

III. Insufficient or no capacities

Once it has been determined what manufacturing capacities encompass, it is necessary to determine when they are insufficient or absent. Like the manufacturing capacity, absence or insufficiency can be determined in two ways: the absolute non-existence of a pharmaceutical sector or, where such exist, the unwillingness of domestic producers to produce the compulsory license for the licensee. The Public Health Declaration, in particular the inclusion of the word ‘insufficient’, appears to require the Member States to find a solution to both, i.e. the problem exists not only where there is no production facilities but also where the existing facilities are unable (or unwilling) to assist in the production. This would imply that although there could be an ability to produce, factors prevent this from occurring. These factors are neither limited by paragraph 6 nor by the Public Health Declaration. Accordingly, there does not appear to be a limitation as to what causes the insufficiency. Provided the reason is a reasonable and justifiable ground and not a means to circumvent the protection of intellectual property rights.

IV. Pharmaceutical sector

The reference to the ‘pharmaceutical sector’ is relevant in that it reflects the context of the Public Health Declaration and ensures that the solution should not extend beyond this scope. One of the goals of the Public Health Declaration was to ensure that Member States were able to afford healthcare treatment. Limiting the solution to the pharmaceutical sector reflects this goal and ensures the solution is tailored to meet this goal and not to be misused for other purposes.

The ordinary meaning of ‘pharmaceutical sector’ implies that only that sector that prepares, preserves, compounds or dispenses drugs will be considered.⁷⁷⁴ This would imply that instruments, testing machinery and other non-medicinal measures used to counter epidemics and other extreme urgencies would not be included.⁷⁷⁵ This is, to some extent, reflected by the reference to access to medicines in paragraph 4 of the Public Health Declaration. Notwithstanding this, limiting the meaning to industries producing medicines would not reflect the general context of the Public Health Declaration, i.e. taking measures to protect the public health. Non-medicine products such as diagnostic kits for HIV/AIDS play a crucial role in the treatment of diseases. A narrow interpretation of the concept ‘pharmaceutical product’ would rule out

⁷⁷⁴ Webster’s Third New International Dictionary (Merriam Chicago 1971) p. 1694.

⁷⁷⁵ Correa makes another proposal. He suggests that the ‘pharmaceutical sector’ may be interpreted to extend to all those products sold by a pharmacy. Cf. Correa, Implications of the Doha Declaration in the TRIPS Agreement and Public Health (WHO Geneva 2002) p. 21.