

Insights

MERGER CONTROL DURING AN ECONOMIC DOWNTURN: WHAT OPPORTUNITIES MAY THE “EXITING FIRM DEFENCE” OFFER BUYERS?

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SUMMARY

On 17 April, the Competition and Markets Authority provisionally cleared Amazon’s acquisition of a minority shareholding and certain other rights in Deliveroo. This provisional decision highlights how the so-called “exiting firm defence” may apply in merger control cases during the COVID-19 pandemic (and any surrounding economic downturn) and allow deals which may otherwise raise competition concerns to be cleared unconditionally.

The Amazon/Deliveroo case

The CMA launched an investigation into Amazon’s investment in Deliveroo on 16 October 2019. At the end of its Phase 1 investigation, on 11 December 2019, the CMA decided that the deal merited an in-depth Phase 2 investigation, citing concerns that the deal could damage competition by discouraging Amazon from re-entering the online restaurant food market and further developing its presence within the online convenience grocery delivery market in the UK.

However, in its decision last week, the CMA provisionally cleared the deal on the basis that:

- as a result of the COVID-19 crisis, Deliveroo was likely to exit the market unless it received additional funding;
- no less anti-competitive investor than Amazon was available to provide the necessary funding; 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’s provisional decision is now open for consultation until 11 May and the CMA must issue its final decision by 11 June.

The exiting firm defence

The exiting firm defence is a feature of many merger control regimes, including in the UK and EU. In order to successfully avail themselves of the defence and thereby obtain merger control clearance, the parties to a deal under investigation will generally have to prove that:

- absent the transaction, the target firm would have exited the market (through failure or otherwise);
- there was no less anti-competitive alternative purchaser for the firm or its assets; and
- the result of the exit of the firm and its assets would be a less anti-competitive outcome than the transaction under consideration.

In usual circumstances, an exiting firm defence is rarely successful. The authorities require robust evidence that each of the criteria is met and will place particular weight on parties' internal documents which were not prepared for the purposes of the investigation. Under the UK regime, it may also be easier to put forward successfully an exiting firm defence during a Phase 2 investigation than during Phase 1. During a Phase 1 investigation, for example, the CMA must believe on the basis of compelling evidence that the target firm's exit is inevitable and it must be able to conclude that there is no realistic prospect of a substantially less anti-competitive alternative to the merger under consideration. By way of contrast, at Phase 2, the CMA has discretion to determine whether, on the balance of probabilities, the merger under consideration is a better outcome from a competition perspective than the situation that would prevail if the deal were not to go ahead. That being said, the CMA has previously cleared deals at Phase 1 on the basis that the target is "exiting", and it may well have cleared the Amazon/Deliveroo deal at Phase 1 if the problems facing Deliveroo now had been present at the time.

The challenges presented by the COVID-19 pandemic may mean that the acquisition of struggling targets by "trade buyers" are capable of regulatory clearance, which otherwise would have been thought of as in the "too difficult camp" from a competition perspective. The CMA is operating remotely and considering deals on its usual timescales. It has also demonstrated a willingness to engage pragmatically with novel transaction-specific challenges presented by the pandemic.

Our Antitrust & Competition team has significant experience advising on these matters and would be delighted to answer any questions you may have about the exiting firm defence or merger control issues more generally at this time. We have also produced [this guide to competition law](#) (including merger control) during the COVID-19 crisis.

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