UK competition law after the pandemic – The end of the COVID excuse

Businesses and consumers in the UK, as in most of the world, continue to face extraordinary difficulties as a result of the COVID-19 pandemic. Businesses have had to adapt supply chains, in particular to guarantee the provision of daily essentials, as well as grapple with reduced demand and major losses. The UK Competition and Markets Authority ("CMA") has been active in monitoring and enforcing competition rules in the UK as businesses reacted and altered their behaviour throughout the COVID-19 pandemic. It has also temporarily given businesses greater flexibility to engage in targeted cross-competitor cooperation. However, as businesses adapt and find new ways to thrive, particularly over the months ahead, it will not be possible to continue to use the pandemic as a justification for collaboration between competitors. It is crucial that businesses which have benefited from the CMA's leeway due to COVID-19, or are considering doing so, ensure that their cooperation does not become inappropriately entrenched over the longer term.

The CMA's COVID-19 Taskforce

In late March 2020, the CMA established its COVID-19 Taskforce to identify, monitor, and respond to competition and consumer problems arising from the pandemic and the measures taken to contain it. The CMA has since indicated that the vast majority of businesses are behaving responsibly and fairly but has been alert to the fact that certain companies may be exploiting the situation.

Noting the restraints which competition law puts on commercial activities, the CMA has issued several statements and guidance in 2020 on its approach to regulating competition law in the UK during the pandemic. These include topics such as merger control, price gouging, and cooperation between competitors.

With respect to cooperation between competing businesses in particular, the CMA's guidance states that it will not take action against exceptional coordination during the pandemic, so long as the following five criteria are cumulatively met:

1. The cooperation is necessary to avoid a shortage, or ensure security, of supply;
2. It is clearly in the public interest;
3. The cooperation contributes to the benefit or wellbeing of consumers;
4. It deals with critical issues that arise as a result of the COVID-19 pandemic; and
5. Lasts no longer than necessary to deal with these critical issues.

In the spring of 2020, the UK government also issued a series of sector-specific orders excluding agreements from the scope of competition law under particular conditions.

Key considerations

- Any coordination between businesses reacting to the pandemic must remain within the permitted limits set out by the CMA's guidance and/or UK Government Exclusion Orders.
- The CMA is likely to apply strict enforcement measures towards anticompetitive activities perpetuated under the cover of COVID-19.
- If they are not doing so already, businesses who have been collaborating with competitors during the pandemic should begin rebuilding towards normal market operations.

However, these are being gradually withdrawn as less restrictive lockdown restrictions have been put in place, businesses find new ways of working, and the rationale for the exclusions erodes. The Dairy Exclusion order was revoked on 25 September 2020 and the Groceries Exclusion Order was revoked on 8 October 2020. While the other exclusions remain in place, they are likely to be withdrawn over the coming months such that any exclusion order should be checked before seeking to rely on it.

Extraordinary times – Permitted cooperation between competitors during the pandemic

Independent healthcare providers and NHS bodies permitted to share information relating to capacity, staffing, joint purchasing, facilities, activities in geographical areas, but not prices or costs.

Ferry companies operating services on the Isle of Wight and UK mainland permitted to coordinate on timetables, routes, deployment of staff and vessels, supply vulnerable customers, but not prices and costs.

Grocery suppliers permitted to coordinate on quantities of groceries, staffing, range of products available, stock levels, the supply of vulnerable people, opening hours, but not prices and costs.

WITHDRAWN

Dairy farmers and producers permitted to coordinate on sharing labour, sharing facilities, sharing information on stock, capacity, and disposal.

WITHDRAWN

Logistic service providers in the dairy industry permitted to coordinate on sharing labour, facilities, information on vehicle capacity and delivery.

WITHDRAWN

Collusion risks

Outside of the ambit of the limited coverage of the CMA's enforcement policy guidance and the shrinking scope of sector-specific exclusions, businesses will be held to normal levels of competition law scrutiny both during and after the end of the pandemic. The CMA has been consistently clear that it will not tolerate companies using COVID-19 as cover for collusion, which could for example include:

— 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;

— Businesses abusing their 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;

— 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; or

— Coordination between businesses that is wider in scope than what is actually needed to address the critical issue in question (for example, if the coordination extends to the distribution or provision of goods or services that are not affected by the coronavirus pandemic).

If the CMA finds that a business has engaged in any of these prohibited behaviours it is able to levy fines of up to 10% of global turnover. If individuals are implicated, they could be subject to unlimited personal fines, a prison sentence or if a director be disqualified for up to fifteen years. It is also a very real possibility that companies found to have engaged in conduct contrary to competition law could face a claim for damages.

The principal factor that the CMA takes into account in deciding on whether to launch enforcement action is whether the relevant collusion or coordination might cause harm to consumers or the wider economy. The CMA has specifically highlighted the need to ensure that prices of products or services considered essential to protect the health of consumers are not excessively increased to exploit their demand due to COVID-19. The scope of its enforcement activity so far linked to the pandemic reflects these priorities.

The CMA's enforcement activity linked to COVID-19

Pharmacies and convenience stores

Four investigations into pharmacies and convenience stores which were suspected of charging excessive and unfair prices for hand sanitiser products. The CMA eventually closed its investigations noting that after a review of the evidence (including wholesale costs and volume of hand sanitiser sold) it was unlikely that the retailers' prices infringed competition law.

Pharmacies

The CMA published a joint letter with the General Pharmaceutical Council, in which the CMA encouraged pharmacies to ensure that prices for essential products do not include higher than usual mark-ups when compared to pre-coronavirus mark-ups.

Online platforms

Following complaints about unjustifiable price rises relating to listing placed on online platforms, the CMA wrote to Amazon and eBay. The CMA noted that it expected online platforms to take steps to prevent listings that charge excessive prices from appearing in the first place; for them to be identified and removed quickly when they do appear; and for the accounts of the relevant seller to be blocked or terminated.

Travel refunds

A significant CMA focus under its parallel consumer law enforcement powers has been unfair cancellations and refunds. Restrictions on travel have meant consumers being obliged to cancel holidays and other trips. The CMA investigated TUI UK following complaints, leading to the company committing to refund a large number of customers.

Looking to the future

In the months ahead, even though the CMA is yet to withdraw its pandemic-related guidance, it is clear that a majority of businesses have now adapted to the situation and have the know-how to deal with common issues that have emerged. As the initial distress leading to more permissible behaviour subsides, businesses will need to be wary of continuing with coordination with competitors that may have been exceptionally justified at the peak of the pandemic.

As companies look to rebuild and regrow in this phase of the pandemic, the CMA will inevitably become less lenient with respect to the scope of permitted cooperation between competitors. It appears less and less likely than new justifications would be found for extraordinary cooperation, bar perhaps vaccine distribution.

For operators within industries still covered by the Government's exclusion orders, it is essential that their conduct stays very clearly within the delineated scope of the orders, in particular by avoiding discussions on pricing or costs, or meeting under the pretext of the pandemic to plan unrelated collusion.

For industries where there is no exclusion order, businesses should keep contact, cooperation and coordination with competitors to the minimum necessary on order to achieve any countervailing consumer benefit. While the Government and CMA's guidance seek to create a flexible environment for businesses to navigate through the pandemic and provide clear benefits to consumers and the overall economy, that does not give companies carte blanche to exchange competitively sensitive information in all contexts.

Significantly, the CMA has not issued any policy or guidance on what it considers 'necessary' collusion to rebuild normal market operations during the recovery phase of the pandemic, as opposed to addressing its early stages, and no guidance is anticipated.

If there is a sound pro-competitive reason why contact is required between competing businesses (perhaps in order to refresh and update COVID-19 technical industry protocols) it is important to ensure that:

— A framework for any meeting/discussion is reviewed by a lawyer, ideally with competition law expertise;

— A written agenda for the meeting/discussion is agreed beforehand;

— Minutes of the meeting/discussion are recorded;

— No discussions take place regarding competitively sensitive information (e.g. prices, costs, customers).

Businesses which have been coordinating with each other in certain industries to survive the pandemic and ensure the supply of critical goods and services for the benefit of consumers, need to ensure that they have a plan for how they unwind that cooperation.

If cooperation becomes entrenched beyond the point at which it can be credibly justified, any business runs a real risk of the CMA investigating and taking enforcement action against them.

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