



The dangers of allowing greater coordination between competitors during the COVID-19 crisis

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On 25 March 2020, the UK's Competition and Markets Authority (CMA) published a document that reassured competitors, it would not take action against coordination undertaken solely to address concerns arising from the COVID-19 crisis and which would not go any further or last any longer than is necessary. Similar statements have been made by many other competition authorities around the world.

It is not the first time that the law has deviated from normal rules of competition to help deal with a crisis. Cartels of various forms have been allowed during times of war and were permitted during the Great Depression of the 1930s. The academic studies into these periods in history are too numerous to list here, but they generally suggest that allowing coordination during times of crisis is a bad idea. Competition laws closely reflect what economic theory teaches us: in most cases, it is competitive markets that can deliver the best outcome for society. For this reason, most forms of coordination between businesses are illegal in the UK. This includes coordination between supermarkets, even if it only relates to distribution and supply.

The move to relax these rules appears to be motivated by a belief that greater coordination will achieve a more reliable supply of food and allow retailers to cope better with spikes in demand for key products. This means sharing stock data and coordinating supply networks, distribution depots, delivery vans, which stores should remain open and possibly also the exchange of staff. A further reason may be the danger of higher prices resulting from bidding wars for these key products. But it is far from clear that greater coordination will have either of these effects or that they will outweigh any loss in competitive forces.

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I. IS THE PROBLEM REALLY ABOUT COMPETITION LAW?

Arguably, the shortages in supermarkets have not come about because of any fundamental problems relating to supply, that coordination between competitors will address. Rather it has resulted from a failure by retailers and government to take decisive action to stop panic buying and stockpiling. This might have protected those hardest hit by the shortages: low-income consumers, the vulnerable and essential workers who do not have time to visit multiple supermarkets to fulfil their basic shopping needs. One driver of this high demand comes from those seeking to profit from the crisis by scooping up supplies of high-demand products like hand sanitizer, only to sell them on at an enormous markup. The CMA is already targeting these practices, using consumer and competition law powers, but ironically may have to ask the government for emergency legislation if problems cannot be addressed using existing laws.

It is, in fact, difficult to see how coordination will help ease any of the issues identified above. For example, balancing out stocks could as easily be achieved by supermarkets trading with each other. Such back-and-forth bargaining would be much more likely to keep prices down than allowing a concerted action and coordinated prices. It is also doubtful that coordination will help avoid unwanted bidding wars between supermarkets, which might naturally be constrained by competition on prices charged to consumers. Indeed, even if prices paid to suppliers did go up, it would only stimulate more production of those products, which is exactly what is needed. Coordination may simply result in a more stable supply through higher prices and less being sold.

It is equally difficult to understand how relaxing competition rules could help deal with labour shortages or misallocation. There is substantial evidence that competitive labour markets (ie competition between the supermarkets to hire people) lead to higher wages, better working conditions, and better allocation of resources. Coordination, on the other hand, could further contribute to shortages, if wages and conditions are not set at the market-clearing level, which competition is generally good at gauging.

II. THE DANGERS OF TRUSTING A PRIVATE CARTEL

A key problem is that the private incentive to collude is not aligned with the legitimate public policy objective of allowing coordination to help ensure reliable supply and reduce shortages. The incentives for a private cartel are quite the opposite: to increase prices directly, or by limiting supply. Historically, there have been many examples of private cartels being encouraged by governments, who, after realizing this misalignment of incentives, resulted in them having to take control of production into a public cartel in order to ensure the public objective of increased supply. This was the case in wartime cartels, such as in Germany in the 1930s, where private cartels were solely replaced by government-run arrangements. When the US government relaxed cartel laws to deal with the Great Depression, empirical studies suggest the private cartels that resulted, prolonged the economy's recovery because they pursued their own interests.

III. HOW DO WE KNOW THEY WILL STOP?

It is notable that many cartels begin with legitimate exchanges of information between competitors, often encouraged by a government department or regulator, but these often go on to become harmful, far-reaching cartel arrangements. The CMA is clear that all 'non-essential collusion' will face enforcement action, but how can we know for certain that coordination will not go beyond what is necessary and that it will stop once the crisis is over? It is very hard to monitor coordination and allowing competitors to share key data will bestow a level of familiarity about one another that did not exist before. This means that even after the relaxing of competition rules ceases, there will still be an increased ability to continue colluding tacitly. This sort of behaviour has been observed in the past. The CMA could deem that higher prices are a price worth paying for reliable supplies, but it is unclear that coordination is really necessary to achieve this.

IV. IF OUTPUT UNDER COMPETITION WAS NOT SUFFICIENT, WHY WOULD CARTEL OUTPUT BE ANY BETTER?

Where supermarkets would normally compete primarily on price and quality, rivalry now also exists in new dimensions, such as reliability of supply. There are two ways businesses can avoid falling behind in this new race. One is, by competing, that is, trying to be better than their competitors. Competition is after all what we trust will provide the best outcome for society over time. But supermarkets can also start rent-seeking, that is, asking the government to exempt them from anti-cartel laws, and thereby they can agree that none of them will outperform the others. The relaxing of the present rules may even cause supermarkets to close some stores, to concentrate supply where it is needed most. Coordination will ensure that those closures do not overlap with each other (thereby ensuring that at least one supplier remains in each geographic location). But ensuring that there is at least one supplier in any area does not equate to ensuring that there is a sustained supply of food in these areas. On the contrary, economic theory would suggest that reduced competition is unlikely to lead to a sustained supply of food.

V. CONCLUSIONS

Without a clear explanation of how 'essential' collusion will help deal with the current crisis and how we can be sure any benefit it will outweigh the very significant dangers that result from a relaxing of enforcement, the wisdom of the CMA's decision is questionable.