COVID-19: Relaxed competition law for healthcare companies

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Please note: the information contained in our legal updates is correct as of the original date of publication.

The COVID-19 pandemic presents unprecedented capacity challenges for the NHS and other healthcare providers. As part of the attempt to cope with this additional strain, NHS England has commissioned independent healthcare providers to provide extra capacity for the treatment of patients, not only to support the treatment of coronavirus but also to help the NHS deliver other urgent operations and cancer treatments. Such arrangements may require providers to work together and share commercially sensitive information in order to sufficiently meet local community needs.

Chapter I of the Competition Act 1998 (the Act) prohibits agreements or arrangements between businesses which prevent, distort or restrict competition in the UK. This provision could render the co-operation and sharing of information between healthcare providers, such as sharing of staff or facilities or discussion of how to divide local services, anti-competitive.

As a result, emergency legislation was passed by the UK Government on 27 March 2020 under paragraph 7(1) of Schedule 3 of the Act, which provides the Secretary of State with the power to exclude certain categories of agreements from Chapter I where he is satisfied that there are exceptional and compelling reasons of public policy. The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 (the Order) permits 5 types of agreement, which are aimed at assisting the NHS in addressing the effects or likely effects of the COVID-19 crisis, namely agreements which relate to:

1. sharing information about capacity to provide certain services (including information regarding staff and facilities);

2. coordination on deployment of staff between NHS bodies and independent providers or between independent providers;

3. sharing or loan of facilities for the provision of health services;

4. joint purchasing of goods, materials, vehicles, plants, apparatus, facilities or services for the provision of health services; and

5. division of activities, involving agreement that one or more independent providers or NHS bodies are to undertake a particular activity or type of activity either generally or within a particular geographical area (including agreement to limit or expand the scale or range of services supplied by one or more providers).

Any such agreement is to be between:

- NHS England and one or more independent provider (defined as any person, other than an NHS Body, that provides health services for the purposes of the NHS);
- one or more NHS body (other than NHS England) and one or more independent provider; or
- two or more independent providers.

To comply with the safe harbour from the Act, agreements covered by the Order must be notified to the Secretary of State within 14 days of the date of the agreement (or within 14 days of the 27 March 2020 for any agreements predating the Order). The following information must be provided:

- the names of the undertakings or bodies that are parties to the agreement;
- a description of the nature of the agreement;
- the date on which the agreement was made and the date it was implemented; and
- the products or services to which it relates.

The exclusion from the Chapter I provision is backdated to apply to agreements relating to relevant activities from 1 March 2020 and will remain in place until such a date as notified by the Secretary of State.

Independent providers and NHS bodies who are looking to utilise the protection offered by the Order should note that whilst it relaxes the normal competition law rules, the exclusion is narrow and applies only to activities in relation to the COVID-19 response.

The Competition & Markets Authority has also produced more general guidance which reminds business that while the current extraordinary situation may necessitate more cooperation between businesses that does not give businesses a 'free pass', and the CMA will not tolerate "unscrupulous businesses exploiting the crisis as a 'cover' for non-essential collusion". The examples they have provided of this include:

- coordination between businesses that is wider in scope than what is actually needed to address the critical issue in question (for example, if the coordination extends to the distribution or provision of goods or services that are not affected by the COVID-19 pandemic); and
- businesses exchanging with their competitors commercially sensitive information on future pricing or business strategies, where this is not necessary to meet the needs of the current situation.

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