

UK Guidance on Business Cooperation During the COVID-19 Pandemic

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In the face of the challenges brought by the COVID-19 pandemic, many businesses are questioning whether they are able to collaborate with competitors in ways that, under normal conditions, might risk violating prohibitions on anti-competitive behaviour. On 25 March 2020, the UK's Competition and Markets Authority (CMA) published its [official guidance](#) on its approach to business cooperation in response to COVID-19.

PRIORITISATION OF ENFORCEMENT CASES

At a time when the CMA's resources are already being tested by the need to prepare for Brexit, the guidance states that the CMA's main focus during the coming months will be ensuring that UK consumers are as protected as possible from the adverse consequences of the COVID-19 pandemic.

In its guidance, the CMA recognises that competitors may need to coordinate to deal with the consequences of the pandemic, particularly to ensure the supply and fair distribution of essential products and/or services to all consumers. The CMA has therefore provided reassurance that it will not take enforcement action against temporary coordination measures that:

1. are appropriate and necessary in order to avoid a shortage, or ensure security of supply
2. are clearly in the public interest
3. contribute to the benefit and wellbeing of consumers
4. deal with critical issues that arise as a result of the COVID-19 pandemic
5. last no longer than is necessary to deal with these critical issues.

At the same time, the CMA is clear that it "will not tolerate conduct which opportunistically seeks to exploit the crisis." Examples of this sort of conduct include the exchange of commercially sensitive information on pricing or strategy that is not necessary for the current situation, the exclusion of smaller rivals from cooperation efforts or a business abusing its dominant position in the market to raise prices, particularly for essential services and products (such as face masks and hand sanitiser).

APPROACH TO EXEMPTION FROM THE COMPETITION ACT

In the UK, anti-competitive agreements are prohibited by Chapter I of the Competition Act 1998. UK competition law provides for the possibility of an exemption from the prohibition if an agreement meets *all* of four specific criteria. The guidance discusses how the CMA will apply the exemption in the specific circumstances of the COVID-19 pandemic. The criteria for exemption and a summary of CMA guidance are as below.

The agreement must:

1. **Contribute to improving production or distribution, or promoting technical or economic progress.** The CMA guidance notes that cooperation that ensures that essential goods and services can be made available to the public will meet this criterion.
2. **Allow consumers a fair share of the resulting benefit.** The CMA states that this condition will be met if the cooperation avoids or mitigates significant shortages of a product that would have otherwise occurred.
3. **Not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.** The CMA considers the key factor determining indispensability to be whether, in the circumstances and limited time available, the cooperation can reasonably be considered necessary.
4. **Not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.** The CMA considers it important that competition remains wherever possible and so the scope of coordination should be kept as limited as possible.

As is ordinarily the case regarding individual exemptions under UK competition law, it is the responsibility of the business to satisfy itself that the particular practice in question qualifies for an exemption: the CMA does not issue “clearances.” It is therefore important for a business seeking to rely on an exemption to be able to demonstrate that it has met the four criteria.

CONSISTENCY WITH THE APPROACH OF OTHER AUTHORITIES

The CMA notes that its guidance does not bind the European Commission in its application of EU competition law in the UK. However, the CMA guidance follows a [Joint Statement](#) issued on 23 March 2020 by the European Competition Network (ECN), the mechanism through which the European Commission and the national competition authorities in the various EU Member States cooperate with each other.

The Joint Statement articulates that the ECN is “fully aware of the social and economic consequences triggered by the COVID-19 outbreak in the EU/EEA,” and that European competition rules take into account market and economic developments such as those of the current crisis. Like the CMA guidance, the Joint Statement outlines that “this extraordinary situation may trigger the need for companies to cooperate to ensure the supply and fair distribution of scarce products to all consumers,” and that the ECN “will not actively intervene against necessary and temporary measures put in place to avoid a shortage of supply.” A certain amount of consistency in application of EU and UK competition rules can therefore be expected, but ultimately the burden rests upon companies to be able to show that they remain compliant with all applicable competition laws.

FOR MORE INFORMATION

If you have further questions, please contact your Winston relationship attorney. View all of our COVID-19 perspectives [here](#) and the members of our COVID-19 Legal Task Force [here](#).

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