

Competitor Collaborations During COVID-19: The EU and UK Competition Law Perspective

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All over the world, businesses are facing exceptional challenges, from disruptions to their supply chains to unprecedented rises in demand for certain products and services. To tackle these challenges, businesses may need to collaborate with their competitors in order to more efficiently address the shortage of essential products and services.

At the best of times, collaborations with competitors can give rise to competition law risks, requiring those involved to self-assess their compliance with competition laws. Self-assessment is not always straightforward, particularly where the collaboration is novel and businesses need to implement projects swiftly. Therefore, in order to facilitate such an assessment in these exceptional circumstances, the European Commission (EC) and the UK Competition and Markets Authority (CMA) have launched various initiatives and published guidance to assist businesses in such circumstances. We discuss these initiatives in more detail below.

EU

On 8 April, the EC published a [Temporary Framework Communication](#) setting out the main criteria that the EC will follow in assessing possible cooperation projects, as well as the temporary process that the EC has set up to provide written comfort to companies in specific COVID-19 cooperation projects.

In the Temporary Framework Communication, the EC specifically recognises that cooperation in the health sector may need to go further to overcome critical supply shortages. Measures to adapt production, stock management and potentially distribution in the industry may require exchanges of commercially sensitive information and a certain coordination of which site produces which medicines, while others remain in under-production. Whilst such measures would in normal circumstances be problematic under EU competition rules, the EC makes it clear that they would not give rise to an enforcement priority for the EC to the extent that such measures would be:

- Designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients;
- Temporary in nature (i.e., to be applied only as long there is a risk of shortage or in any event during the COVID-19 outbreak); and
- Not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply

The EC also notes that cooperation that is encouraged and/or coordinated by a public authority (or carried out within a framework set up by the latter) is also a relevant factor to be taken into account to conclude that such cooperation would not be problematic under EU competition law or would not be an enforcement priority for the EC.

Needless to say that businesses should document all exchanges and agreements with their competitors and be prepared to make them available to the EC on request. This is particularly important in light of the increasing trend of competition authorities to rely on internal documents in their investigations.

Informal guidance/comfort letter

On 30 March, the EC launched a dedicated [webpage](#) and a dedicated [mailbox](#) for companies willing to seek informal guidance on specific COVID-19 cooperation initiatives. Companies may contact the [EC](#) by providing a clear overview of the proposed collaboration arrangement, including elements such as:

- The firm(s), product(s) or service(s) concerned;
- The scope and set-up of the cooperation;
- The aspects that may raise concerns under EU 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.

The EC has committed to treat this information as confidential, with the exception that it may be shared with National Competition Authorities in the framework of the European Competition Network.

In addition, and with a view to increasing the degree of legal certainty, the EC stands ready, exceptionally and at its own discretion, to provide such guidance by means of an ad hoc "comfort" letter. The EC has already shown its willingness to use such a procedure as, on the same date as the publication of the Temporary Framework Communication, the EC issued a comfort letter to Medicines for Europe (formerly the European Generics Medicines Association). The comfort letter was issued to address a specific voluntary cooperation project among pharmaceutical producers – both members and non-members of the association – that targeted the risk of shortage of critical hospital medicines for the treatment of coronavirus patients.

Whilst the EC is committed to providing antitrust guidance and support the proper and swift implementation of cooperation that is needed, the message from the EC is clear: EU competition law remains in force and the EC will not tolerate conduct by businesses that opportunistically seeks to exploit the crisis as a cover for anti-competitive collusion or abuses of their dominant position or limiting production to the ultimate prejudice of consumers. Therefore, businesses should continue to carefully assess whether their cooperation initiatives with competitors are compatible with EU competition law and should use the procedures available from the EC to seek guidance where this is unclear.

UK

On 19 March, the CMA issued a statement that it had "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". This was followed on 25 March with the publication of more detailed [guidance](#) from the CMA on business cooperation in response to COVID-19.

In its guidance, the CMA recognises that 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. The CMA reassures businesses that it will not take enforcement action against coordination between competing businesses provided that the coordination is

- Temporary;
- Appropriate and necessary in order to avoid a shortage, or ensure security, of supply;
- Clearly in the public interest;
- Contributes to the benefit or wellbeing of consumers;
- Deals with critical issues that arise as a result of the COVID-19 pandemic; and

- Lasts no longer than is necessary to deal with these critical issues.

The CMA stresses that this does not give a 'free pass' to businesses to engage in conduct that could lead to harm to consumers in other ways. Like the EC, the CMA will not tolerate unscrupulous businesses exploiting the crisis as a 'cover' for non-essential collusion.

Informal guidance

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, 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 about its enforcement priorities on a case-by-case basis, to the extent that this is possible given current CMA staffing constraints.

UK Government

In parallel with the CMA, the UK Government has passed three exclusion orders (Orders) which temporarily relax elements of competition law to allow certain providers of essential goods and services to work together. The Orders, which came into force on 28 March, apply to: (i) [groceries-chain suppliers and logistic service providers](#), (ii) [healthcare service providers](#) and (iii) [maritime operators providing passenger and freight crossing services across the Solent](#). The Orders list certain forms of cooperation that will be permitted as well as those that are excluded. Businesses should therefore ensure that any coordination does not exceed what is permitted under the Orders. Agreements covered by the Orders should also be notified to the Secretary of State in writing within 14 days of being made in order to benefit from the exclusions in the Orders.

Conclusion

The guidance from the EC and the CMA provides a much needed roadmap for businesses seeking to respond to urgent situations related to COVID-19. However, the message from both authorities is clear: these temporary measures are not a licence to ignore competition law and businesses that opportunistically seek to exploit the crisis as a "cover" for non-essential collusion or abuses of their dominant position will not be tolerated. Businesses should therefore continue to self-assess and seek guidance where the position is unclear.

We are routinely advising companies on collaboration agreements during COVID-19. Please get in touch if you would like any further assistance.

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