

In view of the pressures that the current crisis is causing for a number of businesses and the economy as a whole, the Competition and Markets Authority (CMA) has issued [guidance](#) on its approach to merger assessments during the COVID-19 pandemic, in particular on timetable delays, information requests, interim measures and the failing firm defence.

## Timetable Delays

While the CMA is not currently asking merging parties to delay merger notifications, unlike a number of other competition authorities outside the UK, the CMA has confirmed that it is possible that the pre-notification process will take longer within individual cases than it otherwise would, because of difficulties in obtaining information from the merging parties and third parties. In this regard, the CMA has noted that it will take steps, where possible, to mitigate any delays in third party engagement, including publishing Invitations to Comment during the pre-notification process.

## Information Requests

In recognition of the fact that some businesses may encounter difficulties in engaging with the CMA, the CMA has confirmed that substantiated claims that a business is facing difficulties brought about by COVID-19 will generally constitute a reasonable excuse for not providing certain information by a specified deadline in response to a statutory information request. However, in line with its usual practice, the CMA has confirmed that it may stop the clock where merging parties are unable to provide information by a specified deadline set out in a statutory information request.

## Interim Measures

The CMA has confirmed that it will continue to impose interim measures in completed mergers in line with its policy pre-COVID-19 and that it is unlikely to lift interim measures during the course of its review. However, the guidance confirms that the CMA will assess requests for derogations on a case-by-case basis in order to address operational challenges brought about by COVID-19.

## Failing Firm Claims

The guidance confirms that the COVID-19 pandemic has not brought about any relaxation of the standards by which mergers are assessed in the UK. However, the CMA has acknowledged that the current market environment may lead to additional submissions that firms involved in mergers are failing financially and would have exited the market absent the merger in question ("failing firm" claims). For example, after referring Amazon's investment in Deliveroo to an in-depth Phase II investigation, the COVID-19 pandemic has placed Deliveroo in financial difficulty and thereby created a competitive environment very different from the one that prevailed when the CMA originally called in Amazon's investment. To take account of the change, the parties advanced a failing firm defence before the CMA: Deliveroo is likely to exit the market unless it receives the additional funding available through the transaction, and the loss of Deliveroo as a competitor would be more detrimental to competition and to consumers than permitting the Amazon investment to proceed. The CMA has provisionally determined that Deliveroo would not survive the COVID-19 disruption without additional investment and that the investment required is only realistically available from Amazon. On that basis, Amazon's proposed investment in Deliveroo would not result in a substantial lessening of competition compared to what would otherwise happen, and the CMA has provisionally decided to clear it to proceed.

In recognition of the likely increase in failing firm claims, like the one advanced in Amazon/Deliveroo, the CMA has published an annex to its guidance on merger assessment during the COVID-19 pandemic, which is intended to act as a short reference guide for how the CMA will assess mergers involving failing firm claims.

## Counterfactual

Failing firm claims are typically considered as part of the CMA's assessment of the counterfactual. The counterfactual is an analytical tool that provides the basis for a comparison of the competitive situation on the market with the merger against the future competitive situation on the market without the merger. Where one of the parties to the transaction is likely to exit the market absent the transaction under review, the CMA may consider the exiting firm scenario to be the relevant counterfactual. The exiting firm scenario is most commonly considered when one of the firms is said to be failing financially and would have exited the market without the merger because of financial failure.

## A Three-limb Test

The annex repeats current practice in assessing failing firm arguments through a three-limb framework requiring the CMA to consider:

- Whether the target firm would have left the market (through failure or otherwise)
- Whether there would have been an alternative purchaser for the firm or its assets to the acquirer under investigation
- What would have happened to the firm's sales in the event of its exit from the market

The COVID-19 pandemic is unlikely to impact the CMA's analysis of the existing firm scenario and, in practice, it will remain difficult for merging parties to satisfy the above test to the requisite standard of proof. For instance, where a firm may be exiting the market due to financial failure, a high evidential threshold must be satisfied in order to prove that the firm is unable to meet its financial obligations in the near future, with contemporaneous analysis typically being requested by the CMA from external legal, financial and insolvency advisers. Equally, even if the CMA believes that the firm would have exited, it is difficult to prove that no alternative purchaser could be found whose acquisition of the firm as a going concern, or of its assets, would produce a better outcome for competition than the merger under consideration. However, both the broader guidance and the annex on failing firm scenarios provide helpful insight into the CMA's attitude to merger assessment during the present exceptional times. The Amazon/Deliveroo decision is an early example of this refined approach and a case in which the CMA has (at least provisionally) concluded that the parties have succeeded in meeting the failing firm defence test.

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