

Amazon's response to the Provisional Findings

Introduction

Amazon agrees with the conclusion of the CMA's Provisional Findings ("PFs") that the Proposed Transactions cannot be expected to result in a substantial lessening of competition ("SLC").

To assist the Inquiry Group, certain aspects of the PFs merit clarification. Amazon believes that the Proposed Transactions would not result in an SLC, even in the absence of the ongoing COVID-19 pandemic. Amazon considers the following points to be instructive for both this matter and, potentially, similar minority investments.

I. The Proposed Transactions do not result in Amazon acquiring material influence over Deliveroo

The Proposed Transactions represent a minority investment through which Amazon will obtain only a [%] shareholding, the right to appoint one board director (out of eight, seven voting) and one board observer, [%] and a [%]. While Amazon agrees with the conclusion that the Proposed Transactions do not result in an SLC, it is concerned about the unprecedented finding that Amazon would obtain "material influence" over Deliveroo through the Proposed Transactions.

A. Amazon's board and other rights put it in the same position as Deliveroo's other major investors

First, Amazon's [%] minority shareholding will not enable Amazon to block special resolutions,¹ or exercise influence beyond its ability to vote its shares. Amazon's minority shareholding will be similar in size to the holdings of [%] other Deliveroo shareholders.

Second, Amazon will have the right to appoint only one board director. Amazon's appointment right is not exceptional, as seven other Deliveroo shareholders have the right to appoint a board member (six to appoint a board member with voting rights). The right to appoint a director does not enable Amazon to materially influence Deliveroo, given that those shareholders have been invested in Deliveroo for a significant period, and Will Shu, the founder and CEO who has "*very significant knowledge in restaurant food ordering and delivery services*,"² also is a director.

Third, Amazon's other rights are limited. These include customary [%] that are also held by Deliveroo's other major investors. The [%] will not materially constrain Deliveroo's ability to [%] does not apply in the event of [%]. It is not [%].

In short, the Proposed Transactions reflect terms typical of a minority shareholding, which do not confer on Amazon material influence over Deliveroo.

¹ PFs, para 3.27.

² PFs, para. 3.61.

B. The provisional finding that Amazon’s rights would enable it to exercise material influence over Deliveroo is unprecedented

There is no basis for the provisional finding that Amazon’s minority shareholding and limited additional rights obtained in the Proposed Transactions result in material influence over Deliveroo.

1. Material influence was not found in similar previous cases

The CMA and its predecessor, the Office of Fair Trading (the “OFT”), concluded that similar investments would not enable investors to exert material influence over the target companies:

- In *BT/EE*, the CMA concluded that a 12% shareholding and the right to appoint one director to the board did not confer material influence.³
- In *BBC/ITV*, the OFT concluded that a 14% shareholding and the right to appoint one director to a board of seven did not confer material influence, even where the investor had R&D and know-how experience in the sector.⁴
- In *Breedon/Hope*, the CMA concluded that an 18% shareholding and the right to appoint one director to the board did not confer material influence. The CMA viewed the investor director’s knowledge/experience as not material, given that other board members had sector expertise, and Breedon’s shareholders were investment companies with a long association with the company.⁵

Companies and investors should be able to rely on the analytical framework and approach taken in these cases going forward.

2. The provisional conclusion that Amazon’s status and expertise confers material influence does not meet the legal standard

The PFs apply a lower standard than required by the Enterprise Act and implemented in prior cases, and do not fully account for the expertise of Deliveroo’s existing board members.

First, to meet the legal standard the level of influence needs to be “*material*”, not “*mere influence*”.⁶ The PFs simply note that the views of Amazon’s director “*are likely to be influential in relation to relevant strategic or commercial matters*” (emphasis added).⁷ As a result, the PFs apply a lower standard than is required, concluding that the mere ability to be influential is sufficient.

Second, the CMA’s guidelines indicate that the CMA “*will review [...] the corporate/industry expertise [and] experience [...] of the various members of the board*”.⁸ The PFs do not fully account for the experience and knowledge of the other members of Deliveroo’s board,

³ *Anticipated acquisition by BT Group plc of EE Limited*, paras. 21 and 26.

⁴ *Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel Four Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecom Limited and Arqiva Limited – Project Canvas*, paras 31-38.

⁵ *Anticipated acquisition by Breedon Aggregates Limited of Hope Construction Materials Limited*

⁶ *BSkyB PLC v (1) The Competition Commission; and (2) The Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25, para. 96.

⁷ PFs, para. 3.60.

⁸ CMA’s Mergers: Guidance on the CMA’s jurisdiction and procedure, Para. 4.24.

including its founder and CEO, an independent director with significant operational experience in e-commerce businesses (Darrell Cavens), and appointees of long-standing shareholders.

Third, it is unprecedented to find material influence based on an investor's expertise in circumstances where the investor is not active in the same or a related business, which is the case for Amazon, since it exited the UK online restaurant food delivery business in 2018. For example:

- In *First Milk/Wiseman*, the OFT concluded that there was material influence because First Milk nominated a director who had the most experience in the relevant segment compared to other board members. Further, the investor was a significant supplier to the target, which is not the case with Amazon and Deliveroo.
- In *RWE AG/E.On SE*,⁹ the CMA found material influence based on RWE's sector-specific expertise, in that RWE was active in a multitude of energy-related activities, was continually updating its knowledge, and up until the merger was active in the same market as EoOn.
- In *BSkyB/ITV*, the Competition Commission and the Competition Appeal Tribunal found material influence on the basis of the investor's expertise where the investor (i) was a direct competitor "active in the same market" as the target;¹⁰ (ii) had "virtually unrivalled" or "pre-eminent"¹¹ expertise in that "same market"; and (iii) had pioneered many important innovations in that "same market".¹²

In short, the provisional view that Amazon will acquire material influence because of the rights it has been granted and its status and expertise is unsupported by the facts and goes beyond precedent without justification.

II. The provisional findings under the third limb of the counterfactual assessment

A. The Proposed Transactions do not affect Amazon's incentives regarding its business

The PFs acknowledge that a [x] % stake in Deliveroo has limited impact on Amazon's incentives in relation to developing its online grocery offering.¹³ However, they only do so in passing, and overlook the similarly limited impact the investment has on Amazon's incentives in relation to online restaurant food delivery.

Amazon is committed to experimentation and innovation—it is constantly looking for new ways to serve customers. A [x] % minority investment in Deliveroo would not alter its plans or incentives in either online restaurant food delivery or online grocery delivery. If Amazon were to identify a proposition in either sector that it believes would be viable and attractive to its customers, its incentive would be unaffected by its investment in Deliveroo.

⁹ *Anticipated acquisition by RWE AG of a 16.67% minority stake in E.On SE*, para 37.

¹⁰ *Acquisition by British Sky Broadcasting Group PLC of 17.9% of the shares in ITV PLC*, para. 3.58.

¹¹ *BSkyB PLC v (1) The Competition Commission; and (2) The Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25, para. 138.

¹² *Acquisition by British Sky Broadcasting Group PLC of 17.9% of the shares in ITV PLC*, para. 3.58.

¹³ Para. 42 of the PFs summary and para. 4.88 of the PFs.

B. That Amazon has a general interest in online restaurant food delivery is not sufficient to find that, but for the Proposed Transactions, Amazon would have re-entered UK online restaurant food delivery

While the PFs conclude that there is no “*need to reach a provisional view on the likelihood of Amazon re-entering [the] market [for online restaurant food delivery] in the UK*”,¹⁴ analysis in the PFs is based on a mistaken assumption that, but for the Proposed Transactions, Amazon would have re-entered this sector in the UK because of its “*ongoing interest*” in the sector globally.¹⁵

However, Amazon’s general interest in the sector does not mean that Amazon would re-enter in the UK absent the investment in Deliveroo. Indeed, Amazon decided to exit when it closed its Amazon Restaurants business in the UK in 2018. It was extremely hard to compete in online restaurant food delivery in the UK at that time, and it has only become more difficult since. In its contemporaneous decision to clear Takeaway/Just Eat,¹⁶ the CMA noted that growth in the sector is difficult and expensive, and that it is characterized by material barriers to entry. This runs counter to the PFs’ assessment of Amazon’s likelihood of re-entering the sector absent the Proposed Transactions.

C. Amazon’s and Deliveroo’s different grocery offerings do not currently compete and should not be presumed to converge

The PFs identify Amazon and Deliveroo as two of the largest suppliers of online convenience groceries (“OCG”) in the UK.¹⁷ This provisional finding does not take appropriate account of the Parties’ different grocery offerings. Amazon offers point-to-multipoint delivery for larger shops delivered in scheduled windows, while Deliveroo uses its point-to-point delivery system (developed for online restaurant food delivery) to deliver immediately impulse purchases that tend to consist of a few items only. The survey conducted by the CMA confirms that customers see fundamental differences between the Parties’ grocery delivery services, as the very low diversion ratios between the Parties make clear.¹⁸ Moreover, there is no evidence to support a conclusion that the Parties’ grocery offerings would converge.

Conclusion

Amazon trusts that this submission will assist the Inquiry Group in making its final decision. For the reasons specified above, Amazon fully agrees that the Proposed Transactions do not result in an SLC. Its online grocery offering is fundamentally different from Deliveroo’s, and the decision to invest in Deliveroo is completely independent from any incentive it might (but for clarity, does not) have to re-enter online restaurant food delivery in the UK. While Amazon understands that the PFs are based on the effect COVID-19 has had on Deliveroo’s operations, Amazon believes that the Proposed Transactions would not cause an SLC even absent the pandemic. Completion of the investment will benefit both consumers and Deliveroo’s small business restaurant partners.

¹⁴ PFs, para. 27.

¹⁵ PFs, para. 4.77.

¹⁶ *Completed acquisition by Takeaway.com N.V. of Just Eat plc.*

¹⁷ PFs, para. 4.81.

¹⁸ ‘Amazon/Deliveroo Merger Inquiry Research, Final Report of April 2020’, p.16.