

Cars, online sales (delivery / click & collect) and COVID-19  
**NFDA briefing document: Key issues**

## IMPORTANT: Competition law compliance

Penalties for failing to comply with competition law are severe. They include fines of up to 10% of group turnover, exposure to huge damages claims, director disqualification of board members (up to 15 years), and, in the most serious cases, imprisonment for the individuals involved.

Certain types of infringement are obvious, such as agreements between competitors to fix prices or partition markets; however, it is also important that companies understand that the exchange or disclosure of competitively sensitive information by rivals (which can facilitate commercial coordination) can also constitute a serious breach of competition law.

**Each company must determine independently the commercial policy which it intends to adopt on the market. This requirement of independence precludes contact between such companies (including via a trade association) in circumstances where one may influence (or seek to influence) the future commercial conduct on the market of rivals. This includes disclosing to them its intentions concerning its own commercial conduct on the market, whether in the expectation that it will influence the competitors' conduct or otherwise.**

During the COVID-19 crisis, there is a greater need for companies in different sectors to understand the application of emergency laws and government guidance to their business as well as the scope of and criteria for government relief. A trade association can serve as an important conduit for this information and as the spokesperson for industry (with members coming together to seek guidance on the rules and reliefs and to ask the trade association to lobby on their behalf).

Where other exchanges among competitors are strictly necessary to support the national effort to overcome the crisis and to protect consumers, competition authorities are likely to take a benign view; however, where this is not the case and companies seek to coordinate their behaviour or share information on wider commercial issues, they risk future investigation and sanction (absent specific dispensation from the appropriate competition authority).

It follows that this document, commissioned by the NFDA and based on recent government guidelines, offers some insights on operations affected by COVID-19. Companies in the sector may find this guidance useful (although it is provided on a non-reliance basis) and may discuss the application of different rules and government guidelines to them, however, the discussion should focus strictly on the application of the rules etc.; a company should not for example:

- seek consensus on how online sales should be operated (as it is for each company to adopt its own position independently);
- ask rivals how they intend to manage 'click and collect' sales commercially; or
- agree with rivals as to how they will manage sales operations during COVID-19.

By way of example, a statement to a rival along the lines of *"Government guideline X published yesterday permits the delivery of vehicles provided the following precautions are followed at the point of delivery..."* is unlikely to be problematic; a statement along the lines of *"Government guideline X permits the delivery of vehicles provided the following precautions are followed at the point of delivery...; however, [we do not intend to offer this service outside of large metropolitan areas][we intend to apply a surcharge for the delivery service] etc."* is unnecessary information and unlikely to be justifiable.

It follows that competitors should continue to exercise real caution at this time of crisis. It is important to reflect on the purpose of any exchange. If it is genuinely essential to protect the physical safety of employees and consumers, to access and understand Government rules and support and to contribute to the national effort to maintain security of key supplies and services (vital to the welfare of consumers, including those in vulnerable groups) that depend on mobility, it is more likely to be justifiable; however, this will not serve as a broad shield for non-essential exchanges, so it is important to be vigilant and avoid sharing commercial insights. If in any doubt, seek advice first.

## Introduction

This guidance, which reflects government guidelines as at 6 November 2020, is intended to clarify (as far as possible) the current position surrounding requirements and restrictions relating to vehicle selling, transportation and distribution in England.

Please note that different rules currently apply in different parts of the UK.

It is provided to the NFDA by way of general guidance only. **It is not specific legal advice and should not be relied on as such.** Moreover, some aspects of the Government's recent regulation and guidance around COVID-19 are ambiguous and so may be open to different interpretations by enforcement authorities.

## Vehicle sales

### Current government guidance - summary

The Government guidance, as at 6 November 2020, states that (subject to certain exceptions) all non-essential physical retail establishments, which includes vehicle showrooms, are to close during the current four week lockdown in England. These venues can continue to:

- operate click-and-collect (where goods are pre-ordered and collected without the customer having to "enter inside" the dealership premises); and
- deliver purchased vehicles and accessories to customers.

#### What does this mean in practice?

Physical dealership showrooms and outdoor display areas will not be able to operate as such until present restrictions are lifted.

(Dealerships may continue to operate remotely/virtually, for example, with sales colleagues engaging with customers via online chat or through video calls, sending walk-around videos etc.)

Customers can also collect cars or vans which have been purchased (either online or via telephone) from dealerships; however, the dealership should avoid the customer having to "enter inside" the showroom to do so.

It will be up to dealers to decide their handover location. The NFDA envisages that they will either take place from premises expressly permitted to remain open (workshop facilities dealing with car repairs, servicing, MOTs etc.) or from a designated exterior handover area, in each case with full social distancing measures in place to ensure both colleague and customer safety.<sup>1</sup>

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<sup>1</sup> The regulations are not entirely explicit in terms of whether dealer forecourts can be used for this purpose. It is the case that they should not be used for ordinary vehicle retail activities (Part 2 of The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 extends closure requirements to outdoor areas); however, regulations 17(8)(a)(iii) and 18(1)(a)(ii) (exceptions) indicate that this should not prevent a customer from a collecting a vehicle provided they are not required to "enter inside" the dealership premises to do so. Absent further guidance (and the NFDA would recommend that each dealer take their own advice), the NFDA's initial view is that this restriction might sensibly apply to entering the showroom itself, as opposed to visiting a dedicated external collection area (on or near the forecourt) for collection/handover purposes. Indeed, any other

Home delivery options will also be available, with dealers following NFDA best practice or their own COVID-19 precautions.

Car repair and MOT services and vehicle hire businesses fall within a list of permitted exceptions and are permitted to stay open. The Driver & Vehicle Standards Agency (DVSA) has advised MOT testers that they should stay open and that vehicles should have a valid test certificate to drive on the road. However, it has warned that the current guidance could change at any point if it is deemed necessary to offer another MOT extension because of the pandemic.

With regard to vehicle servicing, people are allowed to travel if it is reasonably necessary to obtain services from a business, so this would include assessment and repairs for any serious or dangerous problems with their car.

### Car showrooms

Car showrooms and other premises, including outdoor areas, used for the sale of vehicles in England must be closed and remain closed for the duration of the current lockdown (until otherwise notified).<sup>2</sup>

### Remote purchasing of vehicles

Remote (including online) sales of vehicles (and accessories) can continue with both delivery and click and collect permitted (subject to the limitations below).<sup>3</sup>

Storage and distribution facilities are also excepted from temporary closure, allowing deliveries (necessary for online sales) to still take place.

In any event, the sales and delivery process (like any manufacturing process) should be done in a manner that is safe and compliant with all coronavirus related health and safety requirements. Examples of these requirements are detailed below under '**Suggested hygiene and social distancing measures**'.

With regard to delivery, it is possible that the authorities may once again decide to investigate those travelling (which may include employees providing the delivery service), and so it would be advisable for the employee to be equipped with a letter from his/her employer to explain that travel is essential for the execution of their duties.

With regard to click and collect, consumers are now allowed to travel to collect goods which have been ordered from a business if permitted by the Regulations.<sup>4</sup> However, they must have "pre-ordered" (online or by phone)<sup>5</sup> and must not "enter inside" the premises to do so.

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interpretation would render click and collect difficult (albeit some might choose to implement it through the dealership's servicing and repair facilities).

<sup>2</sup> Regulation 16(4) and paragraph 26 of Part 2 of the Schedule to the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 (the **Regulations**) specifically require the cessation of "*Showrooms and other premises, including outdoor areas, used for the sale or hire of caravans, boats or any vehicle which can be propelled by mechanical means, and car washes*".

<sup>3</sup> Regulation 18(1) of the Regulations allows businesses to continue to sell online and permits delivery and click and collect.

<sup>4</sup> Regulation 6(2)(i) permits a person to "*collect food, drink or other goods which have been ordered from a business, or to access goods or services which are provided, in any way permitted by regulation 17 or 18*".

<sup>5</sup> "Pre-order" is not defined in the Regulations.

Storage and distribution facilities are permitted to remain open and this includes delivery drop off or collection points, where the facilities are in the premises of a business permitted to remain open.<sup>6</sup> Since these include car repair and MOT services, dealers may opt for handover to be carried out within these service areas, or choose another solution (an external handover area on site) that does not require the customer to “enter inside” premises (see above).

For any deposits paid or arrangements for delivery or collection made prior to lockdown, completion of the order during lockdown will need to be in accordance with the Regulations.

While the Regulations do not explicitly prohibit test drives; it is perhaps difficult – at first glance - to see how they would be permissible during lockdown, as they imply a sales process that extends beyond a virtual sale (followed by delivery or click and collect), and may present certain challenges as regards social distancing. The NFDA would recommend that specific legal advice is obtained before contemplating any test drive offering during lockdown.

Of course, although vehicle hire businesses are allowed to remain open, it might also be difficult to justify any form of vehicle rental to customers as a test drive in-kind if a dealer does not normally provide this type of service. Instead, dealers may wish to increase their offerings of virtual video ‘walk-arounds’.

The bottom line is that based on current government guidance, dealers may continue with remote sales, provided they do not operate a car showroom. It is therefore a question of choice in principle. Some dealers may not consider the number of online sales worth the cost and risk of maintaining remote sales and delivery operations at this time (or may be prevented from doing so anyway if many sales colleagues are once again furloughed and therefore unable to work); others may decide to continue selling online generally (at least in terms of taking orders/ offering provisional part-exchange valuations etc.); others may choose to permit sales, but only to more limited groups, notably for emergency services and workers and within key supply chains etc., in order to offer such continued support as they can to the national effort to manage the ongoing crisis.

When weighing up the pros and cons dealers will also need to consider other issues, such as payment in terms of finalising any deposit and finance arrangements to their satisfaction before delivery or click and collect, which may include considerations around the execution of finance agreements and the provision of any associated guidance remotely as part of the sales process (if such procedures are not already established within their business).

Dealers will also need to consider cancellation. The customer may have the right to cancel after delivery as this is an ‘off-premises’ sale, so – residual value issues aside - any dealer contemplating such sales may need to make any changes to their returns/cancellation policy to ensure that the customer pays for the cost of returning the car etc. if they change their mind.

## Suggested hygiene and social distancing measures

These recommendations (some of which are based on strict government guidelines, and which are far from an exhaustive list) can apply where goods are being delivered or collected, and where any necessary repair or maintenance services are being provided.

1. **Necessity.** All employees should only be working where necessary (i.e. where they cannot fulfil their role from home, and this should be limited as far as possible, for example, limiting the number of employees on a delivery run), and where they are not showing any coronavirus symptoms, nor are they or a member of their household self-isolating.

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<sup>6</sup> Part 3 of the Schedule to the Regulations.

2. **Policy.** Businesses should establish clear policies in these areas, ensuring social distancing measures are implemented (such as 2 metres between all employees and the use of personal protection equipment), communicated to their staff and where appropriate communicated to their customers ahead of any delivery, collection or car repairs or MOT service. These can include measures such as informing a customer that their car will be thoroughly cleaned before delivery/collection and that they are expected to observe social distancing with the employee delivering their item or within any waiting area designated for customers awaiting repairs or an MOT.
3. **Continuous risk assessment.** Businesses have a duty at all times to assess the risks posed to their employees and to the public as a result of them operating. This requirement is even more crucial in the current climate, and will help companies understand where a particular delivery, collection or service may be too complicated to be provided safely.

As a minimum, businesses should be following the Government's guidance, including the following: <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19>. If they fail to do so, it will be difficult for them to discharge their general obligations under the Health and Safety at Work Act.

## Part exchanges

It is clear that many dealers will wish to defer sales, deliveries, collections and part-exchanges until after lockdown measures are eased/removed once again.

That said, dealers - particularly those who may choose to continue to sell vehicles online (not via any car showroom) to key/emergency workers - do not appear to be prohibited from taking vehicles in part-exchange during lockdown (provided this service is conducted remotely, respects the above mentioned hygiene and social distancing measures and, as indicated above, is not perceived as part of operating a car showroom).

Critical issues for dealers will centre on how the relevant inspection, valuation and collection aspects of the part-exchange can be operated practically and safely. This will be a matter for each dealer to decide, for example:

- Greater use of remote inspection/valuation (digital video/audio) technology.
  - For example, the *cap hpi consumer appraisal app*,<sup>7</sup> which guides the customer through providing a 360 video appraisal of their vehicle, which is then emailed to the dealer for valuation purposes.
- Dealers will need to consider whether this type of process should replace or just supplement normal inspection processes and, if so, whether contingencies need to be built into the valuation.
- Establishing processes for those attending the customer's address to conduct an (initial / final) appraisal of the part-exchange, for example:
  - Ensuring that the appraiser observes the above-mentioned hygiene and social distancing measures.
  - Ensuring that the appraiser is adequately protected when carrying out the appraisal (equipped with PPE – possibly gloves, masks, seat covers, vehicle sanitiser etc., the vehicle is properly sanitised, can be driven by the appraiser unaccompanied within the terms of any insurance policy etc.) – all of which will involve some degree of advance notification to the customer so they know what to expect/can play their part.
- Adopting similar measures as part of any vehicle delivery and part-exchange collection process.

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<sup>7</sup> <https://www.cap-hpi.com/products-and-services/consumer-appraisal-app>

# Auction houses

## The current government guidance

The Government guidance, as at 6 November 2020, states that Auction houses fall within non-essential retail i.e. they should not be open (at least physically) to customers during the four week lockdown.

## Online Auctions

While there is no current explicit guidance from the Government surrounding the facilitation of auctions online, the most logical guidance to follow is that provided for online retail sales.

Businesses are encouraged to continue operating on an online basis, even those that are not considered necessities, such as clothing and everyday miscellaneous items. As with any retail operation, auction houses must ensure that where employees are still working, the relevant safety procedures are in place, such as the 2 metre restriction between persons.

Some auction houses have been operating in such a manner for some time now, allowing bidders to submit bids online, or on the telephone. Some establishments are also introducing virtual reality experiences, to allow consumers to view and experience a product, before attempting to purchase.

## Delivery/Collection of products

As noted above, whilst the process of auctions can be moved online, there is still the question of delivery and, in particular, collection. In this regard:

- Auction houses may opt to keep all purchased items until the pandemic has passed before distributing to winners.
- Auction houses may offer delivery of their purchased item(s) to the winner's address.

As regards collections, while auction houses may wish to offer winners the option of collecting purchased item(s), the Regulations place restrictions on admitting non-employees / service providers to their premises. That said, drop-offs at agreed or designated locations for collection (i.e. non-premises locations) is not prevented.

Where delivery or collection options are being provided, the guidelines as set by the Government and as outlined briefly above under 'Suggested hygiene and social distancing measures' should be complied with in any event.

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