

COVID-19 AND RELAXING COMPETITION LAW

A summary of the government's response to date, 14 May 2020

THE PURPOSE OF THIS NOTE

- COVID-19 has created an urgent need for businesses to cooperate in order to continue to protect supply chains and supply essential products and services to customers in challenging times.
- There is a mechanism under the Competition Act 1998 (**CA 1998**) that allows Government to suspend competition law for reasons of public policy. It has begun to do so in a number of cases relating to the COVID-19 outbreak. Below, we set out a summary of the statutory instruments (**SIs**) that the government has implemented in response to COVID-19, to date.
- These temporary suspensions of competition law are intended to allow cooperation between competitors which may not otherwise have been permissible, in order to secure continuity of necessary services to customers during the crisis.
- To date, there have been five government SIs relating to dairy produce, groceries, healthcare and maritime crossings. The government may implement additional SIs - *we will keep this note updated regularly*.
- In addition, the CMA has also set out its approach to enforcement in its guidance *CMA approach to business cooperation in response to Coronavirus (COVID 19)*. This does not change the law, but does aim to give comfort to business by clarifying CMA's enforcement priorities in the crisis. In most cases, it will be for businesses to self-assess any collaborative response to the crisis under these. At the same time, the CMA has been clear that it will not tolerate businesses taking advantage of the situation to go beyond what is necessary to address the temporary crisis.
- The European Commission (**EC**) has also responded to the economic disruption caused by Covid-19. On 4 May 2020, the EC announced exceptional measures to support the dairy sector in Europe¹ as well as the flowers and potatoes sector. The EC has also announced other exceptional measures to support the agri-food sector such as the fruit and vegetables and wine sector. These exceptional measures allow temporary derogation from EU competition rules - Article 222 of the Common Markets Organisation Regulation allows the EC to adopt temporary derogations from certain EU competition rules in situations of severe market imbalances. These derogations allow recognised producers, organisations and other recognised bodies to manage supply for a duration of 6 months. For example, from 1 April 2020, the milk and milk products sector are allowed to collectively plan the production of raw milk. The EC's approach to the milk sector derogation overlaps with the CMA's approach as both allow the milk sector to collectively plan milk production/surplus milk supply and both bodies require a notification to be made. The government SI relating to dairy produce goes further than the EC's measure and lists qualifying activities that are permitted, including, for example, the collecting and sharing of information on

¹ Commission Implementing Regulation (EU) 2020/599 of 30 April 2020 authorising agreements and decisions on the planning of production in the milk and milk products sector.

the availability of milk processing and services provided by logistics service providers as well as the coordination of facilities and the storage of surplus milk. The EC has put a time limit on the derogation for 6 months starting from 1 April 2020 whereas the CMA has stated that the derogation will be ended by the Secretary of State once it is clear that the derogation is no longer needed to respond to the crisis.

1. OVERVIEW

- CA 1998 prohibits certain types of anti-competitive behaviour, including agreements between businesses that prevent, restrict or distort competition. This can, for example, include price-fixing, sharing pricing information and sharing markets.
- Paragraph 7 of schedule 3 of the CA 1998 provides a mechanism to allow the Secretary of State to exclude the Chapter 1 Prohibition (relating to agreements between businesses) for particular agreements or agreements of a certain description where there are exceptional and compelling reasons of public policy to do so.
- For instance, the COVID-19 outbreak has placed significant strain on the groceries supply chain in the UK and the government has announced that supermarkets will be able to work together in a variety of ways to maintain that supply. Similarly, the government has announced that it is temporarily suspending competition law to allow ferry operators in the Isle of Wight to work together and maintain a crucial lifeline between the island and the mainland during the COVID-19 outbreak.
- To date, these Orders have been rare and the Secretary of State has only made four such Orders in the last 20 years relating to warships, weapons and their supporting technology, nuclear submarines and the petroleum supply industry. It is therefore unusual to see this mechanism used widely. The Orders that have been published in light of the COVID-19 outbreak apply to critical industries such as healthcare and the cooperation that they are permitting are far reaching to an extent that they would in normal circumstances be viewed as hard-core infringements of competition law, such as market sharing.
- However, the CMA is conscious of concerns that competition law enforcement could hinder necessary co-operation between businesses to deal with the current crisis and ensure security of supplies of essential products and services and has acted swiftly.
- In many ways, the problems that the new arrangements are trying to address arise in normal times. Companies have, for some time now, argued that cooperation is essential to respond to climate change, or achieve step changes in sustainability, but the full application of competition law makes this difficult to achieve. Post crisis, it will be worth watching how far current experiences will inform government and regulatory responses to these longer term challenges.

2. KEY FEATURES

- Each Order is specific and limited covering particular agreements, or types of agreements between particular parties in relation to a particular activity and goes no further than the permitted activity or purpose.
- Further, each Order is:
 - time limited; and
 - requires notification to the Secretary of State, so that use of the exclusion can be monitored.
- **Scope of the exclusions to the Chapter 1 prohibition – who, what and why**

For an agreement to be excluded from the prohibition, it needs to be:

1. between two or more *parties (*as specified in each Order)
2. relate to a qualifying activity (as defined in each Order); and
3. meet conditions (as defined in each Order).

- ***Specified parties***

Each SI specifies the category of parties to which it applies (e.g. two or more Solent crossing maritime operators).

- **Qualifying Activity**

The SIs are specific to particular kinds of "qualifying activities" (as defined in each specific Order). In the Orders to date, Government has sought to permit information sharing, market sharing, stock allocation and sharing of employees to ensure that crucial services can continue uninterrupted.

The "qualifying activities" defined by Government for the Orders published in response to COVID-19 are detailed in the table below.

However, each Order states that a qualifying activity does not apply to the sharing of information regarding costs or pricing.

- **Conditions – setting out permitted purpose**

The conditions require parties to operate within the permitted purpose of the Order. For example:

- 1) the purpose of the agreement is to prevent or mitigate disruption to the provision of services caused by a reason relating to the coronavirus; and
- 2) the agreement does not have as its object or effect the prevention, restriction or distortion of competition within the United Kingdom, except in relation to qualifying activities in a market for the provision of services affected by a disruption caused by a reason relating to coronavirus.

- **Time Limited**

The SIs are time limited and apply only to the disruption period stated in each Order.

The Orders state the date on which the disruption period commences and further, state that the disruption period ends on a date specified by the Secretary of State which must not be less than 28 days after the date the notice is published. In practice, the Order will be ended once it is clear that it is no longer needed to respond to the crisis.

- **Reporting Requirements**

The Orders require notification of an agreement to be made to the Secretary of State within 14 days of the date on which the Order comes into force, or, if the agreement is made after the date of the Order, notification is to be made on the date on which the agreement is made.

The notification to the Secretary of State also requires details of:

- 1) the names of the undertakings which are parties to the agreement;
- 2) a description of the nature of the agreement;
- 3) the date the agreement was made; and,

if the agreement relates to the "Groceries" order, the "Health Services for Patients in England" order, the "Health Services for Patients in Wales" order or the "Dairy Produce" order, an additional reporting requirement is necessary:

- 4) the "groceries" or "health services" or "dairy produce" to which it relates.

3. CMA GUIDANCE

- The CMA published guidance on 25 March 2020 on its response to business cooperation in response to COVID-19². The CMA set out the circumstances in which the CMA will not enforce competition law (at paragraph 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

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-_pdf

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."

- Businesses with any proposed arrangement or agreement should try to fit within this guidance and should be limited to only what is absolutely necessary to achieve consumer benefit. Essential businesses might consider an exemption from competition law when they are providing a key strategic product or service and where there is no option other than to do something which would otherwise be perceived a hardcore breach of competition law, such as market sharing.
- The CMA stated that the guidance only extends to the CMA's own decisions of what action to prioritise and "*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*"³.

4. SUMMARY OF THE COVID-19 EXEMPTIONS

No.	Publication Date	Statutory Instrument	Qualifying activities for the Order	Disruption Period Commencement Date
1.	27 March 2020	The Competition Act 1998 (Groceries) (Coronavirus) (Public Exclusion) Policy Order 2020	(a) coordination on limiting purchases by consumers of particular groceries during the groceries supply disruption period; (b) sharing of labour or facilities or coordination of the deployment of labour from other industries into the groceries-chain supplier workforce during the groceries supply disruption period; (c) coordination on the range of groceries to be or being supplied by suppliers or retailers during the groceries supply disruption period, which may include simplifying the supply chain and product specifications; (d) sharing information on the day to day stock position and shortages of groceries within any part of the United Kingdom during the groceries supply disruption period; (e) sharing information on services provided by logistics service providers during the groceries supply disruption period; (f) coordination on assistance for particular groups of consumers, including critical workers, the most clinically vulnerable and socially isolated groups, such as prioritising deliveries or opening stores at specific times to these groups or otherwise providing assistance to them during the groceries supply disruption period; (g) coordination as regards the temporary closure of stores or opening hours of stores during the groceries supply disruption period; and (h) coordination on supplying groceries to consumers in areas of the United Kingdom that are	The disruption period commences on 1 March 2020.

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-_pdf (paragraph 2.5)

			particularly vulnerable to shortages of groceries during the groceries supply disruption period.	
2.	27 March 2020	The Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Exclusion) Policy Order 2020	(a) coordination as regards timetables to be operated during the crossings disruption period; (b) coordination regarding the routes to be operated by any Solent crossing maritime operator during the crossings disruption period; and (c) coordination on the sharing of labour or facilities during the crossings disruption period.	The disruption period commences on 16 March 2020.
3.	27 March 2020	The Competition Act 1998 (Health Services For Patients In England) (Coronavirus) (Public Exclusion) Policy Order 2020	(a) information sharing in relation to capacity for providing health services of a particular kind during the healthcare disruption period, including information regarding staff and facilities; (b) coordination as regards the deployment of staff between NHS bodies and independent providers or between independent providers during the healthcare disruption period; (c) the sharing or loan of facilities for the provision of health services during the healthcare disruption period; (d) the joint purchasing of goods, materials, vehicles, plant, apparatus, facilities or services (including the services of staff), for the purpose of the provision of health services during the healthcare disruption period; and (e) coordination as regards the provision of health services which involves agreement that during the healthcare disruption period one or more independent providers or NHS bodies are to undertake a particular activity or type of activity either generally or within a particular geographical area, including agreement to limit or expand the scale or range of health services to be or being supplied by one or more independent providers or NHS bodies.	The disruption period commences on 1 March 2020.
4.	17 April 2020	The Competition Act 1998 (Health Services For Patients In Wales) (Coronavirus) (Public Exclusion) Policy Order 2020	a) information sharing in relation to capacity for providing health services of a particular kind during the healthcare disruption period, including information regarding staff and facilities; (b) coordination as regards the deployment of staff between NHS bodies and independent providers or between independent providers during the healthcare disruption period; (c) the sharing or loan of facilities for the provision of health services during the healthcare disruption period; (d) the joint purchasing of goods, materials, vehicles, plant, apparatus, facilities, or services (including the services of staff), for the purpose of the provision of health services during the healthcare disruption period; and (e) coordination as regards the provision of health services which involves agreement that during the healthcare disruption period one or more independent providers or NHS bodies are to undertake a particular activity or type of activity either generally or within a particular geographical area, including agreement to limit or expand the scale or range of health services supplied by one or more independent providers or NHS bodies.	The disruption period commences on 1 March 2020.

5.	30 April 2020	The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Exclusion) Policy Order 2020	<p><i>Dairy produce suppliers:</i></p> <ul style="list-style-type: none"> (a) collecting and sharing information on surplus milk quantities, stock levels, and aggregate customer demand for milk during the dairy produce demand disruption period; (b) collecting and sharing information on the availability of milk processing, storage and drying capacity during the dairy produce demand disruption period; (c) sharing of labour or coordination of the deployment of labour from other industries into the dairy produce supplier workforce during the dairy produce demand disruption period; (d) coordination and sharing of facilities or coordination of the deployment of new facilities in the dairy produce supply chain during the dairy produce demand disruption period; (e) coordination on the processing and storage of surplus milk during the dairy produce demand disruption period; and (f) sharing information on services provided by logistics service providers during the dairy produce demand disruption period. <p>As well as:</p> <ul style="list-style-type: none"> (a) coordination as regards the temporary reduction of milk production during the dairy produce demand disruption period insofar as it does not involve coordination with the object of excluding one or more dairy produce suppliers from the market; and (b) sharing information on best practices in relation to surplus milk disposal and the environmental impact of surplus milk disposal during the dairy produce demand disruption period. <p><i>Logistics service providers:</i></p> <ul style="list-style-type: none"> (a) sharing information on labour availability during the dairy produce demand disruption period; (b) sharing of labour or facilities or coordination of the deployment of labour during the dairy produce demand disruption period; and (c) sharing information on delivery vehicle capacity and the size, type or destination of delivery vehicles during the dairy produce demand disruption period. 	The disruption period commences on 1 April 2020.
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We will keep this table updated accordingly.

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