

## Company D's response to the CMA's Provisional Findings in Amazon/Deliveroo

### A. Introduction

1. We refer to the CMA's provisional findings (the **PFs**) in Amazon/Deliveroo (the **Transaction**), the summary of which was published on 17 April 2020 and the full version on 27 April 2020.
2. Given our previous interactions with the CMA on this matter, and despite our acknowledgement of the current temporary market conditions, we are disappointed with the PFs – in particular, as regards the CMA's failure to address the concerns we have previously raised. We attach (marked Annex A) sections of our previous submissions to the CMA, detailing those concerns.
3. We are of the view that there are several significant (and inter-related) errors or inadequacies in the CMA's analysis set out in the PFs:
  - a. The CMA attributed undue weight to the alleged negative impact of the significant, but temporary, Coronavirus crisis. See **Section B**. This skew to the short term is ultimately at the expense of UK consumers.
  - b. The search for alternative purchasers/investors for Deliveroo was not sufficiently rigorous. See **Section C**.
  - c. The CMA was wrong to find that Deliveroo or its assets would exit the market absent the Transaction. See **Section D**.
  - d. The CMA's SLC analysis is flawed. See **Section E**.
4. **Sections C to E** cover the CMA's assessment of the three limbs of the Failing Firm (**FF**) test. To assist the CMA we have sought to provide our views by limb (although we note the CMA's analysis often straddles several limbs simultaneously). An error in relation to one of the three limbs would negate the CMA's conclusion on FF and its application to Deliveroo.
5. At a minimum, if the CMA is not prepared to block the Transaction, we consider that the CMA should require undertakings or impose conditions on Amazon to address the medium to long-term and irreparable consequences of that clearance, and to prevent a situation in which Amazon is able, by virtue of the voluntary nature of merger control review under the Enterprise Act, to enhance its influence over Deliveroo, without the scrutiny of the CMA. See **Section F**.

### B. The PFs attribute undue weight to the alleged impact of the temporary crisis i.e. the CMA has taken a short term view over a medium to long term one, with the interests of customers suffering as a result

6. The CMA confirms in the PFs that it has pinned its analysis to the Coronavirus crisis (see paras 2<sup>1</sup> and 17<sup>2</sup>).

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<sup>1</sup> "We have provisionally concluded that the Transaction would not be expected to result in an SLC in either the market for online restaurant platforms or the market for online convenience groceries (OCG) on the basis that, **as a result of the Coronavirus (COVID-19) crisis, Deliveroo is likely to exit the market unless it receives the additional funding available through the Transaction**". (emphasis added).

<sup>2</sup> "There are a number of specific features of this case which have been central to our consideration of the exiting firm scenario. Principal among these has been the impact of the Coronavirus (COVID-19) pandemic and the financial consequences that this has brought about for Deliveroo in light of the specific features of Deliveroo's financial position." (emphasis added).

7. Adopting this short term “snapshot” approach entirely skews the analysis – particularly when the CMA’s analysis of the crisis is one-sided.
8. First, the crisis is a **temporary**. Although this is acknowledged by the CMA<sup>3</sup>, the CMA fails to attribute any weight to this in any meaningful way in its analysis. There is scope for significant change in both (i) the prevailing crisis; and (ii) Deliveroo’s position, even in the period before the Final Report is due (i.e. 11 June 2020). For instance, in the three weeks since the CMA published its summary PFs:
  - a. Small dips in the share price/trading levels seen by several companies (including entities comparable to Deliveroo such as Just Eat, Dominoes, GrubHub (US) and Delivery Hero (Germany)) during early March, have now stabilised – in most instances to above pre-crisis levels. This suggests that in the markets in which Deliveroo operates (i) initial crisis-related effects were **temporary**; and (ii) investor confidence remains positive in assets of this nature. See **Section C** below.
  - b. The findings in paragraph 4.42 of the PFs have already been rendered incorrect. We understand that Deliveroo successfully gained access to the Government’s Future Fund – a crisis-related lending scheme to support start-ups and innovative SMEs through the crisis. See paragraph 16 below.
  - c. Major fast food and restaurants chains including Greggs, McDonalds, KFC, Pret, Nandos and Wagamamas have all announced that they are re-opening in the UK for (i) takeaways and (ii) delivery using food marketplaces. See for example, [here](#)<sup>4</sup> and [here](#).<sup>5</sup> Many of these use Deliveroo to reach customers. Deliveroo itself is making this known to customers through email communications. The CMA should thus take account of the fact that revenues earned by Deliveroo from “*major brands*” is likely to return to (if not exceed) normal levels, as restaurants continue to re-open.
  - d. The UK Government has started outlining ways in which the formal lockdown in the UK will be “phased out”, including an acknowledgement on 30 April 2020 that the UK has “*passed the peak...and is on the downward slope*”. Detailed plans were announced by the UK Government on 11 May to reopen schools, businesses and restaurants, and get people back to work (those who cannot work from home are already to return to work in week commencing 11 May). See [here](#).<sup>6</sup>
9. These are just a sample of the significant developments that have occurred since the CMA’s publication of its PFs, all of which is highly relevant to the CMA’s FF analysis. Reliance on temporary market conditions by the CMA as a fundamental element of its FF analysis is both inappropriate and premature, and gives primacy to Deliveroo’s short term liquidity position, over the medium to longer term permanent and irreversible structural consequences of the Transaction on the markets in which Amazon and Deliveroo operate and in particular, the end-consumers in these markets. This is not consistent with the CMA’s statutory responsibilities to protect consumers.
10. Second, the CMA has **only considered the alleged negative impact** of the crisis on Deliveroo. The CMA should not “cherry-pick” the consequences of the crisis to feed into its merger analysis. The CMA failed to attribute due weight to the “upside” of the crisis for companies

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<sup>3</sup> The CMA notes that “...the [COVID-19] situation is evolving rapidly and there remains considerable uncertainty about the extent and duration of this impact” (paragraph 1.5).

<sup>4</sup> Article available here: <https://www.express.co.uk/life-style/food/1273515/Mcdonalds-reopen-open-coronavirus-news>.

<sup>5</sup> Article available here: <https://www.mirror.co.uk/money/wagamama-reopen-four-uk-restaurants-21941100>

<sup>6</sup> Article available here: <https://www.msn.com/en-gb/news/newsbirmingham/boris-johnson-announces-were-past-the-peak-and-will-explain-next-week-how-schools-can-re-open/ar-BB13qQwi>.

like Deliveroo (which are viewed by many to be one of the few “winners” emerging from the crisis). In particular:

- a. The crisis has entrenched the essential nature of marketplace aggregators and food delivery services in both restaurant and OCG markets – both in terms of (i) end-customers accessing food; and (ii) retailers and restaurants accessing end-customers. See [here](#)<sup>7</sup> and [here](#).<sup>8</sup> In early March, reports suggest that takeaways and fast food sales rose by 8.7% in the UK – a significant increase considering that many other sectors have seen a downturn in spend.<sup>9</sup> JustEat announced in early April that both number of orders (up by 50%) and order value soared in Q1 of 2020, given government measures across Europe regarding social distancing.<sup>10</sup> Similarly, Uber Eats announced its Q1 financial results last week, citing a more than 50% year-on-year increase in gross bookings for its food delivery segment<sup>11</sup>, which has had a significant positive effect on its share price – just another example of the current investor confidence in assets of this nature and the positive performance of these assets during the crisis.
- b. More broadly, consumer behaviour and the perception of online shopping have irreversibly changed, as a result of the crisis. The crisis has considerably accelerated the take-up of online shopping and food delivery services by consumers. Public reports suggest that the total number of UK users of online food delivery services in 2020 is up 9.8% on the same period in 2019 – an increase primarily attributed to the Coronavirus crisis. See [here](#).<sup>12</sup>
- c. There are public reports of thousands of chains and local restaurants joining marketplace aggregators (such as Deliveroo, Uber Eats and Just Eat) to replace lost dine-in or pickup trade, with deliveries. See [here](#).<sup>13</sup> Deliveroo itself announced that it registered around 3,000 new UK restaurants on its platform during the month of March 2020 (see [here](#)<sup>14</sup>). A key element highlighted by Uber Eats in its Q1 results was the number and variety of new restaurant selection now available on its platform. Reliance by restaurants on marketplace aggregators is expected to continue for some time, even after strict lockdown measures are lifted, as consumers remain cautious about dining-out. This has been the experience of other markets such as China.
- d. The OCG market has become more competitive than it was pre-crisis. This is evidenced by Deliveroo’s and Amazon’s respective, significant investments in their OCG “crisis” offering<sup>15</sup> (which also demonstrates the closeness of competition between the two entities), including Deliveroo’s expansion of its partnership with Co-op and its entry into new arrangements with McColls, M&S and BP.<sup>16</sup> Amazon has significantly changed its processes and increased colleague numbers, to prioritise stocking and delivery of items that are a higher priority for customers, such as food and health and personal care products. Amazon has also extended its relationship

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<sup>7</sup> Article available here: <https://tcrn.ch/3cB00QX>.

<sup>8</sup> Article available here: <https://www.foodnavigator.com/Article/2020/03/19/Online-food-delivery-one-of-the-only-winners-in-coronavirus-outbreak>

<sup>9</sup> Article available here: <https://www.theguardian.com/business/2020/mar/10/delivery-and-digital-services-thrive-on-coronavirus-outbreak>

<sup>10</sup> Article available here: <https://www.cityam.com/just-eat-takeaway-orders-soar-50-per-cent-amid-coronavirus-lockdown/>

<sup>11</sup> Article available here: <https://www.siliconrepublic.com/companies/uber-earnings-coronavirus-2020-q1>

<sup>12</sup> Article available here: <https://www.deliverect.com/blog/food-delivery/what-food-delivery-in-the-post-coronavirus-era-will-look-like>

<sup>13</sup> Article available here: <https://www.foodnavigator.com/Article/2020/03/19/Online-food-delivery-one-of-the-only-winners-in-coronavirus-outbreak>

<sup>14</sup> Article available here: <https://london.eater.com/2020/3/23/21190601/coronavirus-uk-restaurant-delivery-deliveroo-gordon-ramsay-dishoom-michelin-star>.

<sup>15</sup> [REDACTED]

<sup>16</sup> See for example, article available here: <https://www.bbc.co.uk/news/business-52545028>

with Morrisons.<sup>17</sup> [REDACTED]. Amazon's acquisition of Deliveroo will likely materially suppress this increasing competition. This has not been addressed in the PFs.

11. These "upsides" of the crisis – including the direct bearing these factors would have on Deliveroo's value to potential investors – were not considered by the CMA in its analysis. See **Section C** below for more.
12. Incidentally, at the time the CMA published its summary PFs, the UK had been in a formal lockdown state for less than 4 weeks.<sup>18</sup> This seems to us an extraordinarily short period of time for (i) Deliveroo to identify and notify the CMA that it had or would suffer significant and irreparable financial loss as a result of the crisis in the UK: we note in this context that the first submission by Deliveroo arguing failing firm seems to have been made 3 days prior to the UK Government's lockdown requirement<sup>19</sup>; and (ii) the CMA to conduct a rigorous and robust FF analysis based on "compelling" evidence<sup>20</sup>, to enable it to entirely overcome the significant competition concerns it had previously identified to warrant a Phase 2 review. Reliance (by either the CMA or the merging parties) on the Coronavirus crisis should not be a construct to secure the (provisional) clearance of the Transaction, particularly given the medium to longer term-lasting impact this Transaction will have on the markets and consumers that will be affected by it. As set out in Annex A, the Transaction will – in our view – have a considerable negative effect on consumers in that it will:
  - a. Dampen the crisis-generated competitive status of the OCG market;
  - b. Weaken the incentive of both Amazon and Deliveroo to innovate and invest to improve their respective service offering; and
  - c. [REDACTED].

**C. The search for alternative investors/purchasers was not sufficiently rigorous – the CMA did not obtain the view of alternative investors/purchasers and acceptance of the views of Deliveroo and its investors was not rigorously challenged**

13. Deliveroo is a highly attractive asset. Amazon – one of the world's most sophisticated, cash-rich and ambitious businesses – would not be interested in the Transaction if that was not the case. In our view (and for the reasons set out in para 9), the crisis only highlights Deliveroo's current (and expected future) value.
14. Amazon's rationale for the Transaction confirms this: *"Deliveroo will be a valuable financial investment...given its rapid growth, customer popularity and the strength of its management team"*.<sup>21</sup>

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<sup>17</sup> Article available here: <https://www.yorkshirepost.co.uk/business/morrisons-expands-amazon-same-day-delivery-more-cities-2848161>

<sup>18</sup> The UK Government ordered a "formal" lockdown on 23 March 2020. See [here](#).

<sup>19</sup> The CMA's PFs seem to suggest that Deliveroo has highlighted its weakening financial position to the CMA several times during Phase I and II – but it (Deliveroo) seemed to have attributed that position to the ongoing merger review process making subsequent investment difficult. The CMA's PFs also suggest that Deliveroo's first submission to the CMA as to the impact of COVID-19 on its (primarily UK-based) business was on 20 March 2020, days before the UK's "formal" lockdown, and at a time when most restaurants were still operating as usual. Just Eat, for example, publicly announced (see [here](#)) that while there was a small dip in orders during early March, that dip was temporary – sales and order values have continued to increase steadily during late March and April, rising above pre-crisis levels.

<sup>20</sup> As acknowledged by the CMA's Merger Assessment Guidance in relation to failing firm claims, paragraph 4.3.10. Note also the CMA's new FF guidance (para 28) which states that: *"Given the implications of a 'failing firm' scenario (the clearance of a transaction that could otherwise raise significant competition concerns), 'failing firm' claims are only likely to be accepted, whether at Phase 1 or Phase 2, where supported by a material body of probative evidence, which the merging parties can expect the CMA to test thoroughly with both the merging parties and their advisers, as well as third parties"* (emphasis added).

<sup>21</sup> See paragraph 2.31 of the PFs: *"Amazon submitted that it believes Deliveroo will be a valuable financial investment...given its rapid growth, customer popularity and the strength of its management team. Amazon believes that food delivery is a rapidly growing and valuable sector*

15. The PF's finding that Amazon is the only possible purchaser/investor for Deliveroo or its assets is simply not credible and as is made clear in the PF's, has not been properly tested.
16. First, the funding options available to Deliveroo as considered by the CMA in its PFs<sup>22</sup> is materially incomplete:
- a. We note that the CMA seems to have considered some crisis-specific funding being made available by Government to see firms through the crisis, and concluded that no such schemes were available to Deliveroo.<sup>23</sup> However, the CMA does not appear to have considered Deliveroo's actions to lobby Government in early April asking that high-growth tech companies benefit from existing or new crisis-related lending schemes (see [here](#)).<sup>24</sup> We understand that as a result of these actions, Deliveroo successfully gained access to the Government's Future Fund on 20 April 2020 (after the CMA's publication of its summary PFs) which provides it with £5m. While significantly smaller than Amazon's proposed investment, this can provide Deliveroo the time to develop a longer-term funding solution, other than Amazon. See [here](#).<sup>25</sup>
  - b. The CMA itself acknowledges that: *"In the absence of the Amazon investment, we consider that Deliveroo would have succeeded in raising alternative funds..."*,<sup>26</sup> and for this reason, at paragraphs 4.28 and 4.33 that the Transaction would not have satisfied the failing firm criteria as set out by the MAGs. The PFs suggest that negotiations with at least two different investors were at a highly advanced stage before Deliveroo decided to proceed with Amazon.<sup>27</sup> However, there is no indication that the CMA or Deliveroo actively re-visited these initial or other investors to assess their interest in investing in Deliveroo now. The fact that these initial offers may (at the time) have been less attractive than the Amazon offer is not strictly relevant to the current FF analysis. First, those investors might re-evaluate their previous offers given current circumstances. Second, the CMA's FF Guidance states that *"...the possible unwillingness of alternative purchasers to pay the seller's asking price (or to pay as much as the purchaser ultimately chosen) would not rule out a counterfactual in which there is a merger with an alternative purchaser, so long as any alternative offer would have been above liquidation value"* (emphasis added).<sup>28</sup> This should have been considered as part of the current FF analysis.
  - c. There is no suggestion that the CMA or Deliveroo assessed the appetite of new investors to invest in Deliveroo, and with respect, it is not adequate as the PF's do at paragraph 4.61, to refer to the time taken in previous Deliveroo funding rounds as a factor to eliminate this funding possibility. In the current environment firms are very rapidly establishing sources of funding and cash flow (see below) and there is no evidence that Deliveroo (or the CMA) has assessed investor appetite or the speed with which, in the current environment, such investments could be made.  
[REDACTED]<sup>29</sup>

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*that offers a large and growing opportunity...".* Although much of the relevant text has been redacted, it appears that Amazon views Deliveroo to be a valuable asset of high importance to its overall commercial strategy (paragraphs 2.31 to 2.40).<sup>21</sup>

<sup>22</sup> See paragraph 4.54 of the PFs.

<sup>23</sup> Paragraph 4.42 of the PFs.

<sup>24</sup> Article available here: <https://www.itv.com/news/2020-04-08/deliveroo-among-tech-firms-calling-for-government-s-coronavirus-scheme-to-be-expanded/>

<sup>25</sup> Article available here: <https://www.essentialretail.com/news/covid19-future-fund-startups/>

<sup>26</sup> Paragraph 4.30 of the PFs.

<sup>27</sup> Paragraphs 2.43 to 2.50.

<sup>28</sup> Paragraph 16 of the CMA's Failing Firm Guidance.

<sup>29</sup> We note that the CMA's recently released 'Failing Firm' guidance suggest that the CMA *"...is likely to conduct a stringent assessment of the marketing process through which a business has been sold, and to consider whether other realistic prospective purchasers would have had*

- d. The CMA does not seem to have considered the possibility of a Deliveroo IPO.<sup>30</sup> The idea of an IPO has been openly floated by Deliveroo historically, and seems to have garnered significant public interest (see [here](#)<sup>31</sup> and [here](#)<sup>32</sup>).
  - e. Following the CMA's clearance of Takeaway.com/JustEat on 23 April 2020, the firm has managed to raise over €700m from investors to reduce debt and for use on strategic opportunities – €400.2m of which was through shares and a further €300m through convertible bonds. This is clearly indicative of (i) the current interest in assets of this nature; and (ii) the available funding options currently available despite the crisis.<sup>33</sup> See [here](#).<sup>34</sup> We would also note that the amount raised here is significantly higher than Amazon's investment in Deliveroo (which we understand to be in the region of \$575m).
17. Most, if not all, of these funding options would not present the same competition concerns as an investment by Amazon.
  18. Second, we note that the evidence the CMA relies upon in this regard seems to come exclusively from the merging parties, namely from (i) several of Deliveroo's existing shareholders (paragraph 4.60 of the PFs); or (ii) Deliveroo's advisers at the time of the Series G funding round (paragraph 4.59 of the PFs). In our view, both groups will have a clear self-interest to secure Amazon's investment in Deliveroo. In any event, we view this evidence to be outdated and not reflective of current investor appetite. This evidence has not been stress-tested by the CMA via third party / independent evidence. This is contrary to other agencies' practice: see for example the 24 RFIs sent out by the European Commission to possible airline bidders for Olympic Airlines in the course of its review of Aegean/Olympic II.
  19. In our view, it is not necessary to identify an investor that would be able to entirely "secure [Deliveroo's] financial position" – Deliveroo's aggressive growth plan requires regular external funding. Neither the crisis nor the Transaction change that position. In this scenario, even short term or finite funding would enable Deliveroo to survive the crisis, and dedicate the time to meaningfully assess longer-term funding options other than Amazon.
  20. Clearly, there are several funding options (other than Amazon) currently available to Deliveroo – none of which was considered by the CMA. The CMA was wrong to conclude that Amazon is the only possible purchaser/investor for Deliveroo.
  21. Consequently, the CMA was also wrong to conclude that the most likely counterfactual absent the Transaction would be Deliveroo's exit from the market – the most likely scenario

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*sufficient opportunity to advance a purchase. The fact that no other bids were ultimately received for a business may not, by itself, support the position that there were no alternative purchasers for a firm or its assets."* (paragraph 15). It is also important to note that: "...the possible unwillingness of alternative purchasers to pay the seller's asking price (or to pay as much as the purchaser ultimately chosen) would not rule out a counterfactual in which there is a merger with an alternative purchaser, so long as any alternative offer would have been above liquidation value". (Paragraph 16). As such, the fact that other investors might not have been able to match Amazon's offer is not relevant, provided those offers are above liquidation value.

<sup>30</sup> Although some of the text is redacted, it seems that the CMA received evidence from Deliveroo's existing shareholders who expressed the view that a Deliveroo IPO is a likely next move (footnote 90).

<sup>31</sup> Press report available: <https://www.cityam.com/deliveroo-ipo-could-menu-star-tech-startup-said-eyeing-2019/>

<sup>32</sup> Press report available: <https://www.ig.com/au/shares/deliveroo-ipo>

<sup>33</sup> While we appreciate that Deliveroo is not a listed entity, we also note that Takeaway/Just Eat's share prices have performed strongly against the market as a whole since listing on 3 February 2020 – at the time of drafting this Response, shares are up 9.2% on the London line and 6.1% on the Amsterdam line. This is additional evidence of investor confidence in assets of this nature, despite the crisis.

<sup>34</sup> Press report available: <https://www.hl.co.uk/shares/stock-market-news/company--news/uk-approves-takeaways-merger-with-just-eat>

absent the Transaction, is the receipt of funding by Deliveroo from another purchaser/investor. See **Section D** below.

**D. The CMA was wrong to find that Deliveroo would exit absent the Transaction**

22. In paragraph 4.49 of the PFs, the CMA concludes that: “...*Deliveroo would be likely to exit the market as a result of the onset Coronavirus (COVID-19) without additional funds*” (emphasis added).
23. We have not had the benefit of reviewing the evidence available to the CMA to reach this conclusion – both that Deliveroo is likely to exit and that that exit is due to Coronavirus. While Deliveroo may be in a highly challenging financial position that does not mean the CMA’s assessment of this limb is correct.
24. First, the relevant test is not whether Deliveroo would exit without additional funds. The test is whether Deliveroo’s exit from the market is inevitable absent the Transaction.<sup>35</sup> As set out in **Section C** above, we submit that there are several funding options (other than Amazon) currently available to Deliveroo.
25. Second, the CMA suggests that Deliveroo’s inevitable exit is (ostensibly, entirely) due to the onset of the Coronavirus crisis. However:
- a. Deliveroo has a highly aggressive growth plan, and has been reliant (for some time) on external funds to be able to meet its financial commitments. Neither the crisis nor the Transaction has changed that position. See [here](#).<sup>36</sup>
  - b. The CMA has not attributed due weight to the temporary nature of the crisis – restaurants (particularly “...*the major brands that account for a significant proportion of Deliveroo’s orders*”<sup>37</sup>) will reopen for business in due course. See paragraph 8 above.
  - c. The CMA has not attributed due weight to the potential “upsides” of the crisis to Deliveroo, both to enable it to improve its current liquidity position<sup>38</sup> and also in relation to its long-term value as a potential investment.
  - d. The CMA concludes that none of the alternative investments available at the time of the Amazon investment “...*would have put Deliveroo in a viable position to survive the Coronavirus (COVID-19) disruption*.”<sup>39</sup> It is inappropriate and misleading to evaluate those funding offers with the benefit of hindsight – that funding round took place in early 2019, at which point there was no way the impact of Coronavirus could have been predicted. In addition, (i) as above, there is no evidence that the CMA or Deliveroo actively re-visited these potential funders to assess their current appetite to invest in Deliveroo; and (ii) assuming one of those other funders was initially successful, it is not unreasonable (although we note the CMA views this to be ‘speculative’) to assume that additional funds could have been secured to see Deliveroo through the crisis, if that was required. In any event, we understand that a wide range of other businesses have successfully raised funds from public

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<sup>35</sup> A point reiterated in the CMA’s recently released “*Summary of CMA’s position on merger involving ‘failing firms’*” (April 2020).

<sup>36</sup> Article available here: <https://venturebeat.com/2019/10/02/deliveroo-lost-284-million-in-2018-amid-bruising-food-delivery-battle/>

<sup>37</sup> Paragraph 22 of the PFs.

<sup>38</sup> We note that the CMA considers that even a rise in Deliveroo’s “bolt-on” OCG services is not expected to “materially offset” any significant proportion of the decline in restaurant sales (paragraph 4.37 of the PFs). Again, however, we have not had the benefit of reviewing the evidence on which the CMA bases this conclusion.

<sup>39</sup> Paragraph 25 of the PFs

shareholders in recent weeks to survive the crisis – WHSmith, SSP (a catering business with substantial exposure to travel outlets) and Hays. It is not appropriate to conclude that the Coronavirus crisis has dampened all investor appetite, in particular where this has not even been tested by the CMA.

- e. Finally, the CMA confirms that no new equity investors were approached at paragraph 4.62. Instead, the CMA chose to rely on submissions from existing shareholders and those who assisted Deliveroo in the Series G funding round (where both sets of commentators have a vested interest in securing Amazon's investment in Deliveroo). Those commentators offered no view of how the crisis would impact appetite in light of the upsides to Deliveroo's medium and long-term investor attractiveness, as set out at paragraph 9 above.

26. Based on the above, in our view the most realistic outcome for Deliveroo absent the Transaction would be investment/acquisition by a third party other than Amazon, particularly given its strong brand and growth potential.

#### **E. The CMA's SLC analysis is flawed**

27. In its analysis of the Transaction to date, the CMA has identified competition concerns (in two separate relevant markets) serious enough to warrant a detailed Phase 2 review.

28. The PFs provide little or no evidence to support the CMA's findings (or even assertion) that:
- a. The concerns previously raised have been appropriately addressed. The CMA seems to simply disregard/decline to take a view on these issues (e.g. Amazon's ongoing interest in the online restaurant market) with limited discussion/evidence; and
  - b. The Transaction is substantially less anti-competitive than Deliveroo's exit.

29. Annex A sets out the concerns we have previously raised. While we will not re-visit these in detail, we comment here that:

- a. The CMA concludes that (i) Amazon will exert material influence over Deliveroo post-merger<sup>40</sup>; (ii) Amazon is a current and potential future strategic/commercial partner to Deliveroo<sup>41</sup>; and (iii) [REDACTED].<sup>42</sup> [REDACTED].<sup>43</sup> Given what the CMA says about Amazon's experience relative to the largely venture capital investors represented on Deliveroo's board and the fact that Doug Gurr, Amazon UK's CEO is himself a director of Deliveroo, it is not credible to suggest that those concerns are eliminated with a minority stake.
- b. [REDACTED]
- c. The CMA concludes that Deliveroo and Amazon are two of the largest, and most ambitious competing suppliers of OCG in the UK.<sup>44</sup> The relevant SLC analysis conducted by the CMA is not sufficiently rigorous given the closeness of competition between the two entities.
- d. The Transaction will, in any event, have the effect of eliminating or at least reducing Deliveroo as a strong, independent competitive force. [REDACTED].

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<sup>40</sup> Paragraphs 3.82 and 3.84 of the PFs.

<sup>41</sup> Paragraph 3.82(b)(iii) of the PFs.

<sup>42</sup> [REDACTED].

<sup>43</sup> [REDACTED].

<sup>44</sup> Paragraph 4.81 of the PFs.



30. The CMA is thus wrong to conclude that Deliveroo's exit would be more detrimental to competition, than permitting the Transaction to proceed.

**F. The CMA should require a series of undertakings/conditions to address the negative consequences for consumers of a clearance decision**

31. In order to protect competition in markets which are likely to be affected by the Transaction, the CMA should conclude that Deliveroo may be flailing, but is not failing in the counterfactual and require as a condition of any approval:

- a. A moratorium on Amazon increasing its rights/stake in or entry into additional arrangements with Deliveroo unless there is a prior, fresh CMA review. The CMA's own analysis concludes that (i) Amazon is a credible potential future acquirer of Deliveroo (or a source of funding)<sup>45</sup>; and (ii) Amazon's incentives to compete with Deliveroo will likely diminish as its shareholding in Deliveroo increases.<sup>46</sup>
- b. A prohibition on Amazon using Deliveroo as a way to get its own goods to customers. i.e. Deliveroo should continue to operate as an independent, competitive force, and Amazon should not be entitled to offer/permit Deliveroo to access or leverage Amazon Prime in any way, or *vice versa*, or otherwise permit cross-selling of the parties' products and services via the other.
- c. [REDACTED]

32. In its response to the CMA's Issues Statement, Amazon consistently described the Transaction to the CMA (and seemingly despite internal documents to the contrary) as "*a minority investment...which cannot be expected to result in Amazon exercising control...*" and which "*...would not alter Amazon's incentives and commercial strategy...*" – simply an "*investment opportunity in a fast-growing sector*".<sup>47</sup> Amazon should therefore have no concerns at being required – by virtue of the undertakings/conditions contemplated above – to act as the "passive investor" it described itself to be in submissions to the CMA to secure merger approval for the Transaction.

33. Finally, if the CMA decides, despite these submissions to clear the Transaction, we assume the CMA is alive to the real prospect of Amazon increasing its stake/rights/bundling products/entering new arrangements, given the terms of the internal documents described in the PFs, and is/has considered a means of monitoring the position both from a Chapter I Competition Act 1998 perspective and from the point of view of a fresh reviewable transaction under the Enterprise Act being created.

**G. Conclusion**

34. We trust this is helpful to the CMA, and would be happy to answer any questions you may have.

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<sup>45</sup> Paragraph 3.53 of the PFs.

<sup>46</sup> Paragraph 4.88 of the PFs.

<sup>47</sup> See paragraphs 1.1, 1.3, 1.4, 1.5, 1.5(i), 1.6(iii), 2.3, 3.1 to 3.14, 4.1, 4.2, 4.3, etc..

Annex A: [REDACTED]