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The impact of COVID-19

UK COMPETITION LAW, POTENTIAL EXCLUSIONS AND EXEMPTION

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INTRODUCTION

As the economic impact of COVID-19 continues, governments and businesses continue to grapple with a host of unprecedented challenges. This briefing note considers some of the key UK competition law considerations arising in connection with the COVID-19 pandemic, in particular:

- the continued application of competition law;
- the UK Competition and Markets Authority's ("CMA") guidance on the application of competition law during the crisis;
- the type of conduct that is high risk;
- industry-wide cooperation between competitors; and
- whether certain statutory exclusions (or an exemption) might be available, including a summary of the CMA's exemption guidance issued on 25 March 2020.

The key message from competition regulators around the world, including the CMA, is that whilst competition law is very much still in force, it should not act as a barrier to steps which are necessary to alleviate urgent situations relating to COVID-19 (such as permitting necessary coordination in order to ensure the supply and fair distribution of scarce products to consumers).

THE CONTINUED APPLICATION OF COMPETITION LAW

Whilst it is clear that unprecedented measures are needed to respond to the ever changing challenges that the pandemic poses, it is important to recognise that competition law continues to apply, and that regulators have already been quick to issue statements and warnings, as well as to launch investigations into suspected breaches.

"No action" statements for "necessary" conduct …

Mindful of the restrictions competition law places on commercial conduct, regulators across a number of jurisdictions have issued statements that they will **not act against legitimate cooperation aimed at preserving the supply of goods and services during the COVID-19 crisis**. For example:

- in the UK, on 19 March 2020, the CMA issued a statement (updated into more detailed guidance on 25 March 2020, *CMA approach to business cooperation in response to COVID-19*) that it has no intention of taking enforcement action against cooperation between businesses or rationing of products "*to the extent that this is necessary to protect consumers*", for example, by ensuring security of supplies; and
- on 23 March, EU antitrust authorities belonging to the European Competition Network issued a joint statement that its members (of which, since Brexit, the UK CMA is no longer one) will not actively intervene against "*necessary and temporary*" measures put in place in order to avoid a shortage of supply.

… but competition law remains in force

However, businesses should be aware that the same competition authorities have issued warnings and launched investigations to demonstrate that they will not tolerate anticompetitive conduct which goes beyond what is necessary to alleviate a legitimate concern. For example:

- on 5 March 2020 the UK Competition and Markets Authority ("CMA") published a statement warning "*traders [not to]… exploit the current situation to take advantage of people*", and stated that it will consider any evidence that companies may have broken competition or consumer

protection laws, for example, by charging excessive prices or making misleading claims about the efficacy of protective equipment;

- the CMA has also set up a dedicated COVID-19 task force to provide advice to the UK Government, scrutinise market developments, and take direct enforcement action in appropriate cases; and
- investigations into excessive pricing practices have been opened in a number of jurisdictions, including Italy (relating to the marketing of hand sanitizers and disposable masks) and Poland (in relation to the supply of personal protective equipment to hospitals).

HIGH RISK CONDUCT

Anticompetitive agreements

Competition law prohibits agreements which have as their object or effect the restriction of competition. In the UK this is governed by Chapter I of the Competition Act 1998 (for agreements which have an effect on trade within the UK) and Article 101 TFEU (for agreements which have an effect on trade between the UK and an EU member state[1]). As a general principle, the following coordination between competitors (i.e. those at the same level of trade, e.g. agreements between competing suppliers, competing distributors and competing retailers) is at high risk of infringement:

- 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**, including suppliers agreeing resale prices with resellers. Although suppliers seeking to enforce maximum prices agreed with their distributors or retailers should be acceptable (confirmed by the CMA's guidance of 25 March 2020, *CMA approach to business cooperation in response to COVID-19*);
- **allocating customers or regions or distribution channels**, even if the objective is to help manage potential supply shortages;
- **agreeing to limit production or supply**, or to **specialise** in the production of certain goods (although there is a block exemption in relation to specialisation agreements);
- **agreeing how to commercially respond** to market developments; and
- **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.

Abuse of dominance

For companies which might be dominant (e.g. with a market share >40%), the following additional conduct might infringe competition law if there is no objective justification, under Chapter II of the Competition Act 1998 (for agreements which have an effect on trade within the UK) and Article 102 TFEU (for agreements which have an effect on trade between the UK and an EU member state):

- charging **excessive prices**;
- **discriminating between customers** (e.g. charging different prices or applying different terms);
- **refusing to supply** certain customers, although an objective justification may include difficulties in meeting the level of demand which a supplier faces, and therefore choosing to supply regular customers, and those with existing contracts rather than spot customers; and
- making purchase of the products/services that are in demand conditional on the purchase of other goods/service (i.e. **tying and bundling**).

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[1] EU competition law continues to apply to the UK during the Brexit Transition Period, at the time of writing set to end on 31 December 2020.

COORDINATION BETWEEN COMPETITORS/WITHIN TRADE ASSOCIATIONS

In some sectors companies may wish to discuss the implications of the crisis and plan coordinated action at trade association meetings/industry forums. Competition law continues to apply to such discussions, even if they take place at the instigation of Government Departments or agencies.

In this regard, the CMA's guidance issued on 25 March recognises that the current extraordinary situation may trigger the need for companies to "*cooperate in order to ensure the supply and fair distribution of scarce products and/or services affected by the crisis to all consumers*". The CMA's guidance states that it will not take enforcement action where the coordination meets the following cumulative criteria:

- it is **appropriate** and **necessary** in order to avoid a shortage, or ensure security, of supply. For example, to ensure that essential supplies find their way to consumers or that key workers can travel safely to their place of work. In this regard, businesses should avoid engaging in coordination that is wider in scope than what is actually needed to address the critical issue in question (e.g., if the coordination extends to the distribution or provision of goods or services that are not affected by the COVID-19 pandemic);
- the coordination is clearly **in the public interest**;
- it contributes to the **benefit or wellbeing of consumers**;
- deals with **critical issues** that arise **as a result of the COVID-19 pandemic**; and
- it is **temporary** (i.e. it last no longer than is necessary to deal with these critical issues.

In terms of conduct at any such meetings between competitors, businesses taking part in such discussions should ensure that:

- there is a **written agenda**, so that discussion does not stray beyond the primary purpose of any meeting;
- **minutes are taken**;
- **objections are raised** if discussions look like they might potentially infringe competition law, or it is unclear;
- **ideally, a lawyer with competition law experience attends** the meetings/discussions;
- conversations are kept away from **competitively sensitive information such** as prices, and specifics regarding costs and customers.

EXCLUSIONS

Competition Act 1998

Whilst antitrust law is very much still in force, there are some exclusions under UK competition law. The Competition Act 1998 provides that:

- the prohibition against anticompetitive agreements and abuse of dominance does not apply to conduct to the extent to which it is made in order to comply with a legal requirement (Schedule 3(5)); and
- the Government (in particular the relevant Secretary of State), can issue an order disapplying those prohibitions to specified agreements or conduct if "*there are exceptional and compelling reasons of public policy*" to do so (Schedule 3(7)).

In this connection, as at 1 May 2020, the UK government has issued five exclusions to specific sectors, relating to particular types of conduct. These are summarised in the table below:

Exclusion Order	Conduct excluded from Chapter I CA 98 prohibition …	…regarding agreements between.	Aim / consumer benefit
Health Services for Patients in England Exclusion Order (SI 2020/368) Health Services for Patients in Wales Exclusion Order 2020 (SI 2020/435)	✓ Information sharing in relation to capacity ✓ Staff sharing and deployment ✓ Joint purchasing ✓ Sharing facilities ✓ Division of activities within particular geographic areas × But **not** information sharing on prices and costs	Independent healthcare providers and National Health Service bodies	**To alleviate shortages / excess demand**. In particular, to assist the NHS in addressing the effects or likely effects of COVID-19 on the provision of health services to patients
Groceries Exclusion Order (SI 2020/369) (Expiry: 8 October 2020)	✓ Coordination about quantities of groceries ✓ Staff deployment ✓ Range of groceries ✓ Stock levels ✓ Store opening hours ✓ To supply vulnerable customers × But **not** information sharing on prices and costs	Groceries suppliers	**To alleviate shortages / excess demand**. In particular, part of a package of measures to allow supermarkets to work together to feed the nation during the outbreak
	✓ Sharing information on staff availability ✓ Storage capacity and vehicles ✓ Coordination of staff deployment × But **not** information sharing on prices and costs	Logistic service providers	
Solent Maritime Crossings Exclusion Order (SI 2020/370)	✓ Co-ordination on timetables ✓ Routes ✓ Deployment of staff and vessels ✓ To supply vulnerable customers × But **not** information sharing on prices and costs	Ferry companies operating services Isle of Wight and UK mainland	**To alleviate excess capacity / supply**. In particular, to ensure security of supply to island residents, who are highly dependent on the ferry services
Dairy Exclusion Order (SI 2020/481) (Expiry: 2 August 2020)	✓ Sharing labour ✓ Sharing facilities ✓ Co-ordination to reduce production ✓ Co-ordination regarding processing and storage issues ✓ Sharing information on surpluses, stock, capacity, demand, milk disposal best practice ✓ Co-ordination to identify hidden capacity for processing milk into other dairy products such as cheese and butter × But **not** information sharing on prices and costs	Dairy farmers and producers	**To alleviate excess capacity / supply**. In particular, to enable collaboration between dairy farmers and producers to avoid surplus milk going to waste
	✓ Sharing labour ✓ Sharing facilities ✓ Sharing information on vehicle capacity and the size, type or destination of delivery vehicles ✓ But **not** information sharing on prices and costs	Logistic service providers	

Practical considerations

Even where an Order under Schedule 3(7) is adopted, businesses should bear in mind the following:

- relevant parties' **conduct must stay within the scope of the exclusion order.** An Order will exclude certain forms of coordination but not others, and the CMA has indicated that it will not tolerate businesses exploiting the crisis as a 'cover' for non-essential collusion - for example, exchanging information on longer-term pricing or business strategies, where this is not necessary to meet the challenges of the current situation;
- if any conduct has already taken place, or is likely to take place, before an Order is issued (which may take a few days), parties should seek to ensure that the **exclusion is backdated** to also disapply the Competition Act 1998 from that conduct as well as future related conduct;
- parties should seek to take **additional steps to mitigate the risk of any breach of the UK criminal cartel offence** under the Enterprise Act 2002.[2] This is because an order under Schedule 3(7) does not automatically disapply the criminal cartel offence. Such mitigation steps might include, in coordination with the Government and/or CMA:
    - notifying customers or publishing details of the arrangements before entering into agreements for supply of the affected products or services;[3]
    - disclosing the arrangements to the CMA; and
    - seeking legal advice before entering into the agreement.

Where Schedule 3 exclusions are not officially adopted, the Government may issue requests or directions for businesses to cooperate with each other and/or the CMA may provide comfort that it would not seek to investigate conduct in certain circumstances. In such circumstances, businesses should take into account the following:

- as a general principle, engaging in conduct at the request of a Government Department does not provide a defence to an allegation of breach of competition law, and if specialist advice confirms that the resulting coordination may infringe, as a minimum, the proposed conduct should be disclosed to the CMA, and ideally an exclusion order sought; in any event, it is essential that any coordination is kept to the **minimum necessary** and **within the scope of any Government direction and CMA comfort**; and
- Government directions or CMA comfort which do not formally disapply the Competition Act 1998 **will not prevent third parties from bringing actions for compensation/damages** if they consider they have suffered loss.

EXEMPTION

Where Article 101 TFEU applies, and/or where no Schedule 3 exclusions are applicable, individual self-assessment as to the application of the **individual exemption criteria** is required. It is possible for an agreement or other coordination to be exempted from the Article 101 or the UK Chapter I prohibition if it:

- **improves the production or distribution of goods/services**;
- allows consumers a fair share of the resulting benefits (i.e. it **benefits consumers**);
- the restriction is **indispensable** to achieving those benefits and is as **minimally restrictive as possible** in achieving those benefits;

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[2] Under the Enterprise Act 2002, an individual may be guilty of the criminal cartel offence if he or she agrees to make or implement arrangements which involve price-fixing, market sharing, customer sharing, limiting production, limiting supply or bid-rigging.

[3] In each of these three exclusions, specified "relevant information" must be disclosed.

- whilst **not eliminating competition** in relation to the goods or services in question.

In practice, it has often been difficult to convince a competition authority or court that the exemption criteria are satisfied. However, the CMA's guidance of 25 March provides the following guidance on the application of the exemption criteria in the specific circumstances of this crisis:

- Cooperation that **ensures essential goods and services can be made available** to the public or an important sub-set of the public such as key workers or vulnerable consumers will be considered efficiency-enhancing (i.e. meeting the first criterion).
- If **without the cooperation there would have been significant shortages** of a product, the cooperation will be likely to give consumers a fair share of the benefits if it avoids or mitigates those shortages (i.e. the second criterion).
- In determining whether the cooperation is indispensable to achieve the efficiency, the key factor will be whether in the circumstances and limited time available to consider alternatives, **the cooperation can reasonably be considered necessary** (i.e. the third criterion). A further important factor is the extent to which the **cooperation is temporary** in nature. Businesses should not restrict competition in any area where such a restriction would be unnecessary for the achievement of the benefits or efficiencies for which the agreement is entered into in the first place.
- In applying the fourth criterion, the CMA considers that it is **important that competition remains wherever possible**. For example, if it is necessary to share capacity information there may still be room for competition on price. Similarly, where the scope of a restriction can be limited to particular goods or geographical areas in order to address a particular issue, businesses should make efforts to limit the restriction in this way.

CMA guidance: Types of coordinated actions that are most likely to be unproblematic (based on the exemption criteria and provided that they do not go further than what can reasonably be considered necessary) include actions 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 delivery to vulnerable consumers.

EU COMPETITION LAW – EXEMPTION NOT EXCLUSION

It should be noted that whilst Schedule 3 exclusions are capable of disapplying Chapter I and II of the Competition Act 1998, they do not disapply the EU equivalents of Article 101 and 102 TFEU. There are therefore no parallel exclusions for conduct which has an effect on trade between EU Member States. In such cases, individual self-assessment as to the application of the individual exemption criteria under Article 101(3) is required.

Whilst the CMA's guidance of 25 March may act as a guide to applying the individual exemption criteria to Article 101 TFEU, it is not binding on the European Commission or any other EU national competition authority with the power to enforce Article 101.

On 23 March 2020, EU antitrust authorities belonging to the European Competition Network issued a joint statement indicating that its members (which no longer include the UK) will not actively intervene against "*necessary and temporary*" measures put in place in order to avoid a shortage of supply. However, this statement does not provide the same certainty or comfort to business as a Schedule 3 exclusion in UK law.

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