



COVID-19: What is the CMA's current approach to UK merger assessment?

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The guidance

Overall approach

The CMA has reiterated that its binding, statutory timeframes for merger investigations have not changed nor has its general approach to its competition law assessment. It will fully investigate potential competition concerns and take appropriate action, if required. The CMA has adjusted its working arrangements in order to progress merger investigations “as close to the usual as possible” and to continue meeting its deadlines. It has, nevertheless, acknowledged that there may be delays to some aspects of its investigations, particularly at the pre-notification stage, due to difficulties in obtaining the necessary information/data for its assessment.

However, it has also reiterated that “it is not currently asking merging parties to delay merger notifications”, but is encouraging merging parties “to consider whether some filings could be postponed”.

Information-gathering

The gathering of information from the merging parties and also third parties, such as suppliers, customers and competitors, is an essential part of the CMA's merger investigation process. The CMA has acknowledged that some businesses may face difficulties in responding to its statutory information requests (under s109 of the Enterprise Act 2002) as a result of conflicting priorities or the availability of staff caused by the current crisis.

To this end, the CMA has confirmed that it is “unlikely” to impose penalties on businesses which are unable to comply with its statutory information requests by the specified deadline due to difficulties arising from COVID-19. Such difficulties will generally be accepted as a reasonable excuse for non-compliance. It is, therefore, important for a business to check the legal nature of any information request received from the CMA and, if

a response is mandatory (ie. it is a s109 request from the CMA) and compliance by the deadline poses genuine difficulties, it is advisable to engage as soon as possible with the CMA and substantiate these difficulties. If the merging parties are unable to respond fully to a statutory information request by the deadline, there may be significant timing implications as it is open to the CMA to “stop the clock” and, thus, suspend its review timetable until the information is forthcoming.

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The timing of investigations

The CMA is “keen to ensure that its investigations can be completed as quickly and efficiently as possible, but, as mentioned above, it is conscious that there may be difficulties in obtaining the necessary information and has indicated that consequently parts of its investigation may be subject to delays. In the present circumstances, it will be even more key for merging parties and their legal advisors to engage with the CMA as early as possible and discuss timings and potential information-gathering challenges. Merging parties will certainly wish to avoid a situation where the CMA has to refer their transaction to an in-depth Phase II investigation because it has not been able to resolve its competition concerns within the fixed Phase I timetable as a result of difficulties in obtaining third-party information.

The CMA is asking that, when the CMA is first contacted about a transaction (ie. when the case team allocation request is submitted), merging parties give as much detail, and be as realistic, as possible about the likely timings and to then keep the CMA updated.

The CMA has also indicated that it may not commence its 40-working day Phase I review where third parties are unable to engage with its investigation. In order to mitigate possible delays, the CMA may publish Invitations to Comment during the pre-notification stage rather than on commencement of the formal Phase I review.

Meetings and hearings

The CMA has reiterated that meetings and hearings continue to be conducted remotely and “have worked well.” During a Phase II investigation, there are usually site visits early on and the CMA has confirmed that these will not presently be taking place. Instead it will arrange alternative opportunities to gain greater understanding of the businesses involved and meet remotely with key operational staff. Even if current restrictions are lifted at a later stage of an ongoing Phase II investigation, site visits will not then take place.

Interim measures

During the pandemic, the CMA is continuing to impose interim measures in relation to completed mergers, although it has acknowledged receiving “a high volume” of requests from merging parties for changes to such measures. It has reiterated the need to preserve the pre-merger structure of the market whilst it investigates completed mergers. However, it has emphasised that it can act swiftly where the merging parties demonstrate that derogations are necessary to ensure the viability of the businesses and appropriate safeguards are put in place.

Again, it is important for the merging parties and their legal advisors to engage promptly with the CMA’s case team and also to put forward a “fully specified, reasoned and evidenced” request if a derogation is required.

Substantive assessment

COVID-19 will not present the merging parties with a free pass for merger clearance. The CMA is not relaxing its investigational or assessment standards but intends to continue to conduct “rigorous” merger investigations which are “forward-looking and evidence-led”. It will analyse the available evidence in respect of the possible impacts of the pandemic on competition on a case-by-case basis.

The CMA has also recognised that the current crisis may lead to more merging parties claiming a “failing firm” defence, ie. submitting that the business is failing financially and would have exited the market, but for the merger. Any such submission will be considered on the specific facts of the case. The CMA has published a “refresher” on how it is likely to approach “failing firm” claims to accompany the new general guidance.

This refresher refers to the CMA’s Merger Assessment Guidelines and, in particular, that the CMA generally considers the following questions when assessing a “failing” or “exiting” firm claim:

- whether the business would have exited the market absent the transaction (whether as a result of financial failure or otherwise)
- whether there would have been an alternative purchaser for the business or its assets (usually prior to the acquisition in relation to a completed merger), and
- what the impact on competition would be if the business had exited the market compared with the competitive outcome arising from the transaction.

It has highlighted that there is a higher evidential threshold for establishing a "failing firm defence" at Phase I as compelling evidence is required. The CMA makes clear that it:

"needs to ensure that its decisions are based on evidence and not speculation, and will carefully consider the available evidence in relation to the possible impacts of Coronavirus (COVID-19) on competition in each case".

If merging parties wish to make a "failing firm" claim, they are asked to inform the CMA at the time of submitting their case team allocation request form and to engage with the case team as early as possible about the information which the CMA is likely to need regarding the business's financial position and the existence of alternative purchasers. The CMA will look to test thoroughly the supporting evidence provided by the parties.

Recent merger decisions highlighting the CMA's approach

Since mid-March, the CMA has continued to investigate mergers and reach its decisions within its statutory deadlines, including in some cases making Phase II references.

When [announcing](#) its recent decision to clear the completed acquisition of Just Eat plc by Takeaway.com NV, the CMA highlighted that it is "working with businesses where it can be to be flexible" and "trying to complete investigations efficiently at this time, wherever possible, to provide businesses with certainty". In this case, it had reached its clearance decision twenty-six days ahead of its statutory deadline.

The CMA has been undertaking an in-depth Phase II investigation into Amazon's investment in Deliveroo. The CMA had been concerned that the transaction could damage competition in the UK by discouraging Amazon from re-entering the online restaurant food market and from further developing its presence within the online convenience grocery delivery market. However, the CMA has provisionally [cleared](#) the investment as a result of a deterioration in Deliveroo's financial position due to the pandemic.

Deliveroo had informed the CMA that, as a result of the pandemic and a significant decline in revenue, it would fail financially and exit the market in the absence of the Amazon investment. The CMA investigated this as a matter of urgency and has provisionally concluded that Deliveroo's exit would be inevitable without access to significant additional funding which, at this time, only Amazon would be able and willing to provide. The CMA considered that Deliveroo's exit from the market would be worse for competition than allowing Amazon's investment.

In relation to its investigation into the completed acquisition by ION Investment Group Limited of Broadway Technology Holdings LLC, the CMA has stopped the clock and announced that it has extended the applicable deadlines until a satisfactory response is received following ION's failure to respond to the CMA's statutory information request by the specified deadline.

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- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
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- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
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