

Impact of COVID-19 on Horizontal and vertical coordination Merger control

EU UPDATE CALL – 6 MAY 2020



What questions are we being asked?

Horizontal & vertical coordination

- To what extent can I engage in self-help with my competitors?
- Has competition law been suspended?
- Are government/public body assurances/requests a “defence”?
- Are the rules as flexible for over supply as shortage situations?

Merger control

- Are the authorities still working?
- What if my deal is urgent?
- Will treatment of mergers be more lenient?

Next session: EU State aid and Public Procurement



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Horizontal and vertical coordination

Has competition law been suspended?

Comp law should not be a barrier

- NCAs recognise extraordinary situation
- **EU:** current exceptional circumstances and their related challenges may trigger the need to cooperate
- **ECN & ICN**
- **CMA:** conscious of concerns that competition law could impede necessary cooperation

"[The Commission] will continue to closely and actively monitor relevant market developments."

DG COMP, 8 April 2020

... but it's still in force

- NCA warnings
- Each case on its merits
- Material repercussions
- "Object" infringements (higher risk)
- Criminal cartel conduct – no dishonesty requirement

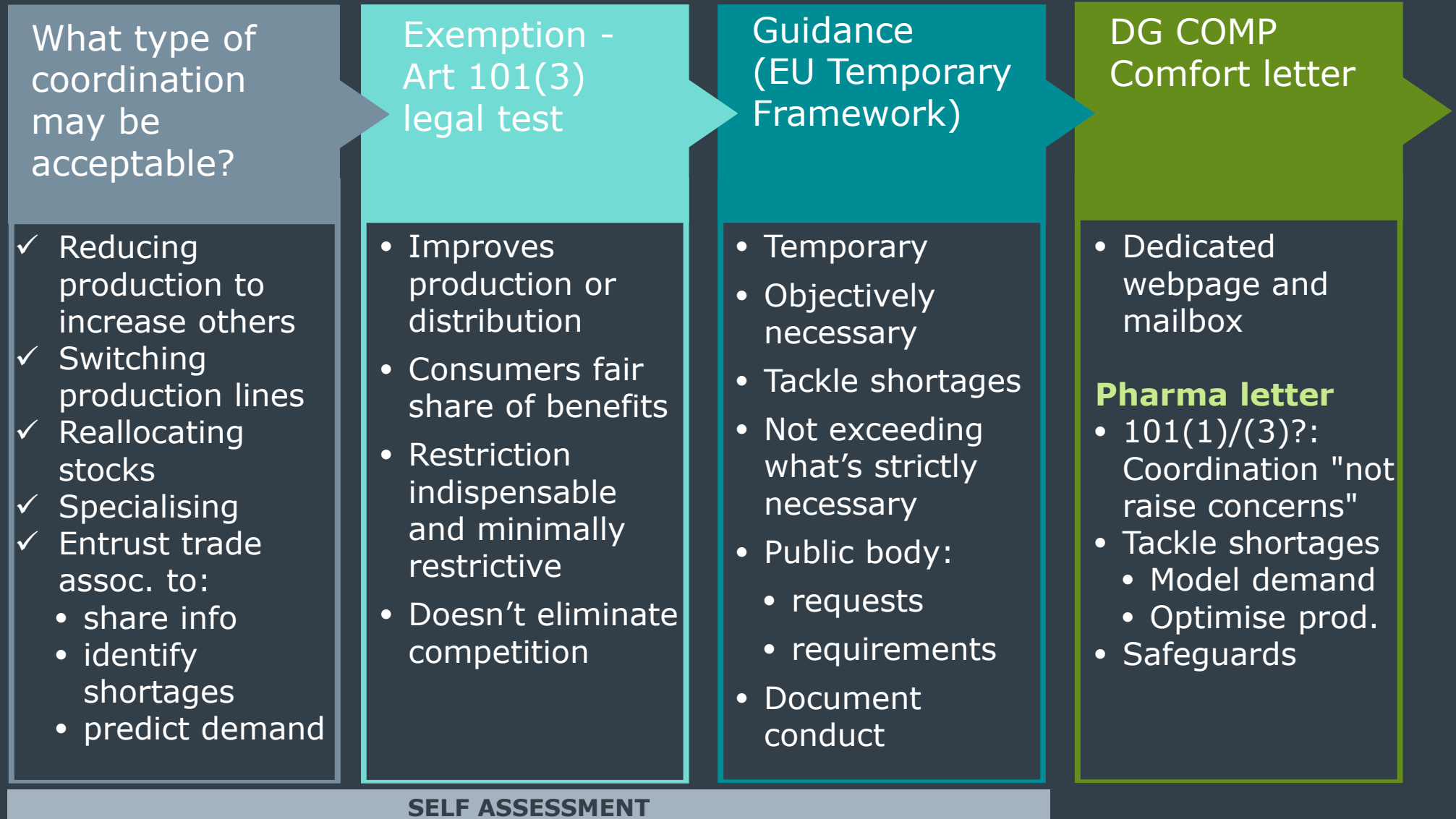
"[The CMA] will consider any evidence that companies may have broken competition or consumer protection law ..."

CMA, 5 March 2020

Dedicated CMA Covid-19 task force

What kind of coordination is acceptable and how can I get comfortable?

THE EU POSITION



Case studies in the UK

LEGAL OPTIONS	EXEMPTION	<ul style="list-style-type: none"> • Same test as EU law • Applies to shortages 		EXCLUSION	<ul style="list-style-type: none"> • Comply with legal requirement • SoS exclusion order • NA to Art 101/102
	EXCESS DEMAND / SHORTAGES	EXCESS SUPPLY			
	GROCERY & HOSPITALS EXCL	UK DAIRY EXCL		UK FERRIES EXCL	
	<ul style="list-style-type: none"> ✓ Info re capacity / stock ✓ Staff sharing / deployment ✓ Joint purchasing ✓ Sharing facilities ✓ Division of areas ✓ Quantities and range ✓ Store opening hours ✓ Supply the vulnerable ✗ Info sharing on prices and costs 	<ul style="list-style-type: none"> ✓ Sharing info: surplus, stock, capacity, demand, disposal best practice ✓ Sharing labour ✓ Sharing facilities ✓ Processing & storage ✓ Sharing info on logistics co. services ✓ Reducing production ✗ Info sharing on prices and costs 	<ul style="list-style-type: none"> ✓ Timetables ✓ Routes ✓ Deployment of staff ✓ Deployment of vessels ✓ Supply the vulnerable ✗ Info sharing on prices and costs 	<div>EU EXCLUSIONS?</div> <ul style="list-style-type: none"> • No general exclusion • But, CMO agri derogations <ul style="list-style-type: none"> • Potatoes, Flowers, Dairy • Art 101 • 6 months 	

2 Merger control

Are the merger authorities still working?

YES

- Office closures
- Remote working
- E-filing



BUT ...

- Requests to hold back filings
- Extended pre-notification
- Slower 3rd party responses
- Pull and refile notifications



SLOWER APPROVAL

What if my deal is urgent?

ENGAGE

- Engage with regulator early



STRUCTURE TO AVOID CONTROL

- Minority holding / no overall control
- NB Low “control” thresholds



DEROGATION FROM STANDSTILL

- Eg. EUMR, Germany, France, Spain, Brazil
- No negative effect
- Serious damage without derogation

NON-SUSPENSORY FILING?

- Voluntary - Eg. UK (Hold separates restrict integration)
- Mandatory, but non-suspensory – Eg. Italy



Will treatment of mergers be more lenient?

BUY, BUY, BUY – IS NOW THE TIME FOR A SHOPPING SPREE?

FAILING FIRM DEFENCE

- Strict conditions
- Strong evidence required
- Concedes transaction may have anti-competitive effects



MARKET DYNAMICS

- Authorities likely to review merger in current climate ...
- ... will this be helpful?



FAILING FIRM ARGUMENT

- Historic market shares overstate competitiveness
- Strong evidence required



PROLONGED EXPOSURE

- Delays may prolong deal's exposure

Other issues in crisis M&A

- Restructuring / refinancing transactions may need clearance
- Watch out for change in JV holdings
- FDI regimes - increasing focus during COVID-19

Key EMEA contacts

ASHURST COVID-19 EU COMPETITION LAW WORKING GROUP

ANTITRUST AND MERGER CONTROL STATE AID



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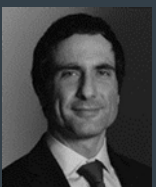
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