



Coronavirus and competition law:

April 2020

The current enforcement scene

General overview

The CMA, other concurrent competition regulators in the UK, the European Commission and EU Member States' national competition regulators are keen to ensure that competition law enforcement concerns do not stand in the way of co-operation between competitors which is necessary in order to deal with the coronavirus crisis and ensure security of supplies of essential products. However, the message is that, even in these very difficult times, competition law still applies and competition regulators will not tolerate unscrupulous businesses exploiting the situation either through illegal collusion under cover of the current crisis or profiteering through charging excessive/unjustifiable prices.

Despite its new priority, the CMA has also emphasised that it is continuing with its investigations, decision-making and is seeking to meet its deadlines, many of which are statutory in nature and, thus, fixed. Evidence of this can be seen through recent merger decisions, decisions to continue competition law investigations (for example, its Statement of Objections in two alleged, illegal Resale Price Maintenance cases involving musical instruments) and its announcement that

it is proceeding with certain director disqualification applications. That said, it is difficult to imagine that some investigatory action, such as dawn raids, will be taking place for some time to come.

Competition law enforcement

UK:

Specific exclusions:

On a temporary basis, the UK Government has introduced legislative exemptions from the Chapter I prohibition under the Competition Act 1998 for certain agreements in the [groceries](#), [health services](#) and [Solent ferries](#) sectors due to "exceptional and compelling reasons of public policy" arising from the Covid-19 pandemic. Thus, specified collaboration between businesses in these sectors during the period of disruption (for the first two sectors, this commenced on 1 March and, for the ferries sector, on 16 March, and will continue until such date as the Secretary of State determines and gives at least twenty-eight days' notice) will not fall within the Chapter I prohibition. Relevant businesses will, therefore, be able to co-operate with each other for prescribed activities, knowing that there is no risk for them of infringing UK competition law.

Any comments or queries?

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However, these exemption orders make very clear that relevant businesses will not be permitted to share costs or pricing information amongst themselves. Other commercially sensitive information, such as stock levels, can be shared as can facilities and workforces. In order “to work together to feed the nation” and, thus, avoid/minimise the risk of groceries shortages, groceries retailers and suppliers will be able to collaborate, as will their logistics services providers. For further information regarding the groceries exemption, please see [here](#).

Ferry operators operating Isle of Wight routes will be able to co-ordinate timetables, routes and share personnel in order to “keep routes open and essential goods flowing”. In order “to assist the NHS in addressing the effects or likely effects of coronavirus on the provision of health services to patients in England”, the NHS Commissioning Board, other NHS entities and independent health services providers are permitted to: share capacity information as well as facilities; jointly purchase certain requirements; and co-ordinate staff deployment and also the provision of health services by independent providers.

Other co-operation arrangements allowed in response to Covid-19:

The CMA has sought to [reassure](#) other businesses, which cannot rely on the specific exemptions mentioned above, that it has no intention of taking competition law enforcement action in relation to their co-operation which is necessary during the current crisis to ensure security of supply of essential products and services.

It has published [guidance](#) which reiterates that it will not take enforcement action against co-operation undertaken “solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary”. In its guidance, 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.

The guidance provides further details for businesses, when conducting their own self-assessment competition law analysis, alongside their legal advisors, as to whether their proposed arrangement would benefit from an individual exemption from the Chapter I prohibition. (For a more detailed summary of the guidance, please see [here](#)).

The CMA has also indicated that if, despite its guidance (which it will update, if necessary, as the situation evolves), there were still genuine uncertainty for businesses and their legal advisors on the legality of proposed actions which were of critical importance, it would be prepared to offer additional, informal guidance to the extent that resourcing constraints permit.

Clamping down on exploitative business practices:

As mentioned above, the CMA (amongst others) has also made very clear that it “will not tolerate conduct which opportunistically seeks to exploit the crisis”, whether this be in the form of illegal collusion between competitors using the current pandemic as cover or profiteering through excessive pricing. Excessive pricing may arise through collusion or unilaterally by a dominant entity (whose dominance may only be temporary and arise as a result of the crisis and there being only limited supplies).

It has [announced](#) the launch of a task force to scrutinise market developments in order to identify harmful sales and pricing practices, to warn businesses suspected of exploiting the current situation and to take enforcement action against businesses where there is evidence of competition and/or consumer law breaches in the event that its warnings have been ignored. The task force will also advise the Government on any policy and legislative measures required to ensure markets work as well as possible going forward.

The CMA has also written an [open letter](#) to the food and drinks and pharmaceutical industries about reports that a minority of companies in these important sectors are charging unjustifiably high prices for essential goods or making misleading claims about their efficacy. The CMA is looking to ensure that any such harmful behaviour is “nipped in the bud now” and that markets continue to work well in the months ahead with consumers being treated fairly and public trust being maintained. It has asked businesses, which face price increases from their wholesalers or suppliers, to provide it with information in writing via a dedicated email address (covid.monitoring@cma.gov.uk) so that the CMA can then investigate these issues further up the supply chain.

It has been reported that the CMA’s task force is currently in discussions with Amazon and eBay about third-party retailers on their platforms profiteering from the pandemic as the CMA seeks to establish what they are doing to put a stop to this exploitation.

The Financial Services sector:

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”.

Other competition work by the CMA during the crisis:

As set out above, the CMA is continuing to progress its investigations and issue decisions. Inevitably, the current situation is impacting on some of its activities as it prioritises “its most urgent and most critical work”. For example, it had been tasked by Government in February with preparing and publishing by this summer its first report in the state of competition across the UK economy. Due to the pandemic, it is currently planning to reconvene the project in the Autumn and publish its preliminary assessment report in early 2021. In relation to its market investigation into the funeral sector, the CMA has suspended its deadline for responses to its working papers. At the same time, it has announced a new initiative to establish a public register of ‘significant’ breaches of remedies agreed in market and merger investigations to prove further transparency of its work and to provide an added deterrent.

The UK Courts:

The Courts are still functioning with hearings being conducted remotely by videoconference or by telephone and electronic filings replacing the submission of signed originals. The Competition Appeal Tribunal has issued a new [Practice Direction](#) to deal with filing and hearing arrangements during the crisis, but has indicated that cases may be “disrupted or lengthened”.

The European Competition Network:

The European Competition Network, made up of the European Commission and individual Member States' competition authorities, 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”. It also highlights that products essential to consumers' health should remain at competitive prices.

The European Commission has [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 where uncertainty remains and measures need to be implemented swiftly to tackle the pandemic. This new ‘antitrust rules and coronavirus’ webpage also refers to its existing competition law guidance.

Both the European Commission and the European Court of Justice are still functioning remotely. The European Commission remains extra vigilant for harmful behaviour arising from the pandemic. As set out in more detail below, the European Commission is continuing its activity in the mergers arena and has had to respond quickly in relation to state aid notifications. The European Court is focusing on urgent cases. The time limits on other non-urgent current proceedings have been extended by a month and hearings listed until the end of April have been adjourned.

Merger control

UK:

The CMA is subject to statutory timetables when conducting its merger investigations. If necessary, it will look to make use of permitted extensions to these fixed timetables. Based on recent announcements, its merger activity is continuing, including the launch of investigations into completed acquisitions and Phase II investigations being commenced.

It is understood that the CMA is encouraging merging parties and their legal advisers to engage early to discuss the timing of their formal merger notifications. As part of its merger investigation, the CMA seeks the views/information from the parties' competitors, suppliers and customers. Given the current situation, it is likely that the CMA will face delays in conducting market testing. It is being reported that the CMA is now, in anticipated mergers, asking the parties to delay their formal notification.

EU:

The European Commission is actively encouraging merging parties “to delay merger notifications originally planned until further notice, where possible” due to the complexities and disruptions caused by the pandemic. It has highlighted that it is likely to face difficulties obtaining information from third parties as well as limitations on access to information and databases and on information exchanges as a result of remote working.

State aid

This has been an area of major, urgent focus for the European Commission as Member States seek to support their economies in the wake of this unprecedented situation. The European Commission has put in place various supporting measures, including issuing guidance and adopting on 19 March 2020 a Temporary Framework for state aid measure to support the economy in the current Covid-19 outbreak, which it is already proposing to extend further to cover another five types of measures.

General support, applicable to all sectors of the economy, would not usually fall within the state aid rules, as there is no 'selective advantage' for particular companies or sectors. More directed financial support, whether it comes from central or local government or other public bodies, may well be subject to the state aid rules. Unless the measures fall within one of many exemptions, they must be notified to the European Commission and approved prior to their implementation, otherwise the recipients of the aid bear the risk of having to repay it.

In relation to supporting measures in the UK, the UK is still currently subject to the state aid rules. Although the UK withdrew from the EU on 31 January 2020, the rules currently apply until the 31 December 2020 when the Transition Period is due to expire. It is, therefore, important that recipients of state aid are satisfied that this has been granted legally. The UK has already notified and received approval under the Temporary Framework for certain measures, known as the Coronavirus Business Interruption Loan Scheme, to support SMEs affected by the pandemic.

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We have won and been shortlisted for a number of industry awards, including:

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- Best Legal Employer every year since 2009 – Legal Week
- Shortlisted – Banking Litigation Team of the Year – Legal Week Awards 2019
- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
- Winner – Client Service Innovation Award – The Lawyer Awards 2017
- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
- Winner – Adviser of the Year – Insurance Day (London Market Awards) 2017
- Winner – Best Tax Team in a Law Firm – Taxation Awards 2017
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