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Guidance

Merger assessments during the Coronavirus (COVID-19) pandemic

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The CMA is aware of the pressures which the current crisis is causing for a number of businesses and the economy as a whole. The CMA has been working closely with government to relax competition law where appropriate and to provide guidance on the CMA's approach to essential business cooperation during the current crisis. The CMA has also already published some guidance on its own working arrangements during the pandemic.

The CMA is also conscious that the pressures brought about by Coronavirus (Covid-19) could have a material impact on its merger control work. The information set out below is intended to provide further detail on the CMA's expected approach over the coming weeks and months.

Overall approach

The CMA's merger control investigations follow established processes, set out in its published guidance, and are subject to binding statutory deadlines. The timescales under which the CMA is required to operate have not been altered.

The CMA has made a number of adjustments to its own working arrangements, in particular through increased remote working and the internal reallocation of staff, to ensure that it is able to continue progressing cases in as close to the usual way as possible, and to continue making decisions and meeting deadlines. It remains possible, however, that some aspects of investigations, in particular, the pre-notification process, may be subject to some delay, as described further below.

On the substance of the cases that come before us, the CMA's overall approach to assessing whether a merger gives rise to competition concerns remains unchanged. It will continue to investigate potential competitive concerns fully and take appropriate action where necessary.

Information-gathering

It is already clear that some businesses (whether merging parties or third parties) are facing challenges, as a result of Coronavirus, that make it difficult to engage with the CMA's merger investigations.

In particular, the CMA understands that businesses may encounter difficulties in responding to statutory information requests during this period because of conflicting priorities or staff availability. Substantiated claims that a business is facing difficulties brought about by Coronavirus will generally constitute a reasonable excuse for not providing certain information by a specified deadline in response to a statutory information request, i.e. under the CMA's information-gathering powers set out in section 109 of the Enterprise Act.

The CMA is therefore unlikely to impose penalties where businesses are unable to comply with statutory requests for information by the specified deadline in such circumstances. In keeping with its usual practice, the CMA may 'stop the clock' where merging parties are unable to provide information by a specified deadline in a statutory information request.

The timing of investigations

The statutory deadlines that apply to the CMA's work have not been altered. The CMA remains keen to ensure that its investigations can be completed as quickly and efficiently as possible, given that merger control is critical to the competitive functioning of markets in the longer term. The Coronavirus pandemic is, however, likely to raise some challenges to the expedient running of investigations, in particular because of the difficulties, as noted above, that may arise in obtaining the information that the CMA requires to carry out its statutory duties.

Within individual cases, it is possible that the pre-notification process will take longer than it otherwise would because of difficulties in obtaining information from the merging parties and third parties. In particular, the CMA may not be able to start the 40-working day clock where third parties are unable to meaningfully engage with the CMA's investigation. It will take steps where possible to mitigate any delays in third party engagement, for example by publishing Invitations to Comment during the pre-notification process. The timing of individual cases should be discussed with the relevant case team.

Unlike a number of other competition authorities, the CMA is not currently asking merging parties to delay merger notifications, because we do not see this working well with the UK's voluntary system of merger control. The CMA would, however, encourage merging parties to consider whether some filings could be postponed (e.g. where a merger is not particularly well-advanced and may not ultimately proceed).

When submitting a case team allocation form to the CMA, merging parties are asked to provide as much information as possible (and to be realistic) about the likely timing of the case. Merging parties are then asked to update the CMA on a regular basis regarding any changes in the timing of mergers under consideration or changes in the likelihood that these mergers will proceed under current market conditions.

Meetings and hearings

All meetings are being conducted remotely via videoconferencing or telephone. It is no longer necessary or appropriate, given the official UK government guidance, to hold face-to-face external meetings.

The same principle applies equally to all meetings and hearings that make up part of the formal investigation process, (i.e. issues meetings, main party hearings and remedies hearings). A number of these meetings have already been held remotely and have worked well. Arrangements for these meetings in ongoing and future cases should be discussed with the relevant case team.

The 'site visits' that typically occur during the early weeks of a Phase 2 investigation will not take place at present. The CMA will arrange an alternative opportunity to gain a greater understanding of the Parties' businesses and meet (remotely) key operational staff during the early stages of the Phase 2 investigation.

Site visits will not be rearranged at a later stage of a Phase 2 investigation in the event that the restrictions on in-person meetings brought about by Coronavirus are relaxed in the coming weeks or months.

Interim measures

The CMA has already received a high volume of requests from merging parties for changes to interim measures in completed mergers (i.e. initial enforcement orders (IEO) and interim orders (IO)) in order to address operational challenges brought about by Coronavirus.

The CMA will assess each request on a case by case basis. If the CMA decides to investigate a merger, it is essential to the functioning of the UK merger regime that the pre-merger competitive structure of the market is preserved during its review. The CMA will therefore continue to impose interim measures in line with its policy pre-Coronavirus, and is unlikely to lift interim measures that are already in place, during the course of its review.

Derogations can be, and have been, granted rapidly where merging parties demonstrate that such steps are necessary to ensure the viability of their businesses, and appropriate safeguards are put in place to protect the CMA's ability to take appropriate action to protect UK consumers as part of the merger review process.

The CMA encourages merging parties to engage with the relevant case team as early as possible after they conclude that such derogations may be necessary. As ever, derogations can be granted more quickly where they are fully specified, reasoned and evidenced.

Substantive assessment

The Coronavirus pandemic has not brought about any relaxation of the standards by which mergers are assessed or the CMA's investigational standards. It remains critical to preserve competition in markets through rigorous merger investigations in order to protect the interests of consumers in the longer term.

The CMA's merger investigations are forward-looking and evidence-led, and the impacts of Coronavirus will be factored into the substantive assessment of a merger where appropriate. It is clear that, at least in the short-term, there will be a substantial impact across the UK as a result of changes in market conditions. There remains considerable uncertainty about the extent and duration of this impact. A merger control investigation typically looks beyond the short-term and considers what lasting structural impacts a merger might have on the markets at issue. Even significant short-term industry-wide economic shocks may not be sufficient, in themselves, to override competition concerns that a permanent structural change in the market brought about by a merger could raise. The CMA needs to ensure its decisions are based on evidence and not speculation, and will carefully consider the available evidence in relation to the possible impacts of Coronavirus on competition in each case.

Finally, the CMA is aware 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. It is important that these submissions are treated in a fair and transparent way that appropriately protects the interests of consumers. While these submissions are carefully considered on a case-by-case basis, the CMA has issued a general 'refresher' on how it is likely to approach 'failing firm' claims.

Next steps

The CMA's case teams are working very hard in challenging circumstances to ensure that UK consumers continue to be protected. The CMA will continue to assess the conduct of its investigations and may be required to make further changes to its practice in light of the impact of Coronavirus.