

Better together – How far can competitors go under UK competition law in cooperating to deal with the challenges of the COVID-19 crisis?

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Competition/antitrust laws generally require rival firms to operate on the market independently of each other and tolerate cooperation between competitors only in limited circumstances where any resulting loss of competition is clearly offset by consumer benefits. But as businesses scramble to deal with the unprecedented fall-out from the COVID-19 outbreak, governments and competition authorities have been confronted with demands for these laws to be relaxed or even suspended, in order to help companies, and the economy more generally, weather the storm.

UK competition legislation allows the government to exclude business arrangements from the normal strictures prohibiting anti-competitive agreements for exceptional and compelling reasons of public policy. Making use of this provision, the government has recently announced that it is allowing the three ferry services operating between the mainland and the Isle of Wight to work together in order to maintain what it describes as the "crucial lifeline" between them.

Of broader impact, the government has also indicated that it will relax competition law to allow supermarkets to share data with each other on stock levels, cooperate to keep stores open, share distribution depots and delivery vans, and pool staff in order to help meet demand.

On 25 March 2020, in recognition that all businesses require clear and timely guidance on such issues, the UK Competition and Markets Authority (CMA) published guidance on forms of cooperation that it considers to be temporarily permissible during this crisis period – see [CMA approach to business cooperation in response to COVID-19](#).

The CMA is in its own words "very conscious" that strict competition law enforcement at this time risks impeding cooperation that could be vital for dealing with the current crisis – in particular, ensuring security of supplies of essential products and services. It therefore outlines how it will prioritise its work and sets out how it intends to apply the statutory criteria for exemption from the competition law prohibition on anti-competitive agreements.

How the CMA will prioritise its enforcement activities during the COVID-19 outbreak

To make best use of its finite resources, the CMA normally decides what investigations and enforcement action to pursue by applying a standard set of prioritisation principles. It has used the same approach to signal to businesses what types of activities related to the crisis it will not pursue given the exceptional circumstances.

The CMA will not take enforcement action where temporary measures to coordinate action taken by businesses:

- are appropriate and necessary in order to avoid a shortage, or ensure security, of supply;
- are clearly in the public interest;
- contribute to the benefit or wellbeing of consumers;
- deal with critical issues that arise as a result of the COVID-19 pandemic; and
- last no longer than is necessary to deal with these critical issues.

However, the CMA reiterates in its guidance that this does not give businesses what it calls "free reign" to engage in unscrupulous conduct that will lead to consumer harm. The CMA offers the following as examples of unacceptable conduct:

- businesses exchanging with their competitors commercially sensitive information on future pricing or business strategies, where this is not necessary to meet the needs of the current situation;
- retailers excluding smaller rivals from any efforts to cooperate or collaborate in order to achieve security of supply, or denying rivals access to supplies or services;
- collusion between businesses that seeks to mitigate the commercial consequences of a fall in demand by artificially keeping prices high to the detriment of consumers;
- coordination between businesses that is wider in scope than what is actually needed to address the critical issue in question (for example, where the coordination extends to the distribution or provision of goods or services that are not affected by the COVID-19 pandemic)
- a business abusing its dominant position in a market (which might be a dominant position conferred by the particular circumstances of this crisis) to raise prices significantly above normal competitive levels.

In determining whether conduct is permissible, the key factor that the CMA will consider is the potential for the coordination to cause harm to consumers or the wider economy. At the same time, it may determine conduct to be permissible, even where coordination might lead to a reduction in product options available to consumers, provided the reduction is necessary to avoid a shortage of the product itself.

The CMA considers it particularly important to ensure that prices of essential products or services are not artificially inflated by businesses colluding on price or taking advantage of a dominant position in the market (the latter potentially arising as a result of current circumstances). It has suggested that manufacturers can help combat excessive pricing by setting a maximum price at which retailers may sell their product. However, manufacturers will still

need to be careful to ensure that any maximum price stipulation does not operate tantamount to a fixed price, i.e. retailers retain genuine pricing freedom below the cap.

The CMA's approach to exemption from the competition rules during the COVID-19 outbreak

Under the UK Competition Act 1998, an agreement or arrangement that restricts competition is exempt from the prohibition on anticompetitive agreements and arrangements if it meets all the following criteria:

- it contributes to improving production or distribution, or promoting technical or economic progress;
- it allows consumers a fair share of the resulting benefit;
- the only restrictions that it imposes on the businesses concerned are ones which are indispensable to the attainment of those objectives; and
- it does not allow those businesses the possibility of eliminating competition in respect of a substantial part of the products or services in question.

The CMA's guidance explains how each of the above criteria can be interpreted in light of the COVID-19 pandemic:

- Cooperation that ensures essential goods and services are available to the public, key workers or vulnerable consumers will be considered efficiency-enhancing.
- If, absent cooperation, there would be significant shortages of a product, the cooperation will be considered as likely to give consumers a fair share of the benefits if it avoids or mitigates said shortages.
- The key factors in determining whether the cooperation is "indispensable" to achieve efficiencies will be: (i) whether in the circumstances and limited time available to consider alternatives, the cooperation can reasonably be considered necessary; and (ii) the extent to which the cooperation is temporary in nature.
- In applying the final criterion the CMA will want to see businesses keep competition intact wherever possible. For example, where it may be necessary to share information on capacity, there may still be scope to remain competitive on price and so there should be no discussion of pricing. Similarly, where the extent of the cooperation can be limited to particular goods or a geographical area, the CMA advises businesses to limit cooperation in this way.

In short, the types of coordinated actions that are most likely to be classified as unproblematic, provided they do not go further than what is reasonably necessary, are those aimed at:

- avoiding a shortage, or ensuring security of supply;
- ensuring a fair distribution of scarce products;
- continuing essential services; and/or
- providing new services such as food delivery to vulnerable consumers.

Additional points

The CMA has established a COVID-19 taskforce to focus on these issues, e.g. by scrutinising market developments to identify harmful sales and pricing practices as they emerge, but also to advise the government on how to ensure competition law does not stand in the way of legitimate measures that protect public health and support the supply of essential goods and services. In cases where businesses are uncertain about the legality of their actions, and the matter is of critical importance, the CMA has offered to provide additional, informal guidance on a case-by-case basis to the extent that their resources allow.

In its guidance, the CMA is clear to qualify this apparent relaxation of the competition rules as applying only to those matters arising directly out of the COVID-19 pandemic. It will announce when it considers that the guidance is no longer applicable – so businesses will need to look out for this return to normal enforcement priorities. The CMA's guidance relates only to the application of the UK competition rules. Other competition authorities in Europe and beyond have announced similar moves in response to the COVID-19 crisis. However, particularly in relation to cross-border initiatives, companies should pay attention to local differences of policy and practice across different jurisdictions in order to avoid falling foul of competition/antitrust laws. Even in these extraordinary times, competition law compliance remains an important consideration for business.

Authors



Mark Jones
Partner, London
T +44 20 7296 2428
mark.jones@hoganlovells.com



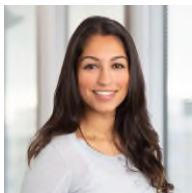
Angus Coulter
Partner, London
T +44 20 7296 2965
angus.coulter@hoganlovells.com



Matt Giles
Senior Knowledge Lawyer, London
T +44 20 7296 2428
matt.giles@hoganlovells.com



Christopher Hutton
Partner, London
T +44 20 7296 2402
christopher.hutton@hoganlovells.com



Simi Malhi
Trainee Solicitor, London
T +44 20 7296 2555
simi.malhi@hoganlovells.com



Ciara Kennedy-Loest
Partner, London
T +44 20 7296 5173
ciara.kennedy-loest@hoganlovells.com

Contacts



Susan Bright
Partner, London
T +44 20 7296 2263
susan.bright@hoganlovells.com



Suyong Kim
Partner, London
T +44 20 7296 2301
suyong.kim@hoganlovells.com

www.hoganlovells.com

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