

Cooperation in the life sciences industry and EU competition law in the context of COVID-19

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The life sciences industry is facing unprecedented demands due to COVID-19. From front line carers to researchers and scientists, significant efforts are being put towards caring for those suffering from COVID-19 and preventing the spread of the virus. Amidst the fierce competition to develop vaccines and treatments, there may also be the need to collaborate. As companies develop testing kits, trial drugs, manufacture ventilators, and step up medical supply distribution, they may be concerned about whether their collaboration efforts could draw the scrutiny of competition law enforcers. The European Commission and EU Member State competition authorities have issued [a joint statement](#) on the application of competition law during the COVID-19 crisis in the context of the European Competition Network. While there is recognition that in these extraordinary times cooperation may be necessary, the competition rules remain relevant and fully applicable.

Can pharmaceutical companies join efforts on the research and development of vaccines?

Press reports as at the time of writing this alert suggest that about 35 companies and academic institutions are racing to develop a vaccine. While some companies and institutions may have the skills, technology and financial ability to go through clinical trials and take the necessary regulatory steps to bring a drug on to the market, some may need to enter into collaboration agreements in order to safely develop their product.

Joint research and development agreements between competitors can be problematic in certain circumstances, for example, if they lead to a reduction in innovation by removing a viable research pole where few others exist. There may also be a concern that collaboration may spill over into other areas and reduce competition between the parties outside the scope of their research and development agreement.

Where competitors have a combined market share of less than 25%, a research and development agreement can benefit from the safe harbour established by the European Commission's block exemption regime for such agreements. Outside this market share threshold, an individual assessment of the agreement must be carried out. It is unlikely that enforcement action will be taken against parties who genuinely pull together complementary skills to put a vaccine for

COVID-19 on the market as quickly as possible, provided that they can demonstrate that any restrictions imposed on their conduct do not go beyond what is necessary to deliver the consumer benefits of their agreement.

Can wholesalers exchange information about stock levels to ensure the supply of medical products?

Given the seriousness of the situation, it is likely that players in the healthcare industry will want to be able to collaborate on stock levels and other crucial information to ensure continuity of supply of medical products to hospitals and pharmacies.

EU Member State competition authorities have acknowledged that the extraordinary nature of the current situation may trigger the need for companies to cooperate to ensure the supply and fair distribution of scarce products. The authorities have noted that these measures are “*unlikely to be problematic*”, since it would either not amount to a restriction of competition under the EU competition law regime or would “*generate efficiencies that would most likely outweigh any such restriction*”. The authorities have also stated that they would “*not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply*”.

The key will therefore be to ensure that any cooperation with regard to information exchange is indeed limited to what is strictly necessary and temporary. For example, data shared between competitors should be shared in an as aggregated form as possible, as infrequently as practicable and not on a long-term basis. Companies should also try to put in place internal information barriers so that any potentially commercially sensitive information is accessible only by a limited group of people. It is vital that all such data sharing is aimed at ensuring supply reaches patients and consumers and actually does bring benefits to them.

Can wholesalers set up purchasing agreements to counter shortages in supply?

Wholesalers may be considering entering into joint purchasing agreements for healthcare products in order to ensure that they maintain adequate supply levels.

Where the parties entering into the joint purchasing arrangement have a combined market share below 15% on the purchasing and selling markets, then the European Commission considers that competition concerns are unlikely to arise. Above this threshold, a detailed assessment will be required. Arguments relating to ensuring the security of supply, in addition to efficiency gains such as more favourable terms on prices, quantities and delivery times, are likely to be particularly relevant in the current situation.

Conclusion

Competition authorities have acknowledged that the current circumstances brought on by the COVID-19 pandemic are exceptional and therefore that cooperation between companies may be needed to overcome the crisis. The European Commission has indicated that it is willing to provide informal guidance on whether specific cooperation initiatives are compatible with EU competition law and has set up a dedicated COVID-19 mailbox for this purpose. In seeking such guidance the parties are asked to explain upfront the EU competition law concerns that their agreement may raise and why the cooperation is necessary and proportionate to achieve its intended benefits.

Competition authorities have also been clear that they will not tolerate cartels or abusive conduct by dominant firms. The joint statement of EU Member State competition authorities specifically stresses that it is critical that essential healthcare goods such as face masks and sanitising gel remain available at competitive prices. To that end, national competition authorities will not hesitate to take action against companies taking advantage of the current situation, with the potential for significant fines. The Italian, Spanish, Greek and Polish competition authorities have already initiated investigations in relation to the supply of several types of personal protective equipment. In addition, companies who use the COVID-19 pandemic as a cover to engage in anticompetitive conduct also expose themselves to private damages litigation.

While there is a clear recognition by the European Commission and EU Member State competition authorities of the challenges brought on by the pandemic, this does not mean that companies have been given a *carte blanche* with respect to the competition rules.

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