

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

### Non-Confidential Submissions by [REDACTED]

#### Executive summary

1. These submissions are made by [REDACTED] in response to the CMA's provisional findings of 16 April 2020 (the "**Provisional Findings**") that Amazon's acquisition of a minority interest in Deliveroo (the "**Transaction**") is not expected to result in a substantial lessening of competition ("**SLC**") within markets in the UK on the basis that, as a result of the Coronavirus (COVID-19) crisis, Deliveroo is likely to exit the market unless it receives the funding available through the Transaction.
2. The CMA also provisionally found that no less anti-competitive investor was available and therefore that the loss of Deliveroo as a competitor would be more detrimental to competition than allowing the Transaction to proceed. [REDACTED] considers that the CMA has not taken into account the potential availability of investors like [REDACTED] as a less anti-competitive alternative to Amazon.
3. However, even if the CMA continues to hold that alternative investors could not prevent Deliveroo from exiting, it is [REDACTED]'s understanding that the CMA's provisional conclusions are based solely on the 'exiting firm' scenario and that the CMA has therefore reached no conclusions as regards a counterfactual against the prevailing conditions of competition. Absent COVID-19, the CMA's competition concerns identified in Phase I and reiterated in the 28 January 2020 Issues Statement therefore remain unanswered.
4. [REDACTED] submits that it is important that the CMA does not lose sight of the opportunity to seek to reduce the risk of such competition concerns coming to pass without proper scrutiny. In order to protect its ability to address these competition concerns in the future, [REDACTED] suggests that the CMA considers whether and how it might seek certain protections from the parties as part of the clearance process. This would give rise to a number of pro-competitive benefits in the longer term:
  - (a) Amazon's ability to increase its control over Deliveroo would be limited;
  - (b) Other strategic investors would retain the ability to participate in future funding rounds;
  - (c) Amazon and Deliveroo could be prevented from entering into exclusive arrangements with one another; and
  - (d) The longer term competitiveness of the nascent online convenience groceries delivery segment could therefore be protected.

#### Introduction

5. In its Phase 1 Decision<sup>1</sup>, the CMA concluded that the Transaction gave rise to a realistic prospect of an SLC arising in:
  - (a) The market for online restaurant delivery, due to the importance of online food delivery to Amazon's strategy and the prospect that it may re-enter the market

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<sup>1</sup> ME/6836/19.

and so provide significant competition to the 3 competing platforms currently present; and

- (b) The online convenience groceries segment of the groceries market<sup>2</sup>, where Amazon and Deliveroo currently compete and are two of the largest suppliers (both with major expansion plans), facing limited constraints from third parties given the smaller delivery network of Just Eat and the reliance of grocery retailers on the logistics firm Stuart.
6. The CMA invited Amazon and Deliveroo to offer undertakings to address these concerns, and the Transaction was referred to a Phase II investigation when they chose not to do so.
  7. The CMA has now concluded in its Provisional Findings that the Transaction is not expected to result in an SLC because as a result of the COVID-19 crisis Deliveroo is likely to exit the relevant markets unless it receives the funding from the Transaction. The conclusion that there is no SLC arises appears to be based solely upon the impact of Deliveroo exiting the market, and has been reached because the CMA believes that no less anti-competitive investor is available.

[REDACTED]

8. In the Provisional Findings, the CMA suggests that Deliveroo is unlikely to be able to obtain external funding from new shareholders given the onset of the COVID-19 crisis and the length of time that Deliveroo's previous funding rounds have taken.<sup>3</sup> However, this conclusion appears to be based upon comments from Deliveroo's existing shareholders and from potential investors approached in the previous funding round. The CMA does not appear to have taken into account the possibility that completely new shareholders might be willing to make significant investments into Deliveroo now.
9. [REDACTED]

#### Competition concerns should still be addressed in any event

10. [REDACTED] is not in a position to comment on the other evidence that the CMA has assessed regarding the likelihood of Deliveroo exiting the market. However, it is important to recognise that the Transaction raised significant competition law concerns identified in the Phase I investigation that have not been addressed in the Provisional Findings because of the reliance on the 'exiting firm' scenario. There is no indication that, in the absence of Deliveroo's apparent impending exit, the CMA would have changed its views from Phase I regarding the SLC arising in both relevant markets.
11. As the CMA will be aware, any clearance decision, whether as a result of the exiting firm counterfactual or otherwise, will mean that subsequent funding rounds and any increase in Amazon's interest in Deliveroo would not fall within the CMA's jurisdiction until the next level of control is reached (i.e. until Amazon moves from a position of material influence<sup>4</sup> to one of *de facto control*<sup>5</sup>). For this reason, the CMA should be concerned to ensure that it takes what steps it can at this stage to make sure competition is protected in the longer term.

<sup>2</sup> [REDACTED] notes that in the Phase 1 Decision the CMA draws a distinction between online convenience groceries and online delivered groceries in establishing a product frame of reference (paragraphs 101 to 110). [REDACTED].

<sup>3</sup> Paragraphs 4.59 to 4.62.

<sup>4</sup> It has been widely reported that Amazon is acquiring a 16% stake (see for example: <https://www.theguardian.com/business/2019/dec/27/amazon-deliveroo-inquiry-regulator-london-food>).

<sup>5</sup> Section 26, Enterprise Act 2002; paragraph 4.31 *Mergers: Guidance on the CMA's jurisdiction and procedure*.

12. [REDACTED] submits that the CMA should consider whether additional measures could be put in place which, without jeopardising the Transaction, would go some way to ensuring that the extraordinary circumstances of the COVID-19 crisis do not result in long-term damage to the relevant markets. The CMA should also be mindful of the need to ensure that [REDACTED] other potential investors are not prevented in participating in any future funding rounds as a result of the Transaction.

Pro-competitive protections that could be put in place

13. [REDACTED] considers there to be a number of areas where the CMA might consider seeking commitments from Amazon in respect to its future intentions for Deliveroo. For example:

- (a) *Limit Amazon's shareholding to the level resulting from the initial investment without prior approval from the CMA*<sup>6</sup> – this would prevent Amazon from gradually increasing its shareholding and levels of influence over Deliveroo. In its Phase 1 Decision, the CMA suggested that Amazon would have insufficient incentive to adopt a bundling strategy with Deliveroo (in relation to Prime Now and Deliveroo Plus) in large part because Amazon's relatively low shareholding means it would only gain a small part of the benefit from each additional customer won by Deliveroo.<sup>7</sup> If Amazon was to increase its shareholding in the future, its incentives to engage in an anti-competitive bundling strategy could increase, without being subject to any further UK merger control review unless the increase in its shareholding was sufficient to confer de facto control. [REDACTED] considers that the CMA should be mindful of the risks of Amazon extending its already all-consuming Prime network into another sector (i.e. online restaurant delivery). Even a non-exclusive bundling of Prime with Deliveroo that left Deliveroo free to explore other opportunities would likely give rise to a significant increase in Amazon's already considerable market power.
- (b) *Other strategic parties to be given access to the next financing round(s) on a pari passu basis* – [REDACTED]. Ensuring that [REDACTED] other companies have the opportunity to participate in future financing rounds is likely ultimately to help limit the influence that Amazon is able to assert over Deliveroo.
- (c) *Restrict Deliveroo from entering into exclusive commercial arrangements with Amazon in respect of online convenience groceries* – at Phase I, the CMA found that the market segment for online convenience groceries is nascent, but that Deliveroo and Amazon are two of the largest suppliers, both with ambitious development plans. The CMA also explicitly recognised the advantages to Amazon of its Amazon Prime customer base and its existing presence and experience in the groceries sector, and suggested that the Transaction could weaken Amazon's incentives to develop its own point-to-point delivery network that could compete with Uber Eats, Stuart and Deliveroo to deliver groceries.<sup>8</sup> Preventing Deliveroo from engaging in exclusive commercial arrangements with Amazon could ensure that Amazon is still incentivised to develop its own offering in this market, rather than relying solely on its partnership with Deliveroo. It would also help avoid the situation where other online convenience grocery suppliers are deprived of one of the most credible delivery routes to market.

<sup>6</sup> This would not need to apply to a proposed acquisition resulting in de facto control, which would be subject to review by the CMA in any event.

<sup>7</sup> Paragraphs 15(b), 361.

<sup>8</sup> See the summary in the Provisional Findings, paragraphs 40-41.

- (d) *Require Deliveroo to engage with other strategic partners in respect of online convenience groceries* – as the CMA held at Phase I, supermarkets do not have the necessary logistical capabilities to offer online convenience groceries and are reliant upon businesses such as Deliveroo, Uber Eats, or third party logistics providers like Stuart in order to offer ultrafast delivery services.<sup>9</sup> A positive obligation requiring Deliveroo to engage with partners other than Amazon would prevent Deliveroo from sourcing all of its convenience groceries from Amazon and would ensure that other grocery retailers continue to have a route to market. This would help prevent the nascent online convenience groceries market segment from developing into one dominated by Amazon and would ensure that the Deliveroo delivery platform remains open for other competitors to use.
- (e) *No further increase in governance rights without prior approval from the CMA* – whilst the CMA concluded at Phase I that the Transaction would confer material influence on Amazon over Deliveroo as a result of the veto and other rights that it holds, together with its ability to influence other shareholders because of its status and expertise, it would be possible for Amazon to strengthen these governance rights post-Transaction without changing the nature of its control and hence without the ability for the CMA to investigate. For example, an increase in its shareholding together with an additional director (i.e. to 2 out of 7) is unlikely to constitute *de facto* control and yet would result in a significantly enhanced level of influence.

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<sup>9</sup> Phase I Decision, paragraphs 11, 125-126.