

CMA approach to business cooperation in response to COVID-19

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1. Introduction

- 1.1 The focus of the CMA in the next few months will be to protect UK consumers from the adverse consequences of the COVID-19 pandemic to the greatest extent possible.
- 1.2 The CMA is conscious of concerns that competition law enforcement could impede necessary cooperation between businesses to deal with the current crisis and ensure security of supplies of essential products and services.¹
- 1.3 Competition typically benefits consumers by spurring businesses to offer lower prices, better service and higher quality. Competition law exists to make sure that businesses do not limit competition to the detriment of consumers. For example, there is a **prohibition in competition law on agreements and arrangements between businesses that restrict competition**.² This prohibits businesses from colluding or cooperating to limit competition - for example by agreeing to increase prices or to divide up markets or customers amongst themselves.
- 1.4 Throughout the UK, businesses are assisting in national and local efforts to tackle the consequences of the COVID-19 pandemic, from providing essential goods and services to consumers, to ensuring key workers can carry out their important tasks in getting the country through this crisis.
- 1.5 **The CMA understands that this may involve coordination between competing businesses. It wants to provide reassurance that, provided that any such coordination is undertaken solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary, the CMA will not take action against it.**³
- 1.6 This guidance sets out:
 - (a) details of the CMA's approach to the **prioritisation** of its work; and

¹ See also the CMA's 19 March 2020 press notice: <https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation>; and the 23 March 2020 joint statement by the European Competition Network on the 'application of competition law during the Corona crisis': https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

² The prohibition is set out in section 2 of the Competition Act 1998 and is known as the 'Chapter I prohibition'. There is an EU law equivalent, in Article 101 of the Treaty on the Functioning of the EU.

³ A joint statement issued by the European Competition Network on the 'application of competition law during the Corona crisis', on 23 March 2020, says that '*necessary and temporary measures put in place in order to avoid a shortage of supply... are unlikely to be problematic, since they would either not amount to a restriction of competition under Article 101 TFEU... or generate efficiencies that would most likely outweigh any such restriction.*'

(b) the CMA's views on how, in the unprecedented context of the COVID-19 pandemic, it will apply the criteria for **exemption** from the competition law prohibition on agreements and arrangements restricting competition.⁴

- 1.7 At the same time, the CMA will not tolerate conduct which opportunistically seeks to exploit the crisis. Therefore, this guidance also explains when the CMA will take enforcement action to prevent consumer detriment.
- 1.8 The impact of the COVID-19 pandemic continues to evolve. So too may the issues faced by businesses as they participate in efforts to mitigate the effects of the pandemic, and also the types of exploitative behaviour that cause consumer detriment. The CMA will continue to monitor the current situation and may update this guidance as and when it becomes necessary to do so in order to provide maximum clarity and certainty for businesses.
- 1.9 This guidance should not be interpreted as applying to any matter other than those relating strictly to, or arising directly out of, the COVID-19 pandemic. The CMA will give notice on its webpage withdrawing this guidance when it considers that it is no longer necessary.

⁴ Under the UK Competition Act 1998 section 9 and, in so far as it applies, the EU law equivalent in Article 101(3) of the Treaty on the Functioning of the EU. The full text of section 9 of the Competition Act 1998 is set out in the **Annex** to this guidance. Forms of cooperation not discussed in this guidance may still benefit from individual exemption under section 9, provided they meet the criteria specified. Certain agreements may also be block exempted by application of one of the block exemption regulations adopted by the European Commission which continue to be in force in the UK during the Transition Period (as set out in the UK/EU Withdrawal Agreement (i.e., up until and including 31 December 2020)). Other agreements may benefit from exclusion orders issued by the Government under paragraph 7 of Schedule 3 to the Competition Act 1998. This guidance does not apply to such block exempted or excluded agreements.

2. How the CMA will prioritise cases during the COVID-19 outbreak

- 2.1 The CMA's Annual Plan for 2020 / 2021 is clear that the CMA intends to '*sharpen [its] focus on what matters to consumers*' so that its '*interventions deliver impact where it is most needed*'. The CMA has also pledged to '*improve how [it] choose[s] which problems to take on*' with '*[p]rotecting consumers, including in particular those in vulnerable circumstances*' a key strategic objective for the organisation.
- 2.2 These principles apply equally in a crisis such as the present one: the CMA's work should be focussed on what matters most to consumers.
- 2.3 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. Where **temporary** measures to coordinate action taken by businesses:
- (a) are **appropriate** and **necessary** in order to avoid a shortage, or ensure security, of supply;
 - (b) are clearly in the **public interest**;
 - (c) contribute to the **benefit or wellbeing of consumers**;
 - (d) deal with **critical issues** that arise **as a result of the COVID-19 pandemic**; and
 - (e) last **no longer than is necessary** to deal with these critical issues,
- the CMA will **not** take enforcement action.
- 2.4 This does not give a 'free pass' to businesses to engage in conduct that could lead to harm to consumers in other ways. The CMA will not tolerate unscrupulous businesses exploiting the crisis as a 'cover' for non-essential collusion. This could include, for example:
- (a) 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;
 - (b) 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;

- (c) 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;⁵
- (d) 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
- (e) 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 COVID-19 pandemic).

2.5 In applying this approach to enforcement during the current crisis, the key factor for the CMA will be the potential for the coordination to cause harm to consumers or to the wider economy. Where the coordination is necessary, for example, to ensure that essential supplies find their way to consumers or that key workers can travel safely to their place of work it is highly unlikely that it would cause harm to consumers. This applies even if the coordination leads to a reduction in the range of products available to consumers, provided that reduction is necessary to avoid supply shortages of the relevant product in the first place.

2.6 It is of the utmost importance to ensure that the prices of products or services considered essential to protect the health of consumers in the current situation (for example, face masks and sanitising gel) are not artificially inflated by unscrupulous businesses seeking to take advantage of the current situation by colluding to keep prices high⁶ or, if they have a dominant position in a market,⁷ by unilaterally exploiting that position.⁸

2.7 Manufacturers can also take steps themselves to help combat ‘price gouging’ or excessive pricing. Manufacturers setting **maximum** prices at which retailers may sell their products is **not** unlawful.⁹ Manufacturers may therefore

⁵ Unilateral conduct by a business with a dominant position in a market might be prohibited under the competition law prohibition on the abuse of a dominant position. This is in section 18 of the Competition Act 1998 and is known as the ‘Chapter II prohibition’. There is an EU law equivalent, in Article 102 of the Treaty on the Functioning of the EU.

⁶ In breach of the prohibition on agreements or arrangements between businesses restricting competition.

⁷ Including a dominant position conferred by the current circumstances.

⁸ In breach of the prohibition on abuse of a dominant position.

⁹ Under the EU Vertical Agreements Block Exemption, a supplier can impose maximum prices above which its retailers or distributors may not resell the products, provided that the maximum price does not amount to a **fixed** or **minimum** resale price as a result of pressure or incentives and provided the supplier and retailers remain below the market share thresholds in the Block Exemption.

directly address price gouging by setting maximum prices for the retail of their products.

3. Our approach to the exemption criteria during the COVID-19 outbreak

- 3.1 The CMA wishes to offer additional information in this guidance to businesses about how the CMA will apply the legal criteria for **exemption** from the prohibition on agreements and arrangements restrictive of competition¹⁰ **in the specific circumstances of this crisis.**
- 3.2 Under section 9 of the Competition Act 1998 (set out in the Annex to this guidance), an agreement that restricts competition is exempt from the prohibition on agreements and arrangements restricting competition if it meets **all** the following criteria:
- (a) it contributes to improving production or distribution, or promoting technical or economic progress (the first criterion);
 - (b) it allows consumers a fair share of the resulting benefit (the second criterion);
 - (c) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives (the third criterion); and
 - (d) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question (the fourth criterion).
- 3.3 Agreements are automatically exempt from the prohibition on agreements and arrangements between businesses restricting competition if all these criteria are fulfilled. Businesses need to assess for themselves whether these exemption criteria apply: the CMA does not have the power to make a formal ‘clearance’ decision to that effect.
- 3.4 To assist businesses in more confidently making their own assessment in the **specific circumstances** of the COVID-19 pandemic, the CMA offers the following guidance:
- (a) 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

¹⁰ This exemption is not available in respect of infringements of the Chapter II prohibition.

workers or vulnerable consumers will be considered efficiency-enhancing (i.e. meeting the first criterion).

- (b) 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).
- (c) 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 factor that will be important 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.
- (d) 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.

3.5 Overall, the types of coordinated actions that, in the exceptional circumstances of the COVID-19 pandemic:

- (a) avoid a shortage, or ensure security, of supply;
- (b) ensure a fair distribution of scarce products;
- (c) continue essential services; or
- (d) provide new services such as food delivery to vulnerable consumers,

are most likely to be unproblematic from a competition law perspective based on the exemption criteria – **provided that** they do not go further than what can reasonably be considered necessary.

4. Additional points

- 4.1 This guidance covers only the approach the CMA intends to adopt to public competition law enforcement during the COVID-19 pandemic. It does not bind the European Commission¹¹ in its application of EU competition law in the UK. The CMA cannot offer protection against private litigation brought by third party litigants for perceived breaches of UK competition law.¹² Businesses may wish to seek legal advice as to any potential exposure they might face in this regard.
- 4.2 The CMA hopes that this guidance will answer most questions that businesses and stakeholders might have in respect of the CMA's competition law enforcement activities during the crisis. However, in certain cases where businesses and their legal advisers remain genuinely uncertain about the legality of the actions they propose to take, and the matter is of critical importance, the CMA will be prepared to offer additional, informal guidance about our enforcement priorities on a case-by-case basis, to the extent that this is possible given current CMA staffing constraints.

¹¹ As noted above in footnote 1, on 23 March 2020 the European Competition Network issued a joint statement on the 'application of competition law during the Corona crisis', which provides guidance for businesses as to the ECN's approach to cooperation between businesses in the context of the COVID-19 pandemic.

¹² Although UK Courts may take this guidance into account when deciding any corresponding competition law cases.

Annex

Competition Act 1998, section 9

Exempt agreements

(1) An agreement is exempt from the Chapter I prohibition if it—

(a) contributes to—

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; and

(b) does not—

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied.