It’s good to talk…sometimes

How competitors can work together to help protect the economy and consumers from the coronavirus crisis

Contents

Introduction

As the COVID-19 public health crisis continues to unfold, the pandemic has already had a significant, game-changing impact on many sectors of the economy.

During these unprecedented times, businesses have an extremely difficult balance to strike between safeguarding the wellbeing of the public on the one hand, while simultaneously ensuring the continued flow of essential goods and services. At the same time, there is a need to ensure that the UK still has a fully-functioning economy when the present crisis eventually starts to subside.

This is hard enough without the added challenge of having to navigate competition laws, which in normal circumstances require rival businesses to remain locked in competition at all times.

Some have questioned whether competition laws could actually hinder the market's ability to mitigate the hardships of the crisis by restricting rival firms from pooling information and resources, or formulating a joined-up response.

Can competitors work together in response to the crisis?

Given that competition laws exist to make the economy work better for consumers, it would be absurd for those same laws to hamstring the national effort to provide vital supplies to consumers and weather the economic storm caused by the virus.

With this in mind, the Competition and Markets Authority (**CMA**) – like some other authorities, including the European Commission (see below)[1] - has already moved to reassure businesses that it does not intend to enforce competition laws against businesses that genuinely cooperate in good faith in order to mitigate the impact of the crisis on consumers. Specifically, on 19 March, the CMA announced:

"the CMA 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."* ***[Emphasis added]***

In keeping with this, we have seen the government legislate recently to suspend competition laws in certain circumstances in key sectors, for example:

- rules have been relaxed to enable supermarkets to share data, talk to each other about stock levels, set common product specifications and cooperate to keep shops open and share distribution depots, trucks and staff; and
- rival ferry operators servicing the Isle of Wight will be allowed to discuss and agree routes and coordinate staff resourcing to ensure that ferries will still run regularly and provide a vital transport link across the Solent.

At the same time, the CMA has warned that that it will not tolerate *"non-essential collusion"*, so any temporary cooperation between competing firms in response to the crisis must not go further than necessary or lead to lasting effects that could weaken competition in the long run.

[1] A joint statement issued by the European Competition Network on the 'application of competition law during the Corona crisis', on 23 March 2020, confirms 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."*

But what does this mean in practice? The reality is that many sectors of the economy are facing a potential existential crisis, and so businesses will inevitably need to think about formulating a joined-up response on some issues, potentially via trade associations and other industry bodies.

In order to assist businesses with this delicate balancing act, the CMA has issued guidance applicable to all sectors of the UK economy.

What kind of temporary measures are likely to be deemed acceptable by the CMA?

In summary, in order to benefit from temporary protection from competition law enforcement, competing businesses must be able to answer "yes" to all of the above:

- Is the temporary measure appropriate and necessary in order to avoid a shortage, or ensure security, of supply?
- Is it clearly in the public interest?
- Does it contribute to the benefit or wellbeing of consumers?
- Does it deal with critical issues that arise as a result of the COVID-19 pandemic? And
- Does is last no longer than is necessary to deal with these critical issues?

In applying this approach to enforcement during the crisis, the CMA has said that the key factor will be the potential for the coordination to cause harm to consumers or to the wider economy.

The CMA gives the examples of coordination to ensure that essential supplies find their way to consumers, or that key workers can travel safely to their place of work, as being unlikely to cause harm to consumers. It goes on to say that this kind of coordination may be acceptable even if it 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.

What kind of coordination is still likely to infringe competition laws?

The CMA has been quick to clarify that its guidance does not give a 'free pass' to businesses to engage in conduct that could lead to harm to consumers in other ways.

In particular, the CMA has said that it will challenge businesses that exploit the crisis as a 'cover' for non-essential collusion. It gives the following examples:

- exchanging commercially sensitive information with competitors on future pricing or business strategies, where this is not necessary to meet the needs of the current situation;
- 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;

- abusing a dominant market 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 that seeks to mitigate the commercial consequences of a fall in demand by artificially keeping prices high to the detriment of consumers; or
- coordination 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).

Firms (and those that run them) that fail to keep their cooperation within safe bounds and engage in the above-mentioned non-essential behaviour run very serious risks, including lengthy investigation, fines of up to 10% of group turnover, reputational damage and third party damages claims, not to mention director disqualification proceedings. Indeed, any attempt to justify illicit cartel-type behaviour by reference to the present situation is unlikely to hold-water, and alongside the penalties above, also has the potential to lead to criminal prosecution and imprisonment for the individuals concerned in the most serious cases.

Is further guidance available? What specific comfort are competition authorities willing to provide?

The CMA's proposed approach reflects conditions for exempting restrictive agreements (that would otherwise be prohibited) that are already enshrined in competition law (in Article 101(3) of the Treaty on the Functioning of the EU and section 9 of the Competition Act 1998), notably where the agreements in question:

a) contribute to improving production or distribution, or promoting technical or economic progress i.e. efficiency-enhancing (the first criterion);

b) allow consumers a fair share of the resulting benefit (the second criterion);

c) do not impose on the businesses concerned restrictions which are not indispensable to the attainment of those objectives (the third criterion); and

d) do not afford the businesses concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question (the fourth criterion).

However, given the highly unusual nature of the situation, the CMA has elaborated on how it will approach any evaluation of different types of cooperation in the present crisis, in particular, it has noted that:

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 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 resulting benefit*** 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 consideration 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.

Put simply, the types of cooperation that are likely to be regarded benignly in the current climate are those which are focused on: avoiding a shortage, or ensuring security, of supply; ensuring the fair distribution of scarce products; continuing essential services; or providing new services such as food delivery to vulnerable consumers – provided that they do not go further than what can reasonably be considered necessary.

Possible examples?

Permitted examples of cooperation could range from:

- dealer networks (rather than closing their vehicle workshops as a precautionary social distancing measure) agreeing to maintain a minimum level of workshop coverage (and even pooling technicians) across different areas of the UK to support ***essential*** emergency services and freight distribution (food etc.); to

- cardboard/paper packaging manufacturers cooperating in terms of temporarily diverting/managing spare manufacturing capacity to produce extra packaging for more pharmaceutical products, medicines and testing kits, thus supporting ***security of supply***,

although individual antitrust advice on the precise terms of any proposed cooperation should be obtained.

It is likely that all manner of initiatives will be explored over the weeks and months ahead. In this regard, the CMA has also indicated that in cases where businesses 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 […] on a case-by-case basis, to the extent that this is possible given current CMA staffing constraints"

It follows that certain business may, in conjunction with their advisers, wish to seek this informal comfort, although the CMA has been keen to stress that although comfort may be given in respect of CMA enforcement action, this would not, in principle, shield any cooperation from legal challenge on the part of affected third parties. In practice, however, the prospect of such challenges may be low.

In order to asses any cooperation, it is likely that the CMA will require similar information to that recently published by the European Commission as part of the European Commission's COVID-19 response.[1] In particular, companies should provide upfront as much detail as possible on the initiative, including:

- the firm(s) involved;
- the product(s) or service(s) concerned;
- the scope and set-up of the cooperation;
- the aspects that may raise concerns under competition law;
- the benefits that the cooperation seeks to achieve; and
- an explanation of why the cooperation is necessary and proportionate to achieve those benefits in the current circumstances.

Collusion aside, are there any other competition law risks?

The CMA has also been quick to warn businesses not to exploit the crisis by engaging in excessive pricing.

It has already issued an open letter to the pharmaceutical and food and drink industries warning firms that they should not capitalise on the current situation by charging unjustifiably high prices for essential goods. The CMA has also specifically warned against price gouging tactics on key products such as hand sanitiser and face masks – but of course it is conceivable that shortages could lead to spikes in demand (and prices) for other more general household goods.

Strictly speaking the CMA's powers in relation to excessive pricing are somewhat limited as it can only take action if the party engaging in the price gouging has a dominant market position. This generally requires a market share of at least 40%.

However, it is interesting that the CMA has suggested it may adopt a flexible approach to determining whether a business is "dominant", potentially by looking at the unique market environment created by the climate.

As such, any businesses with a low market share that happens to be in a position to increase prices significantly should tread carefully before assuming that their market share will protect them from scrutiny by the CMA.

Conclusions

The CMA guidance helps clarify the principles that will inform its approach to competition enforcement during these highly unusual circumstances.

However, as always, the devil will be in the detail. Even if there are genuine public interest grounds to justify rival firms working together, the CMA is likely to expect those businesses to put in place sensible safeguards to ensure that there are no undue “spillover” effects on competition.

For example, if businesses agree to share data, are the parties involved only sharing the data they actually need to reduce the impact of the crisis on consumers, or are or they being overly transparent and potentially giving competitors access to commercially sensitive data they do not need to see?

Similarly, if the measure involves ongoing cooperation, what are the exit provisions to make sure that the cooperation does not go on for any longer than necessary?

We would advise businesses and trade bodies to consider their approach very carefully before embarking on measures that involve substituting competition for cooperation. At the same time, both the CMA and the European Commission have indicated that they are willing to provide more targeted guidance against individual cases, which will be of comfort to those businesses looking to cooperate in order to support the national effort to navigate through the present COVID-19 crisis.

Contact us

This note is for general guidance only; it does not constitute individual legal advice which should be obtained in light of the specific facts of each case. It was prepared by members of TLT LLP’s competition and antitrust team, Miles Trower and Richard Collie.

Please contact them for further information:

Miles Trower
Partner, Commercial

miles.trower@tltsolicitors.com

Richard Collie
Solicitor, Commercial

richard.collie@tltsolicitors.com

tltsolicitors.com/contact

Belfast | Bristol | Edinburgh | Glasgow | London | Manchester | Piraeus

TLT LLP and TLT NI LLP (a separate practice in Northern Ireland) operate under the TLT brand and are together known as 'TLT'. Any reference in this communication or its attachments to 'TLT' is to be construed as a reference to the TLT entity based in the jurisdiction where the advice is being given. TLT LLP is a limited liability partnership registered in England & Wales number OC308658 whose registered office is at One Redcliff Street, Bristol, BS1 6TP.

TLT LLP is authorised and regulated by the Solicitors Regulation Authority under ID 406297.

In Scotland TLT LLP is a multinational practice regulated by the Law Society of Scotland.

TLT (NI) LLP is a limited liability partnership registered in Northern Ireland under ref NC000856 whose registered office is at River House, 48-60 High Street, Belfast, BT1 2BE. TLT (NI) LLP is regulated by the Law Society of Northern Ireland under ref 9330.

TLT LLP is authorised and regulated by the Financial Conduct Authority under reference number FRN 780419. TLT (NI) LLP is authorised and regulated by the Financial Conduct Authority under reference number 807372. Details of our FCA permissions can be found on the Financial Services Register at https://register.fca.org.uk