

COVID-19: PRESSURE POINTS: CMA PROVISIONALLY CLEARS AMAZON/DELIVEROO UNDER FAILING FIRM DEFENCE (UK)

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Legal Briefings

On 17 April 2020 the CMA [announced](#) its provisional clearance of Amazon's proposed acquisition of a stake in Deliveroo. The transaction was referred for an in-depth Phase 2 investigation in December 2019, in light of concerns about the impact on competition for the supply of online restaurant delivery platforms and the supply of online convenience groceries. However, the ongoing COVID-19 pandemic has resulted in significant changes to the competitive environment since the start of the CMA's investigation: against a backdrop of restaurant closures, consumer fears over contamination, and a significant reduction in the number of available drivers, Deliveroo has provided evidence to the CMA that without the Amazon investment it will fail financially and be forced to exit the market.

The CMA's press release states that the CMA has been "considering this new evidence as a matter of urgency", in light of the "wholly unprecedented circumstances" resulting from the current crisis. It has provisionally concluded that the transaction will not be expected to result in a substantial lessening of competition on the basis of the so-called "failing firm" defence: 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.

Whilst this is only a provisional conclusion at this stage (with a final decision due by 11 June 2020 following a consultation process), the CMA is clearly indicating its willingness to take

into account changes to the competitive environment resulting from the COVID-19 pandemic. By way of summary of the key points:

- This is the first application of the failing firm defence during the COVID-19 pandemic, which we have been anticipating that merging parties will seek to rely upon more frequently given the economic impact of the pandemic.
- It is also interesting to note that just two days earlier, on 15 April 2020 the CMA [revoked](#) an interim enforcement order (IEO) – also known as a “hold-separate” order – imposed in Takeaway.com’s acquisition of Just Eat, on the basis that there was no longer a risk of pre-emptive action. This is an unusual step for the CMA to take during a Phase 1 review and suggests that the CMA has concluded provisionally that it has no competition concerns (the Phase 1 decision in that case is expected by 19 May 2020).
- However, the CMA’s approach is also likely to be of wider application beyond the online food delivery sector, and should offer some encouragement to merging parties wishing to rely on the “failing firm” defence (whilst noting that this has historically been a difficult argument to run, and it is too early to say whether the CMA will relax its usual strict application of the relevant criteria).
- The impact of COVID-19 on the relevant “counterfactual” when assessing the impact of a merger on competition is just one aspect of how the crisis is currently affecting merger control review, both in terms of process and substantive assessment.
- Merging parties should also factor in likely delays to the review process (whether as a result of formal changes to review deadlines or increased use of “stop the clock” mechanisms), and be aware that the precedent value of previous decisions may be reduced in markets which have been significantly impacted by the COVID-19 pandemic.

BACKGROUND

In October 2019 the CMA launched an investigation into the acquisition by Amazon of certain rights and a minority shareholding in Deliveroo. The CMA concluded that in light of its expertise in the sector and the size of the investment, together with certain other rights, Amazon would acquire material influence over Deliveroo (which met the relevant UK turnover threshold), thereby giving the CMA jurisdiction to review the transaction.

The CMA identified competition issues in the markets for online food platforms and for online convenience groceries. It expressed concern that without the investment, Amazon would have re-entered the online restaurant delivery market, thereby increasing competition in a highly concentrated market with high barriers to entry. The CMA was also concerned that the transaction would damage competition in the emerging market for online convenience grocery delivery, where Amazon and Deliveroo already had market leading positions.

In December 2019 the transaction was referred for an in-depth Phase 2 investigation. The CMA has now announced its provisional findings in its Phase 2 investigation, concluding that in light of the impact of the COVID-19 pandemic, the transaction will not be expected to result in a substantial lessening of competition on the basis of the so-called “failing firm” defence: 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. In particular, the CMA has expressed concerns that Deliveroo exiting the market could mean that some customers are cut off from online food delivery altogether, with others facing higher prices or a reduction in service quality.

ASSESSING THE IMPACT OF A MERGER IN A FAILING FIRM/EXITING FIRM SCENARIO

The CMA’s [Merger Assessment Guidelines](#) expressly identify an “exiting firm” scenario as an example of a situation where the CMA may use a “counterfactual” (i.e. the conditions of competition against which to compare the post-merger position) which is different from the prevailing conditions of competition pre-merger. The guidelines state that the CMA will consider three factors to determine whether the exiting firm counterfactual will apply to a merger situation:

- whether the firm would have exited (through failure or otherwise); and, if so;
- whether there would have been an alternative purchaser for the firm or its assets to the acquirer under consideration; and
- what would have happened to the sales of the firm in the event of its exit.

To date, the CMA has only accepted the use of an “exiting firm” counterfactual in a very limited number of cases (notable recent examples being [East Coast Buses/First Scotland East](#) (2017) and [Aer Lingus/Cityjet](#) (2018)), in line with the strict approach taken by its predecessor, the OFT.

IMPACT OF COVID-19 PANDEMIC ON THE FAILING FIRM DEFENCE

It has been widely anticipated that the COVID-19 pandemic is likely to result in merging parties seeking to rely more frequently on the failing firm defence, given the economic impact of the pandemic. It is clearly too early to draw conclusions as to whether the CMA will relax its usually strict approach in light of the current crisis, but the provisional findings announced in the *Amazon/Deliveroo* case should offer at least some encouragement to merging parties, and indicate the CMA’s willingness to take into account changes to the competitive environment where the parties can show that those changes will have a direct and material impact on their businesses.

It is however important to note the case-specific factors taken into account in the *Amazon/Deliveroo* case, in particular that Deliveroo is a developing business which is particularly reliant on continued investment to be able to support its operations, and the availability of finance for such early-stage businesses has been severely limited by the COVID-19 pandemic.

BROADER IMPACT OF COVID 19 ON MERGER CONTROL REVIEW

The impact of COVID-19 on the relevant “counterfactual” when assessing the impact of a merger on competition is just one aspect of how the crisis is currently affecting merger control review, both in terms of process and substantive assessment.

With regard to the review process, merging parties should factor in the possibility of delays, and ensure that this is addressed in deal documentation. The CMA has indicated that it currently intends to meet statutory review deadlines as normal (in contrast to many other national competition authorities in Europe which have implemented formal suspensions of the review process). However, it seems likely that we will see increased use of “stop the clock” mechanisms, particularly in light of increased difficulties in obtaining responses to detailed information requests at a time when many companies are in “crisis mode”.

In terms of substantive review, the *Amazon/Deliveroo* provisional findings offer a good illustration of the importance of revisiting the assessment of the impact of a current or contemplated transaction on competition in light of the impact of the COVID-19 pandemic. It is also important to be aware that the precedent value of previous decisions may be reduced in markets which have been significantly impacted by the COVID-19 pandemic, particularly where changes to competitive conditions are unlikely to be merely temporary.

The impact of the COVID-19 pandemic on merger control review, and the potential for greater use of the failing firm defence, is discussed in more detail in our recent webinar, which is available on-demand [here](#).

[Navigating the COVID-19 Outbreak](#)

[COVID-19 UK](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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