

JUST EAT TAKEAWAY.COM**Submission to the CMA in response to its request for views on its Revised Provisional Findings in relation to the Amazon/Deliveroo merger inquiry****1 INTRODUCTION AND BACKGROUND**

1. In line with the Notice of revised provisional findings published on the Competition and Markets Authority ("**CMA**") website, Just Eat Takeaway.com N.V. ("**JETA**") submits its views on the revised provisional findings of the CMA dated 22 June 2020 (the "**Revised Provisional Findings**") regarding the anticipated acquisition by Amazon.com BV Investment Holding LLC, a wholly-owned subsidiary of Amazon.com, Inc. ("**Amazon**") of certain rights and minority shareholding of Roofoods Ltd ("**Deliveroo**") (the "**Transaction**").
2. On 16 April 2020, the CMA published its provisional findings regarding the Transaction (the "**Original Provisional Findings**"), in which the CMA concluded that the Transaction would not be expected to result in a substantial lessening of competition ("**SLC**") in either the market for online restaurant platforms or the market for online convenience groceries ("**OCG**")¹ on the basis that, as a result of the Coronavirus ("**COVID-19**") crisis, Deliveroo would likely exit the market unless it receives the additional funding from Amazon as a result of its investment in Deliveroo. On 11 May 2020 JET submitted its response to the Original Provisional Findings, in which it criticized the CMA's provisional clearance and expressed concerns over the sudden U-turn in the CMA's decision-making.
3. On 22 June 2020, the CMA revised its provisional findings stating that Deliveroo is no longer likely to exit the market as a result of the COVID-19 pandemic as the market conditions and Deliveroo's financial situation had changed since April 2020. In the Revised Provisional Findings, the CMA – for the second time – concludes that the Transaction is not be expected to result in an SLC in either the market for online restaurant platforms or for OCG in the UK, albeit on a different basis.
4. JETA welcomes the CMA's conclusion regarding the unlikely exit of Deliveroo as a result of the COVID-19 pandemic. Nonetheless, JETA questions the direction that the CMA is now taking, and the basis for the Revised Provisional Findings. JETA believes that the Transaction will remove incentives for Amazon to enter or, at the very least, will ensure it has limited incentives to compete effectively as an independent competitor. It cannot be the case that the CMA's SLC assessment should remain the same in a situation where Amazon has no 16% stake (and no related rights) compared to the scenario where it has more rights and influence, by whatever means.

¹ JETA does not agree with the CMA's position in relation to market definition in either of these two areas. JETA considers itself to be active in the food delivery market, which comprises a wide range of consumer options to enjoy takeaway food at home and elsewhere, both online and offline. JETA considers its main rival to be the telephone. However, for the purposes of this submission, references to "market" will align with the CMA's definition as set out in the Provisional Findings.

5. Notwithstanding the above, should the CMA again decide that a clearance decision is warranted. JETA urges the CMA to mitigate to the maximum extent possible: (i) Amazon's influence on Deliveroo; and (ii) incentives on Amazon to decide not to compete as an independent party. At Section 3 of this submission, JETA repeats the ways in which such considerations could be safeguarded.

2 CMA'S ASSESSMENT

2.1 *Supply of online restaurant platforms in the UK*

6. In the Revised Provisional Findings, the CMA concludes that absent the Transaction, Amazon would be likely to re-enter the supply of online restaurant platforms in the UK as it has the incentive and ability to do so.² Subsequently, the CMA examines the impact the 16% shareholding by Amazon in Deliveroo has on the potential future competition between Amazon and Deliveroo. The CMA provisionally concludes that the 16% investment is unlikely to: i) deter re-entry by Amazon³, ii) cause Amazon to compete materially less aggressively if it did re-enter⁴; iii) result in Deliveroo competing less strongly against Amazon⁵. JETA questions the accuracy of these conclusions.

2.1.1 *Amazon's investment confers material influence*

7. Firstly, JETA questions why 16% is considered an acceptable level of investment given that the CMA continues to consider this as being sufficient to give Amazon material influence over Deliveroo.⁶ JETA agrees that the 16% stake and additional rights are sufficient to confer such influence. Moreover, JETA notes that in the CMA's Phase 1 Decision, the CMA reached this conclusion on the basis of a combination of mutually reinforcing factors in addition to the shareholding (which was redacted in the Phase 1 Decision) namely⁷:
- (a) Amazon's particular industry knowledge and expertise;
 - (b) Amazon's right to appoint a director with industry knowledge and expertise to Deliveroo's board;
 - (c) Other arrangements.
8. The CMA has outlined that Amazon considers Deliveroo to be of potential strategic value to it in the future and that Amazon's investment in Deliveroo is strategic.⁸ This status as a strategic investor is likely to increase the weight Amazon's views will carry with Deliveroo's management and other investors and, in turn, increase its ability to influence Deliveroo's commercial strategy⁹. In addition, the CMA has pointed out that

² Revised Provisional Findings, para 1.162.

³ Revised Provisional Findings, para. 5.42.

⁴ Revised Provisional Findings, para. 5.51.

⁵ Revised Provisional Findings, para. 5.55.

⁶ Revised Provisional Findings, para. 1.9.

⁷ CMA Phase 1 Decision, para. 43.

⁸ Original Provisional Findings, para. 2.40

⁹ Original Provisional Findings, 3.37.

post-Transaction, Amazon, as a holder of a majority of Deliveroo's Series G shares, will benefit from other rights not enjoyed by Deliveroo's other major shareholders.¹⁰

9. Furthermore, with regards to the appointment of the board member, the CMA considered that as Amazon's appointed representative, Mr Gurr, who is a senior executive at Amazon and has been head of Amazon UK since 2016, would be able to obtain and relay the knowledge Amazon has accrued through its experience in restaurant delivery.¹¹ In JETA's view, it would be inconceivable to take the view that Mr Gurr will not obtain and relay the knowledge Amazon has accrued through its experience in restaurant delivery.
10. Finally, the CMA also considered other sources of possible influence, such as i) current and possible future commercial relationships or partnerships between Deliveroo and Amazon Web Services (AWS); ii) the possibility of future commercial arrangements or other partnerships between Deliveroo and Amazon; and iii) other commercial/operational discussions between Amazon and Deliveroo.¹²
11. However, the CMA is silent about any of these factors in its Revised Provisional Findings. JETA finds it inconceivable that the 16% investment, taken together with all the "plus-factors" including a board seat, would not lead to the removal of incentives for Amazon to re-enter the market or, following the potential (but, in JETA's view, unlikely) entry, removing incentives for Amazon to compete with Deliveroo. At the very least, JETA would expect the CMA to explain why these "plus-factors" would not lead to undue influence or would expect the CMA to reduce these "plus-factors" through Commitments. Moreover, we note that it is possible for Amazon to continue increasing its stake without further review by the CMA if it were to remain below a de facto level of control.
12. The approach of the CMA is also difficult to reconcile with its previous decision-making practice. For example, in the *Ryanair / Aer Lingus* merger inquiry, the CMA ordered Ryanair to sell its 29.8% in Aer Lingus down to 5% as the shareholding gave it the ability to exercise material influence over Aer Lingus and had led or may be expected to lead to an SLC.¹³ It further imposed an obligation on Ryanair not to seek or accept board representation in Aer Lingus and an obligation on Ryanair not to acquire further shares in Aer Lingus. JETA acknowledges that the stake of 29.8% in *Ryanair/ Aer Lingus* merger inquiry is higher than 16% envisaged by the present Transaction, however (i) the differences in these percentages do not indicate concrete differences in the ability to influence; or (ii) if the CMA believes it does, it should specify why. JETA would like

¹⁰ Original Provisional Findings, para. 3.29.

¹¹ Original Provisional Findings, para 3.62.

¹² Original Provisional Findings, para. 3.66.

¹³ The Ryanair Holdings plc and Aer Lingus Group plc Inquiry Order 2015; Competition Commission, *Ryanair/ Aer Lingus Merger Inquiry*, Provisional Findings Report, 30 May 2013, paras 4.42, 4.43, 7.188.

to point out that the CMA considered a 5% threshold to be appropriate to ensure that the merger would not lead to an SLC.¹⁴

13. In the present merger inquiry however the CMA does not consider whether a lower shareholding would be more appropriate. From JETA's reading of the CMA's Revised Provisional Findings, 16% appears arbitrary. JETA can only assume that it reflects a percentage requested by Amazon rather than a CMA safe harbour at or below which an SLC is deemed unlikely to occur. Moreover, unlike *Ryanair / Aer Lingus*, there has been no substantive consideration regarding the "plus-factors" such as the board seat and the material effect these could have on the analysis.
14. JETA believes the CMA's Revised Provisional Findings are insufficient to demonstrate why material influence in this case should be less concerning than in previous cases and also why it should be treated differently to de facto control, given the incentives to align behaviour as a result of the 16% stake and additional rights. JETA also notes that earlier in 2019, the CMA was so concerned that the investment would lead to the two parties ceasing to be distinct that they imposed an Initial Enforcement Order¹⁵, which has not been lifted.
15. Furthermore, JETA would like to highlight that the decision to exit Amazon Restaurants in the UK and in the US and to invest in Deliveroo were taken almost simultaneously. Although Amazon has submitted that these decisions were taken separately, Amazon failed to clarify the rationale¹⁶. JETA questions how the CMA can conclude that the Transaction does not lead to an SLC and potentially clear the Transaction when such important points remain unexplained and unclear. We also note that if, as is stated, Amazon takes many of its decisions orally in meetings and "*has not retained the documents [the CMA] requested to inform [its] assessment, including the emails*", then the burden of proof should be on Amazon to demonstrate beyond reasonable doubt that there was no link between the two. As the CMA states: "*It has also meant that we have not been able to conclude that a lack of detailed documentary evidence on particular issues (such as Amazon's future strategy and plans with regard to restaurant delivery) means that such issues and related decisions are not being considered by Amazon.*"¹⁷
16. In addition, one of the shareholders of Deliveroo who was deeply involved in negotiating the Transaction – Mr Shu, a founder and the CEO of Deliveroo, – has recently stated in an interview that: "*This is the most consumer obsessed company in the world, and we're really proud to get investment from them*".¹⁸ Statements such as these demonstrate that Deliveroo is not considering this as a pure investment; if they were, why would it be relevant if the investor was consumer-obsessed or not. On the contrary, this seems to

¹⁴ There are also other cases where the impact of a significant shareholding and board representation were critical in the CMA's analysis. For example: ME/1459/04 Completed acquisition by First Milk Limited of a 15 per cent stake in Robert Wiseman Dairies Plc.

¹⁵ Initial Enforcement Order dated 5 July 2019, https://assets.publishing.service.gov.uk/media/5d1dd1cc40f0b609cfd974b6/Amazon_IEO.pdf.

¹⁶ Revised Provisional Findings, para 4.145

¹⁷ Revised Provisional Findings, para 4.74, 4.75

¹⁸ "*Coronavirus: Restaurants are 'hurting', says Deliveroo boss*", BBC News, 29 June 2020, available at: <https://www.bbc.com/news/business-53215411>.

further imply the strategic nature of the investment and consequences flowing from this that the CMA has failed to adequately address.

17. [X].

18. In JETA's view, the Amazon-Deliveroo situation is even more likely to raise anti-competitive concerns relating to coordination; Amazon is a competitor to Deliveroo in the OCG market and remains a potential competitor in the supply of online restaurant platforms in the UK. Given this set of facts, JETA believes that the 16% investment combined with a board seat is very high and should not be accepted by the CMA. In JETA's view, the only basis on which the CMA could accept this, would be for it to do so on the back of a conclusion that the food delivery sector in the UK (both online and offline) is extremely competitive, thereby indicating that no SLC will arise, whatever change in incentives Amazon may have as a result of the investment. This is the only logical basis for a clearance decision.

2.1.2 Evidentiary basis for CMA conclusions

19. JETA questions the evidentiary basis for the CMA's conclusions. With regards to the possibility of re-entry, it appears that the CMA did receive evidence pointing to the possibility that a 16% shareholding could change Amazon's incentives such that it would no longer enter independently. Some noteworthy examples include i) the parties' own submission that they see the current investment as providing possibility for further investment in Deliveroo; and ii) 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 Deliveroo¹⁹.

20. The CMA places limited weight on the theoretical model submitted by the Parties to show that the differences in incentives resulting from a 16% investment as opposed to the full merger and acknowledges that it does not account for the possibility that the investment is strategic, in the sense that it gives Amazon a position from which it can continue to make further investment or use its investment to generate a strategic partnership²⁰. As explained above, JETA strongly considers that this is the case.

21. Ultimately, the CMA concludes that "*there is mixed evidence on what impact the Transaction has on whether Amazon would re-enter the supply of online restaurant platforms in the UK*" and that "*we do not currently²¹ 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*".²² JETA finds it difficult to comprehend the CMA drawing such far-reaching conclusions based on mixed evidence, especially when the CMA seems to agree that the investment is Amazon's initial re-entry strategy²³.

¹⁹ Revised Provisional Findings, para. 5.32.

²⁰ Revised Provisional Findings, para. 5.28.

²¹ Emphasis added.

²² Revised Provisional Findings, paras. 5.41- 5.42.

²³ Revised Provisional Findings, para. 5.41: "*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.*"

JETA does not believe that the CMA's undertaking to assess the transaction in the future – should Amazon subsequently look to obtain de facto control or a higher stake – is sufficient.

22. As already noted above, this is not to say that JETA would agree with any SLC that the CMA may then find on this basis. On the contrary, JETA believes that the food delivery sector (both online and offline) are extremely competitive. Nonetheless, JETA cannot remain silent when faced with a substantive analysis that contains a number of inconsistencies on which the CMA bases its important conclusion regarding the effect that the investment will have on Amazon's incentives and future behaviour.
23. Concerning the impact of the Transaction on the nature of Amazon's entry, the CMA acknowledges the possibility that Amazon could enter the market independently while retaining a minority shareholding in Deliveroo, leading to Amazon having two competing investments in the same market.²⁴ However, on this point the CMA relies on expectations that if Amazon competed less strongly with Deliveroo, it would win fewer customers. The CMA acknowledges that this could be profitable if Deliveroo has lower marginal costs or if costs incurred by Amazon to acquire customers are high. However, the CMA would expect Amazon to have a strong preference for acquiring a customer (and receiving 100% of the profits from that customer) over allowing Deliveroo to retain that customer (with Amazon receiving 16% of profits).²⁵
24. The CMA's assumptions as presented in the Revised Provisional Findings are not supported by or presented with reference to economic analysis. It is therefore impossible for JETA to comment on whether the CMA conducted any (or appropriate) profitability analysis. The same applies to the CMA's conclusion that competition could be lessened as a result of weaker competition from Deliveroo²⁶. While the CMA makes statements on recouping profits and incentives to engage in a certain behaviour, it provides no insight into the economic basis for these conclusions. The conclusions of the CMA also do not take into account the benefits Amazon could recoup from its partnerships with Deliveroo as explained below.

2.2 Additional partnerships between Amazon and Deliveroo

25. In the final section of the Revised Provisional Findings, the CMA mentions the additional concern raised by third parties with respect to the Transaction, namely that it will allow Amazon to bundle Amazon Prime and Deliveroo's services, with a negative impact on other providers – i.e. the conglomerate effects. It was suggested that Amazon could offer its Prime customers cheap or free delivery, or preferential delivery timings on Deliveroo, to drive additional traffic to Amazon and/or Deliveroo and foreclose competitors.²⁷ In addition, the Revised Provisional Findings are silent on the possibility of the partnership with Deliveroo to offer restaurant food delivery, while in the Phase 1

²⁴ Revised Provisional Findings, para. 5.16.

²⁵ Revised Provisional Findings, para. 5.47.

²⁶ Revised Provisional Findings, paras. 5.52 – 5.55.

²⁷ Revised Provisional Findings, para 7.4.

Decision it did recognize that there is a realistic prospect that Amazon could combine Prime with Plus or other Deliveroo products.²⁸

26. Having reiterated its previous position expressed in the CMA Phase 1 Decision, the CMA dismisses this theory of harm on the basis that the Transaction did not give rise to a realistic prospect of an SLC as a result of the conglomerate effects in the supply of online food delivery platforms in the UK due to insufficient incentives to engage in a foreclosure strategy.²⁹

27. [REDACTED].

28. [REDACTED]. Indeed, the CMA itself points out that internal documents from Amazon and other Deliveroo shareholders indicate that they see the Transaction as a potential first step towards a full acquisition of Deliveroo, rather than a purely financial investment.³⁰ Other internal documents have also shown that one of Deliveroo's other principal investors recognised the possibility of future partnerships between Amazon and Deliveroo.³¹

2.3 *The CMA's assessment sets a precedent for future cases*

29. Finally, JETA is concerned that the CMA's current assessment creates a worrisome precedent for future cases. The CMA's Revised Provisional Findings suggest that it is acceptable for competitors to take stakes in one another by virtue of an "investment", especially without any conditions or undertakings attached. The CMA should at least recognize the possibility of such concerns in the present merger inquiry and consider the possibilities to mitigate them.

3 CONCLUSION AND PROPOSED CONDITIONS

30. In line with the above, JETA expresses strong concerns over the repeated provisional unconditional clearance of the Transaction by the CMA and the basis on which this is made.

31. JETA takes note that the CMA has the power to impose remedies only where it concludes that a transaction will result in an SLC and that this is not the case in the current Revised Provisional Findings³². Nonetheless, while JETA understands the urgency of the review and the time pressure the CMA is under, JETA urges the CMA take a correct and well considered decision that sufficiently takes into account potential future consequences. JETA reiterates that the CMA cannot draw such far-reaching conclusions based on mixed evidence, especially where it, itself, acknowledges that it did not receive clarification from the parties to some (critical) questions.³³

²⁸ CMA Phase 1 Decision, para. 313.

²⁹ Revised Provisional Findings, para 7.10, CMA Phase 1 Decision, para 362.

³⁰ Revised Provisional Findings, para 5.35.

³¹ Provisional Findings, para 3.75

³² Revised Provisional Findings, para. 1.10.

³³ Revised Provisional Findings, para 4.145

32. Alternatively, should it continue along its path to a clearance decision, the CMA must, at the very least, recognize the need for conditions to be placed on the clearance given the strong position of Amazon in the UK and the material influence it will be able to exercise over Deliveroo. JETA already proposed a number of conditions in its response to the Provisional Findings dated 11 May 2020 and believes they are still appropriate:
- (a) Prohibit Amazon from taking any additional shareholding in Deliveroo and in any event ensure that its stake does not go over 25% whether considered alongside another key investor (such as Mr Shu) or by itself. As the CMA notes, a share above 25% would permit the blocking of special resolutions;
 - (b) Ensure that Amazon reduces its stake in Deliveroo over time;
 - (c) Ensure that the Amazon director on the Board is independent. It should certainly not be the Director of Amazon UK, Mr Gurr, who is the most senior and influential figure in Amazon's UK business. [REDACTED];
 - (d) Prevent any sort of cooperation between Amazon and Deliveroo. This especially but not exclusively concerns the domain of joint promotion, use of the Amazon customer base or the fulfilment of delivery services for Amazon, [REDACTED];
 - (e) CMA to monitor Amazon's stake in Deliveroo and the relationship between the parties more generally to ensure that Amazon does not exercise its material influence in a manner that harms competition.
33. JETA thanks the CMA for taking its views into consideration and is available to provide additional input or clarifications as required.