition law.

3. Conclusion

The issuance of the Framework, which will be in place until the EC withdraws it, recognises that competition law and the EC's enforcement priorities will need to be adapted to respond to the ongoing crisis. It provides welcome guidance to companies on what they can and cannot do from the perspective of competition law when responding to the COVID-19 outbreak. The Framework follows on the heels of similar guidance issued by other competition authorities, such as the UK Competition and Markets Authority ("**CMA**").³

Companies must note that while the Framework does grant them some leeway to cooperate to respond to the COVID-19 crisis (especially if they operate in the health sector), it does not grant them a free hand to bypass EU competition law. In fact, the EC is closely scrutinising the pharmaceutical sector to detect any violations of competition law, including exclusionary conduct that keeps alternative or additional suppliers out of the market, anti-competitive price hikes and other collusive conduct.⁴

² See the press release here and the comfort letter here.

³ The CMA guidance reassures businesses that the CMA will be adjusting their enforcement priorities so as to not take action against temporary measures necessary to coordinate action in response to the COVID-19 situation (see here for the CMA approach to business cooperation in response to COVID-19).

⁴ The CMA has also issued an open letter to the pharmaceutical and food and drink industries warning them that they should not capitalise on the COVID-19 crisis by charging unjustifiably high prices for essential goods (see here). The CMA has indicated on 24 April 2020 that it has advised the UK government to introduce emergency time-limited legislation that will enable it to take stricter enforcement action against companies engaging in profiteering during these times.

Additionally, companies must bear in mind that while conduct covered by the Framework will not be an enforcement priority for the EC, it could still infringe EU and national competition laws. While it is hoped that all national competition authorities in the EU will follow the guidance set out in the Framework, in the absence of any explicit statement by all of them to this effect, this remains to be confirmed. Therefore, it is advisable that companies obtain a comfort letter from the EC where possible to minimise the risk of enforcement by national competition authorities in the EU.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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