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Will COVID-19 Impact UK Merger Control?

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On April 22, 2020, the UK Competition and Markets Authority published guidance on its approach to merger assessments during the COVID-19 pandemic. Overall, the CMA's approach remains unchanged: statutory deadlines remain in place and the standards by which mergers are assessed have not been relaxed. That said, the CMA is "conscious of the challenges" that businesses are facing during the pandemic and will seek to take these into account where it can. For example, the CMA is not likely to impose penalties where companies can demonstrate that they are experiencing difficulties brought about by COVID-19 in responding to statutory information requests. The CMA may stop the clock where merging parties struggle to provide the requested information within the specified deadline.

Regarding timings, unlike other competition authorities, the CMA is not asking merging parties to delay notifying transactions. However, given the challenges with obtaining information during this period, the CMA recognises that it is possible that the prenotification process will take longer. The CMA is prepared to take steps to mitigate any delay, for example, by publishing invitations to comment during the prenotification period. However, the CMA also encourages merging parties to consider whether some filings could be postponed, for example, where the merger is not particularly well advanced and may not ultimately proceed.

The CMA also acknowledges that the current market environment may lead to additional claims that companies involved in mergers are failing financially and would have exited the market absent the merger – the so-called exit firm scenario or the failing firm defence. The CMA has therefore published a refresher on its position on mergers involving failing firms.

In light of these new publications, we set out below some practical steps for businesses to consider when preparing a UK merger filing in the current climate:

- When submitting a case team allocation form, provide as much information as possible about the likely timing of the transaction and regularly update the CMA on any changes to timing during the process
- Factor in the possibility of delays, either due to a longer prenotification process or increased use of the CMA's stop the clock mechanism
- Ensure that the potential for delay is addressed in the deal documentation
- Be prepared to conduct meetings by video conference or by telephone
- Due to the voluntary nature of the UK merger control regime, the CMA plans to continue to impose interim measures to prevent business integration during its investigation. Derogations can be granted upon request but these will need to be fully specified, reasoned and evidenced. Merging parties should therefore engage with the relevant case team as early as possible where such derogations may be necessary
- Evidence the impact of COVID-19 on competition as part of the substantive assessment, particularly where changes to competitive conditions are unlikely to be short term
- If invoking a failing firm defence, make clear in the case team allocation form that the parties are considering such a scenario and be prepared to support such claims with a "material body of probative evidence," which the CMA will test thoroughly

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