

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

European Commission adopts revised Informal Guidance Notice

On 3 October 2022, the European Commission adopted a [revised Informal Guidance Notice](#) (the Revised IGN), which sets out the circumstances in which the Commission will consider providing companies with informal guidance concerning the application of EU competition law. The Revised IGN replaces a [prior version](#) of the Informal Guidance Notice (the Initial IGN) that was widely viewed as ineffective. The Revised IGN provides for an update of the criteria that allows the Commission to provide informal guidance in cases presenting novel or unresolved questions, including in situations of crisis or other emergencies.

BACKGROUND

Since the coming into force of Regulation 1/2003, the EU competition regime has functioned in accordance with the principle of self-assessment. This means that individual undertakings are responsible for assessing whether their agreements and practices comply with Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The Initial IGN, published in 2004, was intended to assist businesses with the self-assessment process by specifying the circumstances in which the Commission would consider issuing informal, non-binding guidance concerning the operation of EU competition law. For a variety of reasons, the Initial IGN process was utilised extremely rarely. Few companies ever approached the Commission for guidance and the Commission never issued any informal guidance letters pursuant to the Initial IGN. In order to enhance the desirability of the informal guidance process by making the instrument more flexible and giving businesses greater legal certainty, in May 2022, the Commission [consulted](#) on a revised text of the Informal Guidance Notice. This was followed by the adoption of the Revised IGN on 3 October 2022.

On the same day as the Revised IGN was published, in light of the improved sanitary conditions in Europe, the Commission also decided to withdraw its [Antitrust COVID Temporary Framework](#) (the COVID Framework). In addition to setting out the criteria which the Commission used when assessing cooperation projects aimed at addressing COVID-related shortages, the COVID Framework allowed the Commission to provide written comfort letters in relation to such projects. Since the adoption of the COVID Framework on 8 April 2020, two comfort letters were issued.

THE REVISED IGN

HOW DOES THE REVISED IGN OPERATE?

Under the Revised IGN, in response to an undertaking's request, the Commission may assess whether to provide private applicants with informal guidance on their agreements or unilateral practices on the basis of two cumulative factors.

The first factor is whether the request involves “*novel*” or “*unresolved*” questions of EU competition law. This will be the case if the existing EU legal framework (including the

For further information on any EU or UK Competition related matter, please contact the [Competition Group](#) or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

case law of the Court of Justice of the EU and publically available guidance at EU level) does “*not provide sufficient clarity*” on the questions set out in the request.

The second factor is whether there is an EU “*interest in providing guidance*”. This will be the case if a public clarification of the applicability of Articles 101 and 102 would “*provide added value with respect to legal certainty*”. In making this assessment, the Commission will have regard to:

- the actual or potential economic importance of the goods or services concerned by the agreement or unilateral practice;
- whether the objectives of the agreement or unilateral practice are relevant for the achievement of the Commission’s priorities or Union interests;
- the magnitude of the investments made or to be made by the undertakings concerned; and
- the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread usage in the Union.

Like the Initial IGN, the Revised IGN notes that the Commission will not normally consider a request for informal guidance if the subject matter of the relevant request is identical or similar to the subject of ongoing legal proceedings before the EU courts, Member State courts, the European Commission or an EU national competition authority. The Commission will also not entertain hypothetical questions.

The Commission is never obligated to issue informal guidance. If the Commission does decide to issue informal guidance it will do so by publishing a publically available guidance letter. The Commission will agree a publically available version of the guidance letter with the applicant to ensure that the applicant’s business secrets are not disclosed. Guidance letters do not confer any rights on private parties and therefore produce no binding force, whether against the Commission or the competition authorities of Member States.

WILL THE REVISED IGN SPARK A REVIVAL IN INFORMAL GUIDANCE FROM THE COMMISSION?

As it stands, it remains to be seen whether the Revised IGN will prompt a large-scale resurgence in informal guidance requests. However, several of the features of the Initial IGN which may have discouraged parties from seeking informal guidance from the Commission remain in place. The Revised IGN also imposes even more extensive requirements relating to the information that should be provided in a request. Under the Revised IGN regime, applicants should:

- set out their preliminary assessment as to why their request presents novel and unresolved questions and why the issuing of a guidance letter would provide added value with respect to legal certainty;
- set out their preliminary assessment, to the best of their abilities, of the application of Articles 101 and 102 TFEU to the novel and unresolved questions forming their request; and
- provide full and exhaustive information on all points relevant for an informed evaluation of the questions raised in the request.

The Revised IGN also explains that even though the Commission will not impose any fines on an applicant with respect to any action taken by the applicant relying in good faith on a guidance letter, the Commission may subsequently examine the same agreement or conduct under Regulation 1/2003. Furthermore, the position on information supplied remains unchanged and the Commission is not prevented from using this information in later enforcement action against the applicant.

CONCLUSION

The Initial IGN process was widely viewed as ineffective and underused. Although the Revised IGN attempts to breathe new life into the provision of informal competition law guidance by the Commission, time will tell whether major changes will actually occur in practice.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

OTHER DEVELOPMENTS

MERGER CONTROL

EUROPEAN COMMISSION CONDITIONALLY APPROVES CELANESE'S ACQUISITION OF DUPONT'S MOBILITY AND MATERIALS BUSINESS

On 11 October 2022, the European Commission [announced](#) that it has conditionally approved the €11.3 billion acquisition of DuPont Mobility & Materials by Celanese. The proposed acquisition was announced in February 2022 and notified to the Commission on 23 August 2022.

Celanese is a global chemicals and specialty materials company and DuPont Mobility & Materials is a producer of high-performance engineering thermoplastics, elastomers, pastes, filaments and advanced film. According to the Commission, the proposed transaction, as notified, created competition concerns as the combined entity would have become the largest producer of thermoplastic copolyester (TPC) in the EEA and globally. TPC is an engineering plastic mainly used in the automotive sector but also in other applications.

Commissioner Vestager said that absent any remedies, customers would have been left with only a few alternative suppliers. To address its competition concerns, the Commission accepted Celanese's commitment to divest its global TPC business, including a production facility in Italy, and its Pibliflex and Riteflex TPC brands. The commitments consist of the divestiture of a stand-alone business, which fully removes the overlap between the parties' activities.

The Commission concluded that Celanese's commitments would "*fully remove*" any competition concerns by ensuring that another competitor will continue to challenge Celanese in the market for TPCs. Taro Plast S.p.a, an Italian producer of engineering plastics, has been proposed by Celanese as the buyer.

ANTITRUST

EUROPEAN COMMISSION SENDS STATEMENT OF OBJECTIONS TO TEVA FOR ABUSE OF DOMINANCE

On 10 October 2022, the European Commission [announced](#) that it has sent Teva, a global pharmaceutical company headquartered in Israel, a Statement of Objections containing its preliminary view that the company abused its dominant position in the market for glatiramer acetate in seven EU Member States. Glatiramer acetate is the active pharmaceutical ingredient in Copaxone, over which Teva held a basic patent until 2015 and which is used to treat multiple sclerosis.

The Commission's preliminary view is that Teva has breached Article 102 TFEU through practices with an overall objective of prolonging the exclusivity of its drug, Copaxone, by hindering the market entry and uptake of competing glatiramer acetate medicines. In particular, the Statement of Objections formalised the Commission's preliminary findings that Teva, since February 2015, engaged in two types of abusive conduct:

- **The misuse of patent procedures:** the Commission found that Teva artificially extended its glatiramer acetate patent through a tactic that effectively denies or delays the entry of generic medicines by filing and withdrawing secondary patent applications. This behaviour artificially prolongs legal uncertainty to the benefit of the patent holder by forcing Teva's competitors to engage in lengthy legal challenges.
- **Implementing a disparagement campaign:** the Commission takes the preliminary view of Teva "*targeting healthcare professionals and casting doubts about the safety and efficacy of a competing glatiramer acetate medicine and its therapeutic equivalence of Copaxone*".

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

Teva now has the opportunity to examine the documents on the Commission's file, respond in writing to the alleged conduct and to request an oral hearing to present their position.

HONG KONG COMPETITION COMMISSION ACCEPTS CAR DISTRIBUTORS' COMMITMENTS TO LIFT WARRANTY CONDITIONS

Car owners in the city are now free to service their vehicles at independent workshops without fear of losing their warranties, after the Hong Kong Competition Commission (HKCC) [accepted](#), on 10 October 2022, commitments offered under section 60 of the Competition Ordinance by seven major car distributors. The commitments cover 17 passenger car brands, including Audi, BMW, Jaguar, Land Rover, MINI, Toyota, and Volkswagen.

According to the HKCC, the seven car distributors required maintenance or repair services to be performed at authorised repair centres, even for items not covered by the warranty - customers that did not comply risked voiding their warranties. The HKCC's investigation found that these restrictions could deter car owners from using independent vehicle repair workshops during the warranty period. This likely limited the ability of independent workshops to compete with authorized repair centres, restricted car owners' choice of service for their vehicles, and ultimately led to higher prices for maintenance and repair services.

In August, the HKCC held a public consultation on the distributors' proposed commitments not to enforce existing warranty restrictions and not to include them in new warranties issued. The HKCC accepted commitments after considering representations received on the proposed commitments, including those from the Hong Kong Vehicle Repair Merchants Association and the Consumer Council. The commitments will remain in force for a period of five years.

London

T +44 (0)20 7600 1200

F +44 (0)20 7090 5000

Brussels

T +32 (0)2 737 94 00

F +32 (0)2 737 94 01

Hong Kong

T +852 2521 0551

F +852 2845 2125

Beijing

T +86 10 5965 0600

F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2022.

For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com

578847850