DISAPPLYING COMPETITION LAW - THE NEW FIX?

Date: 12 October 2021

UK Policy and Regulatory Alert

By: Jennifer P.M. Marsh, Gabriela da Costa, Niall J. Lavery

Following the recent surge in consumer panic buying of fuel, the UK government announced on 27 September 2021 that it had suspended UK competition law to allow companies to share information so that fuel could continue to be effectively supplied to petrol stations that were running short. On 1 October 2021 the government then temporarily exempted certain forms of collaboration between parts of the CO2 industry from competition law to preserve the security of CO2 supplies across the country. These actions speak to a growing trend of disapplication of competition law by governments as a tool to respond to crises.

The United Kingdom's Business Secretary implemented the Downstream Oil Protocol in response to the fuel shortage to "*ensure [the fuel] industry can share vital information and work together more effectively to ensure disruption is minimised.*" With regard to the CO2 shortage, a similar measure was followed and the Business Secretary confirmed "*companies in the CO2 industry can now work together to ensure that key sectors receive the supplies they need and come to a sustainable market solution.*" The moves effectively permit sensitive exchanges of information and allow cooperation between competitors that, under normal market conditions, could potentially be sanctioned by the Competition and Markets Authority (CMA).

The power for the Business Secretary to relax competition law in the United Kingdom arises under Schedule 3 paragraph 7(1) of the Competition Act 1998, which provides that certain arrangements can be exempted from the Chapter I prohibition of the Competition Act 1998 (which prohibits anti-competitive agreements) on exceptional public interest grounds. More specifically in relation to fuel, an Order was passed in 2012 that provided that the Chapter I prohibition would not apply to protocols agreed between the Secretary of State and designated persons that concern the distribution of fuel in the event of a disruption to supply. The UK government introduced such a protocol to combat the fuel crisis, the Downstream Oil Protocol, so that an agreement effectively existed between representatives of the petroleum industry and the Secretary of State which was exempted from competition law and permitted those business leaders to cooperate.

FOLLOWING THE PRECEDENT OF COVID-19 RESPONSE?

In our previous alert, we set out the relaxation of competition law rules that governments across Europe were adopting in response to the logistical and product availability issues that arose during the COVID-19 pandemic. We discussed how governments were allowing competitors to cooperate to prevent wholesale good shortages but how such collaborations were likely to increase market transparency and exchanges of competitively sensitive information. However, in times of crisis, the authorities can often view such consequences of collaboration as necessary, consumer-focused solutions and the better of two evils.

One example was the UK government's decision to allow supermarkets to cooperate and exchange information on stock levels, delivery time slots, distribution depots, and delivery vans, among other areas, to guarantee the

©2005-2026 K&L Gates LLP. All Rights Reserved.

supply of various goods to consumers. This was implemented by the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 (*SI 2020/369*), which more broadly relaxed elements of competition law to enable supermarkets to respond to the challenges posed by the COVID-19 outbreak. The Order has since been revoked, on 8 October 2020,[1] because it was no longer deemed necessary as the Secretary of State considered that the exceptional reasons for which it was required had now abated.

However, the UK government's latest actions in the context of the fuel and CO2 crises show an ongoing willingness to view relaxations in competition law as a useful tool to respond to times of crisis and in particular critical goods shortages.

WILL RELAXATIONS OF COMPETITION LAW CONTINUE TO ARISE?

The COVID-19 pandemic, fuel, and CO2 crises are rather unprecedented events, but perhaps less so in the case of the latter two, and it would, in our view, not be recommendable for the UK government to suspend competition law on a more regular basis in response to economic shocks. Such consistent exceptions would provide considerable uncertainty to businesses and potentially dilute the importance of the competition regime.

One untested area in this context is climate change. Would the government be willing to relax competition law to enhance industry cooperation on sustainability initiatives as they try to reach net-zero carbon emissions by 2050?[2]

Arguably, cooperation on sustainability would be better addressed by way of changes to the Chapter I prohibition, recognizing the benefits of such conduct and giving a framework for its assessment, than by the short-term, reactionary measures discussed above.

It is also noteworthy that the EU Commission is currently reviewing the Horizontal Block Exemption Regulation (HBER) and accompanying HBER guidelines, which set out permissible forms of collaboration between competitors. The HBER guidelines have also been adopted by the United Kingdom's CMA post-Brexit but are subject to future amendment in the United Kingdom as it decides on areas of legislative divergence. Therefore, there are currently opportunities to influence UK competition law in this area and to lobby for clarity of the remit of individual justifications under Article 101(3) of the EU Treaty or section 9 of the Competition Act 1998 in areas where the law is considered to be inhibitive or unclear, for example in dual distribution, sustainability standards, and R&D developments.

CONCLUDING REMARKS

Our global antitrust, competition and trade regulation team specializes in supply chain management strategies worldwide, including in the European Union, United Kingdom, United States, Australia, and Asia. We have a deep understanding of the challenges faced by undertakings and we are always looking to foresee issues that are on the horizon so we can determine solutions to overcome them. We pride ourselves in designing highly tailored, creative, and pragmatic solutions to these issues. We remain committed and available to provide prompt and relevant assistance to our clients as they try to deal with challenging market conditions.

FOOTNOTES

©2005-2026 K&L Gates LLP. All Rights Reserved.

[1] By the Coronavirus Exclusion Order the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Amendment and Revocation) Order 2020 (*S.I. 2020/933*).

[2] https://www.gov.uk/government/news/uk-becomes-first-major-economy-to-pass-net-zero-emissions-law and https://www.gov.uk/government/publications/achieving-net-zero-carbon-emissions-through-a-whole-systems-approach

KEY CONTACTS



JENNIFER P.M. MARSH
PARTNER

LONDON
+44.20.7360.8223
JENNIFER.MARSH@KLGATES.COM



GABRIELA DA COSTA
PARTNER

LONDON
+44.20.7360.8115
GABRIELA.DACOSTA@KLGATES.COM



NIALL J. LAVERY
SENIOR ASSOCIATE

LONDON
+44.20.7360.6443
NIALL.LAVERY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.