

## Case ME/6851/19

## Completed acquisition of 3G Truck &amp; Trailer Parts Ltd by TVS Europe Distribution Limited

## Response to CMA Provisional Findings Report

**1. Introduction and Executive Summary**

1.1 This response to the Competition and Markets Authority's (CMA) Provisional Findings of 20 October 2020 (the PFs) in its review of the completed acquisition by TVS Europe Distribution Limited (TVS EDL) of 3G Truck & Trailer Parts Ltd (3G)(the **Transaction**) is submitted on behalf of TVS EDL, its wholly-owned subsidiary Universal Components (UC) and 3G (together, the **Parties**).<sup>1</sup>

1.2 For the reasons set out in more detail below, the Parties believe the CMA's provisional conclusion that the Transaction may be expected to result in a substantial lessening of competition (SLC) is not supported by a fair assessment of the available evidence. In particular:

- (i) The CMA's provisional conclusion rests to a large extent on its assessment of five internal documents produced by UC between April and July 2019. However, UC's internal financial modelling from 24 May 2019 – on which the decision to move forward with the Transaction was taken – clearly shows that [⌘]

Further, and as discussed in the Parties' response to the CMA's working papers submitted on 22 September 2020 (the **Working Papers Response**, attached as **Annex 1**), even the earlier internal documents cited extensively in the PFs [⌘]

- (ii) The CMA provisionally finds that narrow or niche suppliers are not significant competitors to the Parties. If that was correct, and therefore the ability to purchase all parts from a single supplier was important to customers, one would expect customer purchase patterns to reflect this. However, the CMA acknowledges that customers in fact purchase from multiple suppliers. Rather than drawing the logical and most plausible conclusion from this evidence – that breadth of range is not a key driver of customer demand – the CMA instead provisionally finds that this is a 'more nuanced' case where *some* customers place *some* value on the option of purchasing *some* of their purchases from suppliers that can offer a wider range of parts. However, the evidence gathered by the CMA simply does not support a provisional conclusion that 'breadth of range' is of particular importance to customers.
- (iii) In fact, the results of the CMA's own customer survey shows that out of the nine possible choice attributes put to customers, 'Breadth' was only the joint sixth most frequently identified as either very important or fairly important, and only the joint fifth identified as very important. Only 'Reputation', 'Technical expertise' and 'Rebates' ranked lower. Likewise, 47% of the customers that listed UC as one of their top 10

<sup>1</sup> Information shaded pink this document is TVS information that is confidential vis-à-vis 3G and third parties. Information shaded green in this document is 3G information that is confidential vis-à-vis TVS and third parties. Information shaded purple in this document is the Parties' information that is confidential vis-à-vis third parties. Unless otherwise indicated, defined terms in this response have the same meaning as set out in the Working Papers Response.

suppliers cited price as a reason for purchasing from UC, while the same percentage cited 'availability'. Only 17% of UC's customers cited 'range'. The figures for 3G are even more striking, with 50% of customers citing 'price', 47% citing availability and only 13% citing 'range'.

- (iv) The PFs attempt to square this unhelpful customer questionnaire evidence by citing comments apparently made in a series of 'follow-up' calls with individual customers. The CMA has refused to provide the Parties (or their external advisers) with notes or transcripts of those calls, confirming instead that it has complied with its legal obligations by setting out the 'gist' of those conversations in the PFs. However, the 'gist' of the evidence gathered by the CMA in support of its theory that customers have a strong preference for sourcing a wide range of products from suppliers amounts to three discrete benefits identified (after prompting) by five of the 341 customers (and one competitor) contacted by the CMA: grouping purchases so as to avoid carriage charges; processing fewer invoices; and concentrating purchases in order to benefit from rebates.
- (v) The first of these alleged benefits refers precisely to the type of *ad hoc* sales in respect of which the Parties have already presented detailed evidence to the CMA. That evidence shows that, while wide range wholesalers may be a more important constraint in relation to such orders (as is reflected in the overstrikes and email price negotiations), this represents only a very small fraction – less than 10% on the basis of the most realistic estimate – of either Party's overall demand, with the vast majority of that demand instead being purchased through primary sales orders. More importantly, the Parties will be constrained by the fact that customers who make *ad hoc* purchases are the same customers who also make their primary purchases from the Parties; it would be entirely irrational for UC to risk the 80-90% of primary sales just for the sake of a slightly higher margin on the de minimis proportion of sales on which 3G may be a more significant constraint.
- (vi) In respect of the second and third benefits apparently identified after prompting by four of the five customers that the CMA contacted, neither of those are specific to wide range wholesalers. In fact, narrow range and niche wholesalers themselves operate aggressive customer rebate programmes designed to encourage customers to purchase all – or at least the large majority – of their requirements of products within the ranges stocked by the relevant wholesaler. Indeed, evidence from the CMA's customer questionnaire shows that of all of the reasons given by customers for using UC, 'rebates' was in fact by some distance the least frequently mentioned at just 3% (and, at 7%, the joint second least frequently mentioned reason for using 3G). Likewise, 'rebates' was by a very significant margin the attribute least commonly identified by customers in response to the CMA's questionnaire as being either very or fairly important. Put simply, the CMA's own evidence directly contradicts any anecdotal suggestion that customers have a preference for using wide range wholesalers in order benefit from rebates.
- (vii) Likewise the assertion in the PFs that customers use wide range wholesalers to "*improve the efficiency of their purchasing process*" is in fact based on a single anecdotal statement by one customer that UC and 3G "*are essentially 'one stop shops'*" and if it "*had to go to individual companies to purchase equivalent parts, a lot of invoices would need to be generated*". Setting to one side the CMA's acknowledgement that in fact neither of the Parties serves customers as a one-stop-shop, the CMA makes no attempt whatsoever to quantify – or even roughly estimate – the value that would be lost by customers if the Transaction were to result in them

having to process “*a lot of invoices*”. Notwithstanding, the Parties believe any such loss would be completely negligible and easily outweighed by the purchasing efficiencies that will arise as a direct result of the Transaction.

- (viii) With respect to estimates of diversions and switching, the PFs disproportionately favour estimates derived from responses to the CMA’s customer questionnaire over estimates derived from contemporary internal documents or using the Parties’ actual data. This is a serious flaw in the CMA’s assessment given the obvious bias that the questionnaire suffers from. Indeed that bias is reflected in the diversion estimates derived from the customer questionnaire (48%) clearly being an outlier when compared to estimates of switching and diversion derived from the Parties’ contemporary internal documents (at 29% and 32% respectively), and the diversion estimates calculated by CRA using the Parties actual transaction data (at 25% in the most conservative scenario). Setting aside the outlying diversion estimates derived from the customer questionnaire and using instead estimates derived from other evidential sources to calculate the gross upward pricing pressure index (**GUPPI**), shows that the level of upward pricing pressure that can be expected from the Transaction is close to the level where the CMA has typically considered anti-competitive effects to be unlikely, and significantly below the level at which the CMA has typically found there to be a higher risk of an SLC. In this context, it is again relevant that UC’s internal documents show it had no expectation of price rises post-completion.

1.3 The remainder of this response is structured as follows:

- (i) Section 2 responds to the CMA’s assessment of the Parties’ internal documents and, in particular, explains that those internal documents clearly show UC had no expectation of raising prices following completion of the Transaction;
- (ii) Section 3 explains why the evidence presented in the PFs does not support a provisional finding that customers make purchasing decisions based on range;
- (iii) Section 4 responds to the assessment set out in the PFs as to customer evidence on choice of wholesaler;
- (iv) Section 5 explains why, taken in the round, that evidence does not support a segmentation of the relevant product market on the basis of ‘range’; and
- (v) Section 6 shows that CMA’s provisional SLC finding is not supported by the available evidence, including (even on the most conservative plausible basis) when considering estimates of GUPPI.

## **2. Analysis of UC internal documents**

2.1 The CMA’s provisional conclusion that the Transaction may be expected to result in an SLC rests to a large extent on its assessment of five internal documents produced by UC between April and July 2019. Throughout the CMA’s investigation, the Parties have repeatedly explained to the CMA why weight should not be attached to those early transaction assessment documents, in particular insofar as they relate to UC’s rationale for entering into the Transaction. We do not repeat those detailed submissions in this response, save in respect of one important point: the CMA’s assertion in the Provisional Findings that “*our review of the 24 May 2019 model indicates that it does not reflect changes in the combined revenues forecast of UC and 3G (either increases or decreases), but it does incorporate price increases under gross margins and reduced rebates. Therefore, our view is that the underlying modelling is not*

*consistent with the Parties' stated position that price rises are not envisaged post-Merger".<sup>2</sup> Simply put, this assertion is contradicted by the evidence available to the CMA.*

- 2.2 At noted in the Working Papers Response, in response to question 2 of the Financial Questionnaire, UC explained that it

[REDACTED]

Likewise, in response to question 3 of the Financial Questionnaire, UC explained that it

[REDACTED]

The Parties note again that this evidence was submitted to the CMA in response to a formal request for information made under section 109 of the Act, in full awareness of the very serious consequences of submitting false or misleading information in response to such a request. Notwithstanding this, in paragraphs 5.5 to 5.13 of the Working Papers Response, the Parties also submitted a detailed, step-by-step, explanation of UC's pre-merger financial modelling which shows that by 24 May 2019, far from expecting prices to rise as a result of the Transaction, UC expected that [REDACTED]

- 2.3 However, throughout the 197 pages of PFs and related appendices, the Parties' submissions on this critical point merit just over 6 lines of consideration – at paragraph 9 of Appendix B:

*"The Parties informed us that [REDACTED]. However, in our view this is not supported by the evidence we have seen, including in particular that which is discussed in paragraphs 6 and 8. Therefore, our view is that the financial projections in the [REDACTED] did not take into account the [REDACTED]"*

- 2.4 Paragraphs 6, 7 and 8 of Appendix B to the PFs, this is set out below for ease of reference.

*"The Parties' combined sales figure under the best-case scenario in the April 2019 business plan document mentioned in paragraph 1 is the same as the figures included in the 24 May 2019 model. This implies that those earlier documents continued to be relevant to the Parties' view of the Merger, as of 24 May 2019.*

*The 'Revitalisation of UK Strategy' presentation notes UC's revenue as £29 million and 3G's revenue as £14 million, which gives a consolidated (UC and 3G combined) post-Merger revenue of £43 million. The £43 million revenue is the same as the figure included in the 24 May 2019 model and in the synergy projections.*

*The 'Project Alpha Strategic Review' presentation identifies short-term revenue loss due to adverse customer reaction had been 'built into the financial projection scenarios, with differing levels of severity'. We also note that the same presentation includes three post-Merger financial scenarios – worst case with revenue figures reflect an adverse market reaction, mid case with marginal drop in sales and best case with incremental revenue. The mid-case scenario is based on consolidated revenue*

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<sup>2</sup> At paragraph 3.27 of the PFs.

<sup>3</sup> At paragraph 9 of Appendix B to the PFs.

*projection of £43 million which is equal to the revenue figures mentioned in paragraph 7.”*

- 2.5 In the absence of any meaningful consideration in the PFs of the Parties’ submissions on this point, the Parties set out again below evidence proving that, far from expecting prices to rise as a result of the Transaction, UC’s internal financial modelling of the Transaction assumed that the combined entity would see a [✂]

[✂]

- 2.6 [✂]

[✂]

[✂]

**Figure 2: Excerpt from 3G’s Statutory Accounts for the Period to 31 May 2019**

<b>3G TRUCK &amp; TRAILER PARTS LIMITED</b>			
<b>PROFIT AND LOSS ACCOUNT</b>			
<b>FOR THE YEAR ENDED 31 MAY 2019</b>			
	<b>Notes</b>	<b>2019 £</b>	<b>2018 £</b>
<b>Turnover</b>	<b>3</b>	<b>14,382,555</b>	<b>12,443,144</b>

[✂]

2.9 [✂]

[✂]

[✂]

[✂]

[✂]

[✂]

[✂]

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<sup>4</sup> As submitted to the CMA with the Parties' response to the Phase 1 Issues Letter (document entitled "*trvs edl consolidated lrp.fy19-fy24 including alpha (1).xlsx*").

<sup>5</sup> [✂]

[✂]

[✂]

*The PFs fail to give due (or indeed any serious) consideration to UC's submissions*

- 2.13 The PFs make no attempt to engage with the evidence set out above (and as previously submitted to the CMA, including most recently in the Parties' Working Papers Response). Instead, cross-referring to Appendix B of the PFs, the CMA simply asserts that "...our review of the 24 May 2019 model indicates that it does not reflect changes in the combined revenues forecast of UC and 3G (either increases or decreases), but it does incorporate price increases under gross margins and reduced rebates. Therefore, our view is that the underlying modelling is not consistent with the Parties' stated position that price rises are not envisaged post-Merger"<sup>6</sup> Paragraph 9 of Appendix B states that "*The Parties informed us that [✂] However, in our view this is not supported by the evidence we have seen, including in particular that which is discussed in paragraphs 6 and 8*".
- 2.14 At paragraphs 6 and 7 of Appendix B to the PFs, the CMA states that "*The Parties' combined sales figure under the best-case scenario in the April 2019 business plan document mentioned*

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<sup>6</sup> At paragraph 3.26 of the PFs.

in paragraph 1 is the same as the figures included in the 24 May 2019 model. This implies that those earlier documents continued to be relevant to the Parties' view of the Merger, as of 24 May 2019...The 'Revitalisation of UK Strategy' presentation notes UC's revenue as £29 million and 3G's revenue as £14 million, which gives a consolidated (UC and 3G combined) post-Merger revenue of £43 million. The £43 million revenue is the same as the figure included in the 24 May 2019 model and in the synergy projections". However, the slide that the CMA refers to in this presentation (prepared on 17 May and therefore again pre-dating the UC 24 May 2019 Financial Model) shows UC's estimate of its turnover for the year to 31 March 2019.<sup>7</sup> Likewise, the £14 million 3G turnover figure on the same slide of the 17 May presentation reflects 3G's turnover for FY 2019 (as explained above). [✂]

- 2.15 At paragraph 8 of Appendix B, the CMA states that "*The 'Project Alpha Strategic Review' presentation identifies short-term revenue loss due to adverse customer reaction had been 'built into the financial projection scenarios, with differing levels of severity'. We also note that the same presentation includes three post-Merger financial scenarios – worst case with revenue figures reflect an adverse market reaction, mid case with marginal drop in sales and best case with incremental revenue. The mid-case scenario is based on consolidated revenue projection of £43 million which is equal to the revenue figures mentioned in paragraph 7*" The £43 million referred to in this presentation relates to the four year period beginning in FY 2021, as can be seen in the figure below.

[✂]

- 2.16 This section of the PFs exposes a serious flaw in the CMA's assessment of UC's internal documents: on the one hand, the CMA refers to UC internal documents showing that in FY 2019, the aggregate turnover of the Parties absent the transaction would be £43 million; on the other, it refers to a different UC internal document showing that if the transaction went ahead, two years later the turnover of the combined group would also be £43 million. Apparently on the basis that both numbers are £43 million, the CMA goes on to assert that "*our review of the*

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<sup>7</sup> UC's *actual* turnover for FY 2019 (as filed with Companies House on 1 November 2019) was £28.96 million. The statutory accounts of Universal Components UK Limited is available [here](#).



24 May 2019 model indicates that it does not reflect changes in the combined revenues forecast of UC and 3G (either increases or decreases)”<sup>8</sup>. This assertion is untenable: the evidence set out above very clearly shows UC expected that by FY 2021, absent the Transaction (i.e. in the counterfactual) each of UC and 3G’s turnover would continue to grow as it had in the immediately preceding years; conversely, in a scenario where the Transaction went ahead, UC expected that the merger would result in the turnover of the combined UC/3G group being £4 million *lower* as a result.

[✂]

[✂]

[✂]

### **3. The evidence does not show that customers make purchasing decisions based on range**

3.1 The CMA’s provisional conclusion set out in the PFs that narrow or niche suppliers are not competitors to the Parties rests on its provisional finding that product ‘range’ is an important attribute to customers. If that provisional finding was correct, and therefore the ability to purchase all parts from a single supplier was important to customers, one would expect customer purchase patterns to reflect this. However, the CMA explicitly acknowledges in the PFs that customers in fact **do not** purchase from a single supplier, but instead purchase from multiple suppliers. The CMA’s provisional findings on this point are set out at paragraphs 5.24 to 5.26 under the heading “*Sourcing from multiple suppliers*”.

*“5.24 As noted above, motor factors typically multi-source their purchases of CVT parts across wholesalers, generally including wholesalers such as the Parties who offer a wide range of parts across all or most product categories, and also wholesalers who offer a narrow range or specialise in particular categories. Some motor factors also purchase direct from OES part manufacturers.*

*5.25 Evidence from responses to our customer questionnaires is consistent with the Parties’ customers purchasing from a range of wholesalers. We asked customers to list their 10 most important suppliers and indicate the proportion of purchases made from each supplier. Of the 38 customers who answered this question, 23 listed the maximum number of 10 suppliers, with the suppliers listed accounting for 76% of their total purchases on average.*

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<sup>8</sup> At paragraph 3.27 of the PFs.

<sup>9</sup> [✂]

<sup>10</sup> As of 2 May 2019, the Bank of England Monetary Policy Committee forecast annual CPI inflation over the period Q2 2019 to Q2 2022 ranging between 1.7% to 2.2% (see [here](#)).

5.26 *The Parties' customers also vary significantly in the extent to which they concentrate their purchases with the Parties. Of the 30 motor factors who provided details of their purchases from the Parties in the last six months in response to our questionnaire:*

*(a) One purchased the large majority (over three quarters) of its requirement for CVT parts from the Parties and three purchased around a half;*

*(b) A further 12 purchased between 20% and 40% of their requirement from the Parties;*

*(c) The remaining 14 purchased less than 20% of their requirement from the Parties.”*

3.2 These findings are consistent with the evidence submitted by the Parties to the CMA. In particular, CRA's analysis of the Parties' transaction data shows clearly that the overwhelming majority of customers are not purchasing all, or even the majority of their purchases, from UC or 3G – as one would expect if range was a key driver for customer purchase decisions. The CMA does not dispute those findings, and indeed at paragraph 5.27 of the PFs (i.e., immediately following its analysis of the evidence from the market survey set out above), the CMA agrees that customers do not buy from a single supplier but rather from multiple suppliers depending upon the product and their needs.

*“Consistent with this, the Parties submitted an analysis of their transaction data showing that a significant proportion of their sales goes to customers who only purchase a small proportion of the product groups from either party. The Parties submitted, and we agree, that as their customers are motor factors who must stock and supply the full range of CVT parts, this implies that customers are purchasing many parts from other suppliers.”<sup>11</sup>*

3.3 However rather than drawing the logical and most plausible conclusion from this evidence that breadth of range is not a key driver of customer purchases, the CMA instead provisionally finds that this is a 'more nuanced' case where *some customers* place *some value* on the option of purchasing *some of their purchases* from suppliers that can offer a wide range of parts:

*“From the evidence on choice of wholesaler and purchasing patterns set out below, we identify that **for some of their purchases** customers **typically value** being able to buy a range of parts from a single wholesaler, often described by customers (and wholesalers) as a using a 'one stop shop'. While these purchases are **not straightforward to characterise and quantify**, our view is that the evidence on choice of wholesaler and purchasing patterns provides the basis for identifying a need for wholesalers that stock a wide range of CVT parts for **some purchases**.”<sup>12</sup> (emphasis added)*

*“Although the term 'one stop shop' has been widely used by both customers and other wholesalers, this term may be unhelpful in the context of this inquiry as it could be interpreted to mean a situation in which customers buy all the products they require from one supplier. However, the situation in this case is more nuanced: it is that **some customers** value the option of sourcing **some of their purchases** from those suppliers that can offer a wide range of parts.”<sup>13</sup> (emphasis added)*

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<sup>11</sup> At paragraph 5.27 of the PFs.

<sup>12</sup> At paragraph 5.5 of the PFs.

<sup>13</sup> At paragraph 5.31 of the PFs.

3.4 Notwithstanding the CMA’s position that this is a “*more nuanced*” situation, given the provisional finding that the Transaction should effectively be prohibited, it is surprising that the CMA does not attempt to quantify what proportion of customers actually have this alleged preference, over what proportion of their purchasing requirements they have it, or indeed what value they attribute to it. It is equally surprising that the PFs make no serious attempt to explain how the Parties might be able to exploit the existence of such a preference.

**4. Customer evidence on choice of wholesaler does not support range being of primary importance**

4.1 Of course, one explanation for the lack of any attempt in the PFs to quantify this ‘more nuanced’ situation is that the evidence gathered by the CMA simply does not support the provisional conclusion that ‘breadth of range’ is of particular importance to customers.

*Evidence on customer ranking of supplier criteria*

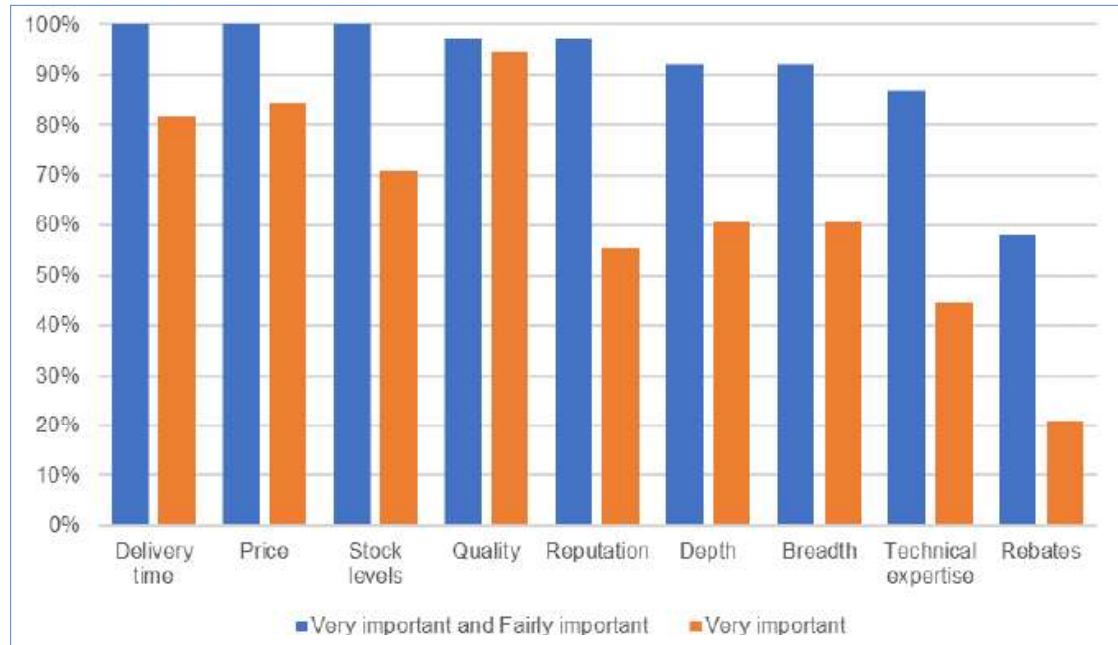
4.2 First, as noted in paragraph 2.1 *et seq.* of the Working Papers Response, the CMA’s customer survey asked customers to rate the importance of different possible choice attributes for suppliers. While the Parties have not been provided with the underlying results of that customer survey (despite repeated requests), the PFs state that “*Quality, price and delivery time are the three attributes most frequently rated as ‘very important’ by customers. Breadth of range was rated as very important by 23 customers out of 38 who answered this question. These ratings do not appear to vary much by customer size*”.<sup>14</sup> In fact, Figure 5.1 of the PFs (reproduced below for ease of reference) shows that out of the nine possible choice attributes put to customers, ‘Breadth’ was only the joint sixth most frequently ranked attribute identified as either very important or fairly important, and only the joint fifth ranked as very important. Only ‘Reputation’, ‘Technical expertise’ and ‘Rebates’ ranked lower when considering attributes identified as very important.

**Figure 6: Proportion of customers ranking various supplier criteria as ‘very important’ and ‘very important’ or ‘fairly important’<sup>15</sup>**

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<sup>14</sup> At paragraph 5.7 of the PFs.

<sup>15</sup> Reproduced from Figure 5.1 of the PFs.



4.3 However, the PFs attempts to dismiss this evidence – which is clearly ‘unhelpful’ to the CMA’s theory of harm – on the basis of three wholly implausible assertions.

- (i) The CMA muses in the PFs that “*it is not clear why a characteristic that is rated as fairly or very important by more than 90% of customers should be treated as only of secondary importance*”.<sup>16</sup> However, this isolated statistic is not meaningful. A large percentage of customers rating a short list of nine attributes as either very or fairly important is not surprising; it is the ranking of these attributes that captures differences in their relative importance to customers. While it may be inconvenient to the CMA, the evidence collected from its customer survey shows ‘breadth of range’ is ranked significantly lower than almost any other attributes put by the CMA to customers – including price, quality and speed of delivery (all of which narrow or niche competitors provide). Curiously, elsewhere in the PFs, the CMA accepts that the evidence does in fact show that “*price, quality and delivery speed are key factors*”.<sup>17</sup>
- (ii) At paragraph 5.8 of the PFs, CMA goes on to note that “*while 14 of the 38 customers who answered this question rated price as more important than breadth, 21 rated price and breadth at the same level and 3 rated breadth as more important than price*” As a preliminary point, the Parties have no ability to verify the accuracy of this statement as the CMA has continually refused access to the results of its customer survey, even on an external advisor basis. However even if this was correct, this statistic does not undermine the finding that across all customers ‘breadth of range’ is rated as less important than price. Nor is it clear why the CMA has only chosen Price as its comparator given Quality appeared the most frequently as ‘very important’ for customers with Delivery and Stock Levels being either ‘very important’ or ‘fairly important’ for 100% of customers. Importantly, if the CMA wanted to explore in more detail the relative significance of attributes, a question should have been added to the questionnaire asking customers about their single most important attribute – as is routinely done in other surveys.

<sup>16</sup> At paragraph 5.8 of the PFs.  
<sup>17</sup> At paragraph 5.11 of the PFs.

- (iii) The CMA also argues that customers were asked about their purchases in general and therefore ‘breadth of range’ “*may be more important for some types of purchases than for others*”.<sup>18</sup> However, the PFs simply speculate that this could be the case, without providing any evidence to support it; the CMA can’t support it because the questionnaire was not designed to explore differences across product categories or different types of purchases. Again, if the CMA wanted to gather evidence to explore this issue, the questionnaire should have asked customers about their purchasing decisions on product field basis. The CMA cannot legitimately seek to block a merger on the basis of an unsupported assertion and then rely on its own failings in the design of the customer questionnaire to explain why there is no evidence to support that assertion.

Evidence on why customers use their main suppliers

- 4.4 That ‘price’ and ‘availability’ are the key parameters of competition in the relevant markets is also borne out by the evidence collected by the CMA as to customers’ stated reasons for using suppliers – including with respect to the Parties. Indeed, the evidence set out in the PFs shows that ‘price’ and ‘availability’ are by a significant margin the most commonly cited reasons that customers chose to purchase from the Parties as well as from their competitors. In particular, the table below (reproduced from Table 5.1 of the PFs) shows that 47% of the customers that listed UC as one of their top 10 suppliers cited price as a reason for purchasing from UC, while the same percentage cited ‘availability’. Only 17% of UC’s customers are identified by the CMA – at least in the version of the table that has been published in the PFs – as citing ‘**range**’ as a reason for purchasing from UC. The figures for 3G are even more striking, with 50% of customers citing ‘price’ as a main reason for purchasing, 47% citing availability and only 13% citing ‘range’.

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<sup>18</sup> At paragraph 5.8 of the PFs.

Figure 7: Reasons given by customers for using different suppliers<sup>19</sup>

Reasons given by customers for using different suppliers	count of terms divided by the number of responses that listed this supplier									
	Customers									
	UC	3G	Automint	TTC	Knorr	EBS	CV Logix	Winnards	EXB	Imexpart
Price	47%	50%	27%	22%	11%	33%	67%	38%	0%	33%
Range	17%	13%	27%	11%	11%	22%	22%	25%	17%	0%
Availability	47%	47%	18%	33%	0%	22%	67%	13%	17%	33%
Quality	6%	7%	27%	11%	22%	0%	0%	25%	17%	17%
Service	8%	10%	9%	0%	0%	11%	0%	0%	0%	0%
Delivery	11%	10%	0%	33%	0%	0%	0%	13%	17%	0%
Rebates	3%	7%	0%	0%	0%	0%	0%	0%	0%	0%
Customer requirement	0%	0%	0%	0%	22%	0%	0%	0%	0%	0%
Convenience	6%	7%	0%	0%	0%	0%	0%	0%	0%	0%
Relationship	6%	7%	0%	0%	0%	0%	0%	0%	0%	0%
Safety	0%	0%	0%	0%	11%	0%	0%	0%	0%	0%
OEM products	0%	0%	0%	0%	33%	0%	0%	0%	0%	0%
Buying group deal	6%	3%	9%	0%	22%	11%	22%	13%	0%	0%
Total number of reasons given	56	48	13	10	12	9	16	10	4	5
Total number of mentions	36	30	11	9	9	9	9	8	6	6

- 4.5 The Parties note that the table above differs in material respects from the equivalent table shared with the Parties in the CMA’s Econ Working Paper. For example, the CMA has changed the heading of the third row in the table from “*Breadth*” (in Table 3 of the Econ Working Paper) to “*Range*”. Notwithstanding, the evidence above is clearly inconsistent with the CMA’s theory that customers value ‘breadth of range’ as a particularly important attribute in their suppliers. Fortunately for the CMA, the PFs observe that that “*We do not place significant weight on this evidence as some suppliers attracted relatively few mentions in total and the interpretation of some of the terms is unclear*”.
- 4.6 On the first attempt to explain away this evidence – that “*some suppliers attracted relatively few mentions in total*” – this clearly is irrelevant insofar as the evidence applies to UC and 3G as this was a customer questionnaire sent by the CMA specifically about a merger of those two businesses, each of whom registered over 30 responses. The Parties would also observe that the lowest number of competitor mentions in this table is *six*, yet the CMA feels no inhibition in placing significant evidential weight on prompted qualitative responses from just *three* customers made during ‘follow-up’ phone calls.
- 4.7 As to the CMA’s second attempted explanation – that “*the interpretation of some of the terms is unclear*” – the Parties note that in the Econ Working Paper, the CMA first attempted to explain away this clear evidence as to the importance of price – and relative lack of importance of ‘**breadth**’ of range’ – by asserting that:

<sup>19</sup> Reproduced from Table 5.1 of the PFs.

*“...it is not clear whether ‘availability’ refers to the range of products supplied (ie as synonymous with either ‘breadth’ or ‘depth’), or to the fact that products can be made available quickly to customers (eg because they are always held in stock). The wording of some responses is more consistent with the former interpretation (for example, one customer refers to a ‘broad base of product availability’), while other responses are more consistent with the latter (for example one customer refers to ‘huge range and good availability’)”<sup>20</sup>*

- 4.8 Having altered the heading in the table from “*Breadth*” to “*Range*” for the purposes of the PFs, the CMA makes a slightly different argument in a footnote to the PFs:

*“...it is not clear whether ‘range’ refers to the breadth of range of products offered (ie the number of product categories), or to the depth of range of products offered (ie the number of products in each product category). Likewise, it is not clear whether ‘availability’ refers to the range of products supplied (ie as synonymous with ‘range’), or to the fact that products can be made available readily to customers (eg because they are always held in stock)”<sup>21</sup>*

- 4.9 As noted at paragraphs 2.5 and 2.6 of the Working Papers Response (attached for ease of reference as **Annex 1**), having asked customers to think of “*breadth*” in terms of “*range of products offered (ie the number of product categories)*” for the purposes of question 6 of the CMA’s customer questionnaire, for the Econ Working Paper to speculate that some (but not all) customers citing “*availability*” in response to a different question may have been thinking about precisely that same concept, is simply not credible. By changing the heading in the table from “*Breadth*” to “*Range*” for the purposes of the PFs, and by tweaking the explanation to “*it is not clear whether ‘availability’ refers to the range of products supplied (ie as synonymous with ‘range’)*” (as opposed to “*it is not clear whether ‘availability’ refers to the range of products supplied (ie as synonymous with either ‘breadth’ or ‘depth’)*”), the CMA clearly does its best to sidestep this criticism. But the attempt is not successful: the fact remains that the customer questionnaire asked customers to think of to think of “*breadth*” in terms of “*range of products offered (ie the number of product categories)*” (emphasis added). To speculate that customers citing ‘range’ meant something other than this precise concept is, again, just not credible.

- 4.10 More fundamentally, the CMA cannot attempt legitimately to rely on alleged failings in the design of its own customer questionnaire to explain away evidence that it is incompatible with its theory of harm.<sup>22</sup> To openly suggest in the PFs that customers choosing to cite ‘availability’ in response to a CMA customer questionnaire in fact *meant* to cite ‘range’ (or ‘breadth’) takes the CMA well outside of the bounds of ‘evaluative discretion’ afforded to it under the Act.

*Evidence from CMA ‘follow-up’ calls with customers*

- 4.11 The PFs attempt to square the lack of support for the provisional SLC in evidence obtained in response to the customer questionnaire by citing comments made to the CMA in a series of ‘follow-up’ calls with individual customers. As a first point, the Parties note that, despite repeated requests, neither they nor their external advisors have been granted access to any transcripts or notes from such conversations. However, paragraphs 5.11 to 5.20 of the PFs strongly suggest that any discussion of the importance of offering a wide range of products on

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<sup>20</sup> At paragraph 17 of the Econ Working Paper.

<sup>21</sup> At footnote 182 of the PFs.

<sup>22</sup> Even more contradictory is the fact that the PFs, even though stating that the responses to this question are unreliable when they do not suit the CMA’s argument, relies on the exact same question to conclude that the evidence “*is illustrative of the fact that customers choose different suppliers for different reasons*” (at paragraph 5.10 of the PFs); to the extent that the CMA genuinely believes this evidence is unreliable, it cannot then choose to rely on that same evidence when doing so suits the CMA’s argument.

those calls was not initiated by the relevant customers, but rather was prompted by the CMA. Consistent with this, this section of the PFs begins by summarising comments made by customers reflecting the importance placed on price, quality and terms of delivery:

*“Fleet Factors explained that price is important to Fleet Factors and it is always monitoring prices. It added that its customers ‘force it down this route’ by having a focus on prices themselves. Likewise, Allspares told us that the choice of supplier comes down to the price and quality. Picksons told us that in choosing a supplier it would consider a range of factors, such as price, quality of product and terms of delivery.”*<sup>23</sup>

*“We were also told that quality is particularly important in relation to safety critical parts. For example, Allspares explained that customers may demand an OES product for braking and steering – these are safety critical products and a quality product is required. Linings and Hoses told us that, for safety critical parts, the quality of parts fitted was important.”*<sup>24</sup>

*“On delivery, customers told us that using wholesalers that can provide the products they need quickly allows them to hold less stock which would otherwise be costly.”*<sup>25</sup>

4.12 Again, this is consistent with the evidence set out above from the customer questionnaire showing that, as the CMA itself accepts, *“price, quality and delivery speed are key factors”*.<sup>26</sup>

4.13 Notwithstanding, the PFs go on to explain that on these calls the CMA then *“discussed with customers the reasons why they use the Parties and other wholesalers that stock a wide range of products”*.<sup>27</sup> The CMA goes on to cite six interviewees that apparently confirmed to the CMA there were some advantages in purchasing from *“wholesalers that stock a wide range of parts”* (EMS-FP&S; Fleet Factors; Complete Commercial Components; Picksons; Linings and Hoses and Allspares).<sup>28</sup> The PFs identify three such advantages:

- (i) one customer and one competitor identified the advantage of grouping purchases so as to meet the free delivery threshold and avoid carriage charges;
- (ii) two customers identified the advantage of simplifying and improving the efficiency of purchasing processes, thereby reducing administrative costs; and
- (iii) one (or possibly two – the Parties are unable to tell from the CMA’s summary in the PFs) customers identified the advantage of concentrating purchases in order to benefit from rebates.

4.14 The Parties note that, of those three benefits, the PFs appears to place significant evidential weight on what Fleet Factors apparently told the CMA in a follow-up interview: *“Fleet Factors explained that while it was possible to source about 80% of the parts bought from UC, 3G or TTC from other suppliers, instead of a single order this would involve purchasing from 20 to 30 different companies. It is likely that many of these individual orders would incur delivery charges (which could be £20 to £40 per order).”*<sup>29</sup> The Parties submit that this account (assuming that the CMA’s summary of that telephone call is accurate) describes precisely the type of delivery charged-based *ad hoc* purchases in respect of which the Parties have submitted

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<sup>23</sup> At paragraph 5.12 of the PFs.

<sup>24</sup> At paragraph 5.13 of the PFs.

<sup>25</sup> At paragraph 5.14 of the PFs.

<sup>26</sup> At paragraph 5.11 of the PFs.

<sup>27</sup> At paragraph 5.15 of the PFs.

<sup>28</sup> At paragraphs 5.17 to 5.19 of the PFs.

<sup>29</sup> At paragraph 5.17 of the PFs.



detailed quantitative evidence proving that the Transaction cannot plausibly be said to result in an SLC. The Parties' submissions on *ad hoc* sales, and the CMA's rejection of that evidence, are discussed in more detail below.

4.15 In fact, when properly understood the CMA's evidential base for the existence of "*cost and efficiency benefits*" to purchasing from a wide range wholesaler outside the context of *ad hoc* orders, reduces to:

- (i) administrative costs saved by not generating a lot of invoices ("*Complete Commercial Components (CCC) said that...[if it] had to go to individual companies to purchase equivalent parts, a lot of invoices would need to be generated*");<sup>30</sup> and
- (ii) rebate-related benefits from concentrating purchases on a small set of suppliers.

4.16 Strikingly, the CMA does not present any evidence at all to suggest that the existence of rebate schemes are seen by customers as a reason to purchase from wide range wholesalers.<sup>31</sup> Instead the sum total of the evidence collected by the CMA in support of this theory amounts to the following four lines at the end of paragraph 5.19 of the PFs: "*Linings and Hoses said that UC will offer a target which encourages firms to purchase more from it to try to hit these targets and gain the additional rebate. Allspares told us that suppliers who do not offer rebates tend not to make its main supplier list*".<sup>32</sup>

4.17 The Parties set out below a detailed explanation as to why neither the existence of rebate schemes nor potential administration cost savings from dealing with a smaller number of invoices can plausibly be regarded as evidence in support of a separate market for wide range wholesalers, much less the basis for an SLC finding.

*Evidence on purchasing patterns*

4.18 The second piece of evidence on range considered by the CMA, is customer questionnaire evidence on how customer purchases are spread across suppliers and the frequency of their purchases. The CMA argues that this evidence supports the view that customers use different types of suppliers for different reasons and therefore for some purchases, customers see benefits from purchasing from wholesalers with a wide range. Specifically, at paragraph 5.29 of the PFs, the CMA states that "*Table 5.2 below shows that customers typically place more frequent orders (that is, four or more times a week) with the Parties and CV Logix than they do with the majority of other suppliers. [The other supplier from whom customers predominantly purchase very frequently is Knorr-Bremse, an OES part manufacturer of braking systems.] These variations in the frequency of purchase across different suppliers are consistent with customers using suppliers for different reasons.*"

4.19 However, as explained in detail in the Parties' observations on the customer questionnaire submitted to the CMA on 3 September 2020 (attached for ease of reference at **Annex 2**),<sup>33</sup> as well as at paragraph 6.6 of the Working Papers Response, variations in frequency of purchases across suppliers may simply reflect the fact that customers purchase products from multiple product fields from the Parties while they purchase from a fewer number of product fields from competitors focused on one or a smaller number of categories. The CMA appears to have ignored this explanation in the PFs.

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<sup>30</sup> At paragraph 5.18 of the PFs.

<sup>31</sup> For completeness, the Parties note that the CMA's questionnaire asked customers to rank 'rebates' as one of nine potential supplier criteria but did not ask customers to identify whether rebates were relatively more or less important depending on the type of supplier.

<sup>32</sup> At paragraph 5.19 of the PFs.

<sup>33</sup> See, for example, paragraphs 25 to 29.

4.20 For the CMA to instead postulate that “*variations in the frequency of purchase across different suppliers are consistent with customers using suppliers for different reasons*” is mere speculation. Had the CMA wanted to test this hypothesis, it should have asked customers why they purchased from different suppliers at different frequencies. It chose not to ask that question. Again, the CMA cannot legitimately seek to rely on its own apparent failings in the design of the customer questionnaire to explain why there is no evidence to support its theory of harm.

*The CMA’s view on preference for ‘one-stop’ shopping*

4.21 The CMA argues that “*customer evidence shows that customers use different types of suppliers for different reasons. While quality, price and delivery time were the criteria typically seen as most important by customers that responded to our questionnaire, customers see benefits from wholesalers with a wide range, as this allows them to save on carriage charges and transaction costs and concentrate purchases in order to benefit from rebates.*”<sup>34</sup> However, the Parties explained at the Main Party Hearing and in their subsequent Working Papers Response that the main advantage of using a wide range wholesaler is likely to be limited to the very small proportion of sales which could be considered as ‘*ad hoc*’ – that is, sales for which customers may place a value on the ability to add an item onto a pre-existing open order so as to receive that item on a next day basis with no incremental delivery fees.

4.22 In this respect, none of the reasons given in paragraphs 5.17 to 5.19 of the PFs as to why customers may use wide range wholesalers explain why customers would favour a wide range wholesaler *where they are already buying from a narrow range wholesaler*. This is important because the CMA does not dispute the fact that the Parties’ customers already buy from narrow range wholesalers.

4.23 For example, the PF’s first stated reason - that customers can group their purchases so as to meet a free delivery threshold - is only valid if the customer is not already buying from a narrow range or niche wholesaler. For those customers that are already making primary orders from a narrow range or niche wholesaler, there is no saving as they will already be paying for delivery for those orders (or have already met the free delivery threshold). Therefore, wide range wholesalers will only have a delivery advantage if there is no existing order from a narrow range wholesaler and the requirement is urgent, but these are precisely the set of *ad hoc* orders which the Parties have examined.

4.24 Similarly, the PF’s second stated reason - to simplify and improve the efficiency of the purchasing process by avoiding multiple invoices - will again only apply if the customer is not already purchasing from a narrow range wholesaler. To the extent that a customer already uses a given narrow range wholesaler, there is clearly no simplification given that there will already be multiple invoices being sent to the customer. The Parties also note that only evidence presented in the PFs to suggest that motor factors may use wide range wholesalers in order to reduce administrative costs associated with processing invoices is a single anecdotal comment apparently made by Complete Commercial Components, i.e. that UC and 3G “*are essentially ‘one stop shops’*” and if it “*had to go to individual companies to purchase equivalent parts, a lot of invoices would need to be generated*”.<sup>35</sup> Setting to one side the CMA’s acknowledgement that in fact neither of the Parties serves customers as a one-stop-shop, the CMA makes no attempt whatsoever to quantify – or even roughly estimate – the value that would be lost by

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<sup>34</sup> At paragraph 5.30 of the PFs.

<sup>35</sup> At paragraph 5.18 of the PFs. For completeness, the Parties note that paragraph 5.18 of the PFs cites a separate anecdotal comment apparently made by Picksons, referring to a hypothetical scenario where it would need to “replace” UC or 3G with other suppliers, indicating that this would be time consuming and a logistical challenge. However, there is nothing in the PFs to suggest that Picksons believed this would be any more time consuming or logistically challenging than would be the case if Picksons were instead replacing a narrow or niche wholesaler.

customers if the Transaction were to result in them having to process “*a lot of invoices*”. Notwithstanding, the Parties believe any such loss would be completely negligible and easily outweighed by the purchasing efficiencies that will arise as a direct result of the Transaction.

4.25 Finally, the same is also true of the third stated reason, i.e. that concentrating their purchases on a small set of suppliers allows customer to benefit from rebates. If customers already buy from a narrow range wholesaler parts that a wide range wholesaler also supplies (which the CMA does not dispute), then it is clear that customers consider that any small benefit from a possible rebate is outweighed by what they see as the benefit of buying from a narrow range wholesaler. As such, the mere fact that there are customers buying the same products from a wide range wholesaler and from a narrow range wholesaler suggests that any preference to consolidate rebates is highly limited. This is not surprising given that narrow range and niche wholesalers themselves operate aggressive customer rebate programmes to encourage customers to purchase all – or at least the large majority – of their requirements of products within the ranges stocked by the relevant wholesaler.<sup>36</sup> Further, the Parties also note that evidence from the CMA’s customer questionnaire (as set out in Figure 7 above) shows that of all of the reasons given by customers for using UC, ‘rebates’ was in fact by some distance the least frequently mentioned at just 3% (and, at 7%, the joint second least frequently mentioned reason for using 3G). Likewise, as can be seen from Table 6 above, ‘rebates’ were by a very significant margin the attribute least commonly identified by customers as either very important or very and fairly important. Put simply, the CMA’s own evidence directly contradicts this anecdotal statement.

4.26 In summary, neither of the two additional anecdotal benefits to using a wide range wholesaler set out at paragraphs 5.18 and 5.19 of the PFs go beyond the evidence submitted by the Parties’ which shows that it is only for a small subset of *ad hoc* sales that customers may view narrow range or niche wholesalers as less of a constraint than wide range wholesalers. Yet, the CMA evidently believes that the detailed evidence presented by the Parties to support the fact that it is only for that small subset of sales that narrow range and niche wholesalers may not be an equally important constraint only merits one paragraph’s worth of consideration in the PFs:

*“We have not seen evidence that ‘ad hoc’ purchases, as the Parties define them, represent the only purchases for which customers value wholesalers with a wide range and motor factors did not explain their use of such wholesalers in these terms. As discussed above, the reasons for using wholesalers with a wide range of products involve cost and efficiency benefits which extend beyond one-off purchases that are added to an existing basket. While these purchases are not straightforward to characterise and quantify, in our view the evidence examined above provides the basis for distinguishing a separate need for wholesalers that stock a wide range of CVT parts.”<sup>37</sup>*

4.27 The Parties note that the CMA has in fact made no attempt to “*characterise and quantify*” purchases for which customers value breadth of product range. More fundamentally however, while the CMA notes that it has been afforded “*a margin of appreciation, or degree of evaluative discretion, in weighing up the totality of the evidence to reach its conclusions*”, the Parties submit that the CMA would be acting far outside any reasonable interpretation of ‘evaluative discretion’ if it continues to maintain that prompted, anecdotal, comments from a handful of customers (and one competitor) in the context of a market investigation that involved

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<sup>36</sup> Indeed, the fact (as set out in the Parties’ Phase 1 Decision Response) that in almost every product category in which the Parties overlap, the Parties’ largest competitor is not a wide range wholesaler, but rather a competitor focused on the relevant CVT parts category (whether as a narrow range or niche wholesaler) shows that rebates offered by wide range wholesalers are not a barrier to narrow or niche wholesalers competing in the relevant product markets.

<sup>37</sup> At paragraph 5.34 of the PFs.

sending questionnaires to 341 customers and the receipt of 40 written responses<sup>38</sup> outweigh the other evidence available to the CMA – all of which shows that breadth of range is in fact not a particularly important consideration for motor factors.

**5. The evidence considered in the PFs does not support a segmentation of the relevant product market on the basis of ‘range’**

5.1 After concluding that there may be some purchases for which ‘range’ is an important attribute based on the anecdotal prompted responses from the four customers and one competitor discussed above, the CMA focuses on four pieces of evidence to consider whether it is appropriate to segment the market on the basis of range (and thus exclude narrow and niche competitors as effective constraints). The Parties note that contrary to what one would expect, none of the evidence presented by the CMA looks at actual substitution patterns between wide range and narrow or niche range suppliers. On the contrary, the CMA’s provisional conclusion on this point is – again – largely based on anecdotal comments apparently made by competitors as to whether there is a ‘relevant distinction’ between ‘wide’ and ‘narrow range’ wholesalers, a statement that could apply equally to complementary suppliers as to substitutes, and hence says nothing about whether such suppliers are competitors.

*Evidence on number of product fields supplied*

5.2 First, the PFs consider the number of product fields for which wholesalers distribute parts. The evidence shows that “*There is a spectrum of different sizes of product range, with no clear and significant dividing lines separating wholesalers into different groups. For example, between those with the widest range and the specialist wholesalers, there are several wholesalers that supply between 20 and 30 product fields (such as Majorsell, Sampa, Imexpart, Febi and Amipart) and some that sell between 10 and 20 product fields (such as EBS, Granning and Guardian).*”<sup>39</sup> The CMA does not appear to consider this to be evidence that in and of itself would support defining a separate market for the wide range wholesale supply of CVT parts; paragraph 6.86 of the PFs explicitly acknowledges that “*We recognise that there is a spectrum of wholesalers and there is not a clear-cut distinction between those that are ‘wide range’ and other wholesalers*”.

5.3 Indeed, the Parties submit that this evidence says nothing more than different suppliers chose to focus on different product fields. Given purchasing decisions are made on a product field by product field basis, if anything, this evidence suggests that a market segmentation by product field is more appropriate than range.

*Evidence from competitors and customers*

5.4 Second, the CMA appears to put a surprising amount of weight on a question to competitors and customers on whether they view a possible distinction between wide range, narrow range and niche wholesalers could be relevant. In this respect, the PFs summarise that “*while third parties varied in the extent to which they recognised and considered relevant the categorisation of wholesalers into ‘wide range’ and ‘narrow range’ (with these terms not resonating with the majority of customers in particular), many market participants identified that these wholesalers had different strengths.*”<sup>40</sup>

5.5 The Parties strongly disagree with this interpretation of the evidence. On views from competitors, the fact that some competitors found the terms wide range and narrow range

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<sup>38</sup> As of 15 September 2020.

<sup>39</sup> At paragraph 6.12 of the PFs.

<sup>40</sup> At paragraph 6.25 of the PFs.

“*relevant*”<sup>41</sup> is trivial. Of course there is a distinction, but the CMA’s question provides no information regarding whether ‘wide range’ suppliers compete with ‘narrow’ or ‘niche’ suppliers. Had the CMA been interested in whether customers and competitors viewed narrow range suppliers as competing with wide range suppliers, it should have asked that question, rather than the vague tangential question that it posed.

- 5.6 Notwithstanding, even if one were to assume the question posed by the CMA was meaningful, if anything the views from customers actually provide strong support that a segmentation between narrow and wide suppliers is not relevant:

*“We asked the Parties’ customers (ie the motor factors they supply) whether they make a distinction between wide range, narrow range, and niche wholesalers, and whether this distinction is relevant to them. Of the 32 customers who responded to this question, 24 said that they did not recognise these terms or did not consider the distinction to be relevant to them.”*<sup>42</sup>

- 5.7 Again, faced with evidence which contradicts the CMA’s theory of harm, the PFs attempt to explain this away. On this occasion the CMA observes that “*Few of these 24 customers provided additional explanations*”<sup>43</sup> While the CMA may be disappointed to learn that the vast majority of customers do not agree with a fundamental pillar of its theory of harm, it is not clear what further ‘explanation’ it expected should be submitted in justification of those views. Of the customers that did provide further commentary however, again this flatly contradicts the CMA’s theory that a meaningful distinction can be drawn between wide, narrow and niche wholesalers:

*“Picksons considered that suppliers could in theory be categorised loosely into the above categories, but it had no use or reason to do so. It told us that it buys from whatever supplier best suits the needs of its business in terms of quality, price, commercial terms, availability, etc. Bison stated that it uses suppliers based on ‘price, availability, brand and quality’.”*<sup>44</sup>

- 5.8 According to paragraph 6.23 of the CMA customers apparently “*explained that wide- and narrow-range wholesalers serve different purposes*”. However, with the exception of one single anecdotal comment suggesting that wide range wholesalers serve as a ‘one stop shop’ (which elsewhere the CMA acknowledges is in fact not correct), in this respect the PFs simply set out evidence showing that non-wide range wholesalers are an important competitive constraint on the Parties:

*“Some of these respondents emphasised the characteristics and selling points of narrow-range and niche suppliers. For example, [REDACTED] said that ‘niche wholesalers have more knowledge’ and Truck & Trailer Equipment stated that being a specialist in one area is an advantage as the wholesaler can offer the complete range of that product and the expertise to advise on fitments etc. Similarly, other respondents highlighted the **disadvantage of wide range wholesalers in this regard**. EMS-FP&S said that **companies that offer a whole range of products often cannot provide the back-up or expertise of companies that specialise in certain areas**” (emphasis added).*<sup>45</sup>

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<sup>41</sup> At paragraph 6.15 of the PFs.

<sup>42</sup> At paragraph 6.22 of the PFs.

<sup>43</sup> At paragraph 6.22 of the PFs.

<sup>44</sup> At paragraph 6.22 of the PFs.

<sup>45</sup> At paragraph 6.23 of the PFs.

- 5.9 The CMA also asked the Parties' competitors how they rated other suppliers, and concluded that the responses support a segmentation by range because wide range wholesalers see other wide range wholesalers as a more significant competitive constraint than other types of wholesalers or suppliers; while narrow range wholesalers see both wide range and narrow range wholesalers as close competitors and some also see manufacturers as competitors. Leaving aside the potential biased response of competitors, the CMA's interpretation of the evidence is incorrect. Focusing on the sample of seven wide range wholesalers, the evidence clearly shows that, whilst 14 of 26 mentions of competitors rated with 5 or 4 were wide range wholesalers, by deduction 12 of 26 competitor mentions were not wide range wholesalers.<sup>46</sup> In other words, 46% of competitor mentions from wide range wholesalers are competitors other than wide range wholesalers, which provides strong evidence that wide range wholesalers view a significant proportion of their competitors as being different types of suppliers.

*Evidence from internal documents*

- 5.10 Finally, the CMA presents evidence from UC internal documents on how UC segments suppliers and views constraints from different types of wholesalers. The CMA argues that the documents support a segmentation based on range because the documents "*make many references to wide range wholesalers and identify certain wholesalers as being in this category*".<sup>47</sup> The Parties consider that this is simply wrong. As detailed in the PFs, UC generally refers to overall revenues or market shares in the UK IAM, it does not consider revenues from wide range wholesalers only. Where shares are provided for narrower segments, the segmentation is based on product fields, not range. UC agrees that some documents contain references to wide range wholesales but they also contain references to narrow range wholesalers as effective competitors to UC in the wider market. This is consistent with the evidence considered by the CMA when assessing the closeness of competition between the Parties; a substantial proportion of competitor mentions in these documents (e.g. price benchmarking, internal communications, leakages reports, sales meeting minutes etc.) are to 'narrow range' and 'niche' wholesalers winning business away from UC.

**6. The CMA's provisional SLC finding is not supported by the available evidence**

- 6.1 With respect to closeness of competition, the PFs broadly restate the analysis set out in the Econ Working Paper, with only cursory reference to the evidence submitted by the Parties in the Working Papers Response.

*Evidence on influences on the Parties' pricing decisions*

- 6.2 The CMA conducted a simple count of the number of mentions of competitors in certain of the Parties' documents. This evidence is summarised below, along with the Parties' categorisation of the type of sales to which the relevant documents refer.

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<sup>46</sup> At paragraph 6.34 of the PFs.

<sup>47</sup> At paragraph 6.32 of the PFs.

**Table 1: Summary of CMA’s evidence on 3G influence on UC’s pricing decisions based on UC’s internal documents**

Evidence from UC	Proportion of 3G mentions - evidence related to primary sales	Proportion of 3G mentions - evidence related to ‘ad hoc’ sales
UC price benchmarking	29% of mentions (*)	
Internal communications	36% of mentions	
CRM database	38% of mentions	
Email price negotiations		56% of mentions (**)
Overstrikes		45% of mentions

(\*) 54% of products (\*\*) 62% of documents.

- 6.3 Based largely on this evidence, the CMA provisionally concludes that “*while UC has regard to a range of competitors in setting its prices, its main focus is on wide range wholesalers, and in particular on 3G, which is far more prominent in its internal documents on pricing than any other competitor*”.<sup>48</sup>
- 6.4 However, as explained in the Working Papers Response, this conclusion overstates the closeness of competition between the Parties because it places equal weight on evidence related to ‘primary’ sales as it does on evidence related to the small proportion of the Parties’ overall sales consisting of ‘ad hoc’ orders. In particular, as discussed in detail at paragraphs 3.2 of the Working Papers Response (attached at **Annex 1** for reference) and in the Main Parties Hearing, the Parties acknowledge that for a very small proportion of their sales, customers may place a value on the ability to add an item onto a pre-existing open order so as to receive that item on a next day basis with no incremental delivery fees. The Parties refer to such orders as ‘ad hoc’ – as opposed to ‘primary’ – sales. Given that wholesalers offering parts in a greater number of product categories will generally be making more frequent deliveries than a wholesaler supplying only one or a smaller number of product categories, on average it is more likely that a customer will have a pre-existing open order with a wide range wholesaler when the requirement for an *ad hoc* part arises. A large proportion of the email negotiations and overstrikes data cited in the PFs pertain directly to such *ad hoc* sales; this explains why there is a relatively higher proportion of 3G mentions in those two datasets than in other internal datasets/documents (such as UC’s price benchmarking or regional sales meeting presentations) assessed by the CMA. Indeed, when *ad hoc* sales are removed from the UC overstrike dataset, the frequency of 3G mentions falls to the same level as observed in those other internal documents: in the range of 29% to 38%.
- 6.5 As set out in detail in the Working Papers Response, and summarised below, not only are *ad hoc* sales a very small proportion of any given customer’s overall sales, but even on this small proportion the Parties will not have the ability or incentive to raise prices post-merger; any attempt to increase prices on these *ad hoc* sales would put at risk not only the specific order subject to the relevant price negotiation (and in this respect, the evidence cited by the CMA shows that the Parties continue to face significant constraints from ‘narrow’ or ‘niche’ suppliers) but also the relevant customer’s underlying primary sales which are of far greater importance to the Parties.

*Ad hoc orders account for a small proportion of each Party’s sales*

<sup>48</sup> At paragraph 7.59 of the PFs.

- 6.6 As the Parties previously explained, ‘*ad hoc*’ orders comprise instances in which a motor factor needs to make a one-off purchase of a particular CVT part outside of their standard ‘primary’ orders.<sup>49</sup> This may be the case if a factor’s customer (i.e. a commercial vehicle repair provider or CVRP) is servicing a ‘vehicle off-road’ which requires a particular part for it to be able to return to the road legally.<sup>50</sup>
- 6.7 For such ‘time sensitive’ *ad hoc* orders, motor factors and fleet operators will place a greater value on the ability to receive the parts as quickly as possible, and therefore will generally want to place an order for them outside of their primary order (which, depending on the time of day that the need for the *ad hoc* part arises, may not be scheduled until the following day).
- 6.8 Given that there is generally a minimum order value to qualify for free delivery, the extent that a factor has an open existing order with a supplier above the relevant free delivery threshold on the same day as its need for an *ad hoc* item arises, the factor could save on an additional next day delivery cost for the *ad hoc* part(s) by appending that *ad hoc* order to the pre-existing primary supply order. Because wholesalers with parts in a greater number of product categories will generally be making more frequent deliveries to customers than a wholesaler supplying only one or a smaller number of product categories, on average it is more likely that the factor will have a pre-existing open order with a wide range wholesaler when the requirement for an *ad hoc* part arises.
- 6.9 However, as discussed above, it is important not to overstate this advantage. First, the advantage will only exist if the motor factor does not already have an open delivery with a so-called ‘niche’ or ‘narrow range’ wholesale supplier that can supply the relevant part occurring on the same day as the need for the *ad hoc* part arises. This means it is not the case that suppliers focused on one or a smaller number of product categories are not constraints for *ad hoc* orders, rather they may simply be less of a constraint on average for these particular types of orders given they make less frequent deliveries to customers. Second, the advantage will only exist to the extent that the specific parts in the *ad hoc* order do not by themselves meet the free delivery threshold. However, as shown below many *ad hoc* parts are relatively infrequent, high value, items whose price will be above the free delivery threshold. For these items there is no advantage to go to a supplier where there is already an order coming, versus a supplier without an order on that day, because the free delivery threshold will be met on the basis of the *ad hoc* item in and of itself. Finally, the advantage will be no greater than the cost of delivery saved by appending the *ad hoc* order to an existing order that has already met the free delivery threshold, versus making a separate *ad hoc* order with an alternative supplier and incurring a separate delivery charge.
- 6.10 In the Working Papers Response, the Parties showed that *ad hoc* orders make up only a very small proportion of any given customer’s overall demand, with the vast majority of that demand instead being purchased through primary sales orders (as evidenced below in relation to UC’s sales data). Specifically, UC looked at estimating *ad hoc* orders on the basis of three different measures.
- (i) First, UC looked at single product and single quantity orders placed by customers after the UC free delivery threshold on a pre-existing order was met.<sup>51</sup> On this basis, *ad hoc*

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<sup>49</sup> This may occur when the relevant part is not common and therefore not generally stocked by the motor factor, or because the stock on the particular part has been depleted and the factor has an urgent need for that part which cannot wait until their normal primary order.

<sup>50</sup> Note that, while in the Parties’ experience most (if not all) *ad hoc* orders relate to safety critical parts, not all safety critical parts will be purchased through *ad hoc* orders; instead customers will endeavour to purchase such parts within their primary supply orders. As such, the conditions of competition for vehicle off road parts are not inherently different from other parts in the same relevant market.

<sup>51</sup> This was done on the basis that *ad hoc* orders are generally single quantity orders appended onto primary orders which have already exceeded the free delivery threshold. Orders placed on days when the customer did not meet the threshold are not treated as *ad*



orders were estimated at only [X] or [X]% of UC's total sales in March 2020, or [X] of UC's total sales in March 2020) if orders which already meet the free delivery threshold in and of themselves were included.<sup>52</sup>

- (ii) Second, to reflect that *ad hoc* orders often come relatively late in the day, i.e. after the primary order has already been placed, UC has looked at any single line orders which are made in the last hour of trading (and for which delivery would be for the day after as part of the main order). This accounts for [X] worth of sales or [X]% of total sales in March 2020.
- (iii) Third, on a highly conservative basis, UC has also looked at any single line, single quantity orders that occur any time in the day, regardless of whether the free delivery threshold has been met or not.<sup>53</sup> Even on this conservative basis, this would amount to [X] or [X] of March 2020 sales.

6.11 All of the estimates above are consistent with the Parties' view that the level of relevant *ad hoc* sales, in which a wide range wholesaler could feasibly have some comparative advantage over a wholesaler focused on one or a smaller number of product categories is only a very small proportion of each Parties' overall sales.

*The overstrike and email negotiation sales are consistent with the Parties definition of ad hoc sales*

6.12 As set out in the UC Hearing, the CMA's evidence with respect to email negotiations and price matched overstrikes predominantly relates to *ad hoc* sales rather than primary sales.<sup>54</sup> In particular, the [X] of competitor overstrikes (i.e., overstrikes related to explicit price matching of a supplier) are granted in respect of single line orders and therefore predominantly *ad hoc* sales. As such, while the Parties acknowledge that the frequency of mention of 3G or other wide range wholesalers in the competitor overstrikes data (and hence email negotiations) is higher than the frequency of mentions in all the other CMA evidence base because that specific sub-set of the overstrike data is largely made up of *ad hoc* sales.

6.13 Furthermore, as discussed above, these higher mentions seem to be predominantly driven by single line items that are below the free delivery threshold – consistent with them being *ad hoc* purchases. Focusing on 3G mentions of single line items in the competitor overstrike reports that are above the threshold (and hence where there is no advantage to ordering from a wide range supplier), the share of 3G mentions is only [X]% – consistent with the evidence on primary orders.

6.14 Importantly, the named competitor overstrikes cited by the CMA account for only a tiny proportion of the total value of parts for which an overstrike was granted ([X]%) and a *de minimis* proportion (just [X]%) of UC's total sales. Even if all overstrikes are considered, regardless of the reason, these account for only [X]% of UC's total sales over the period April 2019 to June 2020 (i.e., the period covered in both the overstrike and ~~transaction data~~).

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*hoc* for these purposes as there is no advantage in ordering these from a wide range wholesaler versus a wholesaler focused on one or a smaller number of product categories.

<sup>52</sup> As a sensitivity, UC has also looked at any single line order, regardless of the quantity in the order despite this sensitivity capturing a significant amount of non-*ad hoc* orders (i.e. those with large quantities of a single part which are more likely to be part of a primary order). Nonetheless, even including such orders, amounted to only [X] or [X]% of March 2020 sales, or just [X] excluding single line orders that already meet the free delivery threshold alone.

<sup>53</sup> This is likely to include many instances of sales that should not be considered *ad hoc* for these purposes insofar as the free delivery threshold has not been met, and therefore there is no advantage for a wide range wholesaler in providing the part versus a wholesaler focused on one or a smaller number of product categories.

<sup>54</sup> It should be noted that email negotiations are a subset of the overstrikes data, rather than a separate data source. This is because whilst the negotiation may take place through email, any reduction in price which is decided on will be entered in as an overstrike, and therefore included in the overstrike data. This accounts for why estimates of 3G mentions in UC's competitor overstrike data and email negotiations data are almost identical.

The Parties will not have the ability or incentive to refuse bilateral negotiations on ad hoc orders

- 6.15 Even though wide range wholesalers may have a relatively stronger position on *ad hoc* sales compared to wholesalers focusing on one or a smaller number of product categories, the Parties are still constrained by the fact that customers who make *ad hoc* purchases are the same customers who also make their primary purchases from the Parties. For primary purchases, customers have a range of credible alternatives outside the Parties. Given the nature and relative value of *ad hoc* orders compared to primary orders, the Parties will not have an ability or incentive to increase prices on *ad hoc* orders post-merger.
- 6.16 Consistent with this, looking at the products on which an overstrike is granted, [X]% of these orders (by value) are to customers who are also using UC for their primary purchases.<sup>55</sup> More importantly, if the CMA's theory is that post-merger the Parties may no longer provide a discount on an *ad hoc* sale when a customer requests it, such sales (i.e. orders on which competitor overstrikes were granted) account for less than [X]% of UC's sales. It would be entirely irrational for UC to risk the [X]% of primary sales just for the sake of a slightly higher margin on less than [X]% of sales on which 3G may have been a more significant constraint. Primary purchases are the main consideration for both customers and the Parties and for these purchases, customers have credible alternatives outside the Parties. The credible threat to switch away primary purchases to alternative suppliers will prevent the Parties from refusing to negotiate down prices on the tiny proportion of *ad hoc* orders on which there is direct competition.

The CMA's critique of evidence on ad hoc sales

- 6.17 The CMA's evaluation of the extensive evidence summarised out above (and submitted in more detail to the CMA in the Working Papers Response) is set out in paragraph 7.56 of the PFs. Specifically, the CMA dismisses this evidence on the basis that:
- (i) *"We have not seen a distinction between 'ad hoc' and 'primary' sales in the Parties' internal documents, nor have customers described such a distinction to us in our discussions with them";* and
  - (ii) *"While most of the Parties' price negotiation documents relate to one or a small number of products, they do not necessarily relate to one-off purchases. In many of these emails and webchats, the customer brings up a competitor's price and asks to be 'set up' for that particular price in UC's or 3G's system, often with no mention of an immediate purchase. UC has also told us that information gathered from price negotiations is regularly fed into price benchmarking documents. In our view, this practice would not make sense if price negotiations related to very specific circumstances that are not representative of broader competitive conditions. Similarly with respect to overstrikes, UC told us that this information is used to inform broader business views on the companies' competitiveness. In our view, this practice would not make sense if overstrikes related purely to ad hoc transactions that reflected different conditions of competition".*
- 6.18 In relation to the CMA's first argument, at no point have the Parties suggested that their respective sales teams explicitly distinguish '*ad hoc*' sales in external correspondence with customers or in their internal reporting documents. However, that does not in any way detract from the evidence set above that very clearly shows a marked distinction between the frequency of mentions of 3G in UC's email price negotiations and overstrikes data (which relate primarily

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<sup>55</sup> This refers to the period covered in both overstrikes and the transaction data i.e. April 2019 to June 2020.

to *ad hoc* sales), as compared to the frequency of mentions in UC's price benchmarking documents, internal communications and CRM database (which relate primarily to all other types of sales). Nor has the CMA suggested any alternative explanation for that distinction.

- 6.19 The Parties have no way to verify the veracity of the CMA's observation that customers did not describe a distinction between *ad hoc* and primary sales in their discussions with the CMA because the CMA has repeatedly refused to provide the Parties with access to any notes or transcripts of those calls (even on an external advisor basis). That said, the Parties note that the CMA has not suggested it ever *asked* customers about this distinction. Absent such a question, the CMA cannot legitimately dismiss the Parties' detailed and evidenced explanations of their own sales practices simply because that distinction was not pro-actively raised on the handful of phone calls the CMA conducted with customers.
- 6.20 Nor do the Parties agree with the CMA's suggestion that it "*does not make sense*" to take into account the prices agreed on an individual SKU purchased by a customer on an *ad hoc* basis when determining the price of that same SKU for that same customer on future sales; however doing so does not make those *ad hoc* sales any more representative of the conditions of competition faced by the Parties with respect to their primary sales. More fundamentally, only a very small proportion of overstrikes result in a change to the prices offered by UC on primary sales: of the 13,051 overstrikes recorded by UC over the 12 month period from 6 November 2019 to 6 November 2020, only 2,011 of those overstrikes resulted in UC making a change to the prices offered to customers on subsequent orders. Given that only a small proportion of prices are overstruck, and an even smaller proportion of those prices are actually updated to a customer's main price file, the PFs view that overstrikes or email negotiations will have a significant effect on prices for primary orders is clearly not supported.<sup>56</sup>
- 6.21 Separately, as part of the evidence on influences on the Parties' pricing decisions, the CMA places weight on the responses to the customer questionnaire, which asked customers whether they requested quotes from alternative suppliers when deciding to purchase from either of the Parties. The CMA finds that 8 of the 10 UC customers that responded to this question requested quotes from 3G, while 11 of the 12 3G customers that responded to this question requested quotes from UC, suggesting that UC and 3G influence each other's pricing. The Parties consider that these findings are not meaningful: first, it is difficult to make robust conclusions based on a sample of 10 or 12 customers, especially when the respondents currently purchase from both UC and 3G.<sup>57</sup> In addition, 5 of the 8 UC customers that named 3G, and 4 of the 11 3G customers that named UC, also mentioned other competitors, which implies that the weight placed on 3G/UC from these customers is overstated.

*Evidence of customer switching and diversion*

- 6.22 The CMA has relied disproportionately on its customer questionnaire to inform its views on customer switching and diversion, whilst attaching little weight to other sources which show significantly different results. Indeed, as the table below shows, the CMA's counts of the number of mentions of competitors in the Parties' internal documents shows that the parties are significantly less close competitors than the CMA's analysis of customer questionnaire responses would otherwise suggest, and is more consistent with the Parties' switching analysis. The evidence considered by the CMA is summarised below.

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<sup>56</sup> For the avoidance of doubt, when an email negotiation or overstrike is received, there is no systematic updating of the price matrix. As such there is no automatic mechanism for new prices the negotiation/overstrikes to be reflected in the main pricing for primary orders. It is correct that in a small minority of occasions, prices for individual SKUs/customers will be updated, but this is discretionary and is up to the sales staff in question.

<sup>57</sup> At footnote 313 of the PFs.

**Table 2: Summary of CMA’s Customer Switching and Diversion Evidence on the competitive strength of 3G**

Source of evidence	Type of evidence	Estimate of the competitive strength of 3G
UC Internal Documents	Regional sales meeting presentations	29% of mentions in opportunities (*)
	Sales meeting minutes	32% of total mentions
	CRM database / leakages	29% of leakages
Parties’ switching analysis	UC Customer switching	4-15%, 25% in most conservative scenario
CMA’s customer questionnaire	Questionnaire diversions	48% weighted diversion

(\*) The CMA also cites an estimate of 47% of wins, which does not directly address the competitive strength of 3G (see also footnote 59 below).

- 6.23 The PFs argue that “*this evidence shows that 3G is an important competitor to UC in terms of the business it wins, opportunities, and the losses and competitive threats it faces, while an estimated half or more of diversion from the Parties would be to one another*”.<sup>58</sup>
- 6.24 As discussed above and as previously explained in the Working Papers Response, by placing a disproportionate weight on the results of the customer questionnaire, the closeness of competition between the Parties is significantly overstated. Looking at the evidence in the round, across both internal documents and the Parties’ switching analysis, the estimated diversions across the other pieces of evidence are not greater than 32%.<sup>59</sup>
- 6.25 The Parties have already provided detailed submissions explaining why the CMA’s estimates from its questionnaire are likely to be materially biased upwards given the significant methodological problems with the wording of the diversion question.<sup>60</sup> In particular, the first part of the question asked:<sup>61</sup>

**Figure 8: Excerpt from CMA Customer Questionnaire**

8. Thinking about the parts that you bought from Universal Components in the last 6 months, suppose that **Universal Components** had not been operating - which alternative supplier(s) would you have used instead to buy these parts?

a. Name of the alternative supplier that you would have used (or the one that you would have bought the most from if you would have used more than one alternative supplier)

<sup>58</sup> At paragraph 7.79 of the PFs.

<sup>59</sup> This estimate also excludes the results on the proportion of wins in the regional sales meeting presentations, which however do not provide a proxy for the competitive constraint of 3G. The issues with this measure are discussed in more detail in the Working Papers Response (at paragraph 3.22b). The PFs also note that the measure of ‘opportunities’ provides more up-to-date estimate because UC “has recently sought to broaden its competitive activities beyond 3G” and “this may be reflected in the fact that 3G (and wide range wholesalers) appear less often in UC’s ‘opportunities’ than in its ‘wins’” (Provisional Findings, para 7.64).

<sup>60</sup> Comments on the Customer Questionnaire, section 3.5 and section 6 of the Working Papers Response.

<sup>61</sup> In relation to UC; the same question was also asked in relation to 3G.

- 6.26 By asking customers to focus on all purchases from the Parties and then asking them to name a single alternative across these products is likely to be interpreted by respondents as limiting their options to a single alternative that can replace all purchases from the Parties. While the PFs dismiss the potential existence of bias in the wording of the question, none of the explanations withstand scrutiny. Most importantly none of the arguments in the PFs on this point explain why the questionnaire response estimate is so inconsistent with not only the Parties' internal documents and internal leakage analysis but also the Parties' own estimates of switching conducted by CRA:
- (i) The PFs argue that "*the first sub-point of the question explicitly allowed for the possibility of splitting purchases between more than one supplier*".<sup>62</sup> The Parties do not agree that this option was made clear to respondents; the question asked customers for a single alternative supplier for all purchases from the Parties. The parenthesis added at the end of the sub-point merely requires the respondent to name "*the one that you would have bought the most from if you would have used more than one*"; by focusing customers on all purchases and asking them to name a their largest single alternative, the question clearly invites respondents to focus on wide range wholesalers.
  - (ii) The PFs also argue that "*the following subpoint asked respondents to state the categories that they would have bought from the primary alternative, implying that diverting different categories to different suppliers was a valid and expected answer*".<sup>63</sup> Again, this entirely misses the point: having effectively invited respondents to limit their response to wide range wholesalers, the second sub-question merely reinforces this by asking which categories (plural) the respondent would purchase from that single alternative supplier. What this sub-question self-evidently does not do in any way is imply that "*diverting different categories to different suppliers was a valid and expected answer*".
  - (iii) The PFs further argue that some customers named multiple suppliers and must therefore they must have understood the question.<sup>64</sup> However, this argument is not meaningful without knowing the number of suppliers that customers would have identified, had the question been asked correctly.
- 6.27 The bias in the responses is clear when the estimated diversion from the questionnaire are compared to the competitor counts from the other pieces of evidence considered by the CMA. For example, the leakages database (which the CMA argues to be robust evidence)<sup>65</sup> produces a significantly lower diversion estimate (29%) compared to the customer questionnaire (48%). The CMA makes no attempt to explain this large difference in the results.
- 6.28 The Parties have conducted their own switching analysis which confirms that the rate of switching and diversion is much lower than suggested by the CMA. Yet, the PFs dismiss this analysis largely because it "*cannot control for all possible factors impacting demand, it is likely to underestimate switching between the Parties*".<sup>66</sup>
- 6.29 In this respect the Parties have made numerous submissions to the CMA and presented a range of sensitivities, which address the specific issues raised by the CMA.<sup>67</sup> However, the PFs do not engage with that evidence but simply state that "*they are not persuaded*" based on highly

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<sup>62</sup> At paragraph 7.76 of the PFs.

<sup>63</sup> At paragraph 7.76 of the PFs.

<sup>64</sup> At paragraph 7.77 of the PFs.

<sup>65</sup> At paragraphs 18 and 19 of Appendix E to the PFs.

<sup>66</sup> At paragraph 19 of Appendix E to the PFs.

<sup>67</sup> At paragraph 3.26 of the Working Papers Response.

speculative assertions, which are not explored or verified by customers. On the three specific reservations expressed in the PFs, the Parties note the following.

6.30 First, the PFs argue that the sensitivities presented by the Parties – namely, using a six-month period to evaluate loss and switching events, and focusing on the 1,000 fastest moving parts – do not control for “*situations where customers stopped purchasing certain parts altogether, or durably reduced their demand*”.<sup>68</sup> The Parties do not agree with this assertion.

(i) In relation to situations where a customer may have stopped purchasing certain parts altogether, the PFs cite a single hypothetical scenario where “*a motor factor may stop purchasing a part for other economic reasons for example if one of its clients loses a contract for a particular fleet or type of vehicle*”.<sup>69</sup> This hypothetical situation is simply asserted by CMA with no attempt to verify it from third parties. From a business perspective, the Parties cannot see how any large customers would stop purchasing any of the fastest moving products for a period of 6 months because a single contract is lost for a fleet or type of vehicle. This hypothetical situation is also inconsistent with statements elsewhere in the PFs where the CMA recognises that “*the Parties submitted, and we agree, that...their customers are motor factors who must stock and supply the full range of CVT parts*” (emphasis added).<sup>70</sup>

(ii) On reductions in demand, as explained in the Working Papers Response, such situations may translate to fewer sales in a month, or even zero sales in a single month, but it is simply not realistic that this would translate to zero sales of a particular product (particularly a fast-moving product) for a customer over a period of six months. As such, it cannot be changes in demand which are driving the low switching results seen between the Parties in the CRA’ analysis.<sup>71</sup>

6.31 Second, the PFs argue that the sensitivity in the Parties’ analysis, which treats any increase in quantity at one Party as a complete switch from the other, “*only partially relaxes the assumption of constant purchase rates*”.<sup>72</sup> The PFs explain that “*if a customer is not observed to increase its purchase from the opposite Party at all*”, the analysis assumes “*that this customer is sourcing the same total value of parts from an alternative supplier*”,<sup>73</sup> therefore potentially misclassifying a reduction in total demand from a customer as switching to alternative suppliers (and hence understating the true switching rate between the Parties).<sup>74</sup> However, this possibility is only one of the possible outcomes associated with a reduction in the total value of parts purchased by a customer following a customer loss event. The other possible outcomes are: (i) the possibility that the customer sources the reduced value of parts from the other Party (in which case as the CMA acknowledges the diversion will be overestimated); and (ii) the possibility that the customer splits the reduced value of parts between the other Party and an alternative supplier (which again will result in an overestimation, given under the analysis,

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<sup>68</sup> At paragraph 16 of Appendix E to the PFs.

<sup>69</sup> At paragraph 16 of Appendix E to the PFs.

<sup>70</sup> At paragraph 5.27 of the PFs.

<sup>71</sup> See also paragraph 3.26 to the Response to the Working Papers.

<sup>72</sup> At paragraph 17 of Appendix E to the PFs.

<sup>73</sup> At paragraph 17 of Appendix E to the PFs.

<sup>74</sup> For example, consider a ‘customer loss’ event where the total value of purchases of a certain part by a customer was £100 during the period prior to the customer loss event and this total value was reduced to £90 during the period after the customer loss event. The possible outcomes following the customer loss event are: (i) the customer sources the reduced value of £90 from the other merging Party (in our analysis, we would allocate the total value of £100 to the other merging Party, therefore overstating the overall diversion between the Parties); (ii) the customer sources the reduced value of £90 from an alternative supplier (in our analysis, we would classify the total value of £100 as switching to alternative suppliers therefore understating the diversion between the Parties); (iii) the customer splits the reduced value of £90 between the other merging Party and an alternative supplier (in our analysis, we would classify the total value of £100 as switching to the other merging Party therefore significantly overstating the diversion between the Parties).

demand will be entirely allocated to the other Party).<sup>75</sup> Across all potential scenarios, therefore, on average the analysis will *overstate* the switching rate between the Parties and to that extent - contrary to the position set out in the PFs – this analysis represents conservative upper bound estimate of the true rate of switching between the Parties.

6.32 The third reservation in the PFs is that the switching analysis “*reflects some assumptions about what customers do, namely that they purchase certain parts at constant rates over certain periods of time*” therefore it does not provide evidence of what the Parties’ customers actually do as “*the Parties have no direct information on what their customers actually do*”.<sup>76</sup> The Parties disagree with this. The switching analysis provides direct evidence of whether the Parties’ customers stop purchasing from one of the Parties for a period of six months. As noted above, the CMA recognises that “*the Parties submitted, and we agree, that...their customers are motor factors who must stock and supply the full range of CVT parts*”.<sup>77</sup> Therefore, it is a logical conclusion (not an assumption) that these customers who stopped purchasing certain parts from one of the Parties, have switched their purchases to other suppliers. This evidence on switching is also clearly more informative than evidence on what the Parties’ customers say they would do, particularly given the issues with the CMA’s customer questionnaire set out above. Most importantly, unlike the CMA’s customer questionnaire, the CRA switching analysis is consistent with the CMA’s other evidence on the constraints that the Parties face in their primary supplies.

6.33 Whilst dismissing the Parties’ switching analysis, the PFs argue that “*in our view, UC’s own internal review of its ‘leakages’ provides a more robust basis for estimating the extent to which it loses sales to 3G, since it incorporates the information gathered by its sales staff regarding the possible different causes for leakages*”.<sup>78</sup> However, the switching rates from the leakages database (29% losses to 3G) is not significantly higher than the switching rates in the Parties’ analysis, which estimates that 25% of switching from UC is to 3G under the most conservative scenario.

6.34 Overall, the evidence from the internal documents considered by the CMA is closer to the estimates based on the Parties’ analysis compared to the estimates derived from the responses to the diversion question in the customer questionnaire.

*Analysis of Transaction’s likely effect on prices (GUPPI)*

6.35 The PFs provisionally conclude that the merger will result in an SLC “*in the form of higher prices and/or lower quality of products or customer service than would otherwise have been the case absent the Merger*”.<sup>79</sup> However, unlike in many previous cases, the CMA’s assessment of the likely impact of the Transaction on competition in the relevant markets does not attempt to quantify these price effects. This is important because, as shown below, the level of upward pricing pressure seen in the current case is close to the level where the CMA has typically considered anti-competitive effects to be unlikely.

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<sup>75</sup> For example, consider a ‘customer loss’ event where the total value of purchases of a certain part by a customer was £100 during the period prior to the customer loss event and this total value was reduced to £90 during the period after the customer loss event. The possible outcomes following the customer loss event are: (i) the customer sources the reduced value of £90 from the opposite Party (in our analysis, we would allocate the total value of £100 to the opposite Party therefore overstating the overall diversion between the Parties); (ii) the customer sources the reduced value of £90 from an alternative supplier (in our analysis, we would classify the total value of £100 as switching to alternative suppliers therefore understating the diversion between the Parties); (iii) the customer splits the reduced value of £90 between the opposite Party and an alternative supplier (in our analysis, we would classify the total value of £100 as switching to the other opposite Party therefore significantly overstating the diversion between the Parties).

<sup>76</sup> At paragraph 18 of Appendix E to the PFs.

<sup>77</sup> At paragraph 5.27 of the PFs.

<sup>78</sup> At paragraph 19 of Appendix E to the PFs.

<sup>79</sup> At paragraph 7.123 of the PFs.

6.36 The table below presents the estimated GUPPI for UC using different parameters for diversions and variable margins.<sup>80</sup> As set out in greater detail in **Annex 3**, the Parties' variable margin ranges between [X] and [X], depending upon the year considered.

**Table 3: GUPPI estimates for UC using a range of diversion estimates ([X] to [X]) and variable margins ([X] and [X])**

<b>Diversion estimate:</b>	<b>Margin of [X] (FY2019)</b>	<b>Margin of [X] (FY2020)</b>
[X] (upper bound of the Parties' switching analysis)	4.3%	5.3%
[X]	4.4%	5.5%
[X]	4.6%	5.7%
[X]	4.8%	5.9%
[X] (CMA's leakages analysis; regional sales meeting presentations)	4.9%	6.1%
[X]	5.1%	6.3%
[X]	5.3%	6.5%
[X] (CMA's analysis of sales meeting minutes)	5.4%	6.7%

Source: CRA calculations based on estimates from UC and the Parties' switching analysis

6.37 As seen in the table above, the GUPPI estimate for UC ranges from 4.3% (based on a [X] diversion and [X] variable margin) to 6.7% (based on a [X] diversion and [X] variable margin).

6.38 The Parties note that estimates of pricing pressure will always be positive if there is some level of substitution between the products supplied by merging parties. The relevant question is therefore whether the upward pricing pressure is substantial enough to result in a *significant* lessening in competition. In this regard, it is also important to note that the above estimates do not include any allowance for the procurement efficiencies expected as a result of the merger and explicitly modelled by UC.

6.39 The CMA accepts that these are relevant factors and, for this reason, has typically presumed that an SLC will not arise where the GUPPI is below 5%.<sup>81</sup> Conversely, the CMA considered that SLCs will arise in some – but not all – cases where the GUPPI is above 10%.<sup>82</sup>

6.40 As the results above show, the level of upward pricing pressure that can be expected from the Transaction is close to the level (i.e. 5% or below) where the CMA has typically considered

<sup>80</sup> It should be noted that, given the serious methodological issues set out above with respect to the CMA's customer questionnaire, evidence from this questionnaire is not used as an input for the estimates set out below.

<sup>81</sup> For example, in *SSE/Npower*, the CMA noted that in previous cases it has taken the approach that a GUPPI of less than 5% indicates that concerns can be ruled out, although it also said that occasionally a higher threshold has been used (*A report on the anticipated merger between the domestic retail energy business of SSE plc and Npower Group Limited*, 10 October 2018, at paragraph 4 of Appendix J). For completeness, we note that in *Sainsbury's/Asda*, the CMA used a considerably lower threshold than 5% on the basis of the size of the market, the fact that the Parties had already estimated efficiencies and therefore no credit was necessary, and the fact that the relevant market is important (in that food is a necessary purchase and all consumers use supermarkets) (*Anticipated merger between J Sainsbury PLC and Asda Group Ltd*, 25 April 2019, at paragraphs 8.275 to 8.296). These factors clearly do not apply to the Transaction.

<sup>82</sup> For example, in *Ladbrokes/Coral*, the CMA used a sense-check review of GUPPI decisional practice to arrive at a GUPPI threshold range no lower than 10% (i.e. 10-20%) as the range within which its decisive intervention threshold (decision rule) should fall (at paragraph 7.127 – 7.129 of *Ladbrokes/Coral* merger inquiry, 26 July 2016). In *Tesco/Booker*, the CMA adopted a lower threshold of concern of 5% but noted this was conservative and a number of local areas were nonetheless cleared despite having GUPPIs above 5% (*Anticipated acquisition by Tesco PLC of Booker Group plc*, 20 December 2017, at paragraphs 9.50 to 9.52 and 11.7 to 11.15) or even above 10% under some sensitivity scenarios (*Tesco/Booker*, at footnote 252). More recently, in *Tobii/Smartbox*, the CMA considered GUPPIs of 10%-20% as being high and referred to previous merger cases (*Ladbrokes/Coral* (2016), *Greene King/Spirit* (2015), and *Eurotunnel* (2013)) where the CMA considered that a GUPPI in excess of 10% gives rise to an expectation of an SLC (*Completed acquisition by Tobii AB of Smartbox Assistive Technologies Limited and Sensory Software International Ltd*, 15 August 2019, at footnote 156).



anti-competitive effects to be unlikely, and significantly below the level at which the CMA has typically found there to be a higher risk of an SLC (i.e. 10% or above). The Parties also note that, as discussed in detail above, a fair and accurate interpretation of the relevant internal documents prepared by UC shows that it expected – as a direct result of the announcement of the Transaction – that [REDACTED]. Indeed, far from expecting the Transaction to result in significant increased prices for the Parties customers, those internal documents show that by 24 May 2019 UC had no expectation that [REDACTED]