

Response to the CMA's Revised Provisional Findings

1. We refer to the CMA's Revised Provisional Findings in Amazon/Deliveroo (the "**Transaction**") – the summary published on 24 June 2020 and the final version on 1 July 2020 (the "**RPFs**").
2. We disagree with the CMA's findings in its RPFs. In our view:
 - a. The CMA's provisional conclusion that the Transaction does not result in an SLC in any relevant market lacks credibility. The CMA's decision appears to be based on facts / circumstances known to the CMA throughout its consideration of the Transaction, including at Phase 1. If the CMA was minded to approve the Transaction on the grounds cited, there was no reason to initiate a Phase 2 investigation, nor provisionally approve the Transaction based on "failing firm" as the CMA did in its original Provisional Findings. This protracted investigation was a waste of time and resource for all relevant parties.
 - b. The CMA erred in its analysis of Amazon's 16% stake in Deliveroo, and the effect of this stake and associated rights on Amazon's incentives and strategy going forward. While the CMA accepts that the 16% minority shareholding and associated rights will give Amazon material influence over Deliveroo¹, it also concludes that (i) this interest will not materially affect Amazon's incentives to compete with Deliveroo in any relevant market; and (ii) material influence is not the same as an ability to control.² By its very nature, a finding of material influence denotes a degree of control considered sufficient by legislation to empower the CMA to investigate a merger transaction in the first place. It is illogical to conclude that the rights and stake confer a degree of control sufficient to bring the Transaction within the bounds of the merger control regime; but simultaneously insufficient to affect the acquirer's incentives and ability to influence the strategic policy of the target. In any event, in reaching the conclusion regarding Amazon's incentives, the CMA has not properly considered:
 - i. The fact that Amazon is the most likely source of future funding to Deliveroo (which will undoubtedly elevate the weight attached to directions/decisions issued by Amazon in a way that is disproportionate to its actual, proportionate shareholding); and
 - ii. The considerable strategic value to Amazon of investing in Deliveroo – as is clear from the content of Amazon's internal documents and emails between key senior members of Amazon's staff.³

Given in particular these two factors, it is highly likely that this investment is a first step towards a larger or even a full acquisition of Deliveroo by Amazon. While we accept the CMA's acknowledgement that a further acquisition of control by Amazon could require separate review by the CMA, that does not (i) address the impact of Amazon's proposed investment under the terms of the Transaction; (ii) address the scenario where Amazon increases its stake (with a concomitant change to both Amazon's and Deliveroo's incentives under this scenario) in a way that falls short of de facto control; or (iii) cover instances where Amazon is able to exert enhanced control over Deliveroo through the entry into separate arrangements with it that do not change its actual shareholding. Given (i) the

¹ Paragraph 1.9 of the RPFs.

² Paragraph 6.288 of the RPFs.

³ Paragraphs 4.150; 6.107 and 6.311 of the RPFs.

likelihood of Amazon increasing its stake in Deliveroo; and (ii) the CMA's own acknowledgement that the likelihood of the Transaction leading to an SLC would be greater in the case of a larger shareholding⁴, the CMA should have considered the impact of a shareholding exceeding 16% on Amazon's incentives as part of its counterfactual and SLC analysis.

- c. The CMA was wrong to find that the Transaction would not result in an SLC in the online convenience grocery ("**OCG**") market.⁵
- i. The CMA identifies that Amazon has a strong incentive⁶, and unique position⁷ to grow its presence in OCG. By its own analysis, the CMA identifies that the (seemingly only) current disadvantage to Amazon's growth/position in OCG is its lack of a point-to-point logistics network⁸ – which is precisely what the Transaction will provide via Deliveroo. The CMA fails to consider that the combination of these attributes (i.e. Amazon's advantages and Deliveroo's logistics network) will place the combined Amazon/Deliveroo entity in a unique position of power, making it extremely challenging for others to pose a credible competitive constraint to it either immediately or in the longer term.
 - ii. While the CMA concedes that providers of OCG services (such as traditional grocery retailers) have a limited choice of last-mile delivery solutions⁹, it fails to acknowledge that the growth/expansion it predicts in the OCG space is highly dependent on grocery retailers being able to access customers via the marketplace aggregators (such as Deliveroo). For this reason, the CMA's conclusion regarding sufficient alternate competitive constraints (i.e. that "*...on the basis of current evidence other market participants appear well-placed to compete in OCG provision...*")¹⁰ is flawed. The fact that others are currently well-placed to compete (and have expanded their OCG services during recent months) is precisely because they have been able to partner with aggregators – primarily Deliveroo. The Transaction (particularly given the CMA's own findings regarding Amazon's incentives and unique position to grow in OCG) will stifle that competition.
 - iii. The CMA has focused on the wrong theories of the harm, and its analysis does not cover the change in Amazon's incentives/strategy in the (highly likely) scenario that it increases its stake in Deliveroo over time. The three theories that form the crux of its analysis entirely miss the point that post-Transaction the interests of Amazon and Deliveroo will be aligned. Amazon's attributes in OCG perfectly complement those of Deliveroo, and *vice versa*. Amazon and Deliveroo will not look to compete with each other post-Transaction, but rather will consolidate their efforts to grow their presence as a unit in this space. The combined entity will have the incentive and ability to impede the ability of other retailers to offer OCG services to

⁴ Paragraph 6.6 of the RPFs: "*The Transaction would give Amazon a 16% holding in Deliveroo. We consider that the likelihood of the Transaction leading to a SLC through each of the harms set out above, or a combination of these harms, is less than it would be in the case of a larger shareholding or a full acquisition*".

⁵ Note that we are not close enough to the online restaurant markets to have an informed opinion/view as to the accuracy/robustness of the CMA's analysis of the impact of the Transaction on that relevant market.

⁶ Paragraph 6.255 of the RPFs.

⁷ Paragraphs 6.260 – 6.261 of the RPFs.

⁸ Paragraph 2.262 of the RPFs.

⁹ Paragraph 6.270 of the RPFs.

¹⁰ Paragraphs 6.280; 6.318 of the RPFs.

consumers at reasonable prices, in particular through the methods described in the paragraphs below.

- iv. The CMA’s analysis of the “bundling theory of harm” is incomplete, particularly as regards its consideration of the parties’ incentives to engage in a strategy of this kind.¹¹ It was wrong of the CMA to rely on Phase 1 conclusions here, without doing the detailed analysis expected of a Phase 2 investigation. In particular, the CMA did not consider that:
 1. Amazon also stands to benefit financially from pushing its own groceries via Deliveroo.¹² This is consistent with the CMA’s findings that Amazon has the incentive to grow its presence in groceries and, in particular, OCG.
 2. Amazon also stands to benefit financially from extending the reach of Amazon Prime (i.e. to enhance its “flywheel benefits”). This is consistent with the CMA’s finding that “[p]romoting and growing Prime is very important to Amazon...”.¹³
 3. Amazon is one of the wealthiest companies in the world, and (by its own admission) tends to adopt a “test and learn” approach.¹⁴ There is no reason to conclude that it wouldn’t look to engage in a (potentially predatory) strategy of this kind.
 4. The size/scale of the financial benefit Amazon stands to earn would increase as its stake / degree of influence over Deliveroo increases – which, as above, we consider is highly likely to occur at some point post the Transaction.
 5. There is considerable benefit to Deliveroo in bundling Deliveroo Plus and Amazon Prime – it will automatically grant Deliveroo preferential access to the extensive Amazon Prime customer base. In addition, where only Amazon groceries are available via Deliveroo, it will eliminate the need for Deliveroo to negotiate and manage several grocery retailer partnerships simultaneously. This is not considered by the CMA in its RPFs.
- v. The CMA’s analysis of the “vertical” theory of harm is flawed in that:
 1. As above, the CMA has created an illogical delineation between “material influence” and “control”. A finding of material influence denotes that the acquirer has some ability to direct the strategic policy of the target, and that would have a considerable impact on its incentives going forward. In any event, there is no suggestion that Amazon would look to drive policy “against the objections of Deliveroo’s shareholders”¹⁵ or such that Deliveroo would “forego a compelling commercial opportunity”¹⁶ – Amazon and Deliveroo share a common interest and incentive to grow their combined position in the OCG space. In any event, the CMA has not considered the

¹¹ Paragraph 7 of the RPFs.

¹² Paragraph 7.10 of the RPFs.

¹³ Paragraph 4.84 of the RPFs.

¹⁴ Paragraph 4.75 of the RPFs.

¹⁵ Paragraph 7.26 of the RPFs.

¹⁶ Paragraph 7.27 of the RPFs.

change in Amazon's incentives and strategy in the (highly likely) scenario that it increases its stake in Deliveroo over time.

2. The CMA does not consider that it would be considerably easier and financially more attractive for Deliveroo to deal with a single supplier of groceries (i.e. Amazon) with an extensive, active and loyal customer base (i.e. Amazon Prime), rather than the range of retailers with which it currently partners.
 3. It is irrelevant to consider Amazon's physical presence in groceries. The more relevant point is that Amazon has considerable access to groceries and extensive ambitions to grow in this space.
 4. It is not appropriate to conclude that such a strategy would automatically benefit the likes of Uber Eats and JustEat as a reason to explain Amazon/Deliveroo's alleged reluctance to pursue the strategy – as is evident from the actions of the aggregators during COVID-19, Deliveroo has established itself as the most attractive and credible route to market for OCG, given the number and extent of grocery retailers with which it has partnered during the period. An exclusive arrangement between Amazon and Deliveroo would effectively result in a 3:2 merger, leaving only JustEat and Uber Eats as alternative routes to market – neither of which currently has a strong presence in OCG. This was not considered by the CMA.
 5. In any event, the CMA's list of alternative routes to Deliveroo is grossly inaccurate.¹⁷ For instance, the CMA fails to consider that third party couriers (such as Stuart) are rapidly reaching saturation levels in terms of the scale and scope of the services they can render to grocery retailers. Several grocery retailers commented on their reliance on Deliveroo to access customers in the OCG space.
 6. [Confidential]. The CMA should focus more carefully on the extensive steps Deliveroo has taken to grow and entrench its position in OCG in recent months (including making adjustments to its app to ensure it is suited to OCG).
3. In our view, the CMA failed to consider the above, and in particular, the change in Amazon's incentives/strategy in the (highly likely) scenario that it will increase its stake in Deliveroo over time. Had the CMA done that, it would have concluded that the Transaction does result in an SLC in the OCG market. If the CMA is not prepared to block the Transaction on that ground, it should require undertakings or impose conditions on Amazon to address that anti-competitive effect.

¹⁷ Paragraph 7.35 of the RPFs.