Competition law in times of crisis—tackling the COVID-19 challenge: a producer perspective

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23 March 2020 is a defining date. The Prime Minister addressed the nation, announcing the closure of schools, restaurant, pubs, and non-essential retail, that people should stay home and, when out, should observe social distancing. In the weeks prior, effects had been escalating, with businesses unilaterally imposing travel bans and meetings over a certain size, sporting events cancelled, cinemas closing, and shoppers rushing to buy certain products resulting in widespread shortages, putting pressure on just-in-time supply chains. This is a true market shock, defined by a rapidly evolving situation, widespread impact on all walks of life, and the imposition of extreme restrictions with unknown (but significant) economic impact and duration.

Members of the British Brands Group, a not-for-profit corporate membership organization, comprise branded companies, many producing essentials such as groceries, household products, and pharmaceuticals. Competition policy, including that which impacts upon the relationships between retailers and suppliers, and brand reputation are core to the Group’s work. Here we look at the potential implications for producers of the relaxation of the competition rules, the setting up by the Competition and Markets Authority (the CMA) of a COVID-19 Taskforce and the protections afforded by the Groceries Supply Code of Practice (a competition remedy introduced following a market investigation into groceries in 2008).

I. RELAXATION OF COMPETITION RULES

Since the country went into lockdown, we have seen a remarkable relaxation of the competition regime in the UK in marked contrast with the approach taken in other European Union countries. Legislation has been passed which temporarily waivers certain competition laws, permitting retailers, suppliers, and logistic companies in grocery (including non-prescription pharmaceuticals) to coordinate on issues such as staffing, product ranges, stock levels, opening hours, and logistics. More broadly, the CMA has indicated that such co-ordination will also be permitted outside of grocery

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where it aims solely to address concerns arising from the current crisis and goes no further and lasts no longer than is necessary.

These initiatives are innovative and the right thing to do in extraordinary circumstances, though for many producers their practical impact has yet to be explored. At time of writing, supply chains are settling into a new kind of reality, with restrictions on consumer purchasing only just being lifted and the supply of products other than essentials now re-starting. In recent weeks, the focus for producers has been on the absolute basics: keeping their workforce safe (with special attention given to the vulnerable), ensuring supply of key products, and servicing their retail customers.

These however are early days and the practical impact has yet to be felt. Potentially, there is scope to collaborate on the development of new products and services to beat the virus, such as the tie-up between GlaxoSmithKline and Sanofi to develop a vaccine. There may also be collaboration between producers when it comes to the distribution and allocation of ingredients were shortages to arise, a potential example being for the production of paracetamol. The dairy sector faces the opposite problem, with the closure of the hospitality sector resulting in a significant surplus, requiring collaboration on reformulations and new routes to market to prevent waste of a perishable product. Further benefits may arise from competitors talking to each other to ensure supply where one may face production or logistics difficulties, and the sharing of experience and knowledge as production lines are re-tooled and adapted to produce, for example, Personal Protective Equipment (PPE) as Gillette is doing to produce face shields. The CMA’s move is timely and removes obstacles that may either slow down or prevent meaningful relief and benefits to patients, essential workers, and consumers.

II. THE COVID-19 TASKFORCE

The announcements on the relaxation of competition enforcement have been accompanied by dire warnings to those who overstep the mark, co-ordinating with competitors in a way that does not fit within the boundaries of what is allowed. Firm warnings have also been issued by the CMA in relation to negative impacts that may arise from the pandemic such as charging unjustifiably high prices and misleading claims.

On 20 March 2020, the CMA launched a taskforce to tackle these impacts and issued an open letter warning pharmaceutical and food and drink industries against such practices. The CMA has powers under the Consumer Protection Regulations to act against misleading claims though the basis for action against unjustifiably high prices is less clear, presumably prompting its statement that it would ‘advise Government on emergency legislation if there are negative impacts which cannot be addressed through existing powers’.

Which?, the consumer organization, found examples of opportunistic sellers using platforms such as eBay and Amazon to supply mostly branded products at inflated prices. Examples included cleaning sprays and sterilizing fluid at more than 10 times the original price and a bundle of one hand wash and one anti-bacterial gel being sold for £30 instead of the usual £3.50. It is no surprise that branded products are targeted as they are well-known and trusted but excessive pricing damages brand
equity, with consumers not fully appreciating how products are priced and by whom, often writing to the original brand manufacturer in protest though they are powerless.

It is notable that, while there are initiatives on excessive pricing and misleading claims, there are no such high-profile initiatives against fakes, whether of PPE, testing kits, medicines, or ingredients, arguably a greater risk to individual health.

III. THE GROCERIES SUPPLY CODE OF PRACTICE
The initial severe disruption to supply chains caused by the crisis, the rapid rationalization of product ranges, the halting of planned promotions, and concerns over future supply all created a recipe for tension between grocery retailers and suppliers. To what extent would retailers pass their costs and the risks upstream to suppliers? Fears were roused when The Grocer reported the Chief Executive of one retailer, Morrisons, calling for the Groceries Supply Code of Practice (GSCOP) rules to be lifted so that de-listings could be pushed through more quickly.

The Groceries Code Adjudicator, Christine Tacon, has been quick to respond, publishing a position statement and an open letter to retailers explaining that GSCOP is sufficiently flexible to deal with this extraordinary situation and she would not enforce its provisions where there is evidence of collaboration between retailers and suppliers. Calls to relax GSCOP rules are surprising as suppliers have so far reported exemplary behaviour from their retail customers, with good communication, a flexible approach, and a high level of collaboration. The current trading climate has been described by one as a ‘breath of fresh air’.

There is no question though that much remains to unfold. The peak of COVID-19 cases in the UK may yet to be reached and significant uncertainties remain over many aspects of producers’ businesses. Nevertheless, attention is already turning to the period of recovery, and scenario planning is underway for a range of eventualities. De-listing decisions and forecasting may yet present real challenges and suppliers may still have cause to be grateful for the protection GSCOP affords.

Whether the relaxation of the rules on co-ordination between competitors will have widespread practical benefits for producers remains to be seen. Equally, whether price gouging by some opportunistic sellers is a short-term blip or a longer-term phenomenon is also unknown. However, producers will be thankful that there is a mechanism to report excessive pricing and that they have the scope to enter into agreements for the good of consumers in the short term that would otherwise not be permissible. That however comes with an appreciation that some significant efforts will be required once the period of disruption ends to remind employees of the competition rules and the penalties that apply should they be broken.