Competition & Markets Authority

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

Representations on the CMA's Provisional Findings of 22 June 2020

Submitted by

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on

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PREFACE

This document and its appendices comprise the written substantive representations (the "**Submission**") by Domino's Pizza Group plc ("**Domino's**") to the CMA in respect of its revised provisional findings ("**Revised Provisional Findings**" or "**RPFs**") notified on 22 June 2020, published on 24 June 2020, and relating to the anticipated acquisition by Amazon.com NV Investment Holdings LLC ("**Amazon**") of a minority shareholding and certain rights in Roofoods Ltd ("**Deliveroo**", together with Amazon, the "**Parties**") (the "**Transaction**").

1 INTRODUCTION

(1) In the summer of 2019, the CMA initiated a merger control review of the acquisition by Amazon of a minority shareholding and certain rights in Deliveroo. Domino's welcomed that decision and actively contributed[1] to the CMA's investigation setting out the reasons why it considers the Transaction, if allowed to proceed unconditionally, would lead to a substantial lessening of competition ("**SLC**").

(2) On 27 December 2019, the CMA referred the Transaction to an in-depth investigation as it considered, rightly in Domino's view, that there was a realistic prospect of an SLC in two markets, the supply of online restaurant platforms and the supply of online convenience groceries ("**OCG**").

(3) On 17 April 2020, the CMA issued a notice of provisional findings unconditionally clearing the Transaction (the "**PFs**"). The CMA provisionally found that the Transaction would not be expected to result in an SLC on the basis that the criteria of the 'failing firm defence' as defined in the Merger Assessment Guidelines[2] ("**MAGs**") were satisfied.

(4) On 7 May 2020, Domino's and its franchisees submitted representations to the CMA in response to the PFs (the "**PFs Response**"), setting out the serious concerns they had if the Transaction were allowed to proceed unconditionally and the adverse effects it would have on competition in the UK. The PFs Response identified flaws and inconsistencies in the Parties' failing firm claim, as did many other interested third parties.

(5) On 10 June 2020 the CMA extended its investigation by another eight weeks in order to take full account of representations received from the Parties and third-parties in response to the PFs, and to reflect the latest impact of COVID-19 in its assessment.

(6) On 22 June 2020, the CMA issued revised provisional findings (the "**RPFs**"), published in summary form on 24 June 2020 and in full form on 1 July 2020. In light of third-parties' representations received in response to the PFs and evidence on how the COVID-19 pandemic evolved in April and May 2020, the CMA provisionally concluded that the Parties' failing firm claim and in particular the claim that Deliveroo would exit absent the Transaction, did not meet the required evidentiary standard, and therefore reversed its original provisional conclusion and dismissed the Parties' failing firm claim altogether.

(7) As a result of the Parties' failing firm claim being dismissed, the CMA was therefore required, as Domino's had urged in its PFs Response of 7 May 2020, to conduct a full substantive competition analysis of the effects of the Transaction within the then little time remaining in the CMA's statutory timetable (a little over a month, given the timetable was at that time due to expire on 11 June 2020). The CMA's RPFs conclude that the Transaction would not, on the balance of probabilities, be expected to result in an SLC.

(8) Domino's and its franchisees are troubled by the CMA's approach to this case. The CMA provisionally cleared the Transaction on the basis of an unsafe failing firm claim and did not undertake any meaningful competition assessment in its PFs despite the Transaction being subject to an in-depth Phase 2 investigation. It then extended its timetable to consider third-party submissions, to then U-turn on its decision on the Parties' failing firm claim and reject this but to find that the Transaction was not, after all, likely to result in an SLC, applying flawed logic (as explained below) and without regard to (even to dismiss) credible theories

[1] Submissions of 15 November 2019 and 7 February 2020.

[2] CMA Merger Assessment Guidelines (2010) CC2/OFT1254 paragraphs 4.3.8 to 4.3.18.

of harm resulting from the Transaction advanced by Domino's and other third-parties. The CMA has itself referred to the same ecosystem theory of harm which Domino's argues applies in this case in its Final Report on the Digital Advertising Market Study (the "**Digital Advertising Final Report**") of 1 July 2020. Moreover, the CMA's Chief Economist has said that the CMA needs to be very tough on digital mergers such as this. However no reference is made at all in the CMA's RPFs to this theory of harm.

(9) Domino's and its franchisees continue to have very serious concerns in relation to the SLC likely to result from the Transaction and the CMA's RPFs. Domino's observes that little time was given for third-party representations (less than three weeks). Domino's and its franchisees urge the CMA to take proper account of their and other third-party representations and to reconsider the substantial long-term negative impact on competition and on UK consumers the Transaction can be expected to have.

(10) Domino's therefore urges the CMA to reconsider its RPFs, conclude there is an SLC and take appropriate remedial action.

2 EXECUTIVE SUMMARY

(11) Domino's and its franchisees strongly disagree with the CMA's provisional conclusion that the Transaction is unlikely, on the balance of probabilities, to result in an SLC.

The CMA has misapplied the SLC test

(12) It was appropriate for the CMA to focus on Amazon's 16% equity stake and associated rights to determine its own jurisdiction. However, the binary question of jurisdiction -- which is a yes or no question based on current facts -- is very different from the forward-looking economic assessment of incentives under the SLC test.

(13) The CMA has in the RPFs misapplied the SLC test by failing to consider that:

- Amazon could increase its shareholding and/or governance rights materially within a spectrum as wide as between 16% and 50% that would still only be "material influence" and less than de facto control; and
- this future position would fall outside the Enterprise Act (2002) (the "**Act**") if not considered as part of the SLC assessment now, because changes in the quality or scope of material influence short of de facto control cannot be re-examined.[3]

(14) Accordingly, as expressly noted by the CMA's predecessor, due to the scheme of the Act in protecting competition and consumers from anti-competitive mergers, the CMA must consider an increase in the size of the economic stake (or quality of material influence) in its SLC assessment to the *maximum* level of material influence, before reaching an ultimate conclusion in favour of no SLC. Otherwise, the CMA will create a lacuna in UK merger regime that was not intended by Parliament:

> "*in the context of the substantive analysis,* ***it is appropriate to assess not only the impact of BSkyB's current shareholding, but also the impact of the maximum level of material influence it could acquire****. The OFT considers that the scheme of the Act justifies this approach. Once the acquisition of material influence has been permitted, the Act does not provide for the OFT to examine increments to material influence. In contrast, as noted above, a subsequent change in the level of control [to de facto control] may be treated as a new merger situation*"[4]. (emphasis added)

(15) In the RPFs, the crux of the CMA's SLC assessment is that the acquisition of a 16% stake – no more – is likely to be too low to deter Amazon's entry and result in an SLC but is careful to note that the SLC result may change with a "*materially larger shareholdin*g"[5].

(16) However, as noted, it is clear that under the Act the CMA cannot re-examine any "*materially larger shareholding*" that falls short of de facto control. Moreover, the CMA's MAGs and a substantial body of decisional practice which finds material influence (but not de facto control) in the 25-50% equity stake range make clear that in this case Amazon could double (to 32%) or treble (to 48%) its stake, for example, and/or acquire veto rights, without triggering de facto control and a fresh merger review. Even if it were correct that a 16% stake is insufficient for SLC purposes (which is disputed), a larger shareholding could result

[3] See MAGs paragraph 3.2.15 and RPFs, paragraph 8.

[4] OFT Report to Secretary of State in BSkyB/ITV, paragraph 66. This question does not arise if the Phase 2 conclusion is already a finding of SLC and a decision to take remedial action in relation to the existing shareholding level conferring material influence, as in *BSkyB/ITV* and *Ryanair/Aer Lingus*.

[5] RPFs, paragraph 72.

in an expectation of SLC through reducing Amazon's incentives to enter or compete aggressively.

(17) Conversely, veto rights associated with a 32% or 48% stake, for example, may affect Deliveroo's ability and/or incentives to compete e.g. strategic expansion - but do not amount to a positive ability to control unilaterally (in the sense in which de facto control has been interpreted in the UK).

(18) As such, a prospective no-SLC finding that is wrongly limited to consideration of a 16% stake and current rights, effectively gives Amazon carte blanche to increase its stake to potentially up to 50% without attracting any further scrutiny from the CMA. More generally, this approach would create a gaping hole in the UK merger regime that incentivises acquirers to build minority stakes in competitors, acquire material influence insufficient for SLC (e.g. 15-16%) and then once CMA approval has been obtained, increase their stake to a level comfortably short of de facto control (e.g. 30-32%) but enough to lessen competition substantially.

(19) The CMA itself states[6] that an SLC could arise should Amazon acquire a materially larger share of Deliveroo. Therefore, the CMA could not, if the analysis had been properly conducted, have credibly concluded that the Transaction does *not* substantially lessen competition. In determining the dynamic SLC question correctly, the CMA should set the shareholding and/or governance rights threshold at which its expectation of SLC arises. It need not pinpoint the threshold at which material influence becomes de facto control provided that the SLC threshold is at a level below de facto control. The CMA's remedial duties point to the imposition of, at least, a cap on Amazon's ability to acquire equity or rights that breach the SLC threshold[7].

(20) This approach is future-proof in protecting competition and consumers as intended by the scheme of the Act, but only imposes such remedies as are effective and proportionate to the SLC finding.

(21) In failing to take into account the critical relevance of legal and economic factors including (i) the scheme of the Act and the CMA's own ability to re-examine new facts; (ii) the wide spectrum of "material influence" short of de facto control; (iii) the greater potential for SLC the greater the shareholding and/or governance rights; and (iv) the evidence on Amazon's intent and/or incentives to increase its equity and/or governance rights, the CMA has therefore fundamentally misapplied the SLC test and the RPFs are therefore materially flawed.

The CMA's substantive assessment is incomplete and unsafe

(22) Second, even leaving aside this error of law, the CMA's substantive SLC assessment based on a 16% investment by Amazon is incomplete and proceeds on unsafe grounds.

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[6] For example, RPFs, paragraph 72 "We are provisionally of the view that it is unlikely the 16% investment in Deliveroo would cause Amazon to compete materially less aggressively if it did re-enter. **We note that this assessment could be different should Amazon acquire a materially larger shareholding in Deliveroo**"; (emphasis added) and 5.42: "*Based on this evidence, we do not currently believe it is sufficiently likely that the investment in Deliveroo would deter re-entry by Amazon if there was a strong financial incentive for Amazon to re-enter.* ***We note that this assessment could be different should Amazon acquire a materially larger share in Deliveroo****: should Amazon subsequently look to obtain de facto control, or a controlling interest in Deliveroo (in order to realise its re-entry strategy), the CMA would have the opportunity to assess such a transaction*" (emphasis added).

[7] It would of course be open to Amazon pursuant to section 41(3) of the Act to seek release of such undertakings on the basis of a material change of circumstances should the relevant facts bear this out at the time of the application (see Ryanair v CMA [2015] CAT 14).

(23) In particular, in assessing Amazon's incentives to re-enter the market for online restaurant platforms (including the scope of such re-entry) and/or compete aggressively with Deliveroo should it decide to re-enter, on the basis of a 16% investment the CMA fails to conduct a quantified incentives analysis, such as the Gross Upward Pricing Pressure Index or GUPPI analysis or similar UPP-inspired analysis, as is standard CMA practice in in-depth retail merger investigations (see e.g. Ladbrokes/Coral, Tesco/Booker, Sainsbury's/Asda, JD Sports/Footasylum)[8] and this failure materially undermines the robustness of the CMA's conclusions.

(24) Domino's estimates of Amazon's GUPPI clearly show that the Transaction is likely to give rise to an SLC the higher the diversion ratio from Amazon to Deliveroo, the higher Deliveroo's gross margin and the higher Amazon's shareholding in Deliveroo (where higher shareholdings than 16% but short of de facto control must be considered, for the reasons above).

(25) The CMA's failure to carry out a GUPPI analysis, given the reliance on GUPPI approaches in many recent merger cases which are the subject of an in-depth Phase 2 investigation, is both inconsistent and undermines the robustness of its conclusions.

The CMA has not addressed Domino's substantive competition concerns

(26) In its PFs Response, Domino's expressed its concerns on the opportunities for cross-selling between Amazon and Deliveroo's online restaurant platform business the Transaction would create, either by way of targeted advertising or tying/bunding. Domino's refers the CMA to paragraph 100 of its PFs Response.

(27) However, the CMA does not tackle (nor even mention) the theories of harm raised by Cremer et al reports nor the theories raised in the CMA's Digital Advertising Final report and which have direct read across to this case in any of its Phase 1 decision, Issues Statement, original provisional findings or the RPFs. In particular, the CMA does not explore:

(a) Whether Amazon has a dominant ecosystem (as per the CMA Digital Advertising Final Report[9]);

(b) the likelihood that user loyalty is intensified through the use of Deliveroo as a complementary asset (as per Cremer et al[10]);

(c) whether customers of the dominant ecosystem can be leveraged to the newly integrated service (as per Cremer et al[11]), except via bundling;

(d) whether customers of the dominant ecosystem can be integrated into the ecosystem (as per Cremer et al[12]);

(e) whether, due to stronger network externalities, customers of the dominant ecosystem are less likely to leave the ecosystem afterwards as per Cremer et al[13] –

[8] Ladbrokes/Coral ME/6556-15, Tesco/Booker ME/6677/17, Sainsbury's/Asda ME/6752-18 and JD Sports/Footasylum ME/6827/19

[9] Digital Advertising Final Report, paragraphs 47 and 58-60.

[10] Cremer et al p. 11.

[11] Cremer et al p. 122.

[12] Cremer et al p. 122.

[13] Cremer et al p. 122.

despite the fact that the CMA has concluded that network effects are relevant for online restaurant platforms notably[14];

(f) whether Amazon sets rules around data sharing within its ecosystem that could lead to a competition concern if extended to Deliveroo (as per the CMA's Digital Advertising Final Report[15]);

(g) whether, other than via bundling, Amazon could leverage its position into downstream or adjacent markets (as per the CMA's Digital Advertising Final Report[16]);

(h) whether Amazon could use its position to protect its existing services from competition by raising barriers to entry for rivals (as per the CMA's Digital Advertising Final Report[17]); and

(i) whether the data advantage that Amazon would gain would provide it with the ability to generate more revenues and a positive feedback loop (as per the CMA's Digital Advertising Final Report[18]).

(28) The CMA's failure even to acknowledge the concerns that it itself has raised or even to note the same points made by Domino's in its PFs Response in relation to issues that arise from the extension of ecosystems – and Amazon's position as the operator of a dominant ecosystem – critically undermines the robustness of its SLC conclusion.

(29) This failure to even consider an ecosystem theory of harm is entirely at odds with the serious competition concerns relating to "big tech" ecosystems which feature in the CMA's Digital Advertising Final Report and the statements of the CMA's Chief Economist in relation to merger reviews, just this week.

Conclusion

(30) For the reasons it has given in this and previous submissions, Domino's and its franchisees consider that the Transaction will result in an SLC, and the CMA should not shy away from its statutory duties.

(31) Domino's calls upon the CMA to intervene before these markets tip, to address its own assessment that there has been "*underenforcement of merger control in digital markets*"[19] and to protect consumers as its statutory duties require.

(32) Domino's therefore urges the CMA to reconsider its RPFs, find that the Transaction is likely to result in an SLC, and impose remedies to prevent or mitigate such SLC.

[14] RPFs, paragraph 3.16.

[15] Digital Advertising Final Report, paragraph 47.

[16] Digital Advertising Final Report, paragraph 58.

[17] Digital Advertising Final Report, paragraph 59.

[18] Digital Advertising Final Report, paragraph 60.

[19] Speech by CMA Chair Lord Andrew Tyrie at CMA Digital Markets event, 3 March 2020.

3 THE CMA MISAPPLIES THE SLC TEST

(34) In conducting a static analysis on Amazon's 16% equity stake and associated rights, the CMA's assessment of material influence commits an error of law.

(35) In particular, the CMA fails to have regard to two points of law that are uncontroversial under the Act:

(i) the application of the concept of material influence for jurisdictional purposes differs from the application of the concept of material influence for the purposes of the SLC assessment. The latter is not a concept tied to a particular fixed shareholding level (whether 16% or any level at or below 50%) and must be examined dynamically in light of the available evidence; and

(ii) the CMA is unable to examine changes to the quality (or scope) of material influence up to the point of acquisition of de facto control.

(36) Therefore, a "green light" that an acquisition of material influence based on a 16% shareholding does not result in an SLC is equally a "green light" that a change in the quality of that material influence up to anything short of de facto control is so unproblematic that it falls outside the ambit of UK merger control altogether. Because its flawed analysis of material influence is, in this case, so central to its conclusion of no SLC, the CMA's error in relation to material influence inevitably infects the SLC conclusion itself.

(37) As a result, the CMA's RPFs of no SLC cannot stand. In particular:

- On the one hand, the crux of the CMA's SLC assessment is that the acquisition of a 16% stake – no more– is likely to be too low to deter Amazon's entry and likely result in an SLC, whilst underlining that a materially larger shareholding could change the SLC conclusion (see section **Error! Reference source not found.**). This analysis is static and is not future-proof.

- On the other hand, it is clear that under the Act the CMA cannot re-examine any dynamic change in the quality of material influence up to the threshold at which Amazon's material influence would convert into the acquisition of de facto control[20]. In light of the CMA's MAGs, its approach in previous cases and its approach in at least one other merger case before the CMA at present, the RPFs effectively give Amazon carte blanche to increase its stake to potentially up to 50% without attracting any further scrutiny from the CMA (and possibly the European Commission) (see section 3.2).

- As a result, the CMA's no SLC assessment suffers an error of law. It fails to recognise that the application of 'material influence' for jurisdictional purposes differs from the application of 'material influence' for the purposes of an SLC assessment. The CMA fails to analyse what the effect of the Transaction on competition would be if Amazon's material influence was based on a potentially much larger stake (up to 50%), possibly coupled with additional rights and/or commercial agreements of the type the CMA identifies are of interest to the Parties from their internal documents. In light of the scheme of the Act, the CMA must examine the maximum extent of material influence (see section 3.3).

[20] See MAGs paragraph 3.2.15 and RPFs, paragraph 8.

– While this properly rounded assessment of material influence should apply in any event as a matter of law, the evidence in this case underlines the need to avoid a static or snapshot approach both to the size of the equity investment and the granting of additional rights as a significant (and already materially-influencing) shareholder. It is clear from the record that this omission is material, as Amazon has an incentive (and as the CMA has found is a real possibility) to increase its investment in Deliveroo. The CMA finds that the investment in Deliveroo could be considered as Amazon's route of re-entry into the supply of online restaurant platforms, and states amongst other things, that "*the Parties told us that they see the investment as providing the possibility for further investment in Deliveroo*"; and that "*other Deliveroo shareholders see the Transaction as a possible prelude to a full acquisition by Amazon*"; and that "*[an Amazon email] indicates that Amazon may see the minority investment as a first step to increasing its shareholding in Deliveroo*"[21]. Provided it is below the level of de facto control, this increase of stake and/or rights will not be scrutinised by the CMA, nor (potentially) the European Commission (see section 3.4).

– Amazon's incentives to (re)-enter and compete as well as Deliveroo's incentives to compete with Amazon would be materially different (as the CMA states) within the wide scope for material influence falling short of de facto control. The CMA itself finds that an SLC could result should Amazon acquire a materially larger share of Deliveroo. Therefore, the CMA could not, if the analysis had been properly conducted, have credibly concluded that the Transaction does not substantially lessen competition. The RPFs are therefore materially flawed (see section 3.5).

3.1 The CMA critically hinges its SLC analysis on a 16% Amazon stake, whilst underlining that a materially larger shareholding could change the SLC conclusion

(38) The CMA's SLC analysis is critically dependent on the snapshot position of an equity stake fixed at 16% – and no more – being insufficient to deter Amazon from entering the UK market for the supply of online restaurant platforms based on its profit incentives. By way of summary, the CMA provisionally finds that:

(i) In the absence of Amazon's investment in Deliveroo, Amazon would likely have re-entered the supply of online restaurant platforms within five years or less. The CMA then compares the effects of a 16% investment on competition with a situation where Amazon would have re-entered the market itself.

(ii) The CMA concludes that, because Amazon's investment is only 16%, it is not sufficient to:

(a) deter Amazon from re-entering the online restaurant platform market in the UK, nor to, should it decide to re-enter the online restaurant platform market;

(b) encourage Amazon to compete less aggressively with Deliveroo; nor

(c) provide Amazon with sufficient influence over Deliveroo to compete less aggressively with Amazon.

On the first two points, the CMA's reasoning is essentially that Amazon would not have the incentive to forego 100% (or a substantial share) of the profit derived from a sale lost to Deliveroo, for a 16% share of that profit, redistributed to Amazon as a

[21] RPFs, paragraphs 5.32 and 5.35.

minority investor. On the third element, the CMA's reasoning is that Amazon's level of influence on Deliveroo permitted by its 16% ownership, which the CMA acknowledges is 'material', is nonetheless not material enough to "*drive Deliveroo to worsen or reduce its offering if Deliveroo saw this as commercially damaging*".

(39) As regards OCG, the CMA provisionally finds that:

(i) In the absence of Amazon's investment in Deliveroo, Amazon and Deliveroo would likely have continued to develop and strengthen their OCG proposition independently. The CMA has then compared the effects of a 16% investment on competition with a situation where Amazon would have expanded its OCG proposition.

(ii) Similar to the reasoning adopted for online restaurant platforms, Amazon's 16% stake would, according to the CMA, be insufficient to:

(a) Drive Deliveroo's policy to discourage it from competing against Amazon in OCG; and

(b) constitute a sufficient incentive to prevent Amazon from making investments it otherwise would have made in OCG or remove the strategic benefit to Amazon of developing its own OCG service.

(40) The CMA is at pains to point out, however, that a materially larger shareholding could make an outcome-determinative difference:

> "*We are provisionally of the view that it is unlikely the 16% investment in Deliveroo would cause Amazon to compete materially less aggressively if it did re-enter. We note that this assessment could be* ***different*** *should Amazon acquire a* ***materially larger*** *shareholding in Deliveroo*"[22]. (emphasis added)

3.2 The CMA's provisional clearance effectively gives Amazon carte blanche to increase its stake and rights to just under de facto control

(41) The CMA's provisional decision clears Amazon's acquisition of material influence over Deliveroo. As the CMA acknowledges[23], the CMA would only be able to scrutinise any further increase in Amazon's stake or any acquisition of further rights if this amounted to the next level of control i.e. de facto or legal control. Put differently, any further increase in Amazon's stake or rights in Deliveroo will not constitute another relevant merger situation capable of being reviewed by the CMA if it still amounts to material influence.

(42) There is no precise threshold at which de facto control can be established – and therefore – when a new relevant merger situation arises. The MAGs state that "*merger arrangements give rise to a position of 'de facto' control when an acquirer becomes clearly the controller of a company, notwithstanding that it holds a 50 per cent voting stake or less in the target company (i.e. it does not have a controlling interest)*"[24].

(43) In summary, a situation of de facto control in Deliveroo can arise anywhere between the current situation of material influence with Amazon's 16% stake, and Amazon increasing its stake to just over 50% of the voting shares.

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[22] RPFs, paragraph 72.

[23] RPFs, paragraph 8.

[24] MAGs, paragraph 3.2.13.

(44) The CMA has very recently found that a stake as high as 49% of the voting rights and corresponding profit would confer material influence, and not de facto control[25].

(45) The CMA's conclusion in Hunter Douglas / 247 Home Furnishings shows how high the bar can be for de facto control[26]:

> "*Despite Hunter Douglas's large minority shareholding and other associated rights,* ***it did not hold more than 50% of the shareholder voting rights*** *in 247 and it did not acquire the ability to unilaterally determine the strategic policy of 247* ***as it was not able (in law or in fact) to control a majority of the board or of shareholder voting rights in 247****. The existence and scope of the associated rights (including the veto rights listed in paragraph 22 and put and call options) do not affect this conclusion as they do not confer, individually or jointly, the ability to unilaterally determine 247's commercial strategy*.
>
> *In addition, the CMA has considered whether, by virtue of its market knowledge, experience and size, Hunter Douglas might have been able to influence a majority of the shareholders to such an extent that it was effectively able to set the policy of Hunter Douglas.* ***Given that the remaining shareholding is held by the 247 Founding Shareholders, who also act as the directors of the 247's board and run the business on a day-to-day basis****, it is highly unlikely that Hunter Douglas would be able, by virtue of its size or influence, to control 247's policy (even if, on occasion, the 247 Founding Shareholders have sought advice from the Hunter Douglas board)*."[27]

(46) Domino's does not have access to details of Deliveroo's shareholder base but notes that Deliveroo's founding shareholder Will Shu holds shares in Deliveroo and is present on the board of Directors. As a result, it is at least plausible that any further increase in Amazon's stake in Deliveroo, potentially up to 50%, and/or the acquisition of further rights including veto rights which may give rise to decisive influence under the European Union Merger Regulation ("**EUMR**") may not constitute a new relevant merger situation under the Act.

(47) In other words, the RPFs give Amazon carte blanche to further increase its stake in Deliveroo, potentially up to 50%, and/or acquire further rights including veto rights without

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[25] ME/6867/19 - Completed acquisition by Hunter Douglas N.V. of convertible loan notes and certain rights in 247 Home Furnishings Ltd. in 2013 and the completed acquisition by Hunter Douglas N.V. of a controlling interest in 247 Home Furnishings Ltd. in 2019, CMA Decision on relevant merger situation and substantial lessening of competition of 20 March 2020, paragraph 22.

[26] The CMA's recent analysis in *Hunter Douglas* / *247* of material influence vs. de facto control is not an outlier decision whose logic can be confined to its facts. On the contrary, it is consistent with a substantial body of decisional practice of the UK Authorities in favour of finding material influence, not de facto control, in circumstances where the acquirer holds a shareholding above the traditional presumption of material influence of 25% shareholding – see e.g. *HBOS/Lex* (50% is material influence), *Boots/D&A* (35-45% is material influence), *Creative/BBC Broadcast* (34.7% is material influence), *Ryanair/Aer Lingus* (29.82% is material influence), *Emap/SRH* (27.8% is material influence).

[27] ME/6867/19 - Completed acquisition by Hunter Douglas N.V. of convertible loan notes and certain rights in 247 Home Furnishings Ltd. in 2013 and the completed acquisition by Hunter Douglas N.V. of a controlling interest in 247 Home Furnishings Ltd. in 2019, CMA Decision on relevant merger situation and substantial lessening of competition of 20 March 2020, paragraphs 43-44.

fearing CMA interference[28], yet the CMA's findings are only in principle valid (although for the reasons given in section 4 Domino's also disputes these) for a shareholding of up to 16%.

3.3 The CMA's no SLC assessment suffers a critical error of law

3.3.1 The application of 'material influence' for jurisdictional purposes differs from the application of 'material influence' for the purposes of an SLC assessment

(48) In the RPFs, the CMA concludes that Amazon will acquire material influence over Deliveroo based on an acquisition of a 16% shareholding and associated rights. For the purposes of the jurisdictional question under section 36(1)(a) of the Act (in connection with section 26(3) of the Act), this analysis has been conducted on the facts at the time of the CMA's RPFs.

(49) Having answered the relevant statutory question in the affirmative, it is not necessary for jurisdictional purposes for the CMA to consider future variations to those facts – such as increases in shareholding or rights and whether they are likely. While material influence itself is a concept based on a question of fact and degree, there is clearly no sliding scale change in the degree or quality of jurisdiction: that is, there is no enhanced jurisdiction available based on heightened material influence at an increased stake of, say, 26%, 36% or 46%. It is a yes-or-no binary question: the CMA either has jurisdiction or it does not – and the PFs and RPFs are consistent in concluding that it does.

(50) However, the CMA then errs in its application of section 36(1)(b) of the Act by focussing only on the 16% stake. In its SLC analysis, the CMA is required to conduct a forward-looking dynamic SLC assessment and not answer a binary question on current facts. In the SLC analysis, economic incentives to compete are a question of fact and degree and are affected on a sliding scale: the greater the stake in the profits of a competitor, the greater the impact on incentives to compete.

3.3.2 In light of the scheme of the Act, the CMA must examine the maximum extent of material influence to avoid a lacuna in UK merger control not intended by Parliament

(51) It is clear from the above that:

- as a matter of law and practice under the Act, there is a wide range of shareholding levels and other facts relevant to influence that fall within the spectrum of "material influence" short of de facto control, and that range can span, for example, from 16% at the low end and (approaching or up to) 50% at the high end;
- equally, if a no SLC finding is reached on a one-on-one fact pattern, it is only if that material larger shareholding conferred de facto control that the CMA would be able to assert jurisdiction and re-examine the SLC question based on the greater level of control[29].

[28] Furthermore, depending on how much turnover is achieved by Deliveroo in the EU27 excluding the UK, any further increase in Amazon's stake in Deliveroo together with the acquisition of veto rights may also escape EUMR jurisdiction following the end of the Brexit transitional period. Indeed, Deliveroo's total turnover in 2018 was GBP 476 million (see PFs paragraph 2.15). The proportion achieved in the UK is confidential and not disclosed in the PFs or RPFs. Deliveroo's EU27-wide turnover may fall below the EUMR thresholds after the end of the Brexit transitional period once UK turnover is no longer taken into account for these purposes. In any case, the EU will have no post-Brexit jurisdiction over competitive effects in the territory of the UK so this would not solve the problem of the lacuna under the Enterprise Act if the maximum level of material influence were not examined now.

[29] Guidance on the CMA's jurisdiction and procedure, paragraph 4.31.

– as a matter of economics underpinning the SLC test, incentives to compete are affected by the size of the shareholding within this range on a sliding scale: the greater the stake one firm has in the profits of a competitor, the more it affects its own incentives to compete.

(52) This is reflected in previous case law. As the Office of Fair Trading ("**OFT**") explained in its Report to the Secretary of State in BSkyB/ITV, it was appropriate for it in that case to assume that BSkyB may obtain board representation (though it did not have it at the time), and, critically, that:

> "*in the context of the substantive analysis,* ***it is appropriate to assess not only the impact of BSkyB's current shareholding, but also the impact of the maximum level of material influence it could acquire****. The OFT considers that the scheme of the Act justifies this approach. Once the acquisition of material influence has been permitted, the Act does not provide for the OFT to examine increments to material influence. In contrast, as noted above, a subsequent change in the level of control [to de facto control] may be treated as a new merger situation*" (emphasis added)[30].

(53) The principle at stake is therefore that the CMA should not decide that a material influence transaction does not result in an SLC without having properly considered the maximum[31] extent of material influence that may be acquired short of de facto control, and whether an SLC arises at a higher or the maximum level[32].

(54) The OFT's logic remains correct on this position of principle, as the relevant scheme of the Act has not changed, and it is clear from the scheme of the Act the legislator did not intend for potential "material-influence"-based SLC cases based on a certain shareholding and rights (say, 30%, 40% or 50%) to fall through the net merely because (a) there was no SLC at a lower level of shareholding (say, 16%) and yet (b) the level of shareholding fell short of de facto control. This approach to the expansive scheme of the Act is reinforced by later judgments of the courts on other issues but ones that pose the question of lacunae under the Act for mergers that may result in SLC, notably the concept of "enterprise" in the Eurotunnel case.

(55) This holds true even if there were no evidence in this case that Amazon contemplates materially increasing its shareholding (and/or acquiring further rights) (however the internal

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[30] OFT Report to Secretary of State in BSkyB/ITV, paragraph 66.

[31] See also the OFT's review of Emap's acquisition of a 27.8 shareholding in SRH, *Emap/SRH* (2004) where the OFT "assumed the worst" before deciding on no SLC, noting that it "*does not rely on Emap's statement that it has no intention of increasing its shareholding in SRH, nor any intention to integrate the programming or advertising sales activities of the two businesses*".

[32] For completeness, The two leading material influence cases under the Act at Phase 2 do not cast any doubt on the principle articulated by the OFT in BSkyB/ITV because in both those cases the Phase 2 conclusion was that there was already an expectation of SLC – and therefore comprehensive remedial action – based on the level of shareholding at the time of the decision. In BSkyB/ITV, the Competition Commission ("CC") already found that BSkyB's 17.9% stake in ITV conferred material influence sufficient to establish both jurisdiction and result in an SLC, which resulted in a remedial outcome that obliged BSkyB to divest shares down to 7.5% or less. It was not therefore material to the SLC analysis to consider whether BSkyB could increase its shareholding beyond 17.9% or acquire other rights or means of influence. In any event, in that case, the Communications Act 2003 prevented Newscorp/Sky from owning more than 20% of ITV, so the absolute maximum Sky could lawfully have raised its stake was only 2.1%. No such legislative cap applies here. In Ryanair/Aer Lingus, Ryanair had acquired material influence based on a shareholding of 29.82% in Aer Lingus at the time of the CC's decision. Similar to the BSkyB case, the CC found that an equity stake of that size already conferred material influence (but not de facto control) sufficient to establish both jurisdiction and result in an SLC, which resulted in a remedial outcome that obliged Ryanair to divest shares down to 5% or less. While there was no shareholding cap on Ryanair acquiring further shares (that fell below de facto sole control or "decisive influence" for EUMR purposes), it was therefore not material to consider whether Ryanair could increase its shareholding beyond 29.82%. The circumstances in Amazon/Deliveroo are materially different

documentary evidence in this case is in fact that this transaction is a step on a path to a greater degree of control – see section 3.4). To decide otherwise on the point would be to give acquirers a green light to game the system and harm competition and consumers by acquiring just enough of a stake in a competitor to acquire material influence (15% is the normal level at which the concept is engaged) but not enough for an SLC – and then raising their stake to be materially larger but staying short of de facto control. This would result in a "safe harbour" for SLC transactions outside the reach of the CMA.

(56) In conclusion, the CMA's RPFs grant unconditional clearance to Amazon potentially investing up to 50% in Deliveroo and acquiring additional rights such as veto rights, whereas the scope of its competition assessment does not go beyond a 16% stake with no veto rights.

(57) As a result, the scope of the CMA's provisional clearance decision goes far beyond what it has assessed. Even if this concern were merely theoretical (which it is not, see section 3.4 below), this is a fatal flaw in the logic of the RPFs.

3.4 Amazon has an incentive to increase its stake

(58) The methodological flaw in the CMA's assessment is material, as Amazon has an incentive (and may well, as the CMA has found) increase its investment in Deliveroo. Depending on the stake and rights acquired, even if these are a very substantial minority stake, these rights may well not be scrutinised by the CMA, and potentially also not by the European Commission.

(59) The RPFs clearly indicate that Amazon has an incentive and is likely to increase its investment in Deliveroo:

> "*Internal documents from Amazon and other Deliveroo shareholders indicate that they see the Transaction as a* ***potential first step toward a full acquisition*** *of Deliveroo, rather than a purely financial investment*"[33].
>
> "*The Parties submitted that Amazon's investment in Deliveroo was financial and that it was investing, amongst other reasons, after being impressed by Deliveroo's performance and CEO. However, as described in our April Provisional Findings,* ***we consider the evidence (in particular, Amazon's internal documents*** *discussing the Transaction and the restaurant food delivery industry)* ***demonstrates that Amazon considers Deliveroo to be of potential strategic value to it in future [redacted]****), and that* ***Amazon's investment in Deliveroo was strategic****, [redacted]*"[34].
>
> "*This evidence suggests the* ***investment in Deliveroo could be considered as Amazon's route of re-entry*** *as:*
>
> (a) Amazon has a strong strategic interest in restaurant delivery;
>
> (b) *Amazon originally considered [redacted] Deliveroo, noting that it would be hard to achieve a [redacted] and that Deliveroo '[redacted]", whilst noting the [redacted] of Deliveroo and broadly agreeing with Deliveroo's assessment of its [redacted];*
>
> (c) *The Parties told us that they see the* ***investment as providing the possibility for further investment in Deliveroo*** *[…];*

[33] RPFs, paragraph 99.

[34] RPFs, paragraph 5.30.

(d) *Amazon's presence as a shareholder is a deterrent to rivals and future rivals, and third parties see the investment as Amazon's re-entry into the market;*

(e) *Other Deliveroo shareholders see the Transaction as* ***a possible prelude to a full acquisition by Amazon****, which would be a potential route for those shareholders to realise their investments in Deliveroo; and*

(f) *Amazon has a higher liquidation preference, which Amazon describes as '[redacted]'; and*

(g) *Amazon has a right [redacted], which contributes to Amazon's ability to exert influence over how a sale of Deliveroo might be achieved*"[35].

"*The email described above indicates that Amazon* ***may see the minority investment as a first step to increasing its shareholding in Deliveroo*** *[redacted]. Amazon told us that it saw the investment as providing '****a little bit of optionality****' around investing further or acquiring Deliveroo in the future […]*"[36].

"*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 […]*"[37].

(emphasis added)

(60) Despite the redacted material from the paragraphs above, it is clear that there is a real possibility that Amazon will increase its investment in Deliveroo in the future, which for the reasons set out above, may well not be reviewable by the CMA[38].

3.5 A correctly performed SLC assessment would conclude that the Transaction will substantially lessen competition

(61) In assessing the Transaction on the basis of an acquisition of material influence, with a possibly larger stake and additional rights, including via commercial contracts which the Parties' internal documents indicate are of interest to them, Amazon's entry and competition incentives on the one hand and Deliveroo's incentives to compete with Amazon on the other hand are materially different from those described in the RPFs.

3.5.1 Material influence via a sizeable minority equity stake can result in an SLC

(62) It is clear from the CMA's SLC analysis and orthodox merger control economics that a material change in the size of the equity stake can materially change economic incentives to enter and/or compete aggressively[39].

(63) As material influence with a sizeable stake can affect an acquirer's unilateral incentives to compete to the point of resulting in an SLC, it is clear that SLC cases can arise even when the acquirer does not enjoy de facto control, and does not exert (or choose to exert) influence

[35] RPFs, paragraph 5.32.

[36] RPFs, paragraph 5.35.

[37] RPFs, paragraph 5.41.

[38] RPFs, paragraph 5.35.

[39] The leading article is by Steven C. Salop and Daniel P. O'Brien, "*Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*", Georgetown University Law Center, 2000.

over the target either at all, or in a contested or controversial way with respect to other shareholders, or management.

(64) Other shareholders or management may be perfectly content to have the acquirer not enter the market independently (and thus depress the shareholder value and profits of the target) or to compete less aggressively if already in the market – indeed this would be to their economic advantage.

(65) Accordingly, even absent evidence of Amazon's documented intent or economic incentives, it cannot be assumed by the CMA that Deliveroo shareholders or management would resist steps by Amazon to increase its shareholding materially. The latter has been interpreted as the unilateral ability to control the target in practice irrespective of any objections by other shareholders or management.

(66) Furthermore, and rather unusually, the CMA has not carried out any financial modelling to understand Amazon's incentives to enter, the scope of that entry, nor Amazon's incentives to deteriorate its offer, once it has re-entered the market for online restaurant platforms.

(67) A standard way of assessing the extent to which Amazon would have the incentive to deteriorate its offer, once it has re-entered the market, is the Gross Upward Pricing Pressure Index ("**GUPPI**"). Domino's has simulated a GUPPI analysis in respect of diversion to Deliveroo for different levels of diversion ratios, Deliveroo's margins and Amazon's shareholding in Deliveroo.

(68) The results of this simulation are set out in more detail in Tables 1, 2 and 3 in section 4.1.2 below. These clearly show that Amazon will have the incentive to increase its price and/or worsen its offering in the majority of the cases if one assumes a shareholding of either 40% of 50%, regardless of Amazon's diversion ratio to Deliveroo and Deliveroo's gross margin.

(69) As a result, the CMA could not have credibly concluded that the Transaction does not substantially lessen competition.

3.5.2 Considering the maximum level of material influence which may result in an SLC finding does not create an unacceptable outcome or remedial consequences

(70) It follows from the above that the correct view is that (even if) the CMA were correct that material influence at 16% does not result in an SLC (which Domino's disputes), it must then conduct an analysis of SLC up to the maximum level short of de facto control.

(71) While the CMA must turn its mind to and consider this maximum level, the SLC finding can properly be framed in terms that are not overly precise in terms of pinpointing a precise shareholding that is de facto control. Instead, it must determine the level at which it can reliably form an expectation of dampened incentives to compete sufficient to deter entry and result in an SLC – whilst ensuring that that particular level is consistent with material influence but not de facto control.

(72) For example, if it were not accepted that 16% is sufficient to result in an SLC, the evidence may suggest that there would be expectation of an SLC based on a shareholding at e.g. 25% or 30% (the "**SLC threshold**"), both of which are clearly short of de facto control.

(73) The duty to remedy the anti-competitive outcome would obviously point towards a cap on Amazon's stake and acquisition of further rights at the existing position. If that were accepted as effective but not proportionate, the CMA can explore whether a remedy that sets a cap to

just below the relevant SLC threshold, e.g. 24.9% would still be effective, but more proportionate.

(74) This would be the mirror image of – albeit substantially more generous to Amazon than – the CC's remedial requirements in previous Phase 2 cases ordering the acquirer to divest to below a material influence threshold sufficient to remove the SLC (below 7.5% and 5% respectively in *BSkyB/ITV* and *Ryanair/Aer Lingus*).

(75) The above approach would be future-proof in terms of the CMA's duties to protect competition and consumers from anti-competitive mergers involving a minority stake.

(76) Of course, the merger parties will urge that the market is dynamic, and circumstances may change. That is no reason not to follow through on the CMA's statutory duties on SLC and remedial action. But there is valve to protect the position of the merger parties. Amazon will always have the right to request a waiver or partial or full release from such remedial undertakings/order if it can satisfy the CMA that there has been a material change of circumstance since the time of the Report, as Ryanair sought to do in respect of its remedy obligations in the Aer Lingus case. Amazon can request that the cap be raised or lifted entirely, for example.

(77) The CMA need not speculate in advance but can cross that bridge at the time based on the facts at the time. That is the approach intended by the scheme of the Act, to which the RPFs have paid manifestly inadequate regard.

3.6 Conclusion

(78) Domino's considers that the CMA's RPFs suffer from a critical flaw in logic that invalidates the CMA's provisional conclusion that the Transaction will not result in an SLC.

4 THE TRANSACTION CREATES SERIOUS SLC CONCERNS EVEN AT 16% AND AT VARIOUS FORSEEABLE SCENARIOS OF GREATER MATERIAL INFLUENCE (SHORT OF DE FACTO CONTROL)

4.1 The CMA's assessment of Amazon's incentives with a 16% stake is flawed

4.1.1 Amazon's incentives to re-enter online restaurant platforms and scale of re-entry

(i) Re-entry decision

(80) The CMA concludes that – based on the evidence available – *"it is [not] sufficiently likely that the investment in Deliveroo would deter re-entry by Amazon* [in the market for online restaurant platforms] *if there was a strong financial incentive for Amazon to re-enter".*[40] This conclusion is based on the observation that Amazon will only have a minority share in Deliveroo as a result of the Transaction, and on Amazon's internal documents.[41]

(81) However, the CMA's conclusion is based on a factual error and a failure of analysis.

(82) The factual error is that the CMA itself notes that its conclusion applies if Amazon retains its 16% shareholding and it does not acquire a larger share in Deliveroo, but could change if Amazon did acquire a large shareholding.[42] However, as set out above in section 3.4 Amazon will have an incentive to materially increase its share following a clearance of the Transaction, and the CMA will not – contrary to its assertion in paragraph 5.42 of the RPFs – have any opportunity to scrutinise the acquisition of an additional stake if it falls short of de facto or legal control.

(83) The failure of analysis is that the CMA does not explore whether Amazon's entry decision would be sufficiently marginal so as to lead to a 16% minority share (or a larger share, up to 50%) in Deliveroo being enough to make entry unprofitable overall. To do so, the CMA would need to:

- Model the profitability of Amazon's entry decision;
- Investigate the likely reduction in Deliveroo sales; and
- Assess whether this impact is sufficient to remove Amazon's incentive to enter (both at a 16% shareholding and at a potential 50% shareholding).

(84) The CMA has not carried out any financial modelling to understand Amazon's incentives to enter. These failures mean that the CMA's conclusions are inadequately supported.

(ii) Scale of entry

(85) The CMA wrongly treats the entry decision as an "enter or not" choice.[43] This is incorrect. Rather, entry can take place at different scales. The CMA has failed to recognise that Amazon is likely to reduce its scale of entry relative to a situation where it did not take a 16% stake in Deliveroo.

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[40] RPFs, paragraph 5.42.

[41] RPFs, paragraph 5.26 and 5.41.

[42] RPFs, paragraph 5.42.

[43] RPFs, paragraph 5.19 et seq, section headed "Impact of the Transaction on whether Amazon would re-enter".

(86) Competition in the online restaurant delivery sector takes place in a series of local markets, and entrants have a choice to enter as many or as few of these as they wish.[44]

(87) A profit maximising entrant – such as Amazon – would enter all areas that are at least marginally profitable.

(88) Following Amazon's acquisition of a 16% stake in Deliveroo, Amazon will take into account the impact of its entry on Deliveroo's profits, and Amazon's entry into some local areas will become unprofitable – leading to a certain reduction in the scale of Amazon's entry.

(89) If Amazon were to increase its stake to 50%, more areas would become unprofitable for Amazon, and it would further reduce its scale of entry.

(90) This mechanism directly leads to a lessening of competition. Yet the CMA has not investigated this issue at all.

4.1.2 Amazon's incentives as regards level of competition post-entry

(91) The CMA also assessed the extent to which the Transaction could lead to an SLC in the event Amazon decides to re-enter the market, but has less incentive to compete effectively against Deliveroo.[45] It concludes that *"it is unlikely the 16% investment in Deliveroo would cause Amazon to compete materially less aggressively if it did re-enter because it is not sufficiently likely that Amazon would have the incentive to worsen its offer in exchange for 16% of the potential benefit that such a strategy would confer on Deliveroo"*.[46]

(92) The CMA does not provide a detailed empirical analysis to support this conclusion, but rather bases its assessment on the assumption that the 16% shareholding in Deliveroo would not confer Amazon enough incentive to worsen its offer to customers.[47] However, the CMA does not carry out any quantitative analysis to determine whether Amazon's incentive to deteriorate its offer is sufficiently large to result in an SLC.

GUPPI modelling of changes in incentives to compete

(93) Consistently with previous CMA decisions,[48] a standard way of assessing the extent to which Amazon would have the incentive to deteriorate its offer, once it has re-entered the market, is the GUPPI. Domino's does not suggest that the use of GUPPI by the CMA is mandatory, only that some generally-accepted quantification of incentives is an essential SLC step in the circumstances and is missing.

(94) In this respect, GUPPI is (in the CMA's own view) "*commonly used*"[49] by the CMA and UPP-based analysis was the model used by the CMA for example in its four most recent completed Phase 2 retail merger inquiries.[50] This index is commonly used to capture the

[44] RPFs, paragraph 3.128 and the discussion in previous paragraphs.

[45] RPFs, paragraphs 5.43 – 5.55.

[46] RPFs, paragraph 5.51.

[47] Ibid.

[48] See CMA's Final Report on the anticipated merger between J Sainsbury PLC and Asda Group Ltd and CMA's Final Report on the completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc.

[49] Completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc Final Report, paragraph 23.

[50] Ladbrokes/Coral (2016), Tesco/Booker (2017), Sainsbury's/Asda (2019), and JD Sports/Footasylum (2020).

parties' incentive to raise their prices and/or deteriorate their offer post-merger.[51] It can readily be adjusted for the case of a minority shareholding.[52]

(95) In order to estimate the Parties' GUPPI, one would have to calculate:

- The Parties' diversion ratios;
- The Parties' margin; and
- The Parties relative price index.

(96) In this case, to assess the extent to which Amazon would have the incentive to increase its price and/or deteriorate its offer, one would have to calculate (i) Amazon's diversion ratio to Deliveroo, (ii) Deliveroo's margin, (iii) Amazon and Deliveroo's relative price index, and (iv) Amazon's likely shareholding in Deliveroo post-merger.

(97) The CMA has not provided any detail on such metrics to estimate Amazon's GUPPI. Nonetheless, Tables 1, 2 and 3 below simulate Amazon's GUPPI (in respect of diversion to Deliveroo) for different levels of diversion ratios[53], Deliveroo's margins[54] and Amazon's shareholding in Deliveroo.[55,56] This analysis is based on the best available information in the CMA's RPFs. To the extent that such information was absent from the CMA's PFs or RPFs, or was required to be estimated, this reflects a failing on the part of the CMA, given that it is clearly relevant to the assessment.

CMA guidance on GUPPI results that materially affect incentives sufficient for SLC

(98) As to the threshold at which a GUPPI signifies an incentive to raise price or worsen the retail offer, there is no fixed threshold across markets or cases. However, highly relevant to a transaction in the supply of OCG and online restaurant platforms is the CMA's recent approach in Sainsbury's/Asda (2019).

(99) As the CMA is aware, the GUPPI result sufficient to establish an SLC-level change in competitive incentives, absent an evidenced efficiencies allowance, was 1.5% GUPPI for a local SLC in groceries online; 1.5% GUPPI for a local SLC for groceries in-store; and 2%

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[51] See CMA's Final Report on the completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc, paragraph 6.30.

[52] See Steven C. Salop and Daniel P. O'Brien, "*Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*", Georgetown University Law Center, 2000 (available at https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1200&context=facpub); and D. Brito, A. Osorio, R. Ribeiro, and H. Vasconcelos, "*Unilateral Effects Screens for Partial Horizontal Acquisitions: The Generalized HHI and GUPPI*", at p28 (available at https://www.fep.up.pt/docentes/hvasconcelos/index_ficheiros/PDFs_Papers/Publications/Unilateral_Effects_Screens_December_2016.pdf).

[53] For the diversion ratios, Table 1, 2 and 3 assume that Amazon's diversion ratios to Deliveroo ranges from 20% - which can be considered a conservative estimate – to 50%. This range is broadly in line with diversions based on a market including Just Eat, Deliveroo and Uber Eats, based on the shares reported only in the Phase 1 decision, and a market including only Deliveroo and Uber Eats, based on the same shares. We note that Amazon's offer is likely to be closer to that of Deliveroo and Uber Eats given that it will providing its own logistics and so – as with Deliveroo and Uber Eats – will primarily attract restaurants which do not have their own delivery capacity. However, unaccountably the CMA has not sought to investigate diversion ratios in this investigation.

[54] For the gross margins, Table 1, 2 and 3 assume that Deliveroo's gross margins range from 20% to 40%, by way of sensitivity analysis.

[55] For the level of Amazon's shareholding in Deliveroo, we assume that Amazon's shareholding in Deliveroo ranges from 16% - which is the actual stake that Amazon has in Deliveroo – to 50%, which is the maximum threshold that would give Amazon a material influence over Deliveroo, without having legal control, as explained in paragraph (42).

[56] For simplicity, Amazon and Deliveroo's relative price is assumed to be 1.

GUPPI for a local SLC in convenience groceries.[57] In setting the level at which a local GUPPI threshold would qualify as constituting a SLC, the CMA noted that it was relevant that the goods in question were the supply of food, which is essential, and which accounts for a significant share of household income, even more so for low-income households:

> "*In assessing what may constitute 'substantial' for the purposes of our local assessment of in-store groceries, we have had regard to the fact that groceries are a* ***non-discretionary*** *expenditure that accounts for a significant share of household spend, proportionally more so for low income households. Government estimates are that UK households' expenditure share on* ***food and non-alcoholic drinks*** *is around 11%, increasing to over 14% for those on* ***lower incomes*** *(households with incomes in the lowest 20%). As a result, even a small percentage increase in the price of groceries (or equivalent worsening of QRS) would have a significant adverse impact on UK consumers*".[58] (emphasis added)

GUPPI results in this case under various assumptions

(100) In this case, Tables 1, 2 and 3 below show that:

- the majority of instances show Amazon's GUPPI to Deliveroo as higher than 1.5% (cells highlighted in red text and grey shading),[59] and
- there are some instances where Amazon's GUPPI to Deliveroo is 5% or well above it (cells highlighted in white text and red shading), which is multiples of the GUPPI applied in *Sainsbury's/Asda* and also consistent with the CMA's finding of a national SLC in the most recent Phase 2 retail merger, *JD Sports/Footasylum* (2020).[60]

Table 1: Amazon's GUPPI, assuming Deliveroo's gross margin is 20%

	Amazon's diversion ratio to Deliveroo			
Amazon's shareholding	**20%**	**30%**	**40%**	**50%**
16%	0.6%	1.0%	1.3%	1.6%
20%	0.8%	1.2%	1.6%	2.0%
30%	1.2%	1.8%	2.4%	3.0%
40%	1.6%	2.4%	3.2%	4.0%
50%	2.0%	3.0%	4.0%	**5.0%**

Source: Domino's analysis

[57] Due to the 1.25% efficiencies allowance, these were then applied in combination with that allowance to result in local SLC thresholds of 2.75% GUPPI (for the online and in-store groceries markets) and 3.25% GUPPI (for convenience store markets); see paras. 8.296, 8.348ff and 11.93ff. In this case, the CMA cites no efficiencies that would be incorporated as an equivalent allowance to Amazon.

[58] ME/6752-18, Anticipated merger between J Sainsbury PLC and Asda Group Ltd, CMA Final Report, paragraph 8.283.

[59] ME/6752-18, Anticipated merger between J Sainsbury PLC and Asda Group Ltd, CMA Final Report, paragraph 46.

[60] In its most recent Phase 2 inquiry (JD Sports/Footasylum, 2020) the CMA explained in that case that a GUPPI of [4-7%] was "*high*" for JD Sports (para. 8.227, 8.228(b)) and a "*strong incentive to increase prices (or deteriorate other aspects of QRS) … for JD Sports*" (para. 8.227 and cf. 8.230) and formed an important part of the SLC conclusion that JD Sports would worsen the retail offering of its JD Sports branded stores post-merger. However, the parallel with the online groceries and convenience stores groceries markets in the recent Sainsbury's/Asda case is much more compelling. See CMA's Final Report on the completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc.

Table 2: Amazon's GUPPI, assuming Deliveroo's gross margin is 30%

	Amazon's diversion ratio to Deliveroo			
Amazon's shareholding	**20%**	**30%**	**40%**	**50%**
16%	1.0%	1.4%	1.9%	2.4%
20%	1.2%	1.8%	2.4%	3.0%
30%	1.8%	2.7%	3.6%	4.5%
40%	2.4%	3.6%	4.8%	**6.0%**
50%	3.0%	4.5%	**6.0%**	**7.5%**

Source: Domino's analysis

Table 3: Amazon's GUPPI to Deliveroo, assuming Deliveroo's gross margin is 40%

	Amazon's diversion ratio to Deliveroo			
Amazon's shareholding	**20%**	**30%**	**40%**	**50%**
16%	1.3%	1.9%	2.6%	3.2%
20%	1.6%	2.4%	3.2%	4.0%
30%	2.4%	3.6%	4.8%	**6.0%**
40%	3.2%	4.8%	**6.4%**	**8.0%**
50%	4.0%	**6.0%**	**8.0%**	**10.0%**

Source: Domino's analysis

(101) Unsurprisingly, the above suggests that the Transaction is likely to give rise to an SLC the higher the diversion ratio from Amazon to Deliveroo, the higher Deliveroo's gross margin and the higher Amazon's shareholding in Deliveroo.

(102) In particular, Tables 1, 2 and 3 above imply that Amazon will have the incentive to increase its price and/or worsen its offering according to the CMA's own logic in the majority of the cases if one assumes a shareholding of 20%, 30%, 40% or 50% - which are plausible future scenarios as explained in section 3.4 above that would not be caught by UK merger control, regardless of Amazon's precise diversion ratio to Deliveroo and Deliveroo's precise gross margin.

(103) This analysis also underestimates the full effect of the merger on market prices, as Amazon's higher price (relative to a no-Transaction world) will lead to unilateral reactions from Deliveroo, Just Eat and UberEats.[61] As noted by the CMA:

> "*any GUPPI must be interpreted in light of the fact that it accounts for only the individual first-order incentives of each merging party and therefore considers neither feedback effects between merging parties nor second order effects from third parties, both of which will naturally follow from an initial price increase or cost saving degradation in QRS*"[62].

(104) The CMA's failure to carry out a GUPPI analysis, given the reliance on GUPPI approaches in many recent merger cases which are the subject of an in-depth investigation, further undermines the robustness of its conclusions and its misapplication of the SLC test in the circumstances.

[61] We note that the Parties' analysis, set out in paragraph 5.26 of the RPFs, only reports a price impact at the overall market level. This analysis either hides, or the CMA does not report, a substantial incentive for Amazon to raise its prices, with smaller incentives for the existing players to raise their prices.

[62] Anticipated merger between J Sainsbury PLC and Asda Group Ltd, CMA Final Report, paragraph 8.287.

4.2 The CMA's assessment of Amazon's influence on Deliveroo with a 16% stake is flawed

(105) Similar to the CMA's analysis of Amazon's incentives to enter and to compete based on a 16% shareholding, the CMA concludes that a 16% share in Deliveroo would not give Amazon sufficient influence on Deliveroo's board of directors to discourage Deliveroo from competing with Amazon in online restaurant platforms and/or OCG.

(106) The CMA notes:

> "*whilst we have provisionally concluded that the Transaction is more likely than not to provide Amazon with the ability to exercise material influence over the policy of Deliveroo, this is not the same as an ability to control that policy. In particular, it does not amount to an ability to drive policy in a direction that other shareholders, management or the board object to*"[63]

(107) As explained above, it is common ground that the CMA could review in future a transaction by which Amazon were to acquire de facto control such that it could positively "drive policy" unilaterally even in the face of objection, as if it owned 51% or more (a controlling interest) in Deliveroo.

(108) However, provided it stayed below this level of control, a no-SLC unconditional clearance would permit Amazon to increase its equity stake (affecting its own incentives to compete aggressively) but also affect how Deliveroo might compete in a strategic way that would still only qualify as (a change in the quality of) material influence that would fall outside the ambit of UK merger control. For example, if Amazon were to offer sufficient capital to acquire, say, a further 14% stake to a total of 30% and in return also be able to block special shareholder resolutions and/or obtain veto rights it could prevent Deliveroo from engaging in pro-competitive actions that might harm the competing Amazon business. This would be similar to the kind of veto power that would have allowed BSkyB to frustrate competition that it might otherwise face from ITV and Ryanair to block acquisition of Aer Lingus by other airlines that would be pro-competitive. In both those Phase 2 cases the CC decided that this sort of negative control variation of material influence resulted in an SLC requiring divestitures (down to 7.5% and 5% stakes, respectively) notwithstanding that neither acquirer enjoyed de facto control.

(109) The RPFs state that the possible impact of Amazon's material influence and the incentives of Deliveroo's management and shareholders have been assessed, and conclude that "*in the round, [the CMA] provisionally believes that it is not sufficiently likely that the Transaction would result in Deliveroo competing less strongly against Amazon in the supply of online restaurant platforms*"[64].

(110) No assessment is provided in the RPFs of the potential for enhanced Amazon ability to harm Deliveroo's competitiveness in a way that would not require it to enjoy de facto control. For similar reasons to those given above, this failure to take relevant considerations into account means that the CMA has erred in its application of the SLC test in the RPFs.

4.3 The CMA has not addressed Domino's concerns set out in its PFs Response

(111) In its PFs Response, Domino's urged the CMA to consider the substantial and harmful mid to long-term effects the Transaction would have on competition. Domino's primary concerns were that: (i) Amazon would engage in tying/bundling and data collection to leverage

[63] RPFs, paragraph 6.288 (OCG). The same applies to online restaurant platforms, see RPFs paragraph 5.53.

[64] RPFs, paragraph 5.55.

customers into Amazon's already dominant ecosystem; and (ii) Amazon's significant last mile delivery infrastructure and financial resources would be used to drive out local, independent businesses.

(112) The RPFs fail to acknowledge, let alone address, Domino's concerns.

4.3.1 Strengthening of Amazon's ecosystem via leveraging strategies

(113) Domino's submitted in its PF Response that the CMA should consider an "ecosystem" theory of harm.[65] This theory has been set out in the Cremer et al report *Competition Policy for the Digital Era*).

> *"… strengthen […] … the platform's (or ecosystem's) dominance, because the acquisition can: (i)* ***intensify the loyalty of those users that consider the new services as complements to services already offered by the platform/ecosystem****…."* (p. 11) (emphasis added)
>
> and
>
> *"[Acquirer may] "appropriate […]" the network effects that the target has managed to establish to the benefit of its own customers in such a way that, after the merger, they further strengthen the ecosystem as a whole.* ***Customers of the dominant ecosystem can be "leveraged" to the newly integrated service; customers of the target are integrated into the ecosystem; and due to the stronger network externalities, all customers are less likely to leave the ecosystem afterwards****."* (p. 122) (emphasis added).

(114) Moreover, only last week the CMA published its Digital Advertising Final Report. This made many references to ecosystem theories of harm.

> "*We have found that, by virtue of this position, and their market power, large platforms such as Google and Facebook increasingly appear to be acting in a quasi-regulatory capacity in relation to data protection considerations, setting the rules around data sharing not just within their own ecosystems, but for other market participants.*"[66]
>
> "***Platforms with market power can leverage their position into downstream or adjacent markets****, giving themselves* ***an advantage over potential competitors and undermining competition*** *in those markets.*"[67]
>
> "*Platforms can use ecosystems to* ***protect their most profitable services from competition***"[68]
>
> "*If platforms can convince consumers to stay within their ecosystem,* ***a new entrant would need to compete on many fronts to displace them***"[69];
>
> "*by gaining control of certain adjacent markets…* ***platforms can control the entry points to their core markets***"[70];

[65] PFs Response, paragraph 15-21.

[66] Digital Advertising Final Report, paragraph 47.

[67] Digital Advertising Final Report, paragraph 58.

[68] Digital Advertising Final Report, paragraph 59.

[69] Digital Advertising Final Report, paragraph 59.

[70] Digital Advertising Final Report, paragraph 59.

"*where the adjacent market may impose a competitive constraint in the future… **controlling it can insulate the platform from the future threat of competition***"[71];

"*by expanding the breadth and variety of online services provided **[dominant ecosystems] are able to gather increasing amounts of… data…** This in turn results in greater… revenues, enabling them to invest at a greater rate than their rivals, which **creates a feedback loop that further cements their powerful position***."[72]

(emphasis added)

(115) While the focus of that investigation was on advertising-funded platforms, the theories set out above do not rely on a platform being funded by advertising rather than through some other route. Indeed, the CMA states that "*it is significant that the most successful digital companies in recent years have increasingly been building large ecosystems of complementary products and services around their core service*".[73] It is obvious that Amazon is one such digital company.[74] The Furman Report was similarly clear that Amazon was one example of a platform with a dominant ecosystem status, as described in paragraph 17 of the PFs Response. It follows that any ecosystem concern in relation to Google and Facebook could equally apply to Amazon.

(116) In its PFs Response, Domino's expressed its concerns on the opportunities for cross-selling between Amazon and Deliveroo's online restaurant platform business the Transaction would create, either by way of targeted advertising or tying/bunding. Domino's refers the CMA to paragraph 100 of its PFs Response.

(117) However, the CMA does not tackle (nor even mention) the theories of harm raised by Cremer et al reports nor the theories raised in the CMA's Digital Advertising Final report and which have direct read across to this case in any of its Phase 1 decision, Issues Statement, original provisional findings or the RPFs. In particular, the CMA does not explore:

(i) whether Amazon has a dominant ecosystem (as per the CMA Digital Advertising Final Report[75]);

(ii) the likelihood that user loyalty is intensified through the use of Deliveroo as a complementary asset (as per Cremer et al[76]);

(iii) whether customers of the dominant ecosystem can be leveraged to the newly integrated service (as per Cremer et al[77]), except via bundling;

(iv) whether customers of the dominant ecosystem can be integrated into the ecosystem (as per Cremer et al[78]);

(v) whether, due to stronger network externalities, customers of the dominant ecosystem are less likely to leave the ecosystem afterwards as per Cremer et al[79] –

[71] Digital Advertising Final Report, paragraph 59.

[72] Digital Advertising Final Report, paragraph 60.

[73] Digital Advertising Final Report, paragraph 2.36.

[74] Amazon recognises that it has an "ecosystem" as found by the CMA (paragraph 4.127, RPFs).

[75] Digital Advertising Final Report, paragraphs 47 and 58-60.

[76] Cremer et al p. 11.

[77] Cremer et al p. 122.

[78] Cremer et al p. 122.

[79] Cremer et al p. 122.

despite the fact that the CMA has concluded that network effects are relevant for online restaurant platforms notably[80];

(vi) whether Amazon sets rules around data sharing within its ecosystem that could lead to a competition concern if extended to Deliveroo (as per the CMA's Digital Advertising Final Report[81]);

(vii) whether, other than via bundling, Amazon could leverage its position into downstream or adjacent markets (as per the CMA's Digital Advertising Final Report[82]);

(viii) whether Amazon could use its position to protect its existing services from competition by raising barriers to entry for rivals (as per the CMA's Digital Advertising Final Report[83]); and

(ix) whether the data advantage that Amazon would gain would provide it with the ability to generate more revenues and a positive feedback loop (as per the CMA's Digital Advertising Final Report[84]).

(118) The CMA's failure even to acknowledge the concerns that it itself has raised or even to note the same points made by Domino's in its PFs Response in relation to issues that arise from the extension of ecosystems – and Amazon's position as the operator of a dominant ecosystem – critically undermines the robustness of its SLC conclusion.

(119) This material omission in this case jars with other CMA public statements, some of them made this week by the CMA's Chief Economist Mike Walker:

> "*We now see the digital platforms creating ecosystems. These ecosystems undoubtedly improve the consumer experience, but they also absolutely lead to anticompetitive concerns*" referring to platforms using "envelopment" strategies to protect their core monopolies, and potentially use those monopolies to extend their power into other markets.
>
> "*We need to continue to be tight on acquisitions in this sector, […] we need to be very tough on digital mergers*", stating that allowing Facebook to acquire Instagram "*looks to have been a mistake*" but that "*the key thing now is that we know a lot more and there is no excuse to continue to make those sorts of mistakes*"[85].

(120) Domino's is at a loss to reconcile the gulf between actions and words.

4.3.2 A predatory strategy that leads to Amazon / Deliveroo becoming unavoidable trading partners

(121) Amazon is one of the world's largest cash-rich businesses with its most recent quarter cash reported as $49 billion[86]. Amazon is able to use its deep cash reserves to shore up loss-making businesses. This predation strategy artificially distorts competition leaving

[80] RPFs, paragraph 3.16.

[81] Digital Advertising Final Report, paragraph 47.

[82] Digital Advertising Final Report, paragraph 58.

[83] Digital Advertising Final Report, paragraph 59.

[84] Digital Advertising Final Report, paragraph 60.

[85] 4th Innovation Economics For Antitrust Lawyers Conference, 6 July 2020.

[86] See https://ir.aboutamazon.com/news-release/news-release-details/2020/Amazoncom-Announces-First Quarter/default.aspx, 30 April 2020.

competitors, who are not receiving such cash lifelines, unable to maintain their prices and resulting in the market being left with higher prices and poorer choice and quality.

(122) Amazon Marketplace has already been identified by the Furman Report as a "*strategically important gateway to consumers*"[87] controlling essential access for e-commerce retailers to consumers. Deliveroo, already a heavy loss-making business, could also employ predation strategies, financed by Amazon's abundant cash reserves, in order for Deliveroo to become the gatekeeper to restaurant/grocery home delivery. Such predation strategies could manifest in a number of ways, and Domino's refers the CMA to paragraphs 105 to 110 of its PFs Response.

(123) These concerns have not been addressed by the RPFs.

[87] Furman report (Unlocking Digital Competition), paragraph 1.58

5 CONCLUSION AND REMEDIAL ACTION TO REMEDY, MITIGATE OR PREVENT LIKELY (CURRENT OR FUTURE) SLC

(124) In summary, Domino's and its franchisees strongly disagree with the CMA's provisional conclusion that the Transaction is unlikely, on the balance of probabilities, to result in an SLC.

(125) Domino's considers that the CMA's RPFs suffer from a critical flaw in logic that invalidates the CMA's provisional conclusion, in that it gives Amazon carte blanche to increase its stake and rights in Deliveroo to up to 50%, potentially without the possibility of further CMA or European Commission intervention, whereas the CMA's conclusion that Amazon's acquisition of material influence in Deliveroo is unlikely to result in an SLC is tied to the quantum of a 16% investment.

(126) Furthermore, even leaving aside this critical methodological error, the CMA's assessment of Amazon's incentives to re-enter the market for online restaurant platform (including the scope of such re-entry) and/or compete aggressively with Deliveroo should it decide to re-enter, on the basis of a 16% investment is incomplete. The CMA's failure to carry out a GUPPI analysis materially undermines the robustness of its conclusions.

(127) Finally, the CMA has failed to acknowledge let alone address the very serious substantive concerns raised by Domino's in its PFs Response, in particular, concerns that the Transaction will result in Amazon strengthening its ecosystem. Competition concerns in relation to "big tech" ecosystems are a significant feature of the CMA's Digital Advertising Final Report and the statements of the CMA's Chief Economist in relation to merger reviews, this week.

(128) Domino's and its franchisees call upon the CMA to intervene before these markets tip, to address its own assessment that there has been "*underenforcement of merger control in digital markets*"[88] and to protect consumers as its statutory duties require.

(129) For the reasons it has given in this and previous submissions, Domino's and its franchisees consider that the Transaction will result in an SLC and urges the CMA to impose remedies to prevent or mitigate such SLC. Domino's asks that the CMA obtains commitments from or imposes commitments upon the Parties that Amazon / Deliveroo, without prior notification to and clearance by the CMA, will not:

- Directly or indirectly increase Amazon's equity stake in Deliveroo[89];
- Directly or indirectly provide any additional funding (whether debt or otherwise) to Deliveroo;
- Provide Amazon with further shareholder rights in Deliveroo;
- Seek or accept appointment of additional Amazon directors to the Board of Deliveroo[90];

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[88] Speech by CMA Chair Lord Andrew Tyrie at CMA Digital Markets event, 3 March 2020.

[89] See *BskyB/ITV* of November 2006 where BSkyB was not only required to divest its shares to below 7.5% (from the original 17.9% stake), but was also barred from directly or indirectly, holding, acquiring or re-acquiring any interest in the shares of ITV plc, other than a holding of less than 7.5%. See also *Ryanair / Aer Lingus* where the Competition Commission ordered that Ryanair reduced its shareholding in Aer Lingus to 5% (from 29.82%) of Aer Lingus's issued ordinary shares and not to acquire further shares in Aer Lingus.

[90] See *Ryanair / Aer Lingus* where the Competition Commission imposed an obligation on Ryanair not to seek or accept board representation in Aer Lingus.

- Enter into any future commercial partnerships other than on arm's length terms including any relating to the Parties' logistics capability and infrastructure, including driver fleet;
- Collect, use or share data (either in raw or processed form) collected from the other party's customers and/or B2B partners; or
- Engage in cross-selling of Amazon / Deliveroo products (including tying and/or bundling).