

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

1. In line with the Notice of provisional findings made under Rule 11.3 of the Competition and Markets Authority ("**CMA**") Rules of Procedure published on the CMA website, Just Eat Takeaway.com N.V. ("**JETA**") submits its views on the provisional findings of the CMA dated 16 April 2020 (the "**Provisional Findings**") regarding the anticipated acquisition by Amazon.com BV Investment Holding LLC, a wholly-owned subsidiary of Amazon.com, Inc. ("**Amazon**") of certain rights and minority shareholding of Roofoods Ltd ("**Deliveroo**") (the "**Transaction**").
2. In the Provisional Findings, the CMA has concluded that the Transaction would not be expected to result in a substantial lessening of competition ("**SLC**") in either the market for online restaurant platforms or the market for online convenience groceries ("**OCG**")<sup>1</sup> on the basis that, as a result of the Coronavirus ("**COVID-19**") crisis, Deliveroo is likely to exit the market unless it receives the additional funding available through the Transaction. The CMA has also provisionally found that no less anti-competitive investors were available.
3. JETA considers that this is an unprecedented decision by the CMA and questions whether it is appropriate in the current market circumstances. In its Phase 1 Decision, dated 11 December 2019<sup>2</sup>, the CMA found that the Transaction gives rise to a realistic prospect of an SLC as a result of horizontal effects in the supply of food platforms and OCG in the UK. In particular, the CMA's initial investigation found that the investment in Deliveroo could harm competition in two ways.
4. First, the CMA was concerned that the deal could damage competition in online restaurant food delivery by discouraging Amazon from re-entering the market in the UK. Although Amazon closed its Amazon restaurants business, in its Phase 1 Decision, the CMA stated that the evidence uncovered in Amazon's internal

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<sup>1</sup> JETA does not agree with the CMA's position in relation to market definition in either of these two areas. JETA considers itself to be active in the food delivery market, which comprises a wide range of consumer options to enjoy takeaway food at home and elsewhere, both online and offline. For example, consumers can order food directly by calling or visiting a restaurant, by using a restaurant's own website or mobile app, including those of vertically-integrated branded food chains (e.g. Dominos, Pizza Hut). JETA considers its main rival to be the telephone. However, for the purposes of this submission, references to "market" will align with the CMA's definition as set out in the Provisional Findings.

<sup>2</sup> ME/6836/19, Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, Decision on relevant merger situation and substantial lessening of competition, 11 December 2019.

business documents shows a strong, continued interest in this sector and a material likelihood that Amazon would look to re-enter. Given the limited number of existing suppliers, the CMA found that the potential re-entry by a supplier such as Amazon would significantly increase competition in online restaurant food delivery in the UK.

5. Second, the CMA was concerned that the deal could also damage competition in the emerging market for OCG delivery, where the two companies have already established market-leading positions.
6. As a result of these concerns, on 27 December 2019, the CMA referred the Transaction for an in-depth investigation. On 28 January 2020, the CMA published the Issues Statement.
7. The CMA has provisionally concluded that by virtue of its investment, Amazon will acquire material influence over Deliveroo due to the cumulative impact of several avenues of influence, such as i) voting rights; ii) Amazon's rights as a holder of a majority of Deliveroo's Series G shares; iii) Amazon's status and expertise; iv) Amazon's right to representation on Deliveroo's Board<sup>3</sup>. In addition, the CMA found a strong body of evidence that Deliveroo's management, its other shareholders and its commercial teams perceive that Amazon has a special status as a "strategic" investor, with various additional rights and is a credible potential future acquirer of Deliveroo (or source of funding) as well as a current and potential future strategic / commercial partner of Deliveroo.<sup>4</sup>
8. JETA believes that the theory of harm laid down in the Phase 1 Decision and the Issues Statement was a distinct possibility prior to the COVID-19 crisis. It believes, absent any CMA clearance decision, that it continues to be a very real possibility in the future. Given the strategic nature of the investment of Amazon and its position in the UK market, JETA believes that the Transaction will remove incentives for Amazon to enter or, at the very least, will ensure it has limited incentives to compete effectively as an independent competitor.
9. JETA, like other parties who have been following developments in this case, is therefore concerned by the very sudden U-turn in the CMA's decision-making. Whilst JETA does not question the very serious and perturbing nature of the COVID-19 crisis, it does not believe that this creates a "carte blanche" to assume permanent, irreversible negative impact on businesses, particularly those who are in the business of delivering food to people at home in circumstances that align with social distancing rules.

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<sup>3</sup> Provisional Findings, paras 3.18, 3.19-3.22, 3.28, 3.29, 3.33, 3.54.

<sup>4</sup> Provisional Findings, para 3.83.

10. JETA notes that the crisis should not offer the opportunity to circumvent the usual, robust CMA review processes. In particular, the CMA must ask itself, the parties and relevant third party experts - whether Deliveroo is providing fully accurate information and context about the impact of COVID-19 on its business and if so, whether it took sufficient steps to mitigate for and counteract any negative effects of the current situation, as other players in this sector have been forced to. In light of the sudden, but likely relatively short-lived, measures that have been put in place to deal with the effects of COVID-19, JETA would urge the CMA to be extra vigilant and diligent in terms of ensuring that the basis on which it makes its ultimate decision in this case is sound, appropriate in the longer term and based on verifiable evidence.
11. All markets in which JETA operates have been experiencing significant disruption as a result of COVID-19. However, most countries tend to be (one to six weeks) ahead of the UK in terms of moving out of a position of (near) total lockdown to a more sustainable economic model. JETA therefore asks the CMA to take note of its observations in this paper, as an expert in food ordering and delivery both in the UK and many EU Member States.
12. Should the CMA nonetheless decide that a clearance decision is warranted, JETA assumes that it will mitigate to the maximum extent possible: (i) Amazon's influence on Deliveroo; and (ii) incentives on Amazon to decide not to compete as an independent party. At Section 3 of this submission, JETA proposes some ways in which such considerations could be safeguarded.

## 2 THE EXITING FIRM SCENARIO

### *Impact of COVID-19 crisis*

13. JETA understands that in assessing whether Deliveroo would have exited the market absent the merger, the CMA considered: i) whether the impact of COVID-19 made exit inevitable; ii) whether Deliveroo had alternative potential funding options to it; iii) whether Deliveroo could restructure its operations to support its liquidity to avoid insolvency; and iv) whether alternative investments were available to Deliveroo.
14. The CMA considered the evidence it received from Deliveroo on the financial impact of COVID-19 on its business. In particular, on the supply side, Deliveroo has apparently experienced a significant reduction in the number of restaurants operating during the crisis, and the restaurants that have closed or reduced operations have included major brands. On the demand side, Deliveroo stated that it experienced a significant decline in customer orders<sup>5</sup>.

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<sup>5</sup> Provisional Findings, para 4.36

15. Based on the information provided by Deliveroo, the CMA appears to now be convinced that, without assurance that it will receive additional funds in the immediate future, Deliveroo's directors would be obliged to declare it insolvent.<sup>6</sup> The CMA also provisionally concludes that no less anti-competitive investor is available.<sup>7</sup>
16. JETA agrees with the CMA that COVID-19 has had a significant and wide-ranging impact on businesses operating all over the world, including Deliveroo. Although the effects of the COVID-19 crisis are indeed unprecedented, the CMA's Provisional Findings fail to outline that, alongside the reduction in the number of operating restaurants as a result of COVID-19, two developments took place which had (or should have had) a positive impact on Deliveroo's business, namely: (i) increased demand for food delivery; and (ii) increased demand for delivery of groceries. Both developments are examined in more detail below.

*Increased demand for food delivery as a result of COVID-19 crisis*

17. Research shows that the food delivery market has not been affected in the same way as many other industries. In fact, it is one of the industries actually experiencing significant increased demand, as a result of the COVID-19 pandemic. With high street restaurants closed for dining, more people staying indoors and practicing social distancing, online food marketplaces, including Deliveroo, Takeaway and UberEats are now experiencing increased demand for their services and have taken steps, like offering contactless delivery, to ensure they can continue to deliver despite the lockdown. In addition, pubs and restaurants that never offered home delivery in the past are now starting to do so by using services offered by the food delivery companies. Online food delivery is referred to as "*one of the only winners*" of the COVID-19 outbreak<sup>8</sup>, with Euromonitor predicting a 11% growth in Gross Merchandise Value (GMV) for 2020 compared to the previous year. Even if increased demand from COVID-19 were not factored into the equation, the total number of users of online food delivery is on the rise<sup>9</sup>. In 2020, the market analyst firm reported 22,5 m users in the UK, representing an increase of 9,8% on the same period in 2019.
18. While Deliveroo might have temporarily lost part of its supply, at the same time it also gained 3,000 new restaurants in the first weeks of the crisis alone. This should have generously compensated the loss of other restaurants. Restaurants turning to delivery through Deliveroo include large chains, local family favourites,

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<sup>6</sup> Provisional Findings, para 4.44.

<sup>7</sup> Provisional Findings, paras 4.58, 4.62, 4.65.

<sup>8</sup> "Online food delivery 'one of the only winners' in coronavirus outbreak", *Foodnavigator*, 19 March 2020, available at: <https://www.foodnavigator.com/Article/2020/03/19/Online-food-delivery-one-of-the-only-winners-in-coronavirus-outbreak>.

<sup>9</sup> "Online Food Delivery United Kingdom", *Statista*, available at: <https://www.statista.com/outlook/374/156/online-food-delivery/united-kingdom?currency=eur>

high-end Michelin-starred restaurants, as well as takeaways. The majority of them did not perform delivery services before the COVID-19 pandemic.<sup>10</sup>

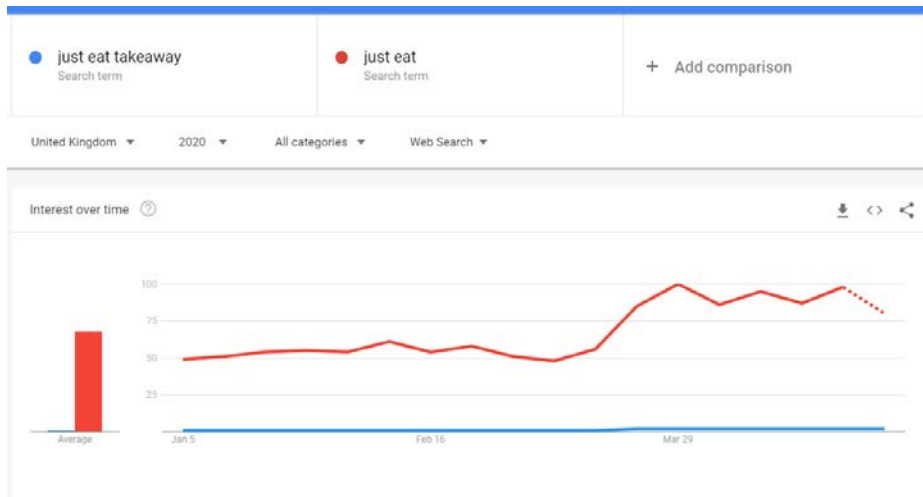
19. This triggers JETA to question whether the decline in the financial position of Deliveroo was actually due to COVID-19 or because of the quality of its business model and decision-making relating to its pricing. The CMA must therefore ascertain, with certainty, that Deliveroo's alleged dramatic drop in orders in the UK occurred as a result of the unavoidable impact of COVID-19, rather than due to a failure on the part of Deliveroo to adapt effectively and grasp opportunities to service additional demand.
20. JETA also notes the reference to Deliveroo experiencing a decline in availability of restaurants in its other major markets which entered lockdown ahead of the UK. According to Deliveroo, this is further reducing the business' revenues and also suggests that the current issues in the UK are unlikely to improve and may in fact be exacerbated in the near future. In JETA's experience as a food platform operating in a number of countries, other countries in Europe are generally ahead of the UK and are already in the process of opening up again with the ability for restaurants to cook and arrange delivery of takeaway food. Therefore, JETA does not agree that as a result of the experiences elsewhere, it should be concluded that the position in the UK is unlikely to improve. In fact, according to the latest news, major chains such as McDonalds, Burger King, Nando's, Greggs and Weatherspoons are re-opening for delivery through platforms, including Deliveroo.<sup>11</sup>
21. JETA notes that the negative COVID-19 impact on its business was only for about 1-2 weeks followed by a quick and strong recovery even to a level above the original benchmark both in the UK and in other markets. The graph below reflects the very evident increase in usage of the search term "Just Eat" entered in Google since the beginning of March. JETA has also provided a comparison line for the search term "Just Eat Takeaway" entered in Google in the same period in order to demonstrate that the increase in interest does not relate to the merger between Just Eat plc ("**Just Eat**") and Takeaway.com, CMA's review of this transaction or other recent corporate actions. The increase, in JETA's view, is specifically related to consumers wanting access to Just Eat food ordering and delivery services.

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<sup>10</sup> "Deliveroo signs up 3,000 restaurants as more turn to delivery to cope with Covid-19", *Prolific London*, 23 March 2020, available at: <https://www.prolificlondon.co.uk/london-ecommerce-news/international-news/2020/03/deliveroo-signs-3000-restaurants-more-turn-delivery>.

<sup>11</sup> "The latest news on McDonalds, Burger King, Nando's, Greggs and Wetherspoons re-opening, delivery and collection", *Manchester Evening News*, 9 May 2020, available at: <https://www.manchestereveningnews.co.uk/whats-on/food-drink-news/latest-news-mcdonalds-burger-king-18204681>.

**Graph A:** Google Trends data for interest in search term "Just Eat" and "Just Eat Takeaway" from Jan 2020 to date<sup>12</sup>



22. Uber has also seen the same trend, as its CEO has said in the company's latest quarterly update: *"Along with the surge in food delivery, we are encouraged by the early signs we are seeing in markets that are beginning to open back up."*<sup>13</sup> It furthermore reported a 59% increase in demand across Europe in March compared to February.<sup>14</sup>
23. Similarly, Delivery Hero – a large food delivery platform with a presence in a number of countries that have been requiring shut downs as a result of COVID-19 – experienced strong growth in Q1 as orders nearly doubled to 239 million with Year-over-Year (YoY) revenue growth of 92%. The press release states that the *"initial negative effect from COVID-19 was swiftly managed and over 50,000 restaurants and 1,500 grocery stores and other local businesses were added in the last 3 weeks of March"*. The CEO of Delivery Hero notes that *"The instant response to the challenges from the COVID-19 pandemic has led to quick recovery and acceleration of our service offering, responding to changing customer behaviour and larger demand for online delivery"*.<sup>15</sup>

<sup>12</sup> Source: Google Trends <https://trends.google.nl/trends/explore?geo=GB&q=just%20eat%20takeaway>. The Google trends data reflects search terms, which provides a rough indication of the public's interest in a specific topic.

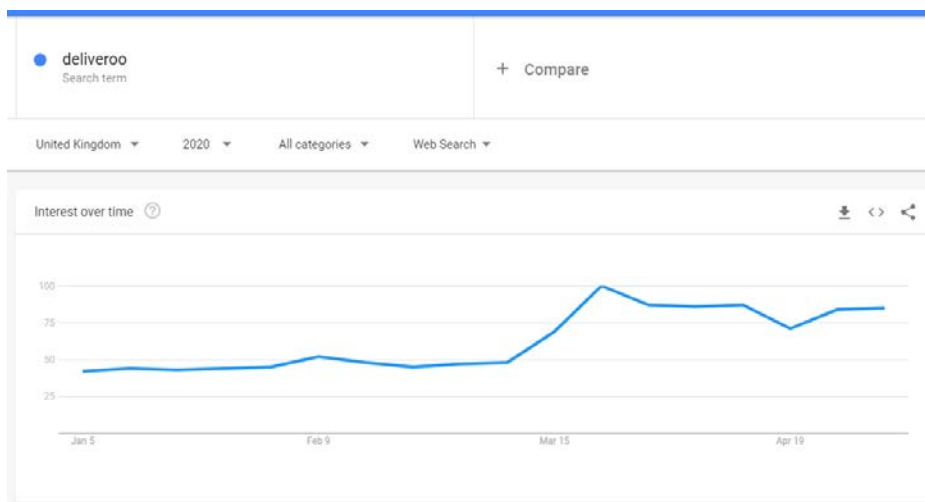
<sup>13</sup> "Uber announces results for first quarter 2020", *Uber Investor*, 7 May 2020, available at: <https://investor.uber.com/news-events/news/press-release-details/2020/Uber-Announces-Results-for-First-Quarter-2020/>.

<sup>14</sup> "Uber Eats sees grocery orders jump in locked down Europe", *Reuters*, 16 April 2020, available at: <https://www.reuters.com/article/us-health-coronavirus-uber-delivery/uber-eats-sees-grocery-orders-jump-in-locked-down-europe-idUSKCN21Y1CE>.

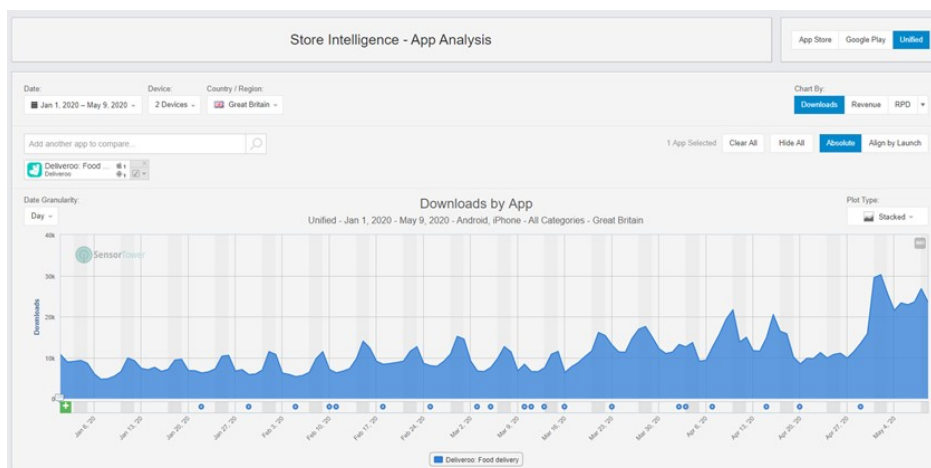
<sup>15</sup> "Delivery Hero continues strong growth in Q1 as orders and revenues nearly double", *Delivery Hero*, available at: <https://ir.deliveryhero.com/download/companies/delivery/Quarterly%20Reports/DE000A2E4K43-Q1-2020-EQ-E-00.pdf>.

24. These are, in many cases, the exact same markets that Deliveroo operates in. It is therefore inconceivable that Deliveroo experienced a different trend. While Deliveroo claims that on the demand side, there was a significant decline in customer orders, in fact, as appears from the graphs below, towards the end of Q1 2020, Deliveroo has seen a huge increase in demand in the UK.

Graph B: Google Trends data showing consumer interest in the search term "Deliveroo" from Jan 2020 to date<sup>16</sup>

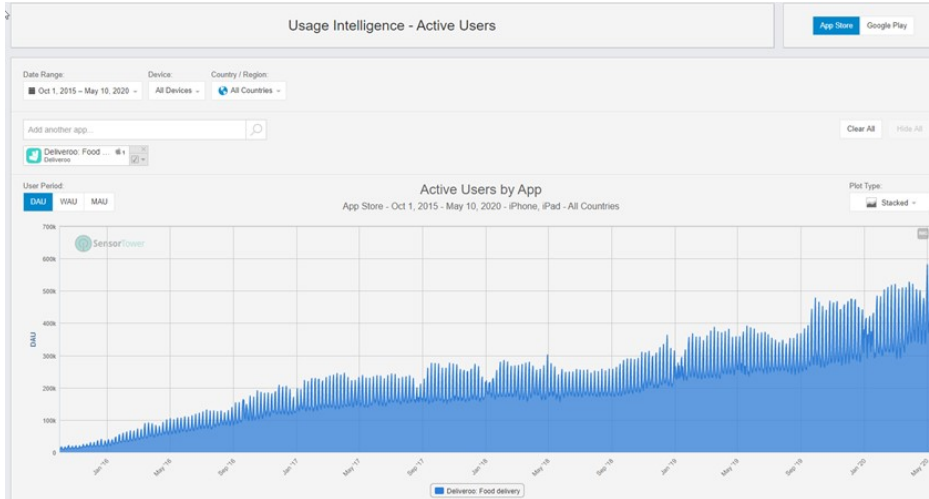


Graph C: Sensor Tower data showing Android & iPhone downloads of Deliveroo App from 1 Jan to 9 May 2020

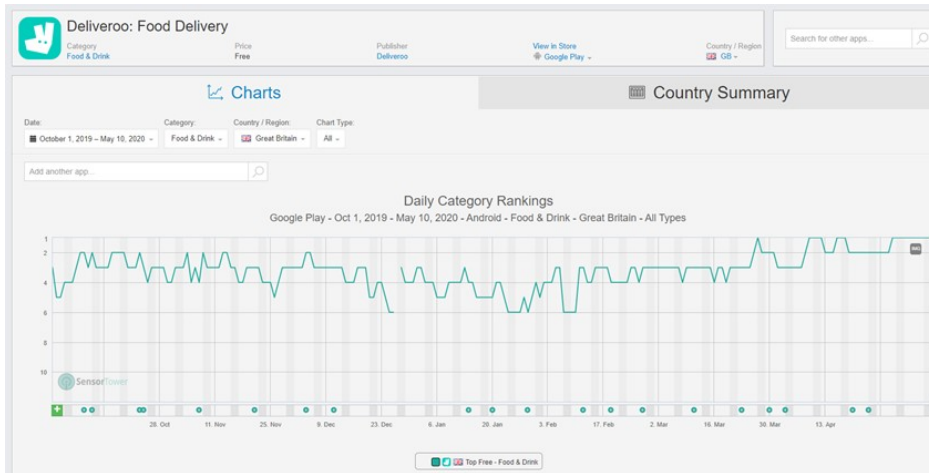


<sup>16</sup> Source: Google trends, Deliveroo, available at: <https://trends.google.nl/trends/explore?geo=GB&q=deliveroo>.

**Graph D:** Sensor Tower data showing Active Users on Deliveroo App from 1 Jan 2016 to 9 May 2020

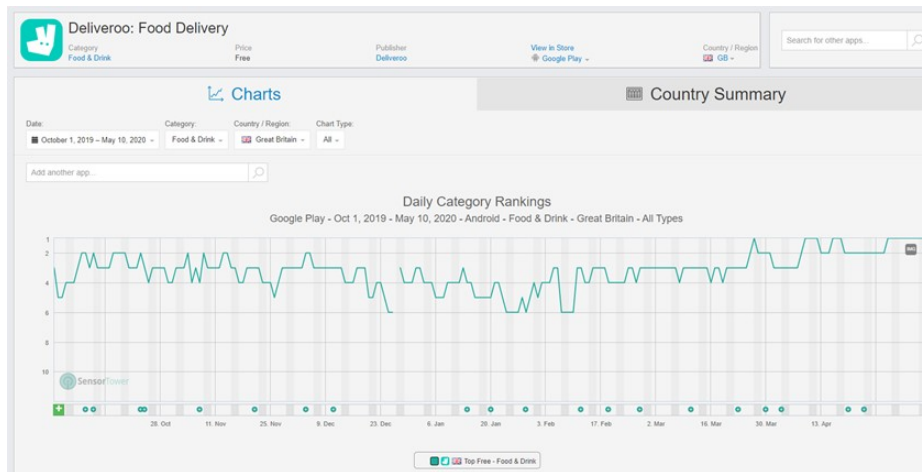


**Graph E:** Sensor Tower data showing Daily Category Ranking of Deliveroo in the Android App Store from 1 Oct 2019 to 10 May 2020





**Graph F:** Sensor Tower data showing Daily Category Ranking of Deliveroo in the Apple App Store from 1 Oct 2019 to 10 May 2020



25. JETA simply cannot reconcile the data above with the version of events that has apparently been presented to the CMA by Deliveroo. Indeed, JETA notes that the Deliveroo app has been so popular as a download during the COVID-19 crisis that it was often ranked as the number 1 download in its category on both Apple and Android phones, higher than the Just Eat app.
26. Based on the above, it seems that the view of the CMA is based either on incorrect or misleading data or on an extremely narrow 1-2 week period at the very start of the COVID-19 crisis in the UK. JETA would urge the CMA to re-assess whether the COVID-19 crisis has continued to have a negative impact on Deliveroo's business. Deliveroo will be able to provide data similar to the graphs set out above and should also be required to explain why it was apparently unable to benefit from the surge in demand when other food platforms were able to do so.

*OGD market represented a real opportunity for growth during COVID-19 crisis*

27. As a result of the COVID-19 crisis, JETA notes that traditional supermarket chains and grocery delivery businesses such as Ocado, have been overwhelmed with requests for home delivery to such an extent that they have had to prioritize their orders and clientele. Ocado notes that the demand for its products has risen tenfold: its web traffic has been up to 100 times higher than usual levels and enquiries into its contact centre are up by 500%.<sup>17</sup> Due to the huge surge in demand, many households in the UK do not qualify for and cannot access these services.

<sup>17</sup> "Covid-19: Ocado apologises to customers and provides coronavirus update", *Essential Retail*, 6 April 2020, available at: <https://www.essentialretail.com/news/ocado-apologises-to-customers/>.

28. This situation undoubtedly presents an opportunity for food delivery companies to step in, both to provide ready-prepared takeout meals and to offer their services for grocery delivery. In January 2020 Coop announced an expansion to its partnership with Deliveroo, to extend to 400 Coop stores, reaching around 100 major towns and cities<sup>18</sup>. On 24 March Deliveroo announced a new partnership with BP and Marks & Spencer (M&S) to enable customers to order a range of M&S food through Deliveroo's App. Then, on 8 April 2020, Deliveroo announced a partnership with the UK food retailer Morrisons to deliver groceries. This service will link to more than 130 Morrison stores across the UK covering one in four households.<sup>19</sup> JETA sees no reason why these partnerships – if effectively executed – could not have (easily) offset the effect of some restaurant closures in the UK, also considering that the GMV of groceries is significantly higher than food delivery, demonstrating a stronger ability to make the orders profitable. The Deliveroo platform has a significant number of consumer users and Coop, M&S and Morrisons are well-respected and widely used supermarket chains. The sheer amount of new partnerships that Deliveroo has engaged in do not signal that the company is in distress.<sup>20</sup>

*Deliveroo chose not to pursue other funding options. This should not allow a "free pass" to now state that Amazon is the only viable investment option*

29. It is important to note that at the time Deliveroo pursued the Series G funding round (which Amazon ultimately led), Deliveroo was in many respects a highly successful company that had grown strongly and had a significant share of the online restaurant platform market in the UK. Prior to the situation created by COVID-19, the CMA considered that Deliveroo would not have exited the market absent the Transaction.<sup>21</sup> Deliveroo would have succeeded in raising some alternative funds given the interest that investors had shown in the opportunity and the attractiveness of Deliveroo as an investment opportunity at that time.<sup>22</sup> It was ultimately the decision of Deliveroo not to progress with those alternative options. As a justification for choosing Amazon and accepting its offer, Deliveroo notes that it involved a smaller number of investors than other available offers.<sup>23</sup> JETA questions the credibility of this statement and believes it also leads to an obligation on the CMA to determine whether a larger number of investors could have delivered the funding Deliveroo needed in an effective manner.

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<sup>18</sup> "Co-op Group eyes same-day delivery service for franchise stores", 3 January 2020, available at: <https://www.conveniencestore.co.uk/news/co-op-group-eyes-same-day-delivery-service-for-franchise-stores/600655.article>

<sup>19</sup> "Morrisons and Deliveroo join up to offer on-demand grocery home delivery", *Deliveroo*, 8 April 2020, available at: <https://uk.deliveroo.news/news/morrisons-deliveroo-partnership.html>.

<sup>20</sup> "Which supermarkets let you order your groceries through Deliveroo?", *Independent*, available at: <https://www.independent.co.uk/extras/indybest/food-drink/deliveroo-supermarket-delivery-grocery-morrisons-coop-a9457006.html>.

<sup>21</sup> Provisional Findings, para 4.28.

<sup>22</sup> Provisional Findings, para 4.30.

<sup>23</sup> Provisional Findings, para 2.54.

30. Unfortunately, much of the text in the CMA's Provisional Findings has been redacted, thereby making it difficult to examine the work undertaken by the parties and the CMA to come to a convincing view. Nonetheless, contrary to the executive summary, it appears that Deliveroo *did* have other options at the time of determining that it would pursue the Amazon investment and, indeed, it failed to pursue some of these. By way of example, discussions on additional funding from other investors were held in early 2019 leading to a term sheet being circulated in early 2019. However, Deliveroo itself stated that the negotiations were broken off when it became clear that the Amazon investment was highly likely to progress in April 2019.<sup>24</sup> Although the extensive redactions make it hard to understand the size and terms of the alternative funding, the information that is included in the Provisional Findings nonetheless makes it difficult to side with the CMA's provisional conclusion that there were no other options available.
31. In any case, the CMA should ascertain whether Deliveroo with claiming that "no other source of funding was available", actually meant that "no other source of funding with the same favourable terms was available".
32. Furthermore, at paragraph 4.29 of the Provisional Findings, the CMA notes that negotiations with one potential investor broke off and explains: "*Whilst additional funding may have been available, we consider this is too speculative to form part of the relevant counterfactual.*"<sup>25</sup> JETA would encourage the CMA to reach out to the party in question to request their input on what they would have been willing to invest.

*The loss-making nature of Deliveroo's business*

33. In relation to the CMA's observation that Deliveroo was a successful but nonetheless loss-making business, JETA notes that huge numbers of well-known and widely used platforms are in this position, including UberEats, Delivery Hero / Foodora, Doordash, Elem.me, Glovo, iFood, Meituan, Rappi, Swiggy, Waitr and Wolt. [X] Therefore, the fact that Deliveroo was loss making is not a unique factor in this analysis and should not be taken as such.

*COVID-19 strengthens Amazon as a potential competitor*

34. When considering the impact of COVID-19 on the CMA's assessment, it is also critical to recall the strong position held by Amazon in the UK and the additional growth it has experienced as a result of the crisis. In 2018 Amazon had GBP 10,9 billion of revenue in the UK, tens of millions of UK customers and an almost complete brand awareness. The COVID-19 crisis has caused the company's global revenues to rise by 26% to USD 75,5 billion in the three months to March,

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<sup>24</sup> Provisional Findings, para 2.43.

<sup>25</sup> Provisional Findings, para 4.29.

compared with USD 59,7 billion in the same period last year. The current situation is referred to as "*living the life of Amazon's dream*": customers are captive by being stuck at homes, unable to shop in physical stores and, as a result, turn to online commerce<sup>26</sup>.

35. The additional revenues being amassed by Amazon make it even more probable that it would be looking for a growth opportunity that it could easily self-finance. With millions of dollars at its disposal and its dominance in e-commerce secure, its position as a potential competitor into the UK must surely have become even more certain. Thus, in JETA's view, any action taken by the CMA to reduce these incentives has a greater impact on competition in the medium to longer term than prior to the COVID-19 crisis. The CMA must therefore be certain that:
- (a) its decision is based on hard evidence and delineates a counter-factual which is less attractive than the proposition (if at all true) that Deliveroo would have exited the market; and
  - (b) any clearance decision attaches conditions to ensure incentives on Amazon to compete independently are retained.
36. With regard to point (b), JETA notes that at paragraph 3.29 of the Provisional Findings, the CMA recognizes that Amazon's preferential status as a shareholder could lead it to influence any future sale process. A sale of Deliveroo would expel Amazon as a shareholder, thereby leading to possible incentives for Amazon to enter the market, whilst also ensuring (more than) sufficient support is provided to Deliveroo to continue operating. Thus, if the CMA continues to support a counterfactual based on Deliveroo's imminent exit and lack of alternative funding options, JETA would ask the CMA to – at the very least – consider limiting Amazon's ability to influence any sales process, or indeed any other process for Deliveroo in the future, such as a public listing.<sup>27</sup> This could be achieved, for example, through conditions that may be placed on the clearance of the Transaction, some of which are proposed in Section 3.
37. At para 4.88 of the Provisional Findings the CMA notes that any weakening of Amazon's incentives to compete with Deliveroo is, in any case, likely to be more limited as a result of the acquisition of a certain shareholding than in the case of a full acquisition. JETA believes that this will only be the case if the CMA takes

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<sup>26</sup> "Amazon-Deliveroo risks clearing the way for a feeding frenzy of failing firms", *The Grocer*, 4 May 2020, available at: <https://www.thegrocer.co.uk/the-grocer-blog-daily-bread/amazon-deliveroo-risks-clearing-the-way-for-a-feeding-frenzy-of-failing-firms/604528.article>.

<sup>27</sup> The CEO of Deliveroo considers a public listing as "*somewhat logical for the company*". "Will Shu, the founder of \$2 billion Deliveroo said an IPO is 'somewhat logical' for the company", *Business Insider*, 9 November 2017, available at: <https://www.businessinsider.com/deliveroo-founder-will-shu-ipo-2017-11?IR=T>.

steps to place obligations on Amazon to change the terms of its investment as proposed in Section 3.

*Assessing the counterfactual*

38. The CMA acknowledges that it is seeking to avoid importing into the assessment of the appropriate counterfactual, any spurious claims to accurate prediction or foresight.<sup>28</sup> Even in a normal economic climate, the ability to foresee with accuracy an alternative reality can be challenging. In the context of the current COVID-19 crisis, this problem is increased ten-fold, since there is no single view on where the economy in the UK will be next week, let alone next month, next year or in the coming years.
39. While many companies might have experienced a (very) rough start due to unprecedented developments in supply and demand, the market circumstances during the COVID-19 crisis are changing rapidly and therefore the state of the market in March, at the time when Deliveroo made its submission to the CMA, will not be the same in the weeks and months following. The CMA should therefore proceed with huge caution to substitute the counterfactual that it determined prior to the COVID-19 crisis and replace it with one which maps out a completely different fate for Deliveroo. JETA strongly believes that now is simply not the right moment to provide unconditional clearance of a Transaction carrying potentially wide-ranging consequences.

## 2.1 Alternative funding options during COVID-19

*Deliveroo had other options available to them to raise capital*

40. As explained above, while COVID-19 may have affected the position of Deliveroo, at least in the short term, this does not necessarily mean that it had no alternatives to raise capital. There are still different routes available to businesses to generate cash despite and during the COVID-19 crisis and many companies in the UK and worldwide have been successful in doing so. JETA provides a few examples below and points out that there have been many more in the past two months:

- (a) Just Eat increased its Revolving Credit Facility ("**RCF**")<sup>29</sup> from GBP 350 million to GBP 535 million in the first quarter of 2020 despite COVID-19. [X];

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<sup>28</sup> Provisional Findings, para 4.3.

<sup>29</sup> A Revolving Credit Facility is a form of credit issued by a financial institution that provides the borrower with the ability to draw down or withdraw, repay, and withdraw again. It is considered a flexible financing tool due to its repayment and re-borrowing accommodations.

- (b) JETA successfully raised EUR 700 million through an accelerated bookbuilding and a concurrent offering of convertible bonds<sup>30</sup>;
  - (c) WH Smith successfully raised almost GBP 166 million from investors after launching an emergency cash call to shore up its balance sheet while the majority of its shops remain closed during the COVID-19 crisis.<sup>31</sup>;
  - (d) British Airways has extended its RCF by a huge sum for one year despite operating very limited passenger flights<sup>32</sup>;
  - (e) H&M Hennes & Mauritz AB has signed a new 12 month EUR 980 million RCF with a six months extension option in order to further strengthen its liquidity buffer and financial flexibility in response to the COVID-19 situation<sup>33</sup>;
  - (f) Logistics developer Harworth increased its RCF to GBP 130 million, among other steps taken to boost its financial position in challenging market conditions<sup>34</sup>;
  - (g) In the week of 5 May, HelloFresh SE launched an offering of up to EUR 175 million convertible bonds due 2025<sup>35</sup>;
  - (h) In the week 11 April, 13 UK start-ups managed to raise GBP 225,44 million<sup>36</sup>.
41. In addition, the Financial Conduct Authority set out temporary measures to help companies raise cash quickly to weather the COVID-19 pandemic. The measures, which took effect immediately, include a combination of temporary policy interventions and reminders of some existing options for companies and

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<sup>30</sup> "Just Eat Takeaway.com announces the launch of an accelerated bookbuild offering of new shares and convertible bonds", *Just Eat Takeaway.com N.V.*, 22 April 2020, available at JETA's website.

<sup>31</sup> "WH Smith raises £166m to shore up finances during COVID-19 crisis", *The Guardian*, 7 April 2020, available at: <https://www.theguardian.com/business/2020/apr/07/wh-smith-raises-166m-to-shore-up-finances-during-covid-19-crisis>.

<sup>32</sup> "British Airways extends Revolving Credit Facility", *International Airlines Group*, 30 March 2020, available at: <https://www.iairgroup.com/en/newsroom/press-releases/newsroom-listing/2020/ba-revolving-credit-facility>.

<sup>33</sup> "H&M signs 980 million euro credit facility to boost liquidity buffer in response to Covid-19", *Fashion United*, 8 April 2020, available at: <https://fashionunited.com/news/business/h-m-signs-980-million-euro-credit-facility-to-boost-liquidity-buffer-in-response-to-covid-19/2020040833029>.

<sup>34</sup> "Harworth secures £30m credit increase amid Covid-19", *North West Place*, 30 April 2020, available at: <https://www.placenorthwest.co.uk/news/harworth-secures-30m-credit-increase-amid-covid-19/>.


<sup>35</sup> "DGAP-News: HelloFresh SE successfully placed EUR 175 million convertible bonds due 2025", *Bloomberg*, 5 May 2020, available at: <https://www.bloomberg.com/press-releases/2020-05-05/dgap-news-hellofresh-se-successfully-placed-eur-175-million-convertible-bonds-due-2025>.

<sup>36</sup> "Business continues with UK startups raising £225.44M this week", *Maddyness.com*, 16 April 2020, available at: <https://www.maddyness.com/uk/2020/04/17/business-continues-with-uk-startups-raising-225-44m-this-week/>.

their current and prospective shareholders. While Deliveroo notes that it was not eligible for any form of support from UK public sources, JETA notes that there are a lot more support offerings from the UK government than the three sources mentioned by Deliveroo.<sup>37</sup> The CMA therefore should make sure that none of these support measures have been or still are available to Deliveroo.

42. In this context, JETA would like to point out that the COVID-19 crisis presents a lot of opportunities for opportunistic M&A. Market players such as private equity investors and buyers are always opportunistic, and given the current environment, they will be looking for areas that are undervalued. Asian firms and funds are particularly active in this time, ready to use the market slump to gain financial momentum as the COVID-19 crisis relaxes in Asia. There are even concerns raised on the side of European regulators that investors from China, Saudi Arabia and other countries will take advantage of the volatility and undervaluation of European and UK companies across industries.<sup>38</sup> While JETA does not take a view on whether this would be the best solution to raise funding, this should be taken into account when reaching a provisional conclusion about scarcity or absence of funding as a result of the COVID-19 crisis.
43. JETA considers the three short paragraphs (4.15 to 4.17) of the Provisional Findings to be manifestly insufficient to demonstrate that Amazon was the only viable option available to Deliveroo, particularly given the fact that the provisional clearance rests predominantly on this critical point.
44. Therefore, JETA urges the CMA to again examine all the options that were and are available to Deliveroo to increase its liquidity. JETA hopes that in its examination, the CMA will not limit its review only to the evidence submitted by Amazon and Deliveroo but will also pay regard to the submissions of other market participants, including JETA.

*Delays caused by the CMA review should not be used as a reason to permit the Transaction*

45. JETA fully agrees with the CMA that Deliveroo should have factored into its assessment a review by the CMA; it cannot use the delays caused by the CMA's investigation as a reason for the CMA to justify the Amazon investment;<sup>39</sup> nor can it use this as a legitimate reason for failing to find other financing sources.
46.  Similarly, when the CMA later investigated the matter and integration of Just Eat with Takeaway.com was prevented, Just Eat nonetheless found other ways

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<sup>37</sup> Provisional Findings, para 4.42.

<sup>38</sup> "European countries increase protections against foreign takeovers amid COVID-19 crisis", *ReedSmith*, 16 April 2020, available at: <https://www.reedsmith.com/en/perspectives/2020/04/european-countries-increase-protections-against-foreign-takeovers>.

<sup>39</sup> Provisional Findings, para 4.11.

in which to ensure that its cash flow position was satisfactory. As mentioned above, it unilaterally negotiated an increase in its RCF from GBP 350 million to GBP 535 million. If Deliveroo failed to consider its other financing options sufficiently and failed to follow through on certain options which were clearly on the table alongside the Amazon investment, this cannot be used as a basis on which to claim a critical lack of funding and a positive clearance decision as a result.

*Deliveroo could have taken more urgent and temporary measures to reduce its cost base to help survive the worst few weeks*

47. Due to extensive redactions in the Provisional Findings it is unclear what steps Deliveroo has taken to reduce its costs and whether other - more drastic and urgent - measures were indeed not possible to implement. In this context, JETA would like to point the CMA to measures such as reducing riders and shutting down "ghost kitchens" as effective ways to reduce costs quickly and across the UK. Other important measures to decrease costs would be to limit or stop performance marketing (e.g. google ads) and to freeze hiring. Stopping or reducing marketing is a very effective way to quickly reduce costs, particularly as a short term measure, as it tends to have an immediate positive effect on cash flow. Instead, on 27 February, at the time of experiencing the alleged financial distress, Deliveroo announced to be one of the main sponsors of Eredivisie<sup>40</sup>, the highest football division, in the Netherlands as well as Spain and Belgium. Issuing vouchers or changing commission rates and structures are also amongst the possible measures that have a positive effect on revenues.<sup>41</sup>
48. It should also be highlighted that Deliveroo's business model already helps to reduce costs as drivers are paid by the order rather than by the hour. Other players who pay their drivers by the hour have a much less flexible cost base.
49. Given that an estimated half of Deliveroo's revenue is in the UK, and its headquarters are in London, it is improbable that it would have even considered to leave the market. It could rather have chosen to close its smaller operations in any of the countries it has its operations<sup>42</sup>. It could also have chosen to (potentially temporarily) close operations in a number of cities in the UK.

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<sup>40</sup> "Deliveroo new partner of Eredivisie", *Eredivisie*, 27 February 2020, available at: <https://eredivisie.nl/en-us/highlighted/deliveroo-new-partner-of-eredivisie>.

<sup>41</sup> JETA understands that Deliveroo may have now taken steps to reduce commission rates in the UK but this has been a very recent measure which does not coincide with the most significant impact of the COVID-19 crisis.

<sup>42</sup> According to Deliveroo's website, it has operations in Australia, Belgium, France, Hong Kong, Ireland, Italy, Kuwait, Netherlands, Singapore, Spain, UK and United Arab Emirates.



### 3 CONCLUSION AND SUGGESTED CONDITIONS

50. In line with the above, JETA expresses strong concerns over the provisional unconditional clearance of the Transaction by the CMA. JETA reiterates that given the rapidly changing market circumstances it has doubts over the credibility of the exiting firm scenario put forward by Deliveroo as it believes that there were alternative avenues available to it to raise funding.
51. JETA also notes that the extensive redactions in the Provisional Findings make it very difficult to ascertain whether Deliveroo has provided sufficient evidence – and whether the CMA has been robust enough in reviewing this evidence and third party expert opinion – in coming to its provisional conclusions.
52. What is more, JETA notes that there is a very clear difference of opinion between Amazon and/or Deliveroo's explanations on some of the internal documents and the CMA views. This has arisen as a result of a methodical, in-depth review of the case. It would therefore be premature for the CMA to rush to conclusions based on evidence provided by the Parties without ensuring that it takes steps to verify that what is being presented to the CMA is accurate and objectively correct.
53. JETA respectfully asks the CMA to reconsider its provisional decision. Alternatively, should it continue along its path to a clearance decision, the CMA must, at the very least, recognize the need for conditions to be placed on the clearance given the strong position of Amazon in the UK and the material influence it will be able to exercise over Deliveroo. JETA believes that it is necessary for the CMA to consider restricting certain aspects of the current proposal to ensure the minimum likelihood possible of negative effects of the investment. JETA believes there are avenues available to the CMA to reduce the level of control of Amazon in Deliveroo whilst still ensuring that the cash is injected by Amazon. For example:
- (a) Prohibit Amazon from taking any additional shareholding in Deliveroo and in any event ensure that its stake does not go over 25% whether considered alongside another key investor (such as Mr Shu) or by itself. As the CMA notes, a share above 25% would permit the blocking of special resolutions.<sup>43</sup>
  - (a) Ensure that Amazon reduces its stake in Deliveroo over time;
  - (b) Ensure that the Amazon director on the Board is independent. It should certainly not be the Director of Amazon UK, Mr Gurr, who is the most

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<sup>43</sup> As explained in para 3.27 of the Provisional Findings, currently the CMA does not consider Amazon to have sufficiently high shareholding to block special resolutions.

senior and influential a figure in Amazon's UK business. In this regard, [REDACTED].

- (c) Prevent any sort of cooperation between Amazon and Deliveroo. This especially but not exclusively concerns the domain of joint promotion, use of the Amazon customer base or the fulfilment of delivery services for Amazon.
  - (d) CMA to monitor Amazon's stake in Deliveroo and the relationship between the parties more generally to ensure that Amazon does not exercise its material influence in a manner that harms competition.
54. JETA thanks the CMA for taking its views into consideration and is available to provide additional input or clarifications if these are required.