

COVID-19: PRESSURE POINTS: EU COMMISSION PUBLISHES GUIDANCE ON COOPERATION ARRANGEMENTS AIMED AT ADDRESSING SHORTAGES DURING THE COVID-19 CRISIS (EUROPE)

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Legal Briefings

On 8 April 2020 the Commission published a '[Temporary framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak](#)' (Temporary Framework). The Commission recognises the exceptional challenges faced by some businesses as a result of the COVID-19 crisis, which may require cooperation in order to overcome and mitigate some of the impact of the crisis and to continue to ensure the supply of essential products or services.

The Temporary Framework focuses in particular on medicines and medical equipment relevant for testing and treating patients or otherwise mitigating the impact of COVID-19, but equally applies to businesses in other sectors that are cooperating in order to ensure the supply of scarce products. It sets out the key criteria the Commission will take into account when assessing such cooperation and establishes a procedure for the provision of guidance for specific conduct by way of an ad hoc comfort letter.

Despite this flexible approach the Commission has made it clear that it “will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for anti-competitive conduct” and will continue to actively monitor market developments in order to identify practices in breach of the competition rules.

The Commission will review and amend the Temporary Framework as and when necessary in light of any COVID-19 related developments, and it will remain in place until the Commission decides it is no longer justified.

These new measures are in addition to the ECN’s joint statement on the application of competition law during the COVID crisis, indicating that the Commission (and the competition authorities of the Member States) will not intervene in necessary and temporary cooperation between businesses aimed at ensuring the supply and fair distribution of essential products and services, and the Commission’s dedicated mailbox that can be used to seek informal guidance on specific initiatives. (see our blog post [here](#)).

CRITERIA FOR THE ASSESSMENT OF COOPERATION ARRANGEMENTS AIMED AT ADDRESSING THE SHORTAGE OF ESSENTIAL GOODS AND SERVICES

Based on a number of requests for guidance received over the last few weeks the Commission has identified a range of measures that may assist with reducing shortages:

- A significant, rapid increase of production for products in short supply
- Reallocation of stocks, requiring businesses to exchange information on sales and stocks
- Switching product lines from non-essential to essential products
- Specific sites focusing on one type product

Such measures may require cooperation between businesses that will be permitted under the competition rules, (provided individualised commercially sensitive information is not exchanged), under which a trade association, independent advisor or public body is tasked with:

- Coordinating joint transport for input materials
- Contributes to identifying essential medicines for which there are risks of shortages
- Aggregating production and capacity information (without exchanging individual

company information)

- Working on a model to predict demand on a Member State level, and identifying supply gaps
- Sharing aggregate supply gap information and requesting individual undertakings to indicate whether they can fill supply gaps to meet demands

Cooperation in the health sector may need to go further in order to overcome critical supply shortages, and may need to extend to coordinating the reorganisation of production in order to increase and optimise output, so that businesses do not all focus on one or a few medicines while others are in under-production.

Measures to adapt production, stock management or distribution may require the exchange of commercially sensitive information and coordination as to which site produces which medicines. Under normal circumstances such measures would in principle be problematic under the competition rules, but in light of the current exceptional circumstances they will not be an enforcement priority for the Commission provided they are:

- Designed and objectively necessary to increase output to address or avoid a shortage of supply of essential products or services
- Temporary in nature (to be applied as long as there is a risk of shortage as a result of the COVID-19 crisis)
- Not exceeding what is strictly necessary to achieve the objective of addressing or avoiding shortages of supply

The fact that such cooperation is encouraged or requested by a public authority will also be a relevant factor. Businesses are advised to keep a record of all such agreements and exchanges so they can be made available on request by the Commission.

AD HOC COMFORT LETTERS

In order to increase legal certainty for businesses the Commission will, where necessary, provide guidance by means of an ad hoc comfort letter.

The Commission used this procedure for the first time in a comfort letter to Medicines for Europe (formerly the European Generics Medicines Association), advising on a voluntary cooperation scheme between pharmaceutical producers aimed at reducing shortages of critical drugs for the treatment of COVID-19 patients. Generic pharmaceutical companies are the largest producers of drugs that are urgently needed in large scale volumes.

[More on COVID-19](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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