Profiteering during a pandemic: No way! Says the CMA.

Dilan Ozdemir (Associate)

18th JUNE 2020
Associate Dilan Ozdemir discusses the implications of Covid-19 on competition law with reference to the applicability of article 102 of the Treaty on the Functioning of the European Union (TFEU). Dilan is currently working on the merchant interchange claims against Visa and Mastercard which concern articles 101 and 102 of the TFEU.

Since lockdown in the UK began on 23 March 2020, complaints made to the UK Competition and Markets Authority (CMA) relating to businesses alleged to have behaved unfairly during the Covid-19 outbreak have increased.¹

Products which have seen higher demand and are in short supply have apparently been particularly vulnerable to profiteering, such as hand sanitisers and face masks. The prices of these products have been substantially inflated and some may argue that unscrupulous businesses have exploited the pandemic to make a profit.

**Article 102 TFEU**

The legal question which arises, therefore, is whether the inflated prices on highly sought-after products such as hand sanitiser and face masks have been excessive and whether businesses have abused positions of dominance. Under article 102 of the TFEU an abuse of dominance is established if “any abuse by one in a dominant position within the internal market directly or indirectly imposes unfair purchase or selling prices or other unfair conditions”.²

In order to establish a case under article 102 TFEU there are three tests which need to be met. First, you need to define what the relevant “market” is.

Second, you must be able to show that the entity at issue has a dominant position on that market. A “dominant position” is one which allows the entity to enjoy a position of economic power that enables it to behave independently of effective competition pressures.³

Third and last, an abuse of this dominant position must be shown such that the entity’s dominance restricts competition on the relevant market. One form of an abuse of dominance is excessive pricing of products.

**Examples of possible abuse during COVID-19**

In the preliminary stages and moving towards the height of the pandemic in the UK in February and March of 2020, coupled with the NHS advice on the importance of washing hands and hand hygiene, the price of certain products such as some hand sanitisers and hand washes increased markedly. On some online platforms such as Amazon, certain hand sanitisers were listed as high as £1,000.⁴ Certain other products such as face masks have also seen a marked surge in price, “where costs of face masks were increased by more than 1300%”⁵ and the price of certain painkillers including paracetamols increased substantially.⁶

Extreme pricing was noted by the European Competition Network (ECN). In their joint statement on the application of competition law during the Coronavirus crisis they noted that they are “fully aware of the social and economic consequences triggered by the COVID-19 outbreak in the EU/EEA” and highlight the need for

⁴https://www.telegraph.co.uk/news/2020/03/05/firms-face-fines-ramping-hand-sanitiser-prices-amid-coronavirus/
“products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices”.\(^7\)

In line with the ECN statement, businesses which enjoy significant market power and are able to abuse their positions of dominance by inflating the prices of high demand products without objective justification may face legal risks under article 102 TFEU. Exploiting a dominant position on a market to inflate product prices abusively so as to profiteer from slow supply and high demand during the Coronavirus pandemic will be unlawful.

On the other hand, small businesses which have increased prices on high demand items through online platforms such as Amazon and eBay will inevitably contend that they do not hold dominant positions on their markets. They will point to a plethora of other brands, online platforms and stores which enable consumers to purchase such products.

Yet, with supply chains disrupted by the pandemic, these other online businesses, platforms and stores saw an increased inability to deliver and resupply, meaning that many “smaller” sellers may have temporarily become dominant within their market, especially those able to utilise Amazon’s robust supply chain.

**The UK’s response**

The CMA has launched the COVID-19 taskforce as a means to monitor and target those businesses which may have exploited the pandemic to take advantage of consumers by charging excessive prices. The taskforce is essentially designed to protect UK consumers from the adverse consequences of the COVID-19 pandemic and to demonstrate that the CMA will not tolerate anti-competitive conduct.

The CMA has warned traders not to “exploit the current situation to take advantage of people”\(^8\) and that it would take “direct enforcement action in appropriate cases”.\(^8\) Further to this, CMA Chief Executive Andrea Coscelli has urged retailers to “behave responsibly throughout the coronavirus outbreak and not to make misleading claims or charge vastly inflated prices. We also remind members of the public that these obligations may apply to them too if they resell goods, for example on online marketplaces.”\(^9\)

The CMA has received 21,000 complaints between 10 March and 19 April 2020 on unfair prices\(^10\) and has written to 187 firms accounting for “over 2,500 complaints about large price rises for personal hygiene products”.\(^11\) This shows that there is real concern amongst consumers who may have been affected by the implementation of excessive prices on essential products.

However, there may be loopholes within competition law which allow unfair pricing to persist. There is growing sentiment among consumers, especially in light of current circumstances, that the CMA should be provided with greater powers to prevent price gouging. Furthermore, it is arguably contradictory that some aspects of competition law have been relaxed by the CMA during the pandemic.

The areas which the CMA have relaxed include:

- Investigating any business which is “appropriate and necessary in order to avoid shortage, or ensure security, of supply”;
- “clearly in the public interest”;

---

\(^7\) https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf


\(^10\) https://www.ft.com/content/6af426bc-bfa3-4acb-86e0-c72eb0333e7e

• “contribute to the benefit or wellbeing of customers”;
• “deal with critical issues that arise as a result of the COVID-19 pandemic”; and
• “last no longer than necessary to deal with the critical issues.”

Nonetheless, if a business has abused its dominant position, which may be a dominant position conferred by the particular circumstances of the pandemic, and has raised its prices significantly above competitive levels, a claim premised on article 102 TFEU may still be viable.

How to make a complaint

The CMA has set up an online form which allows individuals to submit complaints if they believe a business is behaving unfairly during the COVID-19 outbreak. One of the anti-competitive behaviours noted in the form is "unfair prices for products or services" which includes a list ranging from food products to medical products and hygiene and personal care products. The form is designed to develop the CMA’s understanding of “potential issues arising in connection with the coronavirus outbreak” and "may also be used to assist the CMA in considering or taking competition or consumer enforcement action should that be appropriate".

Conclusion

As Hippocrates once proclaimed, desperate times call for desperate measures. However, a pandemic should not provide an excuse for dominant businesses to exploit their markets by imposing excessive prices on temporarily essential products. Consumers should not bear the cost of profiteering. That conclusion is supported both by English competition law and the wider European law on which it is based.

The CMA’s active stance in investigating and penalising those anti-competitive offenders should not go unnoticed. However, further regulation and clarity on the applicability of competition laws, even if only temporarily, are needed to prevent unfair and anti-competitive practices from evolving during a national emergency.

Dilan Ozdemir
Associate
do@humphrieskerstetter.com
+44 207 632 6908

Humphries Kerstetter LLP
St. Bartholomew House
92 Fleet Street
London EC4Y 1DH
Tel: +44 207 632 6900
www.humphrieskerstetter.com

13 https://www.coronavirus-business-complaint.service.gov.uk/