



Working paper - CCLP(L)50

CLIMATE CHANGE, SUSTAINABILITY AND COMPETITION LAW

LESSONS FROM COVID 19*

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The Coronavirus crisis has shown how governments and competition authorities around the world have been able and willing to act in a crisis-and the UK government and the CMA have been no exception. If we can do this to fight one (hopefully, short-term) crisis why can't we show the same resolve in the face of an existential threat like climate change? As President Macron put it *"no one hesitates to make very profound, brutal choices when it's a matter of saving lives. It's the same for climate risk."*ⁱ John Naughton goes further; *"one way of looking at the Coronavirus crisis is as a dry run for the really existential crisis that's on its way further down the line-catastrophic climate change."*ⁱⁱ

The obvious parallel in the current context is the relaxation of the competition rules to ensure that competition law does not *"impede necessary cooperation between businesses to deal with the current*

* This working paper is an extract from my forthcoming article on "Climate Change, sustainability and Competition Law in the UK" which will be published shortly in the ECLR. The article concludes with 10 proposals for action-one of which is that we must learn the lessons from the Covid crisis for the climate crisis. The abstract for this article reads as follows:

Climate Change is an existential threat. Competition law must be part of the solution and not part of the problem. My previous papers on this drew on the constitutional provisions of the EU treaties and remarks by leaders such as Commissioner Vestager to show how competition law need not stand in the way of urgent action and co-operation by the private sector to fight climate change. This new paper builds on this to show how climate change and sustainability can (and must) play a part in UK competition law. We must build on the CMA's commitment in its annual plan to prioritise climate change and to support the transition to a low carbon economy. It also shows how we can learn lessons from the Covid 19 crisis and apply these to the climate crisis.

The previous paper referred to here (based on EU law) was published in the Oxford Journal of Antitrust Enforcement and can be found at: <https://lnkd.in/gNVZcVN>

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crisis and [to] ensure security of supplies of essential products and services”ⁱⁱⁱ. This is very much what I and others have been calling for to ensure that competition law (or fear of competition law) does not stand on the way of vital action by business to fight climate change.

There are 2 strands to this “relaxation” of competition law in the face of the covid crisis: the UK competition authority, the CMA (and other authorities around the world)’s approach to cooperation in response to Covid-19, and the UK government’s exclusion of certain agreements from competition law^{iv}.

A. The CMA’s Approach

The first strand is a statement by the CMA as to its enforcement priorities and its approach to the provisions in competition law that allow certain agreements to be exempt from the general prohibition on anti-competitive agreements if certain conditions are met.^v

The CMA recognises the vital role business is playing to tackle the consequences of Covid 19. It says it:

“understands that this may involve coordination between competing businesses. It wants to provide reassurance that, provided that any such coordination is undertaken solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary, the CMA will not take action against it”

The CMA will not take enforcement action where 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.”^{vi}*

One only needs to change a few words (most obviously “Covid -19 pandemic” to “climate crisis” and you have a draft blue print for valuable guidance to businesses trying to fight climate change and to assist in the transition to a low carbon economy. Point (a) might be drafted along the following lines: *“appropriate and necessary measures in order to combat climate change and to facilitate the transition to a low carbon economy”^{vii}. This would be in line with the CMA’s “strategic priority” set out in its latest annual plan of climate change and “supporting the transition to a low carbon economy”^{viii}.*

One superficial difference is the repeated reference in the CMA’s statements to “temporary measures”. However, this is only an expression of the proportionality principle and that exemptions from competition law must be “no more restrictive than necessary”. The Covid -19 pandemic is a crisis- but, hopefully, a temporary one so it is right that measures should be temporary. Alas the climate crisis is not “temporary”: it is an existential threat and the biggest challenge facing humanity over the coming decades. Measures taken to fight climate change should also be “no more restrictive than necessary” and, indeed, should not “last longer than is necessary to deal with these critical issues” (it’s just that, sadly, this time period is likely to be much longer).

The CMA’s guidance contains clear warnings that it’s new approach to the Covid-19 crisis *“does not give a free pass to businesses to engage in conduct that could harm consumers in other ways”*. Quite

right-and similar warnings should be included in guidance to fight climate change and support the transition to a low carbon economy.

But with that qualification informal guidance offered on a regular basis (whether in writing or orally) would be of immense help in the fight against climate change permitting or encouraging necessary cooperation between market players. There is clear evidence that at the moment competition law (and, more importantly, misplaced fear of competition law) is having a chilling effect on urgent and necessary cooperative action by companies to fight climate change.^{ix} This is particularly the case where a company acting unilaterally would incur increased costs which it could not recoup adequately from its customers and would thus incur a “first mover disadvantage”.^x

Of course, it is not always necessary for firms to cooperate. Where the goal could be met equally well by unilateral action then cooperation would not be justified (this is the “proportionality” principle or “no more restrictive than necessary” rule). However, given the urgency of action to fight climate change the burden on companies to show that cooperation is necessary should not be set too high (as has been recognised by the CMA in its guidance in the context of the covid crisis^{xi}).

Such guidance in the context of the climate crisis might cover, for example, technical standards improving environmental processes or products, open knowledge-sharing platforms, joint procurement of recycled materials, and agreements to increase the recyclability of products or to reduce use of plastic packaging etc.^{xii}

The benefits for the climate and us all as citizens are self-evident but the authorities would also gain useful insights into novel and valuable forms of co-operation. This would help the CMA “*develop our understanding of how climate change effects markets and consider how, when exercising our functions, we can act in a way that supports the transition to a low carbon economy.*”^{xiii}

B. Exclusion from UK competition law

Tucked away in a schedule, the Competition Act 1998 contains a relatively little known provision for an agreement, or agreements of a particular description, to be excluded from the prohibition on anti-competitive agreements (either generally or in specified circumstances) where the relevant minister is satisfied that there :

*“are **exceptional and compelling reasons of public policy** why the Chapter 1 prohibition ought not to apply”^{xiv} (emphasis added).*

The government has issued several orders excluding certain types of agreement from the Chapter 1 Prohibition to ensure the supply of food and essential grocery products and exempting certain types of coordination between competitors to tackle problems arising from the Covid -19 crisis.

While these exclusion powers should be used sparingly, there can be no doubt that the climate crisis can provide “exceptional and compelling reasons of public policy” to exclude agreements from the Chapter1 prohibition in appropriate cases.

In most cases a realistic approach to both the prohibition on anti-competitive agreements and to the exemption provisions (whether under UK or EU competition law^{xv}) should enable business to take vital collaborative action to fight climate change and help the “transition to a low carbon economy”. However, where, for whatever reason, this is not possible then consideration should be given to use of these exclusion powers. They should, of course, be tightly drawn and contain appropriate anti-

abuse provisions, but let's hope it doesn't take another public health crisis, for the government and the competition establishment to consider their use.

C. On-line working

Not a legal point, but one important potential lesson from the Covid 19 crisis in the context of competition law is that we can communicate more through the range of meeting platforms that we are using throughout this crisis. In particular we should all think twice before getting on a plane to speak at/attend competition law conferences^{xvi}.

D. Political shift?

A whole literature will emerge, and a forest of papers will be written, about how the experience of Covid 19 will (or should) change the political landscape in favour of a more humane form of capitalism. I will limit my comment to an observation of president Macron at the height of the crisis. *"When we get out of this crisis people will no longer accept breathing dirty air. People will say...I do not agree with the choices of society where I'll breathe such air, where my baby will have bronchitis because of it. And remember you stopped everything for this Covid thing but now you want me to breathe bad air"*^{xvii}.

Against this background, is it really too much to ask the competition authorities for a little breathing space for business to cooperate to rid us of this dirty air?

Post Script.

If you would like to support those of us trying in our own small way to make competition law more relevant to many of the issues we face in the modern world you might like to join the Inclusive Competition Forum ("ICF") which a number of us from very diverse backgrounds have recently established: www.inclusivecompetition.org

ⁱ *Financial Times*, 17 April, 2020, page 21.

ⁱⁱ John Naughton, 17 March, 2020 [Memex 1.1 John Naughton's online diary]

ⁱⁱⁱ "CMA approach to business cooperation in response to Covid-19", 25 March, 2020, CMA 118. Many, indeed most, other competition authorities around the world (including the European Commission and the European Competition Network) have taken similar measures.

^{iv} This note focuses on the UK and the CMA but most of it is likely to be relevant to other countries-especially those where the authorities have taken steps to explain their approach to competition law in the face of the covid crisis.

^v In the UK's Competition Act 1998 this exemption is in section 9 and sets out the 4 (cumulative) conditions for an agreement to be exempt from the so-called Chapter 1 prohibition on anti-competitive agreements set out in that act. The equivalent provisions in EU competition law are contained in Article 101(3) of the Treaty on the Functioning of the EU ("TFEU") and in Article 101(1) TFEU.

^{vi} See endnote iii above.

^{vii} This might be refined and narrowed as experience and/or research identifies those instances where concerns over competition law are having the worst impact on cooperative action to combat climate change.

^{viii} CMA 112, March 2020, Annual Plan, pages 3 and 17.

^{ix} I have witnessed this many times myself in over 35 years of practice as a competition lawyer; recent survey evidence points to this; and the European Parliament has noted that a narrow approach to competition law has “increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards” [see its annual report on competition policy, 2018].

^x For example, if one car manufacture increases its emission standards; one washing machine manufacturer increases the energy efficiency of its machines; or a light bulb manufacturer phases out bulbs with a short life, necessary as these initiatives are, they may not be viable if only done unilaterally by individual firms. As Commissioner Vestager has recognised, “sometimes business can respond to that demand [for more sustainable products] even better, if they get together”.

^{xi} See for example, para 3.4 (c) of CMA 118 (cited in endnote iii above).

^{xii} For further examples of necessary cooperation on climate change and how fears of competition law is inhibiting this see Section II of my JAE paper referred to in footnote 1. See also Jordan Ellison’s paper on the “carbon defence”, 18, March, 2020 [ssrn.com.sol 3].

^{xiii} See endnote viii above.

^{xiv} Schedule 3, paragraph 7 of the Competition Act 1998.

^{xv} See endnote v above.

^{xvi} My stance before the Covid lock down was to accept speaking requests at events which I could get to by bike or train but otherwise generally decline others or offer to contribute by video link.

^{xvii} See endnote i