

# Key COVID-19 legal developments in the health sector: New Competition Order to allow for enhanced co-operation between healthcare providers in the fight against Covid-19

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On 28 March, the Competition Act 1998 ( Health Services for Patients in England ) ( Coronavirus ) ( Public Policy Exclusion Order ) 2020 ('**Order**') came into force.

The Order allows for wide-ranging co-operation between NHS and/or independent providers, without having to worry about competition rules, provided that the related agreement fulfils certain conditions of the Order.

Related agreements (which can date back to 1st March 2020) also have to be notified within 14 days (starting from entry into agreement or entry into force of the Order for agreements entered into before the Order) to the Secretary of State in order to benefit from the automatic exemption.

## The Order

The Order excludes certain arrangements from the Chapter I prohibition in the Competition Act 1998. Excluded **agreements** are those **between**: The National Health Service Commissioning Board ('**NHS England**') and providers who are not part of the NHS ('**independent providers**'); **Other NHS bodies and independent providers**, and/or **Independent providers**.

Certain activities (referred to as 'qualifying activities') contained in such agreements are automatically exempt, provided that they:

1. Intend to assist the NHS in addressing the effects or likely effects of coronavirus on the provision of health services to patients in England;
2. Do not involve the sharing between independent providers of any information regarding costs or pricing,
3. Do not also include restrictions of competition other than in a market for the provision of health services to patients in England that is affected by coronavirus, and
4. Are notified to the Secretary of State in writing within 14 days from the date on which the agreement is made, in the form of paragraph 6(1) of the Order.

**Agreements** which were **entered into between 1st March 2020 and 27th March 2020** and fulfil the above conditions are also automatically excluded from the Chapter I provision, provided that they are notified within 14 days from entry into force of the Order.

A '**qualifying activity**' and, therefore, exempt activity is any of the following activity that **takes place during the healthcare disruption period** (defined as the period commencing on 1st March 2020 and ending on the date specified in a notice to be published by the Secretary of State):

1. Information sharing in relation to capacity for providing health services of a particular kind, including information regarding staff and facilities;
2. Coordination as regards the deployment of staff between NHS bodies and independent providers or between independent providers;
3. The sharing or loan of facilities for the provision of health services;
4. The joint purchasing of goods, materials, vehicles, plant, apparatus, facilities or services (including the services of staff), for the purpose of the provision of health services; and
5. Coordination as regards the provision of health services which involves agreement that during the healthcare disruption period 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 health services to be or being supplied by one or more independent providers or NHS bodies.

## Background

The Chapter I prohibition precludes agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom and which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

Such agreements are prohibited, unless it can be shown that they give rise to benefits to consumers which outweigh any restrictions of competition.

Anticompetitive arrangements can arise directly or indirectly between competitors, and/or between companies at different levels of the supply chain, e.g. between a supplier and its customers.

Companies found to have breached Chapter I are liable to fines of up to 10% of their worldwide group turnover, and individuals can face disqualification from serving as a director for a period of up to 15 years; as well as prison sentences of up to five years.

Where there are exceptional and compelling reasons of public policy for doing so, the Secretary of State may exclude an agreement or an agreement of a particular description from the Chapter I prohibition.

The Order follows new guidance from Competition and Markets Authority ('CMA') of 25 March 2020 to the same effect, but not only referring to healthcare services.

In its guidance, the CMA outlines its approach to business cooperation in the unprecedented context of the COVID-19 pandemic.

The CMA states that will not take enforcement action in cases where businesses temporarily coordinate with each other with the sole aim of addressing concerns arising from the COVID-19 crisis, where the coordination is appropriate and necessary for certain specific reasons, and always provided that it does not go further than what can reasonably be considered necessary.

In this regard, the CMA confirms that in the exceptional circumstances of the COVID-19 pandemic, coordinated action e.g. to avoid a shortage, or ensure security of supply; to ensure a fair distribution of scarce products; and to continue essential services is unlikely to be problematic from a competition law perspective.

## Comment

It is important to note that the qualifying activities referred to above would not automatically infringe the Chapter I provision without the Order.

However, a detailed assessment of each related agreement is usually required, which can give rise to legal uncertainty and leaves the risk of 'getting it wrong' with the providers of healthcare services.

The Order is therefore welcome in that it provides legal certainty - and thus saves time and money - for providers of essential healthcare services in the combat of Covid-19.

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