

COVID-19: PRESSURE POINTS: THE IMPACT OF COVID-19 ON COMPETITION LAW IN THE CONSUMER SECTOR (UK, AUSTRALIA, ASIA)

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Legal Briefings

The Covid-19 health crisis raises substantial challenges for businesses and consumers and has had a significant impact on competition law affecting the consumer sector.

While the particular implications will vary by jurisdiction, some common trends may be identified. One broader development is that competition authorities have recognised that certain forms of temporary cooperation between businesses, which could otherwise contravene competition law, may be necessary to secure the supply of essential products for consumers and have sought to allow specific cooperation through regulation, authority decisions or guidance. Another pattern that also emerges however is of competition authorities warning businesses against exploiting the crisis and adjusting their enforcement priorities to scrutinise practices related to essential consumer products, with a focus on excessive pricing in the food and healthcare sectors particularly common.

In this briefing we use our global competition law expertise to assess the pandemic's impact in three parts of the world: the UK, Australia and Asia.

UK

While competition rules affecting the consumer sector have been relaxed in certain respects in the UK with exclusion orders in the grocery and healthcare markets and general guidance on temporary business cooperation during the crisis, the Competition and Markets Authority (**CMA**) has also sharpened its enforcement focus to prioritise business practices which seek to exploit the current situation, including excessive pricing in relation to essential food and hygiene products.

Relaxation of competition rules

Specific competition exclusion orders for grocery and other sectors

The UK Government has relaxed the application of competition rules for certain types of agreements relating to the grocery, healthcare and dairy sectors and certain ferry services by adopting exclusion orders which came into force in late March or, for the dairy sector, early May (see the reports on our Competition Notes blog [here](#) and [here](#)).

Exclusion orders exempt specified agreements from the prohibition on anti-competitive agreements under the Competition Act 1998. The orders issued to date are, however, very specific and apply only to particular types of agreements between:

- grocery suppliers to ensure the smooth and efficient supply of food and essential groceries, for example by permitting coordination on range and purchase quantity limits and information sharing regarding stock levels and certain logistics services;
- independent healthcare providers among themselves and with NHS bodies to provide extra capacity to treat patients, such as by allowing joint purchasing of goods and services and sharing facilities or information about health service capacity;
- dairy suppliers to maximise processing and storage efficiency and mitigate the need to dispose of milk due to demand disruptions, for example by allowing information sharing on surplus milk quantities and storage capacity;
- certain ferry service operators on routes between the Isle of Wight and ports on the UK mainland.

The power to issue exclusion orders requires exceptional and compelling public policy reasons, as may exist given the current pandemic, and was last used in 2012 to allow communications between fuel suppliers to address petrol shortages resulting from panic buying. The Government has made these orders promptly and we expect it is unlikely to hesitate in adopting further exclusions in other sectors if necessary.

Guidance on business cooperation in all sectors during the crisis

Beyond these specific exemptions, the CMA has recognised concerns that competition law enforcement may prevent necessary coordination between businesses to address the crisis and ensure the supply of essential goods and services. In guidance published in late March on its approach to business cooperation in response to the pandemic, the CMA has indicated it does not intend to take enforcement action where businesses adopt temporary measures to coordinate conduct if those measures:

- are appropriate and necessary to ensure security of supply or avoid a shortage;
- are clearly in the public interest;
- contribute to the benefit or wellbeing of consumers;
- deal with critical issues arising from the pandemic; and
- last no longer than necessary.

The guidance also clarifies, in light of the crisis, the CMA's approach to applying the statutory criteria for exemption from the prohibition on anti-competitive agreements. (See our competition note on the guidance [here](#)).

Nonetheless, the CMA has warned that this reassurance does not give businesses a 'free pass' to engage in unlawful conduct and it will not tolerate unscrupulous businesses exploiting the crisis as a 'cover' for nonessential collusion. For businesses in the consumer sector, it is important to note that exchanging information on longer term pricing or business strategies which is not necessary to address the crisis, coordinating the manufacture or distribution of products not affected by the pandemic and actions by retailers to exclude smaller rivals from efforts to cooperate to achieve security of supply are all cited by the CMA as examples of non-essential (see our report [here](#)).

Enforcement focus on conduct harming consumers or the wider economy

The CMA has indicated its enforcement approach during the crisis will be guided by the potential for coordination to harm consumers or the wider economy. It has launched a Covid-19 taskforce which will scrutinise harmful sales and pricing practices by businesses suspected of exploiting the current situation and take enforcement action where evidence exists of breaches of competition or consumer protection laws (see [here](#)). The CMA will focus in particular on practices related to products or services essential to the health of consumers, including excessive pricing for necessary goods (such as face masks and hand sanitizers) and misleading claims about their effectiveness, and recently published an open letter to the pharmaceutical and food and drink industries emphasizing this message (see [here](#) and [here](#)).

The CMA has to date received more than 20,000 Covid-19 related complaints. While a growing proportion relate to cancellations and refunds, concerns about large price increases for food and hygiene products have resulted in numerous letters to businesses and online platforms. The CMA has, for example, engaged with Amazon and eBay to help ensure that listings which charge unjustifiable prices for essential goods are removed quickly (see [here](#)).

While the CMA has announced that the current crisis will not result in a relaxation of merger control standards, its provisional clearance of Amazon's proposed acquisition of a stake in food delivery company Deliveroo based on the so-called 'failing firm' defence indicates the CMA is willing to take the crisis into account in its merger assessments. In that case, the CMA based its decision on evidence showing that, without Amazon's investment, Deliveroo was likely to exit the market and concluded that the loss of Deliveroo as a competitor would be more detrimental to competition and consumers than permitting Amazon's investment to proceed (see our e-bulletin [here](#)). While this is the first application of the failing firm defence during the pandemic, the CMA's approach is likely to be of wider relevance and we anticipate merger parties will seek to rely more frequently on this argument given the economic impact of the crisis (see our note on the CMA's guidance on merger assessments during the pandemic [here](#)).

AUSTRALIA

The Australian Competition and Consumer Commission (**ACCC**) has been particularly active in its response to the Covid-19 pandemic. The unique circumstances of the current health crisis have resulted in the ACCC receiving and quickly granting interim authorisations across a range of sectors. It has also adjusted its enforcement priorities to focus on competition and consumer issues arising from the pandemic.

Authorisation of coordination between competitors

Since late March, the ACCC has granted more than 20 interim authorisations related to Covid-19 cooperation across a broad range of sectors (see our legal briefing [here](#)). These interim authorisations permit cooperation between competitors that may otherwise be prohibited under competition law. In particular, interim authorisations have been sought to facilitate the supply of essential goods and services and provide relief and benefits to customers during the crisis.

Examples of interim authorisations affecting the consumer sector include the ACCC allowing coordination by:

- supermarkets and certain other retailers to ensure the supply and fair distribution of groceries to consumers ([here](#));
- shopping centre owners and managers to implement rent relief measures for small to medium shopping centre tenants facing financial hardship and, similarly, retailers to engage in collective bargaining with landlords for rent relief ([here](#) and [here](#));
- the national broadband network wholesaler (NBN Co) and the 5 largest internet service providers to manage changes in demand given increased internet use from homes during the day ([here](#));
- private health insurers to arrange financial relief for policy holders and broaden coverage to include Covid-19 treatment, telehealth consultations and medical care at home. The ACCC has reminded insurers to keep consumers informed of policy changes including to their coverage and entitlements in an approach consistent with its past focus on this issue (see our legal briefing on prior enforcement action [here](#));
- major oil refiners and their industry association to secure fuel availability and supply for businesses and consumers and minimise the risk of shortages. The ACCC continues to closely monitor petrol prices and has recently criticised retailers for the time taken for lower international oil prices to flow through to retail prices and warned against excessive pricing during the pandemic ([here](#) and [here](#)).

The ACCC has generally granted interim authorisations promptly, often within 3 business days of the application being received.

Adjusting enforcement priorities

The ACCC has adjusted its enforcement priorities to focus on competition and consumer issues arising as a result of the pandemic. In particular, it intends to focus enforcement activities on any business that is exploiting the crisis to unduly enhance its commercial position or harm consumers. It has also indicated that it will seek to ensure changes to the competitive landscape during the pandemic are temporary so far as possible and will take steps to support competition as the Australian economy recovers.

A key area of focus is on pricing gouging in relation to essential products. Unlike a number of other jurisdictions, Australian competition law does not contain a prohibition on excessive pricing. However, the ACCC has indicated it will closely monitor representations made by businesses in relation to price increases for potentially misleading or deceptive conduct contrary to consumer law and will consider whether extreme price rises for essential products could amount to prohibited unconscionable conduct.

The ACCC has also established a Covid-19 taskforce which will coordinate its response to the pandemic and communicate with businesses regarding their competition and consumer law obligations, including in relation to suspended and cancelled services and refunds. While the ACCC will continue to enforce Australia's competition and consumer laws, it has recognised the pandemic is placing a significant strain on a large number of businesses and will take this into account when considering the scope and timing of its enforcement activities.

ASIA

Across Asia, a number of competition authorities have recognised that temporary cooperation between businesses may be necessary in certain circumstances to ensure the supply of essential products to consumers and have announced adjustments to their approach to competition enforcement. However, as in the UK and Australia, these announcements have typically been accompanied by warnings against taking advantage of the health crisis and, at least in certain jurisdictions, increased scrutiny of conduct affecting everyday consumer necessities, with excessive pricing in the food and healthcare sectors emerging as a common area of focus.

In Hong Kong, no formal changes have been made to competition law as a result of the pandemic. The Hong Kong Competition Commission (**HKCC**) has however acknowledged that there could be a need for cooperation between businesses on a temporary basis, particularly to maintain the supply of essential goods and services to consumers, and indicated it will take a pragmatic approach to enforcement in respect of measures genuinely necessary to address the outbreak and in the interests of consumers and society. The HKCC has reminded businesses that competition rules continue to apply and will remain vigilant for anti-competitive conduct by businesses seeking to take advantage of the outbreak or using the outbreak to justify improper collusion ([here](#)).

In China, the State Administration for Market Regulation (**SAMR**) has recognised that certain forms of cooperation may be required to address supply gaps, including joint R&D agreements related to drugs and medical devices, and arrangements falling within existing exemptions will be allowed. It considers, however, that fair competition is essential to maintain stable prices and an adequate supply of essential products for consumers' everyday lives. In this context, SAMR has been investigating and imposing stricter and quicker sanctions for anti-competitive conduct which hinders the prevention and control of the pandemic, the resumption of work and industrial production and consumer interests. In particular, it has recently launched a number of investigations related to price increases for medical supplies. This focus on competition efforts concerned with the pandemic and its impact on consumers is also reflected in the approach to merger control. Since April, SAMR has accelerated its merger review process for certain transactions closely related to the pandemic response and consumers' daily lives, including in the pharmaceutical and medical equipment, food and retail sectors.

The Japanese Fair Trade Commission (**JFTC**) has similarly accepted that certain temporary cooperation between competitors may be necessary and has advised businesses to refer to prior guidance issued after the natural disasters in 2011 on acceptable coordination in the circumstances, such as certain collaboration to coordinate logistics or restrict sales per customer when supply is limited. The JFTC has reminded businesses that tying in relation to the sale of masks and other hygiene products currently subject to supply shortages may contravene competition law.

The Taiwan Fair Trade Commission (**TFTC**) has moved to combat price fixing and price gouging during the outbreak in relation to essential groceries, including flour, biscuits, noodles and canned food. In January and March 2020, the TFTC conducted dawn raids at major supermarkets as part of investigations into such practices.

In South Korea, the competition authority has emphasized it will fast-track merger review processes in industries particularly affected by the outbreak. In this respect, its clearance in late April of one low-cost airline carrier's acquisition of another is noteworthy for the prompt decision and because it marked the first case in which the authority has taken the pandemic into account, relevantly accepting that the heavily indebted target, which had already suspended all flights due to the outbreak, was a failing firm.

In southeast Asia, the Indonesian competition authority has increased scrutiny in a number of areas (see our note [here](#)) with a particular focus on excessive pricing in the healthcare, medical equipment and food sectors and an investigation into the tying of pandemic testing services to other health tests announced recently. The Singaporean competition regulator has stated it remains operational with the vast majority of its staff working remotely, although it is expected that investigations and market studies may be disrupted. In the Philippines, the competition authority has not made any specific announcements regarding its approach to enforcement during the outbreak but ongoing proceedings in the Philippines have already been temporarily suspended ([here](#)). In Malaysia, the Government has published regulations which in effect prohibit unfair price escalations for a list of essential products during the emergency and the competition authority continues to operate with a limited workforce ([here](#)).

[More on COVID-19](#)

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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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