



# Coronavirus and competition law:

## The CMA's Guidance for business co-operation

### Introduction

In addition to the Government's relaxation of certain competition rules for arrangements in specific sectors ([groceries](#), [ferries](#) and [healthcare services](#)), the Competition and Markets Authority (the CMA) had sought to provide wider reassurance to businesses about its enforcement intentions (as previously [reported](#)). It has now followed up on this reassurance with the [publication](#) of its promised guidance.

The CMA has made clear that its priority in the coming months is to protect as far as possible consumers in the UK from the adverse consequences of the Covid-19 pandemic, whilst also acknowledging that competition law enforcement concerns might impede business co-operation which is necessary in order to deal with the crisis and, for example, ensure the security of supply of essential products and services or ensure that key workers can travel safely to work.

### Overriding message

In its Guidance, the CMA provides further reassurance that it will not take enforcement action against a business which is involved in co-ordination with its competitors, if this co-ordinating action is taken "solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary".

It also makes very clear that the Guidance is not "a free pass" either and that it "will not tolerate conduct which opportunistically seeks to exploit the crisis".

### A reminder of the Competition Law Rules

The UK's Chapter I prohibition (s2 of the Competition Act 1998) prohibits agreements, decisions and concerted practices which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK. Thus, businesses are prohibited from colluding or co-ordinating amongst their competitors to limit competition by, inter alia, dividing up markets or customers amongst themselves or agreeing to raise prices.

However, s9 of the Competition Act allows an exemption from this Chapter I prohibition for agreements which satisfy the following criteria:

- they contribute to improving production/distribution or promoting technical/economic progress
- they allow consumers a fair share of the resulting benefit
- they do not impose restrictions which are not indispensable to attaining the above objective(s), and
- they do not give rise to the possibility of the elimination of competition.

### Any comments or queries?

**Melanie Musgrave**  
Senior Associate

+44 20 3060 6296

[melanie.musgrave@rpc.co.uk](mailto:melanie.musgrave@rpc.co.uk)

**Lambros Kilaniotis**  
Partner

+44 20 3060 6033

[lambros.kilaniotis@rpc.co.uk](mailto:lambros.kilaniotis@rpc.co.uk)

It is for businesses themselves to self-assess whether the exemption criteria are satisfied, in the event that they wish to rely on the s9 exemption. It is not possible for the CMA to issue a formal clearance decision confirming that the exemption would apply to a particular agreement or arrangement.

### The Guidance in detail

The purpose of the Guidance is to assist businesses in carrying out their competition law self-assessment in order to reduce the risk that the process may result in delays or uncertainty which would be detrimental to the ability of business to deal with the crisis for the public good. It also provides businesses with a reminder of the behaviour which will be considered a breach of competition law.

### What businesses can do:

The CMA has confirmed that businesses may co-ordinate action on a temporary basis without fear of it taking enforcement action against them where this action:

- is appropriate and necessary to avoid a shortage or ensure security of supply
- is clearly in the public interest
- contributes to the benefit or wellbeing of consumers
- deals with critical issues resulting from the pandemic crisis, and
- lasts no longer than is necessary.

It has also provided examples of the types of co-ordination which are most likely to be unproblematic from a competition law perspective, provided that the co-ordination does not go further “than what can reasonably be considered necessary”, such as action to:

- avoid a shortage or ensure security of supply
- ensure a fair distribution of scarce products
- continue essential services, or
- provide new services, such as food deliveries to vulnerable consumers.

In relation to the application of the exemption

criteria, the CMA has provided more detailed guidance:

- co-operation ensuring essential goods and services can be made available to the public, or an important subset of the public (for example, key workers or vulnerable consumers) will be considered to be efficiency enhancing (the first criterion);
- if the co-operation is needed to avoid or reduce significant product shortages, it is likely to give consumers a fair share of the benefits (the second criterion);
- the key factor when determining whether the co-operation is indispensable is whether it can “reasonably be considered necessary” in the circumstances and limited time available for deciding on the course of action (the third criterion). The CMA has highlighted the importance of the co-operation being temporary in nature and not being wider in scope than necessary; and
- competition should remain wherever possible (the fourth criterion). Thus, in circumstances where it is necessary to share capacity information, competitors should still compete on price if possible. The scope of the restriction should be limited to cover only the particular goods or geographical area of concern.

### What businesses must not do:

The CMA has reiterated the importance of ensuring that unscrupulous businesses do not exploit the current crisis by artificially inflating the prices of essential products and/or services either through collusion amongst themselves or, if dominant (including temporarily as a result of the current circumstances) unilaterally deciding to set excessive prices. As previously [reported](#), the CMA has set up a task force to monitor developments.

Regarding profiteering, the CMA has pointed out that manufacturers are generally permitted under competition law to set a maximum price at which retailers may sell

their products, provided that the maximum price does not amount to a fixed or minimum price as a result of manufacturers' incentives or threats.

The CMA has made clear that it will not tolerate the following behaviour:

- the exchange of commercially sensitive information about future pricing or business strategies (ie that goes beyond the current situation)
- retailers excluding smaller rivals from efforts to co-operate/collaborate to ensure security of supply or denying rivals access to supplies/services
- collusion to keep prices artificially high in order to mitigate falling demand, or
- co-ordination which is wider in scope than what is actually needed.

### Practical aspects of the Guidance

The CMA has confirmed that it may need to update the guidance as the situation and issues evolve in order to "provide maximum clarity and certainty for business". In due course, when it no longer considers the guidance necessary, the CMA will withdraw it by means of a notice on its website. In the meantime, if, despite the guidance, there is genuine uncertainty for businesses and their legal advisors on the legality of proposed actions which are of critical importance, the CMA has said that it would be prepared to offer additional, informal guidance to the extent that resourcing constraints permit.

The CMA has reiterated that it cannot bind the European Commission in relation to its application of EU competition law in the UK (please see section below). In addition, the Guidance does not protect against the possibility of a third party taking legal action claiming a breach of competition law, although the UK Courts may take the Guidance into account.

### Other regulators' approach to competition law enforcement

The Financial Conduct Authority and the Payment Systems Regulator, as concurrent competition regulators with the CMA, have [confirmed](#) that they are supportive of the CMA's Guidance and will take a consistent approach to their competition law enforcement activities in the financial services sector. They have acknowledged the importance of competition law not impeding co-operation between firms where necessary to provide essential services to consumers during the coronavirus pandemic, but have also made clear that they too will not tolerate conduct which "seeks to exploit the situation and harms consumers".

For businesses also active in the EU, there is similar comfort to the reassurance being provided by the CMA. The European Competition Network, made up of Member States' competition authorities and the European Commission, has issued a [joint statement](#) setting out that:

"The ECN understands that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply."

However, there is also a warning that the ECN will not hesitate to take enforcement action against companies exploiting the current situation "by cartelising or abusing their dominant position".

The European Commission has also just [announced](#) that it has set up a dedicated mailbox (COMP-COVID-ANTITRUST@ec.europa.eu) for companies to seek informal guidance on the compatibility of their specific co-operation initiatives with EU competition law.

## Conclusion

Competition law compliance may well not be uppermost on the minds of companies during this unprecedented crisis, but should not be ignored. The Guidance is to be welcomed at such a difficult time, as is the possibility of additional, informal guidance both at UK and EU level. It is important that companies do seek legal advice before agreeing to discuss any form of co-operation or collaboration with competitors and do take care in those discussions. Even if there is a legitimate reason arising from the pandemic for potential co-operation, it is important that the scope of any discussions, and any subsequent agreement reached, between competitors is limited to dealing with the current crisis.

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