

CMA Provisionally Clears Amazon's Investment in Deliveroo Due to COVID-19 Impact

April 20, 2020

Key Points

- On April 17, 2020, the CMA provisionally cleared Amazon's investment in Deliveroo in light of the deterioration in Deliveroo's financial position caused by COVID-19.
- The CMA has provisionally concluded that Deliveroo's exit from the market would be inevitable without access to significant additional funding (which only Amazon would be willing and able to provide at this time) and that the imminent exit of Deliveroo would be worse for competition than allowing the Amazon investment to proceed.
- This is the first time that the CMA has referenced the impact of COVID-19 in its substantive assessment, and is one of few "failing firm defence" cases to date.
- Third parties have until May 11, 2020, to provide their views on the CMA's provisional findings and the CMA then has until June 11, 2020, to reach its final decision.

On December 27, 2019, the U.K. Competition and Markets Authority (CMA) referred the acquisition by Amazon of a minority (c. 10 to 16 percent) stake and certain accompanying rights (including board representation) in Deliveroo for an in-depth Phase II review in light of concerns that the transaction may be expected to result in a substantial lessening of competition (SLC). More specifically, the CMA had concerns that as a result of the transaction Amazon would be discouraged from independently re-entering the online restaurant food market and from further developing its position within the online convenience grocery delivery market in the U.K.¹

However, on April 17, 2020, the CMA announced that in light of a significant deterioration in Deliveroo's financial position as result of COVID-19, it had taken the decision to provisionally clear Amazon's investment in Deliveroo.² This is the first time that we have seen the CMA specifically reference the impact of the COVID-19 pandemic in the context of its substantive assessment of an ongoing transaction.³

Following a submission made by Deliveroo (supported by evidence from its financial advisers), the CMA took into account the impact of COVID-19 when determining the correct counterfactual (i.e., the most likely competitive conditions that would have

Contact Information

If you have any questions concerning this alert, please contact:

Davina Garrod

Partner

davina.garrod@akingump.com

London

+44 20.7661.5480

Scott Pettifor

Counsel

scott.pettifor@akingump.com

London

+44 20.7012.9637

existed in the absence of the transaction) against which to assess the impact of the transaction. Whilst the CMA typically defines the prevailing conditions of competition as being the correct counterfactual, one exception is the so-called “exit-firm scenario” (or “failing-firm defence”). In an exit-firm scenario, the CMA instead considers whether one of the merging parties may have left the market absent the transaction and the impact this would have on competition.

Applying its three-limb exit-firm scenario test to the Amazon/Deliveroo transaction, the CMA has provisionally found that: (i) Deliveroo’s exit from the market would be inevitable and imminent unless it receives the additional funding from Amazon available through the transaction (limb one); (ii) there are no alternative investors or purchasers for Deliveroo’s assets that would have created a substantially less anticompetitive landscape (limb two); and (iii) Deliveroo’s departure from the market would be more detrimental to competition and consumers than allowing the investment to proceed (limb three).

In reaching the above conclusions, the CMA relied on a number of factors, including in particular:

- Deliveroo’s financial position has been “substantially affected” as a result of the COVID-19 pandemic which the CMA concluded has led to a “significant reduction in the number of restaurants operating during the crisis ... [including] major brands that account for a significant proportion of Deliveroo’s orders. Deliveroo has also experienced a significant decline in revenue.”
- Deliveroo has responded by seeking to expand its supply of convenience groceries during the crisis, however, these sales are limited and have not offset (nor are they expected to materially offset) losses in its restaurants business.
- Whilst Deliveroo has grown strongly and accounts for a significant share of the online restaurant platform market in the U.K., as a loss-making business that is still developing it is particularly reliant on continued external investment to be able to support its operations.
- At this time only Amazon would be willing to provide the significant additional funding necessary to avoid Deliveroo’s exit from the market. Whilst securing additional funding from other sources (e.g., existing shareholders, other third-party investors and debt funding) may have been possible before the COVID-19 outbreak, the pandemic has severely limited the availability of finance for early-stage businesses such as Deliveroo.
- If Deliveroo were to exit the market this could mean that some customers would be cut off from online food delivery altogether, with others facing higher prices or a reduction in service quality.
- Even if the transaction were to reduce Amazon’s incentive to re-enter the market, exit by Deliveroo would result in significantly weaker competition over an extended period of time, and this would be the case even if Amazon ultimately re-entered the market successfully.

In light of the above, the CMA has provisionally concluded that the exit firm scenario is applicable and, as such, that the transaction is not expected to result in an SLC and should therefore be cleared unconditionally. Third parties now have until May 11, 2020, to provide their views on the provisional findings and the CMA will then assess any responses it receives before reaching its final decision by June 11, 2020.⁴

¹ See the CMA's Phase I [press release](#).

² See the CMA's Phase II provisional findings [summary](#).

³ Whilst in the merger control context the CMA has formally been operating on a business as usual basis (and in particular in respect of ongoing reviews subject to statutory deadlines), we understand that from a timing/resource perspective the CMA has been informally encouraging the delay of non-urgent filings. COVID-19 has also impacted other aspects of the CMA's work, for example: (i) on March 16, the CMA [announced](#) that it was extending the statutory deadline for its funeral market investigation by six months; and (ii) on March 24, 2020, the CMA [announced](#) that it would be taking into account the disrupted market conditions caused by COVID-19 when making its final decision in the pricing dispute between NATS (the air-traffic services provider) and the Civil Aviation Authority.

⁴ Whilst provisional findings are not the CMA's final view on a transaction, they have to-date been a good indicator of the CMA's ultimate decision. This is because there have been very few instances in which the CMA or its predecessor (the Competition Commission) have reversed their Phase II provisional findings. Importantly with respect to the Amazon/Deliveroo transaction, none of these reversals have involved a shift from a finding of no SLC to an SLC finding.

akingump.com