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EXPLORING OPPORTUNITIES: THE IMPACT OF COVID-19 ON COMPETITION LAW IN THE PHARMACEUTICAL SECTOR (EUROPE)

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Legal Briefings

The global Covid-19 pandemic has, to an extent, re-directed some of the actions and focus of competition authorities, which are placing increasing scrutiny on several strategic industries to ensure they do not profit from the crisis. Some of these developments, as outlined below, are relevant to the pharmaceutical industry (for information on Covid-19's more general implications on competition law, please see our blog post "*Covid-19 and the impact on competition law*").

KEY POINTS FOR PHARMA COMPANIES TO NOTE

- Despite some relaxation in the competition rules to enable companies to cooperate, regulators remain very vigilant and have signalled that they will pursue violations of competition law during the Covid-19 crisis. In this vein, the EU's Competition Commissioner, Margrethe Vestager, warned at an online event on 27 March that the Covid-19 crisis is "*not a shield against competition enforcement*" and that the EC will be "*even more vigilant than in normal times if there is a risk of virus-profiteering*".

- Although certain forms of necessary and temporary cooperation between businesses aimed at ensuring the supply and fair distribution of essential products might be acceptable during the crisis, cooperation between pharma companies to develop or

market new products should nonetheless be done in a compliant manner, as such activities are likely to be closely scrutinised by the authorities.

- On 8 April 2020, the European Commission ("**EC**") issued a “Temporary Framework” for assessing antitrust issues related to business cooperation in response to the Covid-19 outbreak. This focuses in particular on medicines and medical equipment relevant for testing and treating Covid-19 patients (but also applies to other business sectors). It sets out the key criteria the EC will take into account when assessing cooperation between companies, and also establishes a procedure for the provision of guidance for specific cooperation projects by way of an *ad hoc* "comfort" letter (this is in addition to the dedicated DG Competition Covid-19 website and a mailbox that can be used by companies to seek informal guidance on specific cooperation initiatives). The EC makes it clear however that it will continue to actively monitor market developments to identify potentially anticompetitive practices.

- Regulators will not hesitate to intervene in cases of excessive pricing or other potentially abusive practices and indeed enforcement action is currently being taken against such practices. Pharma and medical device companies should be particularly cautious given the sensitivities about their pricing practices, especially against a backdrop of various recent findings of excessive pricing of products within the sector. To help combat price gouging, regulators are welcoming the imposition of maximum prices on resellers of products, which is generally permissible under competition rules.

- As regards M&As in the pharma sector, EC officials are teleworking at the moment (thus likely slowing down the review of the merger control notifications) and the EC has urged companies to delay filings to the extent possible (particularly in non-simplified cases) in view of the anticipated difficulties in collecting information from third parties in the coming weeks. Also, companies should be aware that in response to the Covid-19 outbreak, the EC has adopted guidelines on foreign direct investment (**"FDI"**) screening in order to protect critical European assets in areas such as health, medical research and biotechnology.

COMPETITION AUTHORITIES ARE HOT TO RESPOND TO PRICE GOUGING AND ANY ABUSE OF MARKET POWER ALLEGATIONS

Numerous competition authorities across the world have given robust responses to seemingly rocketing prices of products experiencing high demand due to the Covid-19 crisis and other potentially abusive practices.

OPENING OF INVESTIGATIONS

The Italian authority announced on 12 March that it was investigating Amazon and eBay for the excessive price rises of hand sanitizer and face masks. Similarly, the French authority has launched an investigation into price surges and also announced price regulation for antibacterial hand gels, whilst the Greek authority has also launched an investigation into price increases and output restrictions in healthcare materials (including antiseptic wipes/solutions and surgical masks).

In addition to excessive pricing, other practices have also drawn scrutiny as potentially abusive. For instance, in late March 2020 the Dutch competition authority opened an investigation into allegations that a pharma company withheld the recipe for solutions used in its Covid-19 tests, making it difficult for laboratories to produce their own solutions for use in the company's testing machines. The investigation closed after the company committed to share the recipe with the government and do "*everything it can*" to eliminate obstacles and enable hospitals and laboratories to carry out as many tests as possible.

WARNING LETTER TO PHARMA AND FOOD/DRINK COMPANIES

On 20 March, the UK's Competition and Market's Authority (**"CMA"**) issued an open letter to companies in the pharmaceutical and food/drinks sectors. The CMA has received reports that a minority of companies in these sectors are charging unjustifiably high prices for in demand goods, or making misleading claims about their efficacy, and warns companies against exploiting the Covid-19 pandemic for their benefit. The CMA emphasises that it will use all the powers available to it to ensure that these critical sectors continue to work properly in the months ahead and asks companies to provide it with any information relating to price increases. Similar warnings have been issued by the competition authorities in Spain and in the USA amongst others.

COMPANIES SHOULD BE MINDFUL OF THE “ABUSE OF ECONOMIC DEPENDENCE” PROVISIONS IN VARIOUS NATIONAL JURISDICTIONS

Several countries have pre-existing measures that prevent the abuse of relationships of economic dependence, including Austria, Belgium, Germany, France and Japan. The scope for such abuse could, in theory, be heightened in a more uncertain and difficult economic environment. Thus companies with others dependent on them must not exploit this advantage, e.g. by raising their prices or reducing their supply. The Polish competition authority launched in March 2020 an investigation into two wholesalers' termination of contracts to supply medical equipment to doctors, which they did with the intention of re-signing the agreements at significantly higher prices. Whilst the authority is investigating an abuse of dominance, rather than economic dependence, it acts as a warning that the dominant parties in a commercial relationship must act fairly and not exploit the current situation.

RESTRICTIONS ON HORIZONTAL COLLABORATION LIKELY TO BE RELAXED

In times of external events impacting particular sectors of the economy, we could see the formation of "*crisis cartels*", wherein governments or authorities permit suppliers (e.g. of pharmaceutical products or key food), to co-ordinate and level out their stock levels. Such coordinating behaviour, which could in principle raise anticompetitive concerns in normal times, could be captured by exceptions (e.g. Article 101(3) TFEU) or, if mandated by law/governmental decrees, be exempt under the state compulsion doctrine (this is to be interpreted strictly and in principle only action that is truly determined by the government without any freedom on the part of the participating undertakings would be captured). Alternatively, there could be a more general relaxation on rules forbidding horizontal co-operation within sectors more acutely affected by the outbreak.

We set out below the key developments regarding horizontal cooperation between businesses in the context of the Covid-19 crisis.

EC'S TEMPORARY FRAMEWORK FOR ASSESSING BUSINESS COOPERATION IN THE CONTEXT OF THE COVID-19 CRISIS

On 8 April 2020 the EC 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*" (the "**Temporary Framework**"). The EC recognises the "*exceptional challenges*" faced by some businesses as a result of the Covid-19 crisis, which may require cooperation between companies 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 (although it is not sector-specific). It sets out the key criteria the EC will take into account when assessing such cooperation and also establishes a procedure for the provision of guidance for specific cooperation projects by way of an *ad hoc* comfort letter.

The EC also issued on the same day its first comfort letter, to Medicines for Europe (formerly the European Generics Medicines Association), advising on a voluntary cooperation scheme aimed at reducing shortages of critical drugs for the treatment of Covid-19 patients.

Despite this flexible approach the EC 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 potentially anticompetitive practices.

The EC 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 EC decides it is no longer justified.

These measures are in addition to the ECN's joint statement on the application of competition law during the Covid-19 crisis, indicating that the EC (and the competition authorities of the Member States) will not intervene in necessary and temporary cooperation in response to the crisis (see below), and the EC's dedicated Covid-19 website and mailbox that can be used to seek informal guidance on specific initiatives.

For further information on the EC's Temporary Framework, please see our blog post on this topic.

It is noted that on the same day, the EC also issued Guidelines on the optimal and rational supply, allocation and use of medicines to avoid shortages during the outbreak. These Guidelines, which are addressed to Member States and are also relevant for European Economic Area (EEA) countries, "*aim to protect public health and preserve the integrity of the single market*" and rely "*on the EU pharmaceutical industry acting responsibly and with solidarity*". Although the Guidelines do not relate to antitrust issues, companies are advised to read them together with the Temporary Framework as they are both aimed at preventing shortages of supply and ensure the optimal and rational supply of medicines.

JOINT STATEMENT BY EU COMPETITION REGULATORS ON COOPERATION BETWEEN COMPETITORS

On 23 March, the European Competition Network (**"ECN"**), which comprises the EC and the competition authorities of all EU Member States, issued a joint statement on the application of competition law rules during the Covid-19 crisis. The statement indicates that the ECN will not intervene in necessary and temporary cooperation between businesses aimed at ensuring the supply and fair distribution of essential products and services. However, the ECN emphasises the importance of ensuring that products considered essential to protect consumers' health in the current situation (e.g. face masks and sanitising gels) remain available at competitive prices and notes that it will take robust action against attempts by companies to capitalise on the crisis by cartelising or abusing their dominance (in this regard, the ECN notes that the existing rules allow manufacturers to set maximum prices for their products).

UK REGULATOR'S APPROACH TO BUSINESS COOPERATION IN RESPONSE TO COVID-19

On 25 March, the CMA published guidance on how it will prioritise its cases during the Covid-19 crisis and how it will apply the legal criteria for exemption from the prohibition on agreements that are restrictive of competition. In light of the current crisis, the CMA does not intend to take enforcement action where businesses adopt temporary measures to coordinate conduct as long as these measures: (i) are appropriate and necessary to avoid shortages or to ensure security of supply; (ii) are clearly in the public interest; (iii) contribute to the benefit or wellbeing of consumers; (iv) deal with critical issues arising as a result of the Covid-19 pandemic; and (v) do not last longer than is necessary to deal with these critical issues. However, the CMA notes that it will ensure that this approach is not used as a cover for non-essential coordination that may cause harm to consumers or the wider economy. For further information on the CMA's guidance, please see our blog post on this topic.

M&A CONTINUES BUT PROCESSES COULD SLOW DOWN

In the M&A field, companies should be aware that EC officials are teleworking at the moment which is likely to slow down the review of the merger control notifications. Also, the EC has urged companies to delay filings to the extent possible (particularly in non-simplified cases) in view of the anticipated difficulties in reaching out to companies for the purposes of the market investigation in the coming weeks. Given that in many jurisdictions transactions subject to merger control review cannot be implemented prior to clearance, this could have a material impact on the closing of transactions, particularly those where *prima facie* competition concerns may arise.

NEW EC GUIDELINES ON FDI SCREENING IN RESPONSE TO COVID-19 CRISIS

On 25 March, the EC adopted new guidelines ahead of the application of the FDI Screening Regulation to ensure a strong EU-wide approach to foreign investment screening in response to the Covid-19 crisis. The EC's aim is to preserve EU companies and critical assets, notably in areas such as health, medical research, biotechnology and infrastructures that are essential for security and public order in the EU.

According to the EC, in the context of the current crisis, there could be an increased risk of attempts to acquire healthcare capacities (e.g. production of medical or protective equipment) or related industries such as research establishments (e.g. developing vaccines) via FDI. Thus, vigilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens and the EC calls on Member States to: (i) make full use already now of its FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs etc.; and (ii) for those Member States that currently do not have a screening mechanism, to set up a fully-fledged screening mechanism and in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs. For further information on the EC's FDI guidelines, please see our blog post on this topic.

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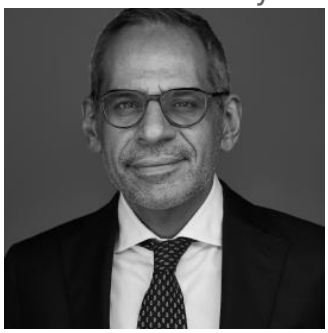
KEY CONTACTS

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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