

UK Competition Law Enforcement during Covid-19

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Collaborating with competitors in a global pandemic

1. **15 April 2020** UK competition law enforcement is expected to undergo drastic changes due to the implications of Brexit. The transition period started running when the UK exited the EU on 31 January 2020 and is currently scheduled to end on 31 December 2020. EU treaties, free movement rights and EU law principles, including competition rules, continue to apply in the UK until the end of the transition period.
2. In January 2020 the Competition and Markets Authority (the “**CMA**”) and businesses operating in the UK were preparing for anticipated changes around domestic enforcement once the European Commission (the “**Commission**”) is no longer in the picture. The CMA is expecting an increased number of larger, more complex merger cases and antitrust investigations as well as the enforcement of state aid rules at a national level. A number of commentators anticipate that the CMA will continue to align its approach with the Commission’s response in order to facilitate business beyond UK borders. Others expect a divergence of approaches over time.
3. Little did anyone know in January that the coronavirus pandemic was about to rear its head, a crisis unprecedented in scale and, unlike the Brexit transition period, without a definitive end date. The conversation on UK competition law enforcement has since shifted from analysing post-Brexit implications to much more existential topics: crisis cartels, rescue mergers and unparalleled levels of state aid.
4. This short article examines the regulators’ approach (i.e. Commission and CMA) to the practical challenges businesses may face in the area of competition law enforcement during Covid-19, in particular when collaborating with competitors.

Crisis cartels

5. Collaborating with competitors in a crisis may amount to a cartel. There are two types of crisis cartels. One type is a cartel organised by the government for various industries or products to fix prices, and ration production and distribution during times of severe shortages. But what about the other type of crisis cartel, where during an economic downturn private sector firms collaborate with competitors on price, quantities, market shares, production, sensitive data etc. without approval from the state?

The European approach

6. The European Commission cooperates with national competition authorities of EU Member States through the European Competition Network (ECN). The ECN's aims are to build an effective legal framework and the enforcement of European competition rules against companies that engage in cross-border business practices that restrict competition to the detriment of the consumer.
7. On 23 March 2020, the ECN issued a [joint statement](#) assuring businesses that cooperation between competitors during the coronavirus crisis is permissible in certain circumstances. For example, cooperation to ensure supply and fair distribution of scarce or essential products, such as face masks, would not amount to a restriction of competition under Article 101 TFEU/53 EEA or “*generate efficiencies that would most likely outweigh any such restriction*”. Nonetheless, the ECN will take action against businesses taking advantage of the current crisis by cartelising or abusing their dominant market position.
8. The CMA has issued its own response to the coronavirus pandemic which is largely in line with the ECN's approach. However, it is important to point out that if, going forward, any further relaxation of the rules is implemented by the CMA alone, this would not prevent the European Commission from applying EU competition law in the UK as it sees fit whilst the coronavirus crisis falls within the Brexit transition period. The CMA is also not in a position to protect businesses against private litigation brought by third parties for any perceived breaches of UK competition law.
9. Therefore, businesses may continue to be at risk of litigation during Covid-19 and in need of legal advice in this area, something the CMA is trying to offer, but can only do so on a case-by-case basis and within the remit of its limited resources.

The CMA's approach

10. On 20 March 2020, in an [open letter](#) to the pharmaceuticals and food and drink industries, the CMA condemned the behaviour of companies that are charging unjustifiably high prices for essential goods. The regulator encourages businesses that are justifiably raising their prices, because they are passing on increases in prices charged by their wholesalers or suppliers, to contact them on covid.monitoring@cma.go.uk, so the CMA can investigate these issues further up the supply chain.
11. On 25 March 2020 the CMA published guidance on its approach to business cooperation during the coronavirus crisis (please see [here](#)). The regulator recognises that businesses are working together to address concerns arising from this crisis and clarifies what is permitted and when it will take enforcement action.
12. *Examples of permissible coordination during the coronavirus crisis:*
 - Coordination between businesses will be permitted, as long as this is *appropriate, necessary* and *in the public interest* to avoid a shortage, or to ensure security of supply and fair distribution of scarce products;
 - Even if coordination results in a slimmer product range available to consumers, this would be permissible provided this is a necessary step for ensuring that the type of product is available in the first place;
 - Offering services such as food delivery to vulnerable consumers and ensuring travel safety for key workers are good reasons for coordination measures between businesses;
 - Measures must not last longer than is necessary to deal with critical issues arising from the pandemic and all such efforts must contribute to the benefit and wellbeing of consumers.

13. *Examples of prohibited collusion:*

- Non-essential collusion could include the exchange of commercially sensitive information between competitors, such as future pricing or business strategies that do not relate to meeting the needs of the current crisis;
- Retailers excluding smaller players from coordination efforts with a view to securing supply and prohibiting access to rivals is not permitted;
- Collusion to keep prices artificially high in order to brace a fall in demand remains an unscrupulous business practice. Thus, manufacturers are encouraged to exercise their right to set maximum prices for products at risk of excessive pricing.

14. These are only some examples of permissible and prohibited coordination. Businesses are expected to continue self-assessing their coordination efforts with competitors under Section 9 of the Competition Act 1998.

Self-assessment under section 9 of the Competition Act 1998 during Covid-19

15. When deciding whether an arrangement or agreement restricting competition is in fact permissible, the exemption criteria set out in section 9 of the Competition Act 1998 continue to apply and must be met. Since the CMA does not have the power to make a formal clearance decision under section 9, businesses are required to assess their own situation in the context of the Covid-19 pandemic and decide whether the conditions for exemption are met.

16. To satisfy section 9, the arrangement or agreement in question must satisfy 4 conditions:

- i. Contribute to *improving production or distribution or promoting technical or economic progress*;
- ii. Allow consumers *a fair share of the resulting benefit*;
- iii. Not impose restrictions that are *not indispensable*;
- iv. Not *afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products [or services] in question*;

17. Applying section 9 conditions:

- The first condition is likely to be satisfied where the agreement is efficiency enhancing in nature, for example by ensuring essential goods or services are made available to the public or sections of the public, such as key workers or vulnerable consumers;
- The second condition is likely to be met where the cooperation between businesses avoids or mitigates significant supply shortages of a product, giving the consumer a fair share of the benefit;
- The third condition requires businesses to consider whether alternatives to cooperation could equally achieve efficiency in current circumstances and within the limited time available or whether cooperation is in fact indispensable;
- The CMA advises that for the fourth condition to be met, competition should remain in place where possible. For example, if sharing *capacity information* is necessary, this does not automatically mean that competition on *price* is no longer possible. If particular products or geographical areas require coordination to address a shortfall, restrictions on competition should be limited to those concerns.

Further practical challenges in competition law enforcement during Covid-19

Antitrust investigations

18. On [18 March 2020](#) the CMA stated that whilst it endeavours to meet statutory deadlines in respect of ongoing investigations, it would consider extending these timeframes where required. Hence, procedural delays seem likely.
19. With IT challenges faced by staff working from home, the authorities may struggle to get information from businesses required for their decision-making process. In particular, information from third parties may be difficult to obtain, since competitors, customers and suppliers are often also having a hard time coping with the impact of coronavirus on their respective businesses.

20. Furthermore, struggling businesses may call for reductions of financial penalties imposed for their infringements of competition law. However, to date, financial hardship adjustments remain exceptional and case law makes it clear that “*there can be no expectation that a penalty will be adjusted on this account*”¹. Similarly, the Commission may only in exceptional cases take account of “*the undertaking’s inability to pay in a specific social and economic context*”². Whether the context of the coronavirus crisis would meet this test remains to be seen.

Rescue mergers

21. As the crisis progresses the number of companies on the brink of economic collapse will increase, which in turn is likely to spark interest amongst competitors to buy them out. Such rescue mergers are time sensitive, as businesses aim to ensure uninterrupted continuity of agreements with customers and employees. If the delay in obtaining clearance is too long the company may collapse before the deal is concluded. Whilst the crisis may increase the need for mergers, the impact of the pandemic on working practices may slow down the regulator’s ability to deal with the merger clearance process in a timely manner.
22. Currently there are stringent requirements in place to ensure that acquiring a competing and ‘*failing firm*’ does not have significant anticompetitive effects on the market as a whole. The regulator’s assessment involves the comparison of two hypothetical scenarios; on the one hand the merger going ahead, on the other, it not taking place. Provided the harm to competition post-merger is not caused by the merger, the deal can conclude (i.e. any harm caused by it going ahead must not be greater than the harm caused by it not going ahead).
23. Such an assessment is rooted in economic reality and is not always clear cut. Companies face a high burden of proof, requiring, for example, proof of the target company’s financial position and evidence showing that the acquiring party is the only possible purchaser. Whether the Commission and national competition authorities will loosen the evidential requirements to facilitate rescue deals amidst Covid-19 is yet to be seen.

¹ *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) v Precision Concepts Ltd* [2007] CAT 13, at [94];

² Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), 2.F.35.

State-aid

24. A further area of competition law that has been stretched during Covid-19 is state aid. The UK government, like most of its counterparts in EU Member States, has granted financial aid to help sectors and industries shoulder the economic impact of the crisis. Many such measures would under normal circumstances qualify as state aid. These are interventions using state resources, such as grants, loans, tax breaks etc., which may give recipients an advantage on a selective basis, for example, a particular industry sector or region. This may distort competition and affect trade between Member States.
25. On 19 March 2020 the Commission adopted a [Temporary Framework](#) (amended 03 April 2020) to help Member States navigate state aid rules whilst they offer liquidity to businesses to ensure the continuity of their economic activity during the coronavirus outbreak.
26. On 25 March 2020 the Chancellor of the Exchequer Rishi Sunak announced measures to support small and medium-sized enterprises (SMEs), amongst others, through grants and loan guarantees. On 06 April 2020 this £50bn UK state aid umbrella scheme was approved by the Commission, as it found the aid measures to be “*necessary, appropriate and proportionate to remedy a serious disturbance in the economy*” of the UK, as required by Article 107(3)(b) TFEU and the conditions of the Temporary Framework.

Conclusion

27. Whilst regulators have relaxed their approach towards businesses that are collaborating with their competitors to help manage shortages in connection with the coronavirus outbreak, this is not an invitation for companies to cartelise or abuse their dominant market position. The CMA has provided examples of what type of collaboration it considers permissible or prohibited. However, since the CMA does not have the power to make a formal clearance decision under section 9 of the Competition Act 1998, businesses are required to assess their own situation.
28. Despite the UK having exited the EU in January, EU competition law continues to apply in the UK during the transition period part of this crisis. The CMA is also not in a position to

protect businesses against private litigation brought by third parties for any perceived breaches of UK competition law. Therefore, businesses may continue to be at risk of litigation during Covid-19 and in need of legal advice in this area.

29. Looking ahead, struggling businesses that incur financial penalties for infringements of competition law are likely to call for reduced fines. It remains to be seen whether these would be granted. Similarly, it is unclear whether the Commission and national competition authorities will loosen the evidential requirements to facilitate rescue mergers arising out of the ensuing economic crisis. Lastly, already high levels of state aid may increase further to ensure liquidity and continuity of economic activity whilst lockdown measures remain in place.

Whilst every effort has been taken to ensure the accuracy of the contents of this article, the position in relation to Covid-19 is rapidly changing. This document should not be used as a substitute for obtaining legal advice. If you have a particular query, please contact the 3PB clerking team, who will be happy to direct your enquiry to the relevant person.

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