

# Covid-19: Competition and State Aid Law During The Coronavirus Crisis

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Updated on 8<sup>th</sup> June, 2020

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*As originally published this note reflected developments as at 26 March 2020. It was first updated to take account of developments to 15 April 2020. This version is updated to 29 May 2020. It will be further updated on a regular basis. It provides an overview of how UK and EU competition law and EU State aid law will apply during the COVID-19 crisis. It is not legal advice and should not be relied upon as such.*

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## Updates made in this updated note

In relation to competition law, the following updates have been made:

A register of agreements that are covered by an exclusion order has now been published (see paragraphs 15, 16, 18 and 22 below).

CMA update on excessive pricing (see paragraph 42 below).

## INTRODUCTION

1. The Coronavirus pandemic has already had significant economic effects that will last for some time. Restaurants, bars, cafés and leisure facilities, such as gyms and cinemas, have been ordered by the Government to shut. Most retail businesses have also now shut temporarily. Travel and tourism, domestic and international, has ground to a halt. Public transport services are being reduced. This will have a severe and long-lasting effect on businesses, large and small, which are faced with falling demand and delays in being paid. There have also been reports that some businesses are seeking to exploit the situation by charging inflated prices for goods and services sold by them. Responding to the

COVID-19 crisis may require competing businesses to cooperate with each other to ensure the production and supply of essential goods and services. Many businesses will need public support to survive.

2. This note focuses on how competition and State aid laws will be applied during the COVID-19 crisis, both in the United Kingdom and at the European Union level, and in what circumstances collaboration between competitors, and public support for businesses affected by the pandemic, may be permitted. Under the UK/EU Withdrawal Agreement, EU competition and State aid law will continue to be applicable to and in the UK during the transitional period, which is currently due to expire on 31 December 2020, unless extended.
3. Both the Competition and Markets Authority ("**CMA**") and European Commission ("**Commission**") remain fully operational, with staff working from home.<sup>1</sup> The CMA has, for example, continued to progress investigations into suspected anti-competitive behaviour, although some have been paused to enable the CMA to reallocate resources to focus on urgent work.<sup>2</sup> It has also applied to the High Court to have disqualified two directors of companies that broke competition law.<sup>3</sup> The Commission has adopted new State aid rules to deal with the crisis (which are discussed below). It has also continued to adopt decisions in on-going State aid cases unrelated to the coronavirus crisis, including cases concerning the United Kingdom.
4. The CMA, Commission and other competition authorities will continue to enforce competition law and, although there is some "relaxation" of the enforcement of competition law (but not a complete dis-application) in key sectors, businesses must continue to ensure that, the current crisis notwithstanding, they continue to comply with competition law. Public authorities and businesses must also ensure that any financial support provided to address economic difficulties caused by the crisis respects the EU State aid rules.

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<sup>1</sup> See <https://www.gov.uk/government/news/covid-19-cma-working-arrangements>.

<sup>2</sup> See e.g. <https://www.gov.uk/cma-cases/pharmaceutical-drugs-suspected-anti-competitive-agreements>.

<sup>3</sup> See CMA press release, *Court proceedings seeking director disqualification* (26 March 2020).

## COMPETITION LAW

### Cartels and other cooperation between competitors

5. Chapter I of the Competition Act 1998 ("**1998 Act**") and Article 101 TFEU prohibit agreements and concerted practices that prevent, restrict or distort competition, unless they have countervailing benefits (such as new or improved products) for consumers and so are exempted. Heavy fines can be imposed on businesses that engage in prohibited agreements and practices, in particular price-fixing, sharing of markets and/or customers or the exchange of competitively-sensitive commercial and strategic information. In addition, in the UK, it is a criminal offence for individuals to enter into prohibited cartel arrangements, namely price fixing, market sharing, bid-rigging and limiting output.
6. Competition law continues to apply during the Coronavirus crisis. Businesses must continue to ensure that they do not engage in agreements with competitors that restrict competition, in particular 'hard core' cartel arrangements such as price-fixing, customer- and/or market-sharing, bid-rigging and tender-allocation, and restrictions on output. Manufacturers must also not engage in 'resale price maintenance'.
7. The existence of an economic crisis does not justify anti-competitive behaviour. Accordingly, a so-called 'crisis cartel' remains an illegal cartel. There are numerous examples of when participants in markets under pressure have fixed prices (whether directly or through the imposition of surcharges), shared customers and/or geographic areas between them or agreed to reduce capacity (whether by closing or mothballing capacity, cancelling investment plans or buying up rivals' plants to induce them to exit the market). In each case, this led to heavy fines being imposed.
8. That said, in these exceptional circumstances, both governments and competition authorities recognise that suppliers may need to collaborate in order to ensure security of supply of essential goods and services, such as groceries, to consumers, particularly vulnerable consumers.

***United Kingdom: exclusion of certain agreements from the Chapter I prohibition***

9. On 19 March 2020, the UK Government announced that it would publish legislation to exclude from the 1998 Act some forms of collaboration between supermarkets to ensure that shops continue to be supplied with groceries. Three statutory instruments were adopted on 27 March 2020, covering groceries,<sup>4</sup> health services in England<sup>5</sup> and Isle of Wight ferry services,<sup>6</sup> permitting cooperation to ensure the continued provision of essential goods and services. A fourth was made on 17 April for health services in Wales.<sup>7</sup> Each order is time-limited. Those for groceries and health services apply as of 1 March 2020 and that for ferry services as of 16 March 2020. Each order excludes the application of specific agreements and practices (referred to as 'qualifying activities'), but none permit agreements on or the sharing of information on costs and pricing. In each case, the Chapter I prohibition will continue to apply to agreements and practices that are not covered by the relevant exclusion order.
10. On 17 April 2020, the UK Government announced that it would publish legislation permitting the dairy industry to collaborate to minimise waste of fresh milk and to use to make other essential dairy products, such as butter, cheese and skimmed milk powder.<sup>8</sup> An exemption order was made on 30 April 2020.<sup>9</sup> It applies to agreements entered into on or after 1 April 2020.

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<sup>4</sup> The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/369.

<sup>5</sup> The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/368.

<sup>6</sup> The Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/370.

<sup>7</sup> The Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/435.

<sup>8</sup> DEFRA and BEIS press release, *Dairy industry to join together to manage milk supply* (17 April 2020).

<sup>9</sup> The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020.

11. None of the orders permit the sharing of information on costs or prices, which remains a prohibited infringement of the Chapter I prohibition.
12. The orders require notification of an agreement to be made to the Secretary of State, within 14 days of the order being made or, if the agreement is made after this date, 14 days of the agreement being made. This will include information on the parties, the nature of the agreement, when it was made and the groceries or health services to which it relates. The Secretary of State will maintain a register of notified agreements. The register is now available on the DBEIS website.<sup>10</sup>
  - in relation to groceries:
  - in relation to Solent Sea

#### Groceries

13. The groceries order is not limited to supermarkets. A 'retailer' includes a person carrying on business in the supply of groceries to the public. It also applies to 'suppliers' of groceries, which includes manufacturers, importers and wholesale. The groceries order permits retailers and/or suppliers of groceries (food, non-prescription medicines, pet food, drinks, cleaning products, toiletries and household goods, but not other goods commonly sold by supermarkets) to enter into agreements concerning the groceries supply chain on:
  - limiting consumer purchases of particular groceries;
  - sharing labour or facilities, or coordinating the deployment of labour from other industries;
  - coordinating the range of groceries to be supplied by retailers or suppliers (which includes;
  - sharing information on the day-to-day stock position and shortages of groceries;
  - sharing information on logistics service providers;

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<sup>10</sup> See [https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19?utm\\_source=ddbcdc56-e883-45e8-aaaa-60fbe2472312&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19?utm_source=ddbcdc56-e883-45e8-aaaa-60fbe2472312&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate).

- coordination on assistance for particular groups of customers, including critical workers, clinically vulnerable or socially isolated people, e.g. by prioritising deliveries or store opening times;
  - coordination on the temporary closure of stores or opening hours; and
  - coordination on supplying groceries in areas that are particularly vulnerable to shortages of groceries.
14. The groceries order also permits certain activities between groceries logistics providers:
- sharing information on labour availability;
  - sharing labour or facilities or coordinating the deployment of labour;
  - sharing information on storage capacity, including ambient, chilled and frozen warehouse capacity for groceries;
  - sharing information on storage or warehouse services for groceries; and
  - sharing information on delivery vehicle capacity, size, type or destination.
15. Agreements that have been notified include:
- agreements between two logistics providers, Brakes and Bidfood, to coordinate deliveries of essential food boxes to the clinically vulnerable and socially isolated people, under contracts with DEFRA and devolved administrations; and
  - agreements between supermarkets to share information on day-to-day stock positions and shortages of groceries (in fora organised by DEFRA and the British Retail Consortium), to coordinate support to vulnerable customers identified by DEFRA and the NHS and to critical workers (including priority home delivery slots, increased 'click and collect' capacity and store opening hours) and to coordinate limiting purchases of particular groceries.

#### Isle of Wight ferry services

16. The Isle of Wight ferries order applies to specific named operators of ferry and hovercraft services and permits coordination on timetables, routes and the sharing of labour or facilities. Notified agreements between Hovertravel, Red Funnel and Wightlink have been facilitated by the Isle of Wight Council

Transport Infrastructure Board. They provide for an integrated timetable utilising all three operators, which (to reflect available crew resources and to minimise the costs of providing a 'lifeline' service for key workers, freight, deliveries of mail and pharmaceuticals and ambulance transfers) have included ceasing services on one route and reducing sailings on others.

#### Health services in England and Wales

17. The health services orders apply to independent providers of health services in England and Wales for the purposes of the NHS. The orders for England and for Wales are substantively identical. They permit the following:
  - information sharing in relation to providing health services of a particular kind, including information on staff and facilities;
  - coordination on the deployment of staff between NHS bodies and independent providers, and between independent providers;
  - the sharing or loan of facilities;
  - the joint purchasing of goods, materials, vehicles, plant, apparatus, facilities, services and staff for the provision of healthcare services; and
  - coordination on the provision of health services by independent providers and NHS bodies, including on the provision of specific services general or in specific areas or limiting or expanding the scale or range of services to be or being supplied by a particular provider or NHS body.
18. Notified agreements include agreements between members of the Independent Healthcare Providers Network (i.e. private hospitals), NHS England, Clinical Commissioning Groups and NHS trusts to meet healthcare needs, including the provision of full private hospital capacity and services to the NHS for acute, in-patient and out-patient care and services, including urgent elective and cancer treatment, and also agreements to work collectively to use surplus private sector capacity for urgent elective cases by NHS and privately-insured patients. There are similar agreements in Wales, with NHS Trusts and Local Health Boards.

#### Dairy industry

19. The dairy produce order applies to suppliers of dairy produce (milk and other milk products, including skimmed and semi-skimmed milk, cream, butter,

yoghurt and cheese), i.e. farmers, milk processors and manufacturers of milk products, and others who buy or sell milk or milk products in the supply chain between a farmer and a consumers, for example wholesalers and retailers. It applies to agreements that are intended to maximize processing, transport and storage efficiency and storage capacity and prevent or mitigate the disposal of surplus milk.

20. The order permits, between two or more suppliers of milk and dairy products:
- Information sharing on surplus milk quantities, stock levels and aggregate consumer demand;
  - Information sharing in the availability of milk processing, storage and drying capacity;
  - sharing of labour or coordination of the deployment of labour from other industries;
  - coordination and sharing of facilities on the deployment of new facilities;
  - coordination on the processing and storage of surplus milk;
  - sharing information on logistics services;
  - coordination on the temporary reduction of milk capacity, provided that this does not have the object of excluding a supplier from the market; and
  - sharing information on best practices on the disposal of surplus milk and the environmental impact of such disposal.
21. The order also permits certain specified activities by suppliers of logistics services to the dairy sector.
22. To date, no notified agreements have been published.

***United Kingdom: CMA guidance on business cooperation***

23. On 25 March 2020, the CMA published guidance, *CMA approach to business cooperation in response to COVID-19*.<sup>11</sup> It has stated that it will not take action

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<sup>11</sup> *CMA approach to business cooperation in response to COVID-19* (CMA118, 25 March 2020), available at: <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19>.



against cooperation or coordination between competing businesses that (i) is undertaken solely to address the crisis and (ii) does not go further or last longer than is strictly necessary. It will continue to take enforcement against any other conduct that does not satisfy these stringent conditions and which is not otherwise lawful under the 1998 Act or Article 101 TFEU, e.g. because a block exemption applies or the conditions for individual exemption (under s.9 of the 1998 Act or Article 101(3)) are satisfied.

24. The following conditions must be met for the CMA not to take enforcement action against cooperation or collaboration between competitors:
- it must be temporary;
  - it must be appropriate and necessary in order to avoid a shortage, or ensure security, of supply;
  - it must be clearly be in the public interest;
  - it must contribute to the benefit or well-being of consumers (whether generally or a specific group, for example, key workers or vulnerable people);
  - it must deal with critical issues that arise as a result of the COVID-19 pandemic; and
  - it must last no longer than is necessary to address these critical issues.
25. This is not limited to collaboration in the grocery sector, but will extend to other sectors manufacturing or supplying essential goods and services (such as agriculture and food manufacturing, pharmaceuticals, medical equipment, energy and transport), where some form of cooperation (short of a cartel) may be necessary to ensure the production and continued availability of key goods and services. This could include joint production or R&D, sharing logistics and distribution assets, identifying customers which should receive priority delivery and cross-supplies of scarce raw materials and finished products.
26. The CMA has, however, made it very clear that this is limited to activities necessary to address the COVID-19 crisis and does not extend to wider cooperation or collaboration. It will not permit price-fixing or sharing of longer-term pricing or business strategies. It also does not apply to agreements and practices that do not relate to essential goods and services.

## ***European Union competition law***

### ECN and Commission guidance on collaboration

27. Similarly, on 23 March 2020, the European Competition Network (“**ECN**”, comprising the European Commission, the EFTA Surveillance Authority and the 27 national competition authorities of the EU Member States) announced that cooperation that is necessary to ensure the supply and fair distribution of scarce products is unlikely to give rise to problems, if it is temporary and limited to addressing shortages of supply.<sup>12</sup> However, ECN authorities will not cease to take action against cartels that restrict supply or raise prices for customers.

### The Commission’s ‘Temporary Framework Communication’ provides antitrust guidance on cooperation during the crisis and its ‘comfort letter’ on cooperation relating to generic medicines

28. On 8 April 2020, the Commission published a ‘Temporary Framework Communication’<sup>13</sup> setting out guidance on the application of Article 101 TFEU to cooperation between businesses during the coronavirus crisis. This applies to cooperation that is intended to urgently increase production and optimise the supply of critical products, in particular hospital medicines and equipment used to test and treat COVID-19 patients, or to mitigate and possibly overcome the outbreak. This may include cooperation to address shortages, for example:

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<sup>12</sup> *Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis* (23 March 2020), available at: [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).

<sup>13</sup> Commission, Framework Communication addressing the antitrust issues related to cooperation between competitors in COVID-19 related urgency situations (8 April 2020), available at: [https://ec.europa.eu/info/files/framework-communication-addressing-antitrust-issues-related-cooperation-between-competitors-covid-19-related-urgency-situations\\_en](https://ec.europa.eu/info/files/framework-communication-addressing-antitrust-issues-related-cooperation-between-competitors-covid-19-related-urgency-situations_en). See also Commission press release, *Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak* (IP/20/618, 8 April 2020).

- coordinating production, so firms specialise in specific products, which can ensure efficient use of capacity and materials;
  - coordinating logistics;
  - sharing information to identify stocks, shortages and available production capacity; and
  - sharing information to predict demand, identify supply gaps and how to address these gaps.
29. Businesses must normally self-assess whether agreements and practices to which they are a party comply with Article 101 TFEU, taking account of the Commission's various guidance notices and decision-making practice, and the EU courts' case law. This will not change as a result of the crisis. However, the Commission will – in these exceptional times – provide guidance, ad hoc feedback and/or comfort on the legality of specific cooperation initiatives, in order to assist businesses' self-assessment. It will do so if cooperation needs to be implemented quickly to tackle COVID-19.
30. More generally, the Commission has indicated that, in the current exceptional circumstances, the following measures (which ordinarily would be problematic under EU competition law) will not give rise to an enforcement priority for the Commission:
- sharing information (particularly if it is aggregated) on production and capacities, stocks, demand and supply gaps;
  - coordinating and adapting production between individual producers, to increase output in the most efficient way or to avoid shortages of supply;
  - coordinating stock management and distribution; and
  - cooperation in response to an imperative request by public authorities for businesses to temporarily cooperate to address an urgent situation.
31. However, this can only apply to essential products and services, such as those used to treat COVID-19 patients. It is not of general application across the economy. This cooperation must be temporary in nature and not exceed what is strictly necessary to address or avoid the shortage of supply. Full documentary records must be kept, which the Commission may request to see.

32. In these exceptional circumstances, and in a departure from its usual practice, the Commission is prepared to offer ad hoc informal guidance on the application of Article 101 TFEU to specific cooperation initiatives that are being contemplated to address the crisis.<sup>14</sup> This process will be confidential.
33. On 8 April 2020, the Commission also published its first ad hoc 'comfort letter' given to the European Generics Medicines Association. In this letter, the Commission states that voluntary cooperation between pharmaceutical manufacturers to target the risk of a shortage of critical hospital medicines was in line with the 'Temporary Framework Communication' and did not infringe EU competition law.<sup>15</sup> The comfort letter has not been published, but the cooperation relates to the supply of medicines for intensive care patients under mechanical ventilation, including sedatives, muscle relaxants, analgesics and antibiotics.<sup>16</sup>

European Commission: derogation from competition law for milk, potatoes and live plants and flowers sectors

34. On 4 May 2020, the Commission published regulations, under the rules applicable to the Common Agricultural Policy, adopted regulations to exclude from Article 101 TFEU certain agreements between businesses in three sectors: milk and milk products, live plants and flowers, and potatoes. These cover the following:
- milk and milk products: agreements on planning production volumes of raw milk;<sup>17</sup>
  - live plants and flowers: agreements on market withdrawals and free distribution, joint promotion and temporary planning of production;<sup>18</sup> and

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<sup>14</sup> See <https://ec.europa.eu/competition/antitrust/coronavirus.html>.

<sup>15</sup> See Commission press release IP/20/618, *supra*.

<sup>16</sup> See Medicines for Europe press release, *Medicines for Europe welcomes European Commission decision to enable secure supply of hospital medicines* (8 April 2020).

<sup>17</sup> Commission Implementing Regulation (EU) 2020/599 of 30 April 2020 authorising agreements and decisions on the planning of production in the milk and milk products sector.

- potatoes: agreements on market withdrawals and free distribution, transformation and processing, storage, joint promotion and temporary planning of production.<sup>19</sup>
35. The relevant exclusions apply to farmers, farmers' associations, associations of farmers' associations, recognised producer organisations, associations of recognised producer organisations and recognised inter-branch organisations. Each exclusion applies for six months from 1 April 2020. They do not cover 'hard core' restrictions of competition, such as price-fixing and market sharing, which remain prohibited. Agreements covered by the exclusions must be reported to the competent national authorities and the Commission will continue to closely monitor these sectors for any anti-competitive behaviour.

### **Excessive prices**

36. Chapter II of the 1998 Act and Article 102 TFEU prohibit the abuse of a dominant position, which includes charging an unfair or excessive price for a good or service. In *Flynn Pharma v CMA* [2020] EWCA Civ 339, the Court of Appeal recently confirmed that a price is unfair if it could not be obtained in conditions of normal competition or if it bears no reasonable relation to the economic value of the good or service, either because the supplier's profit margin (revenues less costs) is unfairly high as compared to a benchmark return (such as return on sales or return on capital employed) or is unfairly high in comparison to the price of a comparable product in the same or a different geographic market. Exactly what is an 'excessive' price in times of economic turmoil is not clear, but dominant firms (with large market shares) can expect close scrutiny if they unjustifiably increase prices at this time. In its guidance, the CMA states that it will investigate prices that are "significantly above normal competitive levels".

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<sup>18</sup> Commission Implementing Regulation (EU) 2020/594 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage sector.

<sup>19</sup> Commission Implementing Regulation (EU) 2020/593 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the potatoes sector.

37. The CMA has established a 'COVID-19 taskforce' to identify businesses that exploit consumers through unjustifiable or excessive prices for essential goods.<sup>20</sup> It has also published an open letter to the pharmaceutical and food and drink industries, warning against charging unjustifiably high prices.<sup>21</sup>
38. On 4 April 2020, it launched an online tool that can be used to report businesses that are behaving unfairly.<sup>22</sup> The CMA has also written to businesses in the pharmaceuticals and food and drink sectors to warn them against such practices. It may also recommend that the Government adopt additional measures to restrict excessive prices or 'price-gouging'.
39. Similarly, the ECN has made clear that essential products (such as face masks, sanitizing gel and groceries) must remain available at competitive prices. The ECN authorities will take action against dominant businesses should they charge excessive prices.
40. The CMA and ECN have also made clear that manufacturers may set maximum resale prices, in order to prevent retailers from engaging in excessive pricing or 'price gouging'. This does not constitute 'resale price maintenance', which is prohibited by the Chapter I prohibition and Article 101(1) TFEU.
41. On 24 April 2020, the CMA published an update on the work of its taskforce.<sup>23</sup> By 19 April 2020, it has received almost 21,000 complaints, most concerning refunds and cancellations (a consumer protection issue). However, it is investigating a number of cases of suspected excessive pricing and has written to 187 traders. It is also investigating price increases further up the supply chain, as

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<sup>20</sup> See <https://www.gov.uk/government/news/cma-launches-covid-19-taskforce>.

<sup>21</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/874240/COVID\\_19\\_Open\\_letter\\_to\\_pharmaceutical\\_and\\_food\\_and\\_drink\\_industries2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874240/COVID_19_Open_letter_to_pharmaceutical_and_food_and_drink_industries2.pdf).

<sup>22</sup> See <https://www.coronavirus-business-complaint.service.gov.uk/>.

<sup>23</sup> CMA. *Protecting consumers during the coronavirus (COVID-19) pandemic: update on the work of the CMA's Taskforce*: see <https://www.gov.uk/government/publications/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cmas-taskforce>.

many traders claim to have been charged higher prices by their suppliers. Complaints have largely concerned food and drink (e.g. meat, rice, eggs and flour), hygiene and personal care (in particular, handgel and toilet paper) and, to a lesser extent, medication (in particular, ibuprofen and paracetamol).

42. A further update was published on 21 May 2020. The number of complaints was then up to 60,000, mostly concerning unfair practices in relation to cancellations and refunds. Complaints about unjustifiable price increases are much lower, around 10,000 in all. The CMA has now written to 264 traders that collectively represent over 3,100 complaints. It is also collecting evidence on price rises further up the supply chain: many retailers have claimed that they have increased their prices due to increases in supply costs. Many complaints relate to online sales. The CMA has written to Amazon and eBay and expects online platforms to remove listings charging unjustifiable prices and to block or terminate unscrupulous traders.
43. The CMA continues to monitor complaints about prices, will warn business raising prices to unjustifiable level and may take enforcement action where it suspects that competition law has been broken. The difficulty will be, however, in distinguishing between price rises that are due to increases in demand and/or supply difficulties (e.g. where capacity is being operated at its maximum, but demand exceeds this) and cases of genuine profiteering.
44. On 18 May 2020, the *Financial Times* reported that the CMA had requested the UK Government to adopt 'emergency' legislation to allow it to act against companies that were considered to be profiteering during the crisis.<sup>24</sup> This reflects that, save where a business is dominant, 'price-gouging' is not prohibited by existing competition law.

## STATE AID

45. The United Kingdom and other governments have already announced wide-ranging support for businesses during the economic crisis caused by COVID-19. It can be expected that further support measures will be announced in the

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<sup>24</sup> K Bioley and J Pickard, 'UK watchdog seeks powers to tackle coronavirus profiteering', *Financial Times* (18 May 2020), available at: <https://www.ft.com/content/6af426bc-bfa3-4acb-86e0-c72eb0333e7e>.

coming weeks and months. The EU State aid rules are applicable to such support. The Commission has established a specific section of its website to address this topic.<sup>25</sup>

46. In the UK, measures already announced include: support to cover part of the salary costs of furloughed employees (the Coronavirus Job Retention Scheme); deferring VAT and income tax payments; support to SMEs for statutory sick pay payments; grants for small businesses; a business rates holiday and grants for retail, hospitality and leisure businesses; and loans for both SMEs and larger businesses.
47. Public bodies (including devolved administrations, local authorities and organisations such as local enterprise partnerships) that wish to support businesses in the current crisis must satisfy themselves that they do so in compliance with the State aid rules. Equally, entities in receipt of public support must also satisfy themselves of this: if they receive funding that is aid and is not exempted, they could be required to pay it back. That said, the majority of funding will be compatible with the State aid rules, whether under the existing rules or the new Temporary Framework.

#### **EU State aid law continues to apply in the UK, notwithstanding Brexit**

48. Although the UK left the EU on 31 January 2020, EU State aid law continues to apply to and in the UK until 31 December 2020 (or such later date as the UK and EU may agree to extend the transition period by). Therefore, unless exempted, all aid granted by the UK (whether by central, devolved or local government, or other public bodies) must be notified to and approved by the Commission before it can be implemented. This includes measures introduced to support businesses in difficulty as a result of the COVID-19 pandemic.
49. The State aid rules apply to any entity that carries on an economic activity, irrespective of its size, legal status and whether it is profit-making. They therefore apply to all entities that provide goods or services for remuneration, including charities and other non-profit organisations and certain activities of local authorities.

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<sup>25</sup> See [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html).



50. Public funding constitutes aid if it (i) is granted by a Member State or through State resources, (ii) provides a selective advantage that favours certain undertakings or the production of certain goods, (iii) distorts competition, and (iv) affects inter-State trade. Typical aid measures include: grants, subsidised loans, guarantees, investments that are not on market terms, the supply of goods at subsidised prices, and debt and tax deferrals or write-offs.
51. Some types of public funding during the COVID-19 crisis will not be 'State aid', because they apply to the economy as a whole, and so are not 'selective'. Funding to SMEs active only in a local area might not have an effect on inter-State trade. Other measures will be exempted without prior notification (see paragraph 52 below). Where measures do constitute aid and are not exempted, for example because they benefit only specific sectors or individual businesses, the Commission has stated that it will approve notified Coronavirus-related aid measures very quickly, typically in 24-48 hours (see paragraphs 53 ff below).

### **Existing exemptions: de minimis aid and the General Block Exemption**

#### **Regulation**

52. The Commission can investigate non-exempted and non-notified aid granted during the transitional period and the British courts can also require its suspension or even repayment until it is approved. Over 95% of aid does not require notification, as it is covered by an exemption, typically either because it is 'de minimis' aid (less than €200,000 over three years) or is covered by the Block Exemption Regulation ("**GBER**", which exempts a wide variety of aid, including regional aid, aid to SMEs, aid for R&D, training aid, aid for environmental protection, aid for cultural purposes and aid for certain types of infrastructure). These exemptions continue to apply.

### **The Commission's Temporary Framework for State aid during the COVID-19 crisis**

53. On 19 March 2020, the Commission adopted a 'Temporary Framework' that will apply until 31 December 2020 to measures taken to provide liquidity, support businesses that have suffered significant damage due to the crisis and preserve the continuity of economic activity.<sup>26</sup> The Temporary Framework was

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<sup>26</sup> Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01) (19 March 2020). See

amended on 4 April 2020 and again on 8 May 2020, in the latter case to cover recapitalisation and subordinated debt measures.<sup>27</sup>

54. Measures falling outside the Framework, such as rescue and restructuring aid for fundamentally-sound businesses that are in difficulty only as a result of COVID-19, must be notified to the Commission, but can be expected to be approved quickly.

***Grants, repayable advances, tax and payment advantages, loan guarantees and subsidised loans***

55. The Temporary Framework exempts (without the need for notification) the provision of aid to individual businesses of up to €800,000 in the form of grants, repayable advances, and tax or payments advantages, as well as (subject to certain conditions) loan guarantees, subsidised loans, funding for guarantees and loans that are channelled through private banks and export credit insurance.
56. On 4 April 2020, the Commission adopted its first amendment to the Temporary Framework.<sup>28</sup> This amendment permits Member States (and the UK) to provide, without the need to notify the Commission, funding to:
- accelerate COVID-19 research and development;

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Commission press release, *State aid: Commission adopts Temporary Framework to enable Member States to further support the economy in the COVID-19 outbreak* (IP/20/496, 19 March 2020).

<sup>27</sup> See Commission press release, *State aid: Commission expands Temporary Framework to recapitalisation and subordinated debt measures to further support the economy in the context of the coronavirus outbreak* (IP/20/838, 8 May 2020).

<sup>28</sup> Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (C(2020) 2215 final, 3 April 2020). See Commission press release, *State aid: Commission extends Temporary Framework to enable Member States to accelerate research, testing and production of coronavirus relevant products, to protect jobs and to further support the economy in the coronavirus outbreak* (IP/20/570, 4 April 2020). An informal consolidated version of the Temporary Framework is available at: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/TF\\_consolidated\\_version\\_as\\_amended\\_3\\_april\\_2020.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_as_amended_3_april_2020.pdf).

- provide investment aid for infrastructures for testing and upscaling COVID-19 related products before mass production;
  - provide investment aid for the production of COVID-19 related products;
  - aid in the form of temporary deferrals (until no later than 31 December 2020) of tax and/or social security contributions to ease businesses' liquidity constraints and to protect employment; and
  - wage subsidies for employees and self-employed individuals to avoid lay-offs in specific sectors that are particularly affected by the COVID-19 outbreak, of up to 80% of gross monthly salary.
57. Three other aid measures are now also permitted under the Temporary Framework:
- interest-free loans of up to €800,000;
  - guarantees covering 100% of loans of up to €800,000; and
  - equity capital injections of up to €800,000 per company.
58. R&D and investment aid may be provided through grants, repayable advances or tax advantages. It is available for projects concerning R&D into, testing of or production of COVID-19 relevant medicinal products (including vaccines), intermediates, active ingredients and raw materials; medical devices and equipment (including ventilators, PPE and diagnostic tools), disinfectants and raw materials; and data collection and processing tools.
59. Aid for R&D can cover up costs of an R&D project, of up to 100% for fundamental research and 80% for industrial research and experimental development, with higher limits for projects supported by two or more states and for projects involving cross-border collaboration. Aid beneficiaries must grant non-exclusive and non-discriminatory licences of the research results to third parties in the EEA.
60. Investment aid for testing and upscaling infrastructures can have a maximum aid intensity of 75% of eligible costs. The testing and upscaling infrastructure must be open to several users on a transparent and non-discriminatory basis.
61. In the case of investment aid for the production of COVID-19 relevant products, the investment project must be completed within six months of the granting of

the aid. The aid must not exceed 80% of the eligible costs, or up to 95% if the project is completed within two months.

### ***Recapitalisation and subordinated debt measures***

62. On 9 April 2020, the Commission announced proposals to further extend the Temporary Framework to include measures for the recapitalisation of individual companies in need of additional capital as a result of decreased demand for their products and services and reduced liquidity.<sup>29</sup> These measures were adopted on 8 May 2020.<sup>30</sup>

#### Recapitalisation measures

63. The Temporary Framework permits public support through equity or hybrid capital,<sup>31</sup> to ensure the viability of the beneficiary company by restoring its capital structure to pre-COVID-19 levels. It may be provided only if there is no other appropriate solution, market-based financing is not available at affordable terms and, if, without support, the beneficiary would either go out of business or face serious difficulties to maintain its operations. Recapitalisation investments may be made in both large enterprises and in SMEs, and in both listed and privately-held companies.
64. Recapitalisation funding is, however, subject to strict conditions to minimise distortions to competition, including on the behaviour of companies receiving

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<sup>29</sup> See Commission press release, *Coronavirus: Commission Statement on consulting Member States on proposal to further expand State aid Temporary Framework to recapitalisation measures* (STATEMENT/20/610, 9 April 2020).

<sup>30</sup> Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (C(2020) 3156 final), available at: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/sa\\_covid19\\_2nd\\_amendment\\_temporary\\_framework\\_en.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_2nd_amendment_temporary_framework_en.pdf). An unofficial consolidated version of the Temporary Framework is available at: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/TF\\_consolidated\\_version\\_as\\_amended\\_3\\_april\\_and\\_8\\_may\\_2020\\_en.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_as_amended_3_april_and_8_may_2020_en.pdf).

<sup>31</sup> For example, instruments with an equity component, in particular profit participation rights, silent participations and convertible secured or unsecured bonds.

support, incentives to repay the aid and the need for the State to have a clear exit strategy. Therefore:

- the State must receive appropriate remuneration, in the case of hybrid capital at a level of interest at a minimum specified margin over base rate;
- the recapitalisation must be redeemed when the economy stabilizes;
- the State remuneration should increase, to provide incentives for its investment to be redeemed, in the form of additional shares or other measures (for equity investments) or conversion into equity (for hybrid capital investments): if after four years the State has not sold at least 40% of its equity participation and after six years the State has not sold all of its equity participation;
- any share buy-back must be at the higher of the nominal investment plus interest and the prevailing market price;
- beneficiaries must not engage in 'aggressive commercial expansion', i.e. acquisitions of shareholdings of over 10% in competitors or other 'operators in the same line of business' or by cross-subsidising activities that were already in financial difficulty at 31 December 2019. Where a large enterprise receives investment of over €250 million and has 'significant market power',<sup>32</sup> it will be subject to additional restrictions;
- If the recapitalisation measures have not been fully redeemed, the beneficiary may not pay dividends, make non-mandatory coupon payments or buy-back shares, except in relation to the State;
- If at least 75% of the recapitalisation measures have not been redeemed, the remuneration of the beneficiary's management must not exceed the fixed component of their 2019 remuneration. No bonuses, variable or comparable remuneration may be paid; and
- the State must have a clear exit strategy, comprising a repayment schedule, publication of information on the use of the aid received and, if the State has

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<sup>32</sup> It is assumed that that this is equivalent to the concept of a dominant position, which may exist with a market share of over 40%.

not reduced its interest below 15% of its equity after six years (seven years for non-listed companies), a restructuring plan.

65. These rules are similar to those applied to state recapitalisation of banks and insurance institutions during the 2008/2009 financial crisis, which included requirements to sell assets or businesses, restrictions on M&A activity and prohibitions on dividend payments and share buy-backs.

#### Subordinated debt measures

66. Member States (and the UK) may provide subordinated debt on favourable terms to companies facing financial difficulties as a result of the crisis, to provide liquidity for working capital and/or investment costs. The following conditions apply:

- The interest rate must be higher than base rate plus a credit margin of 200 basis points (for large enterprises) and 150 bps (for SMEs);
- these debt instruments cannot be converted to equity whilst the recipient company is a going concern;
- as the debt is subordinated to senior creditors, it must be remunerated at a higher rate than senior debt;
- the recipient company must be subject to limits on raising new senior debt

67. The Temporary Framework applies to aid up to the following thresholds calculated by reference to annual wage bills and 2019 turnover:

- for SMEs: 100% of wage bill and 12.5% of turnover; and
- for large enterprises: 2/3 of wage bill and 8.4% of turnover.

If it is intended to provide subordinated debt above these levels, all the conditions for recapitalisation measures will also apply.

### ***The Commission's approval of numerous State aid measures under the COVID-19 Temporary Framework***

68. The Commission has now adopted over 100 decisions approving national measures that either provide liquidity to businesses or compensation for losses suffered as a result of the exceptional circumstances caused by the coronavirus

outbreak. It has approved a range of aid schemes notified by almost all Member States. These schemes have included grants, loan guarantees, and subsidised loans provided by state-owned banks and were approved within 24 to 48 hours of notification, including over the Easter holiday weekend.<sup>33</sup> As well as approving aid schemes (where a specific beneficiary is not identified and aid may be provided to any business complying with the scheme's eligibility criteria), the Commission has also approved aid to specific companies under the Temporary Framework. For example, On 4 May 2020, the Commission approved the provision of €7 billion of liquidity support to Air France, in the form of loan guarantees (of up to 90% coverage) and a subordinated shareholder loan, to support it through a period of high operating losses caused by restrictions on air travel.<sup>34</sup> It has also approved a €5 billion loan guarantee provided to Renault.<sup>35</sup>

#### *Aid in the United Kingdom*

69. The Commission has now approved four COVID-19-related aid schemes in the United Kingdom. It will clearly be necessary for public authorities (including local authorities) and other bodies that distribute state funds (such as LEPs) to ensure that the requirements of the Temporary Framework and the Commission's approval decisions are met.
70. On 25 March 2020, the Commission approved, under the Temporary Framework, two UK measures to support SMEs affected by the COVID-19 crisis. First, the 'Coronavirus Business Interruption Loan Scheme', which guarantees 80% of loan facilities for SMEs with a turnover of up to £45 million and will be

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<sup>33</sup> A full list of decisions is available at:  
[https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_sa\\_by\\_date](https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_sa_by_date).

<sup>34</sup> See Commission press release, *State aid: Commission approves French plans to provide €7 billion in urgent liquidity support to Air France* (IP/20/796, 4 May 2020).

<sup>35</sup> See Commission press release, *State aid: Commission approves €5 billion loan guarantee by France to the Renault group to mitigate economic impact of coronavirus outbreak* (IP/20/779, 29 April 2020).

provided by the British Business Bank.<sup>36</sup> Second, the provision of grants to support SMEs, of up to €800,000 (approximately £734,000).<sup>37</sup>

71. On 6 April 2020, the Commission approved a £50 billion ‘umbrella’ scheme to support the UK economy during the coronavirus outbreak.<sup>38</sup> The key elements of this scheme are:

- it will apply until 31 December 2020 and will be used to support both SMEs and large corporates, throughout the UK;
- aid may be provided through direct grants, equity injections, selective tax advantages, repayable advances, guarantees for commercial lending (to ‘channel’ state aid to ‘the real economy’) and subsidised loans;
- aid may be provided by central government, devolved governments, local authorities and other public bodies or other bodies administering schemes funded from state resources (which, presumably includes Local Enterprise Partnerships and public/private bodies that disburse funds under the Regional Growth Fund and similar schemes);
- aid may not be granted to undertakings in difficulty (other than as a result of the crisis);

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<sup>36</sup> Case SA.56792 *United Kingdom, UK COVID 19 measure CBILS Guarantee* (25 March 2020). See Commission press release, *State aid: Commission approves UK schemes to support SMEs affected by coronavirus outbreak* (IP/20/527, 25 March 2020). The decision is not yet publicly available.

<sup>37</sup> Case SA.56794 *United Kingdom, Coronavirus Business Interruption Loan Scheme (CBILS) Grant - COVID-19* (25 March 2020). The decision is available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202014/285210\\_2143912\\_38\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202014/285210_2143912_38_2.pdf).

<sup>38</sup> Case SA.56841 *COVID-19 Temporary Framework for UK authorities* (6 April 2020). The decision is available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202015/285283\\_2146683\\_71\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202015/285283_2146683_71_2.pdf). See Commission press release, *State aid: Commission approves £50 billion UK “umbrella” scheme to support the economy in the coronavirus outbreak* (IP/20/603, 6 April 2020).



- aid of up to €800,000 per undertaking can be provided either directly to beneficiaries or by guaranteeing loans made by banks and other financial institutions. This is in line with the Temporary Framework;
  - specific rules apply to aid granted through loan guarantees, subsidised loans and aid that will be ‘channelled’ through banks to the ‘real economy’, in the latter case to ensure that banks do not benefit and that aid is ‘passed through’ to the end beneficiary through lower interest rates. This is also in line with the Temporary Framework; and
  - aid may also be given to support R&D into COVID-19 and other antiviral relevant research and for testing and upscaling, and production of COVID-19 relevant products. Again, this is in line with the Amended Temporary Framework.
72. On 23 April 2020, the Commission approved an amendment to this ‘umbrella’ scheme, which revised the fees payable for government loan guarantees, to reflect the revised Commission Temporary Framework.<sup>39</sup>
73. ]On 11 May 2020, the Commission approved, under the Temporary Framework, a £9 billion scheme to provide grants to the self-employed and members of partnerships, whose businesses have been affected by the COVID-19 outbreak.<sup>40</sup> The Commission considered that the scheme was compatible with the Temporary Framework, as it was time limited, grants could only be granted to individuals whose business activities were on-going, the aid would not exceed 80% of gross monthly income and aid would not lead to over-compensation.

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<sup>39</sup> Case SA.57078 (2020/N) - *United Kingdom – Amendment to the aid scheme SA.56841 (2020/N) – United Kingdom - COVID-19 Temporary Framework for UK authorities* (23 April 2020).

<sup>40</sup> See Commission press release, *State aid: Commission approves € 10.3 billion UK scheme to support self-employed individuals and members of partnerships during the coronavirus outbreak* (IP/20/862, 11 May 2020). Case SA.57152 *COVID-19 – UK – Self-Employed (including members of partnerships) Income Support Scheme* (11 May 2020)

### **Approval of COVID-19-related aid outside of the Temporary Framework**

74. As well as approving dozens of national and regional schemes,<sup>41</sup> the Commission has now also approved, under Article 107(2)(b) TFEU and outside of the Temporary Framework, aid schemes and individual aid to some companies that are facing specific difficulties directly caused by the exceptional circumstances of the pandemic. Article 107(2)(b) permits the Commission to approve aid to compensate companies for damage caused by unforeseen and exceptional natural disasters.
75. This has included individual aid to the airlines SAS (guarantees on a €137m revolving credit facility provided by Sweden and by Denmark) and Condor (guaranteed €550m public loan in Germany), as well as schemes in France (moratorium on aeronautical charges), Sweden (aid for cancelled or postponed cultural events) and Denmark (aid for cancelled large public events). In the case of Condor, the exact damage suffered by it will be calculated after the crisis is over, by reference to its 2020 accounts; if support exceeds the losses suffered, Condor must repay the difference, so ensuring that it is not over-compensated.<sup>42</sup> The same approach has been taken with respect to SAS.<sup>43</sup>

### **Merger control**

76. The CMA and Commission are both authorities are also progressing with merger investigations. Although both agencies would prefer not to receive new merger

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<sup>41</sup> See the list, as at 28 April 2020, available at:  
[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/State\\_aid\\_decisions\\_TF\\_and\\_107\\_2\\_b\\_and\\_107\\_3\\_b.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2_b_and_107_3_b.pdf).

<sup>42</sup> See Commission press release, *State aid: Commission approves €550 million German State-guaranteed loan to compensate airline Condor for damage caused by coronavirus outbreak* (IP/20/752, 27 April 2020).

<sup>43</sup> See Commission press releases

*State aid: Commission approves Danish public guarantee of up to €137 million to compensate airline SAS for damage caused by coronavirus outbreak* (IP/20/667, 15 April 2020) and *State aid: Commission approves Swedish public guarantee of up to €137 million to compensate airline SAS for damage caused by coronavirus outbreak* (IP/20/748, 24 April 2020).

notifications at this time, they are accepting notifications and the CMA is continuing to open investigations into completed mergers. The Commission is also accepting electronic submissions of merger notifications.

77. By way of example of recent merger work by the CMA and Commission:
- a. The CMA has prohibited a merger between two suppliers of airline booking software, Sabre and Farelogix,<sup>44</sup> and it also prohibited sports-fashion retailer JD Sports' completed acquisition of rival Footasylum.<sup>45</sup> It also intends to accept final remedies, after a Phase 2 investigation in a merger in the commercial radio sector.<sup>46</sup>
  - b. The CMA has also referred three mergers for a Phase 2 investigation, *FNZ/GBST*,<sup>47</sup> *Kingspan/Building Solutions*<sup>48</sup> and *Hunter Douglas/247 Home Furnishings*<sup>49</sup> and is considering whether to accept remedies in lieu of a reference in a third, *Circle Health/BMI Healthcare*.<sup>50</sup>
  - c. The CMA has also requested the Commission to investigate a merger that has effects across the EU.<sup>51</sup>

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<sup>44</sup> See CMA press release, *CMA blocks airline booking merger* (9 April 2020).

<sup>45</sup> See CMA press release, *CMA blocks sports-fashion merger* (6 May 2020).

<sup>46</sup> *Bauer Media Group*. See <https://www.gov.uk/cma-cases/bauer-media-group-merger-inquiry>.

<sup>47</sup> See CMA press release, *Merger of retail investment software firms raises competition concerns* (30 March 2020).

<sup>48</sup> See CMA press release, *Construction products merger raises competition concerns* (7 April 2020).

<sup>49</sup> See CMA press release, *Mergers between window blind companies raises competition concerns* (20 March 2020).

<sup>50</sup> See CMA press release, *Private hospital merger to be approved if local concerns addressed* (8 April 2020). On 14 May 2020, the CMA announced that it was consulting on the proposed divestment of two hospitals, owned by the acquiring party, Circle, in Bath and Birmingham

<sup>51</sup> *MasterCard/Nets*. See <https://www.gov.uk/cma-cases/mastercard-nets-merger-inquiry>. The Commission has accepted the request.

- d. The Commission has recently approved mergers subject to significant divestment remedies, *Mylan/Upjohn*<sup>52</sup> and *Gategroup/LSG*<sup>53</sup> and has opened a Phase 2 investigation in *Johnson & Johnson/Tachosil*.<sup>54</sup>
78. On 22 April 2020, the CMA published guidance on its approach to merger control during the pandemic.<sup>55</sup> Importantly, the CMA will maintain its existing approach in assessing whether a merger will give rise to competition concerns, both in Phase 1 and Phase 2 investigations. In Phase 1, it will continue to assess whether there is a realistic prospect of a merger substantially lessening competition, such that (unless acceptable remedies are given) a Phase 2 investigation should be launched. In Phase 2, the CMA must decide whether a merger will result in a substantial lessening of competition. Whilst the crisis will have significant short-term economic effects, the longer term effects are less certain. Therefore, the CMA will not speculate on future market structures and will be cautious to approve mergers on the basis of short-term changes in market structures brought about by the pandemic.
79. In terms of merger investigation procedures:
- a. The CMA remains subject to statutory deadlines, but may not be to start a Phase 1 investigation if there are concerns that third parties (a key

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<sup>52</sup> See Commission press release, *Mergers: Commission approves the merger of Mylan and Pfizer's Upjohn division, subject to conditions* (IP/20/724, 22 April 2020).

<sup>53</sup> See Commission press release, *Mergers: Commission approves acquisition of the European catering business of LSG by Gategroup, subject to conditions* (IP/20/594, 3 April 2020).

<sup>54</sup> See Commission press release, *Mergers: Commission opens in-depth investigation into proposed acquisition of Tachosil by Johnson & Johnson* (IP/20.529, 25 March 2020).

<sup>55</sup> CMA, *Merger assessments during the Coronavirus (COVID-19) pandemic* (CMA120, 22 April 2020): see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/880570/Merger\\_assessments\\_during\\_the\\_Coronavirus\\_\\_COVID-19\\_\\_pandemic\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880570/Merger_assessments_during_the_Coronavirus__COVID-19__pandemic_.pdf).

source of evidence and information) will not be able to meaningfully engage with it.

- b. All meetings and hearings will be conducted remotely, by telephone or video-conferencing. Site visits will not take place in Phase 2.
- c. Where a merger has been completed, the CMA will continue to adopt interim enforcement orders (in Phase 1) and interim orders (in Phase 2), requiring the merging parties to be held and operated separately. However, the CMA will continue to grant derogations where appropriate to ensure the viability of the parties' businesses.

80. It is likely that many mergers will involve a party that is in financial distress as a result of the pandemic. In some cases, a party may not have been in difficulty at the time that the merger was announced, but has since become so due to a downturn in business. In others, the merger may be a means of 'rescuing' a target business that is in difficulty as a result of the pandemic. The merging parties may therefore seek to rely on the so-called 'failing firm defence' as a basis for approving the merger. The failing firm defence exists under both UK and EU law, although the conditions that must be met in order for it to be applied to approve the merger are slightly different.

81. Under UK law, the following three conditions must be met:

- a. The firm would have exited the market, absent the transaction, whether because of financial failure or some other strategic reason. Restructuring or continued parent company support must not be possible.
- b. There must be no less anti-competitive alternative purchaser for the firm or its assets. Ordinarily, this requires that the firm or its assets must have been marketed, with no offers above liquidation value having been received.
- c. The impact of the firm's exit on competition must be more than the impact of the merger. This requires an assessment of what would have happened absent the merger and comparing this to the expected post-merger outcome.

82. Under EU law, the following three conditions must be met:
- a. The target firm would, in the near future, have exited the market due to its financial difficulties, unless taken over by another firm.
  - b. There is no less anti-competitive purchaser.
  - c. Absent the merger, the firm would have inevitably have exited the market, provided that the negative effect on competition of the merger is greater than the effect of exit.
83. In its recent Guidance, the CMA anticipates that it may receive additional submissions that one party (or even both parties) to a merger are failing financially and would have exited the market absent the transaction. It has therefore released an 'Annex' to its Guidance, setting out its approach to applying the failing firm defence.<sup>56</sup>
84. Shortly before the Guidance was published, the CMA announced that, provisionally, it intends to approve Amazon's proposed acquisition of a minority shareholding in the restaurant home-delivery business, Deliveroo.<sup>57</sup> Whilst Deliveroo was not in financial difficulty at the time the transaction was announced, its financial position deteriorated significantly due to the COVID-19 pandemic, during the CMA's Phase 2 investigation. It would therefore have financially failed without additional financial investment which, in the limited time available and during the crisis, could only have been provided by Amazon. As Deliveroo's market exit would have had an immediate negative impact on competition (by significantly reducing competition on competitors such as Just Eat, leading to price increases and reduced levels of quality), as compared to more speculative effects even if Amazon would have re-entered the market.
85. In *JD Sports/Footasylum*, the CMA, in reaching its final decision to prohibit the merger, took into account the effect that the COVID-19 crisis was having in the

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<sup>56</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/880570/Merger\\_assessments\\_during\\_the\\_Coronavirus\\_COVID-19\\_pandemic\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880570/Merger_assessments_during_the_Coronavirus_COVID-19_pandemic_.pdf).

<sup>57</sup> See CMA press release, *CMA provisionally clears Amazon's investment in Deliveroo* (17 April 2020).

retail sector. It noted that the long term effect of the crisis on retailers and on competition, including any possible shift towards more online retailing, was uncertain and difficult to predict and it could not determine if either party would be hit harder than other retailers so as to become a less effective competitor, or whether the . In particular, even though COVID-19 would have a material impact on Footasylum's, neither party had claimed that it would go out of business and thus be a 'failing firm'. In any event, there was no clear evidence that there would not have been alternative purchasers for Footasylum, particularly as it had not conducted a full sale process before JD Sports made its public bid to acquire Footasylum and took a significant minority stake.

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8 June 2020