

UK Suspends Elements of its Antitrust Laws and Refocuses Enforcement in Response to COVID-19

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The UK Government, the Competition and Markets Authority (“CMA”) and sectoral regulators are taking measures to respond to COVID-19, including suspending certain elements of competition law to allow competing suppliers of essential products and services to work together, while monitoring business conduct to prevent collusion and consumer exploitation.

The COVID-19 pandemic is unprecedented. Among other things, it has had significant and immediate economic effects, causing substantial changes in pre-existing patterns of demand and placing considerable pressure on suppliers of essential products and services, including, in particular, groceries and health services. The most immediate difficulty facing these firms is securing access to sufficient supplies, facilities, and staff to meet huge spikes in demand and fluctuating costs.

The UK Government, together with the CMA and sectoral regulators, have responded by making changes to UK competition law and refocusing enforcement priorities to help suppliers meet these challenges and protect consumers from unscrupulous business practices, with similar efforts being taken by other national agencies and the European Commission. These measures include:

- allowing cooperation between grocery suppliers;
- allowing cooperation between health service providers;
- issuing new guidance on the criteria for exemptions to the prohibition on restrictive agreements;
- prioritising enforcement to focus on pricing collusion and exploitative abuses;
- creating a CMA COVID-19 Taskforce; and
- adopting a consistent approach to business cooperation across competition regulators.

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For more information, please consult the [COVID-19 Resource Center](#).



Allowing grocery suppliers and logistic service providers to work together. On 19 March, the UK Government [announced](#) that it would temporarily relax elements of competition law as part of a package of measures designed to allow supermarkets to work together “*to feed the nation.*”

Following that announcement, the CMA issued a [statement](#) reassuring businesses that, even where agreements are not covered by the UK Government’s exclusions, it has “*no intention of taking competition law 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.*” It added, though, that it would “*not tolerate unscrupulous businesses exploiting the crisis as a ‘cover’ for non-essential collusion.*”

On 27 March, the UK Government gave legal effect to its announcement by introducing a [Groceries Public Policy Exclusion Order](#)¹ enabling grocery suppliers² to:

- coordinate on (i) limiting purchases of particular groceries, (ii) setting the range of groceries to be supplied, (iii) assisting particular groups of customers (*e.g.*, critical workers and vulnerable groups), (iv) setting store closure and opening hours, and (v) supplying areas of the country vulnerable to shortages;
- share labour and/or facilities; and
- exchange information on day-to-day stock positions and services provided by logistic service providers.

The order also allows logistic service providers (any person carrying on a business providing a service to grocery suppliers in relation to delivery, storage, or maintenance) to share labour and facilities, and to exchange information on labour availability, storage and vehicle capacity, and storage or warehouse services.

Allowing cooperation between health service providers. Health services across the UK are facing shortages of facilities, staff, and equipment as the

number of people affected by COVID-19 continues to grow. On 27 March, the UK Government introduced the [Health Services for Patients in England Public Policy Exclusion Order](#), which allows NHS bodies and independent health care providers to:

- exchange information on capacity (including staff and facilities);
- coordinate the deployment of staff;
- share facilities;
- engage in joint purchasing; and
- coordinate on the treatments offered by different providers.

Issuing new guidance on the criteria for exemptions to the prohibition on restrictive agreements. Under section 9 of the Competition Act, an agreement that restricts competition is not prohibited if it meets four cumulative criteria: (i) contributing to improving production or distribution, or promoting technical or economic progress, (ii) allowing consumers a fair share of the resulting benefit, (iii) not imposing restrictions that are not indispensable for the attainment of those objectives, and (iv) not creating the possibility of eliminating competition in a substantial part of the product or services in question.

On 25 March, the CMA issued [new guidance](#) on its approach to applying these legal criteria in the exceptional circumstances of the COVID-19 pandemic. It explained that the criteria will likely be met by any coordinated actions that do not go further than necessary and are designed 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.

Prioritising collusion and exploitative abuses. In its [Annual Plan for 2020/21](#), the CMA said that it intended to “*sharpen [its] focus on what matters to consumers*” so that its interventions deliver impact where it is most needed. It also said it would seek to

¹ [Schedule 3 of the Competition Act 1998](#) (the “Competition Act”) provides the Secretary of State with the power to suspend provisions of the Chapter 1 Prohibition

on anticompetitive agreements where there are exceptional and compelling public policy reasons for doing so.

² The order applies to grocery retailers and wholesalers.

“improve how [it] choose[s] which problems to take on,” with “protecting consumers, including in particular those in vulnerable circumstances” a key strategic objective for the organisation.

Applying these principles to the circumstances created by COVID-19, the CMA has [indicated](#) that the relaxation of competition laws “does not give a ‘free pass’ to businesses to engage in conduct that could lead to harm to consumers in other ways,” and that it will not tolerate unscrupulous businesses exploiting the crisis. It will therefore focus its efforts on investigating:

- exchanges between competitors of commercially sensitive information on future pricing or business strategies;
- exclusion of rivals from any efforts to cooperate in order to achieve security of supply, or denying rivals access to supplies or services;
- excessive prices or “price gouging”;
- collusion between businesses that seeks to mitigate the commercial consequences of a fall in demand by keeping prices high to the detriment of consumers; and
- coordination between businesses in relation to goods or services not affected by COVID-19.

The CMA has already started sending warning letters to companies in certain sectors. On 20 March, the CMA sent an [open letter](#) to the pharmaceutical, food and drink sectors warning firms that they should not capitalise on the current situation by charging unjustifiably high prices for essential goods or making misleading claims around their efficacy.

The CMA is committed to ensuring that the prices of products deemed “essential” to protect consumers’ health are “not artificially inflated by unscrupulous businesses seeking to take advantage of the current situation.” Relatedly, the Prime Minister announced on 25 March that “profiteering” during the crisis may be addressed via legislation, and the CMA has made clear that it will “advise the Government on emergency legislation if there are negative impacts for

people which cannot be addressed through existing powers.”

Creating a COVID-19 Taskforce. On 20 March, the CMA [announced](#) the creation of a COVID-19 taskforce to tackle the harmful effects of anti-competitive practices on consumers and the market.

The taskforce has a broad remit, including issuing warnings and taking enforcement action against companies exploiting these exceptional circumstances through unjustifiable prices or misleading claims, advising the government on emergency legislation if there are negative impacts for people which cannot be addressed through existing powers, and advising government on how to ensure competition law does not stand in the way of legitimate measures to protect public health and support the supply of essential goods and services.

The CMA’s Chief Executive, Andrea Coscelli, [has stated that](#) “... our taskforce is monitoring market developments to enable us to intervene as quickly as possible. We have a range of options at our disposal, from warnings to enforcement action to seeking emergency powers. We hope that such action will not be necessary, but we will do whatever is required to stop a small minority of businesses that may seek to exploit the present situation.”

Adopting a consistent approach to business cooperation across competition regulators. The UK has nine sectoral regulations with concurrent competition powers in the sectors for which they are responsible.³ Several of them have issued statements concerning COVID-19. The FCA and PSR [announced](#) that they support the [CMA’s guidance](#) on its approach to business cooperation under competition law and will take a consistent approach to their competition law enforcement activity in the financial services sector. This means that these regulators will not enforce competition law in a way that impedes financial services providers from working together to provide essential services to consumers.

³ Civil Aviation Authority (CAA), Office of Communications (Ofcom), Gas and Electricity Markets Authority (Ofgem), Financial Conduct Authority (FCA), Payment Systems Regulator (PSR), NHS Improvement

(NHSI), Office of Rail and Road (ORR), Water Services Regulation Authority (Ofwat), Northern Ireland Authority for Utility Regulation (NIAUR).

Conclusion

The UK Government, the CMA, and sectoral regulators have responded to COVID-19 by refocusing their enforcement priorities and relaxing competition law in relation to essential products and services.⁴ It is, though, important to remain aware of the following:

- The UK Government’s recent Public Policy Exclusion Orders do not cover exchanges of commercially sensitive information relating to costs or pricing. These exchanges are still prohibited.
- Agreements covered by Public Policy Exclusion Orders are not automatically excluded from the Chapter 1 prohibition. They must be notified to the Secretary of State within 14 days of being made.
- Public Policy Exclusion Orders will cease to have effect when they are brought to an end by the Secretary of State.
- Changes to UK competition law do not bind the European Commission, which will continue to enforce EU competition rules. The European Competition Network has,⁵ however, [indicated](#) that it will not actively intervene against necessary and temporary measures put in place in order to avoid supply shortages. The European Commission has also [offered to provide guidance](#) on specific initiatives.
- The CMA’s new enforcement priorities do not offer protection against private litigation brought by third-party litigants for perceived breaches of competition law. Businesses may wish to seek legal advice on their potential exposure before entering into agreements with competitors.

In exempting cooperation among competitors to minimise disruptions in the supply of essential products and services, the CMA’s reaction to the immediate implications of COVID-19 has been swift,

targeted, and effective. Companies should not, however, expect a “free pass” from the application of competition rules during the crisis and the CMA will remain vigilant to instances of unlawful collusion or exploitative practices.

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⁴ The UK Government has also issued the [Solent Maritime Crossings Public Policy Exclusion Order](#), which suspends certain elements of competition law for Isle of Wight ferry routes and allows ferry operators to share labour and facilities, and to coordinate routes and timetables.

⁵ The European Competition Network includes the European Commission, the EFTA Surveillance Authority, and EU Member State competition authorities.