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CLA AGM and Webinar

“Exiting Lockdown: Implications for Competition Law”

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Dan Rawling

CMA's Covid-19 Taskforce

The CMA's Covid-19 Taskforce was launched in March 2020 against the backdrop of all CMA offices being closed and working remotely, and facing an unprecedented amount of consumer concern. The Taskforce had three aims; to coordinate 1) policy response; 2) enforcement response; and 3) behavioural influencing response, which goes hand in hand with formal enforcement.

Policy response

The coordination of the policy response included providing guidance to businesses and the legal community about the application of the law and the CMA's enforcement approach and priorities. This included the merger control guidance that was issued regarding information gathering, timing and conduct of hearings, and a refresher to the failing firm defence (albeit with no change to CMA's substantive assessment approach).

Enforcement response

The CMA set up an online complaints form, through which members of the public could contact the CMA with concerns. Between March and the end of June 2020 the CMA was contacted more than 80,000 times by consumers, although it is important to note that those complaints relate to a small minority of businesses across the UK. The majority of complaints concerned cancellations and refunds of services such as holidays, weddings, childcare provisions, where firms were refusing to provide refunds or introducing kinds of unnecessary complexity into obtaining one. These raised an interesting issue as to the interface between competition and consumer policy. The CMA has taken a firm line in its approach. Whilst recognising the pressure that businesses were under, it is nevertheless worth recognising and protecting consumer rights to ensure consumer confidence and trust in markets; an important issue now and in the future for economic recovery.

There is a question as to whether the proposals for CMA reform that were published in February 2019 would have given the CMA a stronger ability to deal with the pandemic-related business behaviour that occurred. These reforms suggested the introduction of an administrative model of enforcement and allowing the CMA to bring fines for breach of consumer law. The CMA is continuing to make the case and is keeping up dialogue with the UK Government about CMA regime reform across its tools. However, those reforms related to the process of enforcement; they did not propose to change the underlying consumer or competition law. Legislating for an administrative model of consumer law enforcement would be unlikely to have helped with the issue of price gouging.



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Approach to price gouging/profitteering behaviour

One part of the policy response of the Taskforce was to advise the Government on options for anti-profitteering legislation which could equip the CMA and other enforcers to tackle price gouging efficiently. The UK is among a small number of countries internationally that does not have anti-profitteering legislation in place or the ability to switch on such powers in emergency situations.

The pandemic led to market for essential goods changing in unusual ways, through a unique combination of supply side and demand side factors. When combined with the restrictions of movement brought about by the national lockdown, this gave some traders a high degree of market power in local markets.

The CMA had a behavioural influencing approach and an enforcement approach to this. The latter consisted of writing to traders asking them to explain their price rises, and working with trade associations and other regulators to clarify expectations and warn about the consequences of charging high prices. When deciding whether and how to respond to these cases, a number of things were taken into account; including the volume of complaints, size of reported price increases, and impact on vulnerable consumers.

As a result of data analysis (at its peak, CMA had c. 70-80 price-gouging complaints per day), informal information requests and mystery shopping results, the CMA initiated four Chapter II investigations. The CMA is obliged to assess whether there are reasonable grounds to suspect that the Chapter II prohibition had been infringed. However, in order to determine in a given case whether an undertaking has the amount of market power to indicate dominance, it is necessary to look at the specific locality of the market which, in the context of lockdown, causing specific consumer behaviour and inability of consumers to shop around, was smaller (c.f. *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002]). Further, the CMA did not rule out shorter term dominance, and applied various concepts across the firms being investigated, on the basis that there is no single way in which excessive pricing abuse can be established.

Whilst some might find that the CMA was overreaching through its approach, its response to the pandemic indicates the genuine application of dominance frameworks recognising the unique circumstances of the present pandemic. This unique emergency situation does suggest that price-gouging can indicate significant market power. Where there are reasonable grounds to suspect an infringement, one should investigate and engage with the firms involved. Doing so inevitably involves a prioritisation exercise and consideration of the consumer benefits of pursuing a case, which can lead to investigations later being closed.

General thoughts on Taskforce and post-lockdown issues

Overall, the CMA Covid-19 Taskforce response shows that the CMA is not afraid to seek enhanced powers where its existing toolkit is lacking, allowing the CMA to bring experts together in one place. The CMA may not be redrawing the way in which it discharges functions in a grand way, but the Taskforce does allow the CMA to consider how it tackles broader issues.

Post-lockdown, the competitive landscape will be a changed one, bring with it key policy considerations. In particular, online retailers have done well during the crisis, whilst traditional businesses have fared badly. Lockdown exit strategies might jeopardise the level playing field for traders, and local or regional lockdowns may also change the landscape.



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Lockdown has not fully ended yet and further lockdowns may occur. The real question being asked here is therefore what the impact on competition law is in the aftermath of Covid-19. In broad terms, it is possible to identify a number of practical issues that will arise from "ending lockdown", as well as a number of longer term policy issues that will need to be addressed.

Practical issues

The Exclusion Orders that were adopted related to specific areas of industry. In essence, those for private healthcare, dairy and grocery were concerned with trying to deal with shortages of essential goods/services and excess demand. The exclusion order relating to cross-Solent ferries interestingly addressed a lack of demand, permitting operators to coordinate, in order to keep a key service going despite lack of demand. Revocation of these Orders will raise a number of practical issues that will need to be thought through, including the possibility that further lockdowns will arise after some orders have been revoked, and the fact that staggered or partial revocations e.g. in relation to private hospitals in certain parts of the country may lead to distortions of competition. It will also be necessary for businesses to ensure that appropriate compliance guidance is given to the individuals who were involved in administering the coordination that was permitted by the Orders, particularly given that once the Orders are revoked, any lapses will likely constitute object infringements. A particular concern is the broad interpretation given to the mere receipt of emails containing competitively sensitive information from competitors as constituting 'acceptance' for the purposes of article 101/Chapter 1 and therefore an infringement (see, for example, the FCA's recent decision in relation to information exchange/disclosure between fund managers).

The process by which the Orders can be revoked has recently been amended by statutory instrument (SI 933 of 2/9/20). Previously the Orders had been expressed to be capable of revocation by the Secretary of State giving 28 days' notice, but the Joint Committee on Statutory Instruments had observed that such a process was likely to be ultra vires, and the Orders have been amended so that they must be revoked by statutory instrument on similar notice. The SI also gave notice of the revocation of the Groceries Order on 8 October 2020.

Questions also arise in connection with the withdrawal in due course of the CMA's Guidance on the application of competition law during the Covid crisis (CMA 118). That guidance refers to coordination taking place during the "*current crisis*" and the fact that coordination permitted by the Guidance must not go further or "*last longer than what is necessary*"; but is understandably unclear as to when the current crisis will end, whether notice will be given as to the withdrawal of the Guidance, and what will happen if it begins again. There is also a question that arises as to the relationship between the Exclusion Orders and the CMA's Guidance and how they interact where an Order is being revoked; in particular whether the Guidance will continue to apply to a sector that had previously been the subject of an Order. The logical answer would seem to be "yes in principle", but the revocation of an Order would seem to be relevant to the assessment, required by the Guidance as to whether coordination is still "necessary". This issue needs to be resolved quite quickly, as the Orders are now being revoked.

Likewise, the existence of the EU Temporary Framework raises the question as to whether there will be co-operation between the Commission and CMA in deciding whether the respective guidance should be withdrawn, particularly where the coordination in issue affects trade between Member States.



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Policy issues

There are also a number of policy issues and challenges for the CMA, for business and for those who advise business. These arise out of Covid-19, but are accentuated by Brexit. Dan has clearly outlined the need for vigilance on the part of the CMA, particularly in relation to vulnerable consumers, and it would seem that there will need to be a much stronger and more clearly defined nexus between consumer law enforcement and competition law enforcement seems inevitable and necessary. The question will arise as to whether greater attention should be given to vulnerable consumer groups more generally in competition law assessments, including potentially in merger reviews.

The pandemic has clearly resulted in asymmetric shocks across sectors. Travel, transport, bricks and mortar retail, hospitality, and live entertainment have suffered significantly with market exits and potentially greater market concentration. "On-line", and the major platforms have apparently done well, and this will no doubt strengthen the calls for regulation in the digital sector. However, it is important not to forget that online platforms, retail and services have generally been forces for good during this crisis. We therefore need to be quite careful about the nature of interventions in these markets which seem to be on the horizon, to ensure that such interventions do not themselves lead to distortions in competition and consumer dis-benefits.

The crisis has demonstrated that shorter supply lines are likely to be preferred going forward, especially with regard to essential products. When coupled with Brexit and potential tariffs on products coming into the UK, it seems the CMA will likely be more concerned with domestic competition and narrower geographic markets in future reviews. More government intervention in the broad sense also seems inevitable. For example, we have already seen the addition of a new public interest intervention criterion (healthcare), a potential breakdown of any consensus around state aid, and debate around a new FDI regime. The combination of Covid and Brexit is likely to lead to a vigorous debate on the future and purpose of competition law. In my view, we should be wary about reaching for hastily constructed alternatives.

Looking ahead: what is the new normal?

It seems to me that the 'new normal' will take some time to emerge, but we are already beginning to see its shape: there is likely to be a greater focus on domestic competition, 'concentrated' markets and greater scepticism of arguments stressing the ease of entry or the ability of firms to expand in merger and market assessments. We may see more market investigation references being made in the UK, which would be unsurprising at a time when the European Commission is proposing the adoption of a similar new ex ante competition tool.

There is a further issue that perhaps will receive attention: whether Brexit provides an opportunity to support the bricks and mortar part of the retail sector. When we examine the European case law that has been applied to online trade, the UK courts have tried to balance the traditional focus of a single market object infringement (as set out in the EU case law flowing from *Consten and Grundig*, which is generally concerned with ensuring the free movement of goods throughout the single market) with a consideration of the seriousness of the impact on competition (as set out in *Cartes Bancaires*), (see, for example, *Ping Europe Limited v Competition and Markets Authority*). Brexit might mean that the UK can do things differently, and may present an opportunity for the CMA to support the physical retail sector if it wishes by revisiting the approach to online sales bans.