Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo

Submissions by [REDACTED] on the Revised Provisional Findings

Executive summary

1. These submissions are made by [REDACTED] in response to the CMA's Revised Provisional Findings published on 1 July 2020 (the "**Revised PFs**") in which the CMA concluded that Amazon's acquisition of a minority interest in Deliveroo (the "**Transaction**") is not likely to lead to a substantial lessening of competition ("**SLC**").

2. [REDACTED] has significant concerns that the CMA's SLC analysis is defective, undermining the conclusion that the Transaction is not likely to lead to an SLC. The Revised PFs adopt a counterfactual that, absent the Transaction, Amazon would re-enter the online restaurant platforms market within the next 5 years as a direct competitor to Deliveroo. Contrary to the findings in the Revised PFs, [REDACTED] submits that the Transaction will have a material impact on Amazon's incentives to re-enter as a competitor. It is unrealistic to expect that Amazon will still re-enter independently in circumstances where Amazon has already made a significant investment into Deliveroo and the evidence available to the CMA suggests that both Amazon and Deliveroo are treating the Transaction as a first step towards either a full acquisition of Deliveroo by Amazon, or at least a significantly greater stake.[1]

3. Furthermore, having concluded that Amazon's acquisition of a 16% shareholding is sufficient to confer material influence, the CMA will not have jurisdiction to consider any further increases in Amazon's stake unless and until Amazon has increased its stake to one of at least 'de facto' control. It is therefore imperative that the CMA's SLC analysis is undertaken against the correct counterfactual. Yet the Revised PFs have not adequately assessed the Transaction against the most likely counterfactual, given the findings of fact, that Amazon's strategic interest is to increase its stake in Deliveroo. This goes directly to the SLC assessment. The CMA has also not devoted sufficient analysis as to whether bundling Deliveroo with Amazon Prime could cause an SLC. The CMA simply concludes that the incentive to do so would not arise because of the level of Amazon's shareholding limiting the benefits it would receive from such a strategy, despite the CMA earlier having made a finding of fact that Amazon is not interested in short-term profits at this stage.

4. [REDACTED] submits that the CMA should reconsider the appropriate counterfactual in light of the findings of fact concerning Amazon's strategic interests. A proper review would lead inevitably to a conclusion that the Transaction may be expected to give rise to an SLC and hence that it would be appropriate to consider remedies, namely a restriction on Amazon increasing its stake (or other rights) beyond 16%, preserving Amazon's incentives to re-enter the market independently. Such a remedy should be supported by other controls, including removing the right for Amazon to be able to appoint a director to the Deliveroo board and commitments to prevent any integration of Deliveroo with Amazon without prior consent of the CMA.

Introduction

5. [REDACTED] welcomes the finding in the Revised PFs that the failing firm defence no longer applies because COVID-19 has in fact had a more limited impact on Deliveroo's business than forecast, with the result that Deliveroo is not likely to have exited the market absent the Transaction.[2]

6. However, in the Revised PFs the CMA concludes that the Transaction is unlikely to cause an SLC in either the online restaurant platforms market or the supply of online convenience groceries ("**OCG**") market in the UK. The basis for this is said to be that the Transaction is unlikely to have a material impact on either Amazon's incentives to re-enter the online

[1] Paragraphs 5.30 to 5.32.

[2] Paragraphs 4.62 and 4.69.

restaurant platforms market or its approach following re-entry, and that the Transaction is unlikely to remove the strategic benefit to Amazon of developing its own OCG service.

7. A key aspect of the reasoning behind the CMA's conclusion that Amazon is still likely to re-enter the online restaurant platforms market is that Amazon is only acquiring a 16% shareholding, the effect of which is limited in comparison with the effects of a full merger. Because Amazon is only entitled to 16% of the profits of Deliveroo, the CMA suggests that if Amazon re-enters the market, for every sale it wins from Deliveroo, it stands to lose only the 16% share in the profit Deliveroo would have gained from that sale (as opposed to 100% of that profit if Amazon had fully acquired Deliveroo).[3] As a result, the CMA concludes that if Amazon has a strong financial incentive to enter, it is unlikely that its 16% shareholding would materially reduce its incentive to re-enter.[4]

8. In the Revised PFs the CMA adopted a counterfactual that, absent the Transaction, Amazon would re-enter the online restaurant platforms market within the next 5 years, at which point it would be a direct competitor of Deliveroo. For the reasons set out below, [REDACTED] does not agree that Amazon's 16% shareholding has no material impact on its incentives to re-enter on this counterfactual. Further, while [REDACTED] agrees that Amazon is likely to re-enter, given the other findings in the Revised PFs, [REDACTED] considers that the most likely route of Amazon's re-entry is by increasing its stake in Deliveroo. On this counterfactual, which has not been fully considered by the CMA, it is even more apparent that an SLC arises.

<u>Why an SLC arises</u>

9. Amazon's 16% investment in Deliveroo is likely to alter materially Amazon's incentives to re-enter the market:

   (i) The CMA recognised that the investment in Deliveroo could be considered as Amazon's route to re-entry into the market, not least because both Parties informed the CMA that they saw Amazon's investment as providing potential for further investment, and that Deliveroo shareholders saw the Transaction as a possible prelude to full acquisition by Amazon.[5] Despite this, the CMA described the evidence as to whether Amazon's investment is likely to materially alter its re-entry incentives as mixed: "*On the one hand, there is evidence indicating that Amazon views the investment in Deliveroo as its initial re-entry strategy and could use this investment in the future to realise its ambition in the UK market, and potentially internationally. On the other hand, there is evidence indicating that Amazon has an interest in pursuing multiple routes into the market and that the minority investment in Deliveroo is unlikely to be sufficient to prevent further investment by Amazon where a material alternative opportunity arose*".[6] The CMA goes on to agree with the "*logic and intuition*" of a model submitted by the Parties that a 16% investment will have limited impact on Amazon's incentives to re-enter compared to a full merger. In [REDACTED]'s view it is unrealistic to expect that despite making a significant investment into Deliveroo, recognised by the Parties as being a first step towards a full acquisition,[7] Amazon might about-turn and adopt another route to market. Amazon's most likely route to market is simply to increase its shareholding in Deliveroo.

   (ii) The CMA suggests that a 16% shareholding is unlikely to mean that Amazon's incentives to re-enter are materially affected because if it did re-enter, it would only lose its 16% share of Deliveroo's profits if it succeeded in taking a sale from Deliveroo.[8]

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[3] Paragraph 64, paragraph 5.44.

[4] Paragraph 5.28.

[5] Paragraph 5.32.

[6] Paragraph 5.41.

[7] With Deliveroo shareholders seeing this as a route for realising the value of their investments in Deliveroo, paragraph 5.32(e).

[8] Paragraph 64.

This appears to build upon the Parties' submission that a fourth competitor to Deliveroo/ Uber Eats/ Just Eat would not be deterred from entering because it holds a 16% shareholding in a rival unless the decision to enter was very marginal.[9] However, this analysis ignores the wider financial implications associated with Amazon's investment and potential decision to re-enter. Amazon was the biggest investor in Deliveroo's last funding round, which raised $575m. The CMA has recognised that Deliveroo is currently a loss-making business;[10] it is therefore likely to require future funding rounds in which Amazon will either need to invest further or face a reduction of its shareholding. In investing in Deliveroo, Amazon has made a decision with significant, ongoing financial liabilities, and it must be the case that this will have a material impact on Amazon's incentives as to whether to enter through Deliveroo or by other means. This is particularly so if one considers the likely impact on Deliveroo's valuation (and accordingly the value of Amazon's investment) if Amazon were to announce that it intended to re-enter the online restaurant platforms market via another route that would directly compete with Deliveroo. However, the Revised PFs do not assess any of these factors.

10. For those reasons, [REDACTED] believes that Amazon's investment in Deliveroo is in fact likely to mean that Amazon does not re-enter the market independently as a competitor to Deliveroo, Uber Eats and Just Eat, to the detriment of competition and the choices available to consumers, with the result that the CMA should find that an SLC arises.

11. [REDACTED] also considers that the Revised PFs do not properly address the impact on Amazon's incentives to re-enter that could arise upon the more likely counterfactual whereby Amazon increases its shareholding in Deliveroo (to a level that does not amount to de facto or actual control that would be subject to further review):

(i) The CMA's SLC analysis does not consider the likelihood that there will be further funding rounds for Deliveroo. Amazon would participate in those rounds, at least maintaining, but more likely increasing its stake. The CMA's SLC analysis cannot be undertaken against a static 16% stake, but should assess whether Amazon's strategic incentives would be to choose to continue to invest in Deliveroo to a point where it means Amazon must have materially less incentive to re-enter the restaurants market (with knock-on consequences for the OCG market).

(ii) The Revised PFs recognise that an increase in Amazon's shareholding in Deliveroo will affect any re-entry by Amazon: "*Firstly, entry into an area will divert sales from Deliveroo to itself (ie cannibalisation), thus reducing the return it receives from Deliveroo and resulting in Amazon entering fewer areas, and secondly, having entered, the unilateral effects increase (ie lost sales are recaptured by Deliveroo), meaning it competes less intensely and prices rise. Therefore, at a lower shareholding, Amazon would still enter unless the decision was marginal in the first place (ie the expected returns only just covered the costs of entry).*"[11]

(iii) On that basis, the CMA accepts that the impact on Amazon's incentives to re-enter can change as its shareholding increases.[12] However, the CMA's competitive assessment is limited to the acquisition of a 16% shareholding.[13] It will have no further opportunity to review a larger acquisition unless Amazon takes de facto control of Deliveroo. Amazon thus has the ability potentially to increase its shareholding to 49% without further review by the CMA, despite the CMA recognising that an increase in Amazon's shareholding like this would impact its incentives to re-enter the market.

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9 Paragraph 5.26.

10 See e.g. paragraph 4.11.

11 Footnote 217.

12 Paragraph 5.42.

13 Paragraph 5.14.

12. This is also relevant to potential concerns about the bundling[14] of Deliveroo and Amazon Prime. In the Revised PFs, the CMA notes that it accepted at Phase 1 that the Parties may have the ability to use a bundling strategy to foreclose Deliveroo's competitors, but concluded that they would not have the incentive to do so.[15] The CMA explains in the Revised PFs that the basis for this decision was that the "*level of Amazon's shareholding in Deliveroo would limit its incentive to fund a large discount, as Amazon would only gain a small part of the benefit from each additional customer won by Deliveroo*".[16] In the counterfactual where Amazon increases its shareholding in Deliveroo (which [REDACTED] considers must be most likely and hence the only appropriate counterfactual), this conclusion is clearly cast into doubt.

13. In any event, the profits that Amazon stands to gain through its stake in Deliveroo should not be the sole focus of the analysis as to whether an SLC arises with respect to bundling Amazon Prime and Deliveroo. The CMA recognises that Amazon does not focus on short-term profits and instead treats "*growing its Prime membership*" as "*the more important objective*".[17] And yet, the CMA has not devoted any analysis to why and how Amazon's investment Deliveroo can help it achieve this. [REDACTED] considers it obvious that the real value to Amazon of the investment in Deliveroo is: (a) the potential to integrate Deliveroo into Amazon Prime membership to encourage more subscribers; and (b) the data it will obtain on how consumers order food online (e.g. customer location, order frequency, order size, average spend, type of cuisine). After all, as the graphic[18] below shows, over the last decade Amazon has rapidly increased the rate at which it acquires other companies[19]:

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14 That is, offering Deliveroo Plus to Prime members at a discounted price, or by offering Deliveroo Plus as free benefit to all Prime customers (see paragraph 7.8).

15 Paragraph 7.9.

16 Paragraph 7.10.

17 Paragraph 4.87.

18 This graphic was originally published by Tortoise Media in the article '*Inside Amazon's economy*', available at the following link: https://members.tortoisemedia.com/2020/06/02/tech-nations-united-states-of-amazon-economy/content.html. Each bubble represents an acquisition. In the online version of the graphic, the bubbles can be filtered by industry sector (those shown in darker orange in the image above are in the 'AI' sector selected at the time the screenshot was captured).

19 The filter tool referred to above shows the sheer breadth of Amazon's acquisition strategy across a bewildering number of sectors. The CMA should not lose sight of this in the context of its review of the Deliveroo investment.

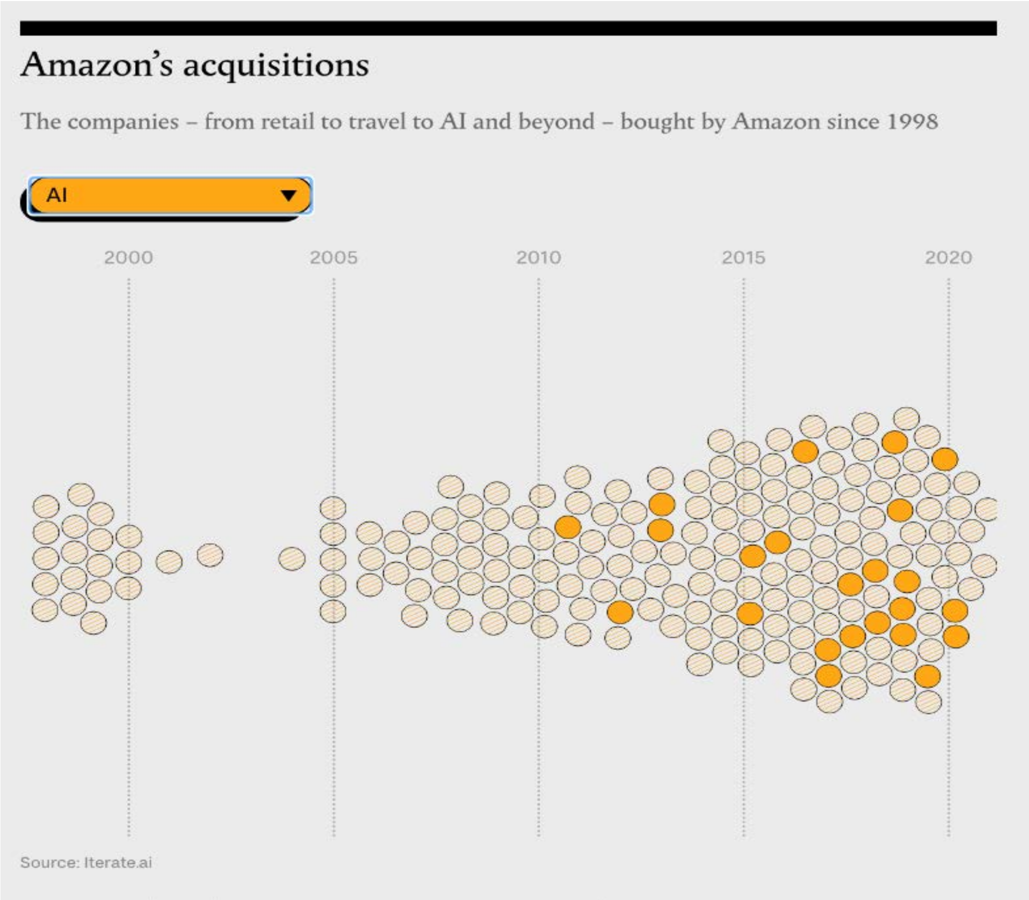

Figure 1 – extract from Tortoise Media article

14. Amazon has also taken other significant steps to expand Amazon Prime, such as developing an 'on demand' video service incorporated into Prime as Amazon Prime Video. Seen in this light, there are clear incentives for Amazon to bundle Deliveroo into Amazon Prime, and the CMA must assess properly the potential impacts on competition that this strategy would cause.

15. The impact of an increased Amazon shareholding in Deliveroo upon Amazon's incentives to re-enter independently and the likelihood of this occurring, and upon whether Amazon and Deliveroo have an increased incentive to enter into an anti-competitive bundling strategy, should be assessed as part of the CMA's consideration of whether an SLC arises. The fact that they are not represents a material omission in the CMA's SLC analysis.

16. There are also other potential impacts on competition that have not been considered in the Revised PFs, or have not been considered in sufficient detail. The Revised PFs note that both "*Deliveroo and Amazon's Prime Now offerings concentrate on London and other major cities, indicating they would also be competing in the same areas geographically*".[20] The fact that Deliveroo and Amazon have overlapping areas of focus suggests that Amazon is likely to have a greater ability and means to influence Deliveroo's strategy in London, or to tailor any other Amazon re-entry plans using the knowledge it gains of Deliveroo's performance through its position as a shareholder. However, the Revised PFs simply suggest that Amazon would find it difficult to influence Deliveroo to reduce or worsen its offering, and that if it did, customers might divert to a competitor other than Amazon (despite the fact that Amazon and Deliveroo have overlapping areas of focus).[21] As noted above, the analysis is also static in considering Amazon's ability to influence as a 16% shareholder – given the CMA's findings of fact and the likelihood of Amazon increasing its stake, the CMA must consider this question against a position where Amazon has increased its stake to one that falls just short of *de facto* control

20 Paragraph 5.50(a).

21 Paragraph 5.54.

(i.e. below the level at which the CMA's jurisdiction might be further engaged). Yet this analysis is missing from the Revised PFs.

17. The points set out above relate to whether an SLC arises in the market for online restaurant platforms. However, they are also relevant to the OCG market, where for example the CMA considered a theory of harm relating to Amazon avoiding competing directly with Deliveroo in very similar terms to its analysis of that risk with respect to the online restaurant platforms market. Once again, the CMA focused on its expectation that the mere 16% holding arising from the Transaction will produce a weaker price effect on OCG services than a full acquisition.[22] However, it is not clear whether the CMA has considered the impact of an increase on Amazon's shareholding in this analysis (and as noted above, Amazon could significantly increase its shareholding without acquiring de facto control and prompting further review). If, as [REDACTED] submits, there is a material impact on Amazon's incentives to re-enter the online restaurant platforms market as a result of its investment in Deliveroo, then this could also have a significant impact on the development of the nascent OCG market.

<u>Potential remedy</u>

18. On either the CMA's preferred counterfactual, or [REDACTED]'s suggested counterfactual, the reduction in Amazon's incentives to re-enter the online restaurant platforms market independently can be expected to give rise to an SLC.

19. However, the concerns that give rise to a likely SLC could be addressed by imposing a remedy that caps the level of Amazon's shareholding in Deliveroo at 16% (or at least at a level that prevents Amazon taking de facto or full control of Deliveroo). In addition, the CMA should ensure that any remedy is sufficiently comprehensive to address the SLC that [REDACTED] considers is inevitable when assessed against the correct counterfactual. As such, the capped shareholding remedy should be strengthened to prevent Deliveroo from being integrated within Amazon (or linked to Amazon Prime) and to include the removal of Amazon's Deliveroo board member. [REDACTED] considers that the CMA would have jurisdiction to impose such remedies were it to reassess the SLC analysis in light of the points made above.

20. Imposing these kinds of remedies would enable the Transaction to proceed, whilst addressing both [REDACTED]'s concerns that Amazon's investment is already in effect its decision as to how to re-enter the online restaurants platforms market and the fact noted by the CMA that an acquisition of a greater shareholding in Deliveroo would have a more significant impact on Amazon's incentives for re-entry. Such a measure would ensure that Amazon retains the incentive to re-enter the market (in accordance with the CMA's counterfactual) by other means, and prevent the likely SLC from arising.

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22 Paragraph 6.303.