競爭事務委員會
COMPETITION COMMISSION

Notice issued under section 2 of Schedule 2 to the Competition Ordinance regarding the Commission's proposal to accept a new proposed commitment from Deliveroo in the Online Food Delivery Platforms Case (EC/03JJ)

10 November 2023

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Competition Commission ("**Commission**") has conducted an investigation under section 39 of the Competition Ordinance (Cap. 619) ("**Ordinance**") into certain conduct by two leading online food and beverage delivery platforms ("**OFPs**") operating in Hong Kong, in relation to certain terms in their respective agreements with partnering restaurants in Hong Kong ("**OFP/Restaurant Agreements**").

2. The OFPs in question are (i) Deliveroo Hong Kong Limited ("**Deliveroo**"); and (ii) Delivery Hero Food Hong Kong Limited (formerly, Rocket Food Limited) ("**Foodpanda**") (together referred to as the "**Parties**" or separately as "**Party**").

3. In particular, the Commission has investigated whether Deliveroo and Foodpanda have contravened the first conduct rule in section 6(1) of the Ordinance ("**First Conduct Rule**") by including the following contractual provisions in their respective OFP/Restaurant Agreements (collectively, "**Provisions**"):

   (a) **Exclusive Terms,** whereby partnering restaurants are required to work exclusively with either Deliveroo or Foodpanda, in return for Deliveroo or Foodpanda, as the case may be, charging a lower commission rate to the restaurant.[1]

   (b) **Breach of Exclusivity Provisions**, which restrict partnering restaurants from, or penalise them for, switching from Exclusive to Non-Exclusive Terms.[2]

   (c) **Price Restriction Provisions**, which prevent partnering restaurants from charging lower prices, or require them to charge the same prices, for menu items:

      (i) on their own direct channels; and

      (ii) in the case of Foodpanda only, on competing platforms,

1 Although the Exclusive Terms restrict partnering restaurants from partnering with *any other platform*, for the reasons explained below, the Commission's concerns arise only with respect to the application of the Exclusive Terms vis-à-vis OFPs with a low market share. See further paragraphs 57 to 61 below.

2 See further the definition of "Exclusive Terms" and Non-Exclusive Terms" in Deliveroo's proposed commitment.

compared to their prices on Deliveroo or Foodpanda, as the case may be.[3]

(d) **Tying Provisions** (Foodpanda only), whereby partnering restaurants acquiring Foodpanda's Order to Deliver Service are effectively required to also acquire Foodpanda's Order to Pick Up Service.[4]

4. The Commission is concerned that the Provisions may have the effect of foreclosing competing platforms, particularly those with low market shares, from the market for Order to Deliver Services in Hong Kong and/or softening competition in that market. This is particularly the case since each of Foodpanda and Deliveroo appears to have a degree of market power in the market for Order to Deliver Services. With respect to the Tying Provisions, the Commission is also concerned that the provisions may have the effect of foreclosing competing platforms from the market for Order to Pick Up Services in Hong Kong.

5. As a consequence, the Provisions may have led to Foodpanda and Deliveroo being able to charge higher commission rates to partnering restaurants and, in turn, to end customers paying higher prices for the partnering restaurants' menu items.

6. The Commission takes the view that, by reason of the inclusion of the Provisions in their respective OFP/Restaurant Agreements, Foodpanda and Deliveroo may each have made and/or given effect to agreements with the effect of preventing, restricting or distorting competition in Hong Kong in contravention of the First Conduct Rule.

A. The Initial Proposed Commitments

7. Initially each of Deliveroo and Foodpanda offered separate proposed commitments under section 60 of the Ordinance to take and refrain from particular actions in relation to the Provisions. On 1 June 2023, the Commission initiated a consultation over these proposed commitments for a period of 15 days.

8. Under these proposed commitments, Deliveroo and Foodpanda would, among other things:

(a) refrain from enforcing the Breach of Exclusivity Provision against partnering restaurants that switch from exclusivity to non-exclusivity;

(b) refrain from imposing the Exclusive Terms against OFPs with a market share of 10% or less (i.e., Low Market Share Platforms);

(c) remove the Price Restriction Provisions and allow partnering restaurants to charge prices for their menu items on their direct delivery channels (as well as on other OFPs for Foodpanda)

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[3] Such Pricing Restriction Provisions give rise to, respectively a narrow price parity obligation and an across platform (or wide) price parity obligation.

[4] See further the description of Order to Deliver and Order to Pick Up Services in paragraph 14 below.

that are lower than the prices that they charge on the relevant Party's platform for Order to Delivery Services, subject to the condition that the prices for their menu items on the relevant Party's platform can only be marked up by the commission rate charged by the relevant Party; and

(d) (for Foodpanda only) remove the Tying Provisions and specify that partnering restaurants who accept the Exclusive Terms for Order to Deliver Services are not required to also obtain Order to Pick Up Services.

B. Deliveroo's 2nd Proposed Commitment

9. On 21 September 2023, Deliveroo notified the Commission that it was withdrawing the proposed commitment that went through consultation on 1 June 2023 and submitting a fresh commitment under section 60 of the Ordinance ("**2nd Proposed Commitment**").

10. The 2nd Proposed Commitment is largely the same as Deliveroo's initial proposed commitment, save for the following changes:

(a) carving out Outlet Expansion Terms and Profit Guarantee Terms from the obligations relating to exclusivity and price restriction, in line with Foodpanda's proposed commitment, and including monitoring provisions covering these terms;[5]

(b) permitting partnering restaurants to work with Low Market Share Platforms at the coming into effect of the 2nd Proposed Commitment; and

(c) clarifying that the Exclusive Commission Rate only has to be specified if Exclusive Terms have been agreed by both Deliveroo and the partnering restaurant.

11. The remainder of the notice sets out further details regarding:

(a) the relevant factual background (Part II);

(b) the competition concerns identified by the Commission (Part III);

(c) the 2nd Proposed Commitment (Part IV); and

(d) the manner in which interested parties should make representations in response to this notice (Part V).

[5] See further below at paragraphs 83 to 86.

II. RELEVANT FACTUAL BACKGROUND

A. Deliveroo

12. Deliveroo is one of two leading OFPs with substantial business in Hong Kong.

13. Deliveroo is a limited liability company incorporated in Hong Kong in 2015. It is a member of the Deliveroo Group with Deliveroo plc, a company incorporated and registered in England and Wales, being its ultimate parent company. Deliveroo launched its OFP business in Hong Kong in September 2015.

B. Services provided by Deliveroo

i. Relevant Services

14. Deliveroo provides end customers with the ability to order and obtain delivery of food and beverages ("**F&B**") through its online platform, which is available on its website and mobile phone application. Using the platform, end customers can order from partnering restaurants and arrange for either:

    (a) delivery, which is usually carried out by the OFP but in some cases is carried out by the restaurant ("**Order to Deliver Services**"); or

    (b) pick up by the end customer from the partnering restaurant ("**Order to Pick Up Services**").

15. The Order to Deliver and the Order to Pick Up Services are referred to together as the "**Relevant Services**".

16. Restaurants are providers of F&B to paying end customers. Restaurants may partner with OFPs such as Deliveroo to display their menu and prices to end customers on the OFP's platform. To help end customers to compare different restaurant options in their locality, the platforms also offer information to end customers such as restaurant ratings, pictures and delivery times. The OFP then intermediates food ordering, transactions and delivery logistics and act as a conduit between restaurants partnering with the OFP, delivery drivers and end customers who wish to order F&B online.

17. Typically, end customers will have their orders delivered to a designated location (i.e., Order to Deliver Services), although OFPs in Hong Kong also enable end customers to order online and pick up their orders at the partnering restaurant at a designated time and location (i.e., Order to Pick Up Services). Order to Deliver Services will incur a delivery fee and a service fee for the end customer, while Order to Pick Up Services do not involve a delivery charge for the end customer and may come with a discount on the listed price.

18. Ordinarily, an OFP and its partnering restaurant will enter into an agreement for the purpose of the former providing the Relevant Services to the latter (i.e., an OFP/Restaurant Agreement). Generally, partnering restaurants will pay a commission to the OFPs (in terms of a percentage of the total value of F&B spent by an end customer) from each sale the partnering restaurants make through the OFP. In addition, and as mentioned, end customers ordinarily pay a delivery fee and a service fee to the OFP in cases of Order to Deliver Services.

19. OFPs constitute multi-sided platforms that connect both partnering restaurants and end customers. This means that OFPs compete both for end customers' order bookings as well as for providing ordering services to partnering restaurants. There are positive indirect network effects between partnering restaurants and end customers (that is, the more restaurants an OFP has on offer, the more end customers the OFP will attract and vice versa).

ii. Other services

20. In addition to the Relevant Services, the services offered by Deliveroo on its respective platform include:

(a) allowing end customers to order catering services from partnering restaurants; and

(b) allowing end customers to order delivery of grocery products from the platform's own service (i.e., Deliveroo Hop) or through retail grocery partners.

21. The Commission has not identified competition concerns with respect to the provision of these other services.

C. <u>Market players</u>

i. Current players

22. Apart from Deliveroo and Foodpanda, other OFPs which provide Order to Deliver and/or Order to Pick Up Services in Hong Kong as of October 2023 include KeeTa, OpenRice, Oddle, DimOrder (點單) and Shopper.

Competitor	Order to Deliver Services	Order to Pick Up Services
Deliveroo	√	√
Foodpanda	√	√
KeeTa	√	X
OpenRice	X	√

Competitor	Order to Deliver Services	Order to Pick Up Services
Oddle	√	√
DimOrder	√	√
Shopper	√	√

23. Certain restaurants and restaurant groups also provide Order to Deliver Services for their own restaurants or restaurant groups. These include McDonald's, Blacksheep GO, JIA Everywhere, KFC, Pizza Hut and Gaia Group.

ii. Previous players

24. Honestbee previously provided Order to Deliver Services in Hong Kong, but suspended its services and exited the market in May 2019.

25. In addition, UberEats, the OFP launched by the Uber ridesharing service, previously provided both Order to Deliver and Order to Pick Up Services in Hong Kong. UberEats commenced operations in October 2016, but exited the market on 31 December 2021.

26. Similarly, Lingduck previously provided both Order to Deliver and Order to Pick Up Services in Hong Kong, but exited the market after 31 August 2022.

27. The online retailer HKTVmall previously provided both Order to Deliver and Order to Pick Up Services in Hong Kong under the name HKTVexpress, commencing operations in June 2021, but suspended the provision of these services on 15 October 2022.

28. 51wm previously provided both Order to Deliver and Order to Pick Up Services in Hong Kong, but has recently altered its business model to provide IT solutions to restaurants to manage their own food delivery and self-pick up services.

iii. Entry by KeeTa

29. In May 2023, Meituan launched its food delivery brand "KeeTa" which now provides Order to Deliver Services throughout Hong Kong.

D. The Provisions

i. Use of Exclusive Terms

30. Under the Exclusive Terms, partnering restaurants are required to work exclusively with Deliveroo, in return for Deliveroo charging a lower commission rate to the restaurant. The Non-Exclusive Terms allow partnering restaurants to partner with third-party OFPs for Order to Deliver Services, but require payment of a higher commission rate.

31. The level of commission rates charged by Deliveroo varies between partnering restaurants and depending on whether the partnering restaurants enter into Exclusive Terms with the OFP. The information gathered by the Commission indicates that commission rates can range between approximately one-quarter (≈25%) of order values to greater than one-third (>33%) of order values, with non-exclusive rates being higher than exclusive rates and in general being towards the upper end of this range.[6]

32. Partnering restaurants that agree to the Exclusive Terms may also receive certain commercial incentives from Deliveroo, such as sponsorship for marketing initiatives and analysis of the partnering restaurant's sales.

ii. Breach of Exclusivity Provisions

33. Through the Breach of Exclusivity Provisions, Deliveroo restricts partnering restaurants from, or penalises them for, switching from Exclusive to Non-Exclusive Terms. This includes by allowing Deliveroo to:

    (a) prevent the partnering restaurant from approaching competing OFPs for talks or negotiations;

    (b) provide no option for partnering restaurants to switch at all;

    (c) require partnering restaurants to pay back the difference between the exclusive and non-exclusive commission rates from a date which may be significantly prior to the switch;[7] and

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[6] The commission rate may vary in particular cases, e.g., restaurants newly joining the platform may be charged a lower commission rate.

[7] Partnering restaurants are liable to pay the difference between the exclusive commission rate that applied before the date of the switch and the non-exclusive commission rate that would have been payable if the partnering restaurant had entered into the relevant agreement under the Non-Exclusive Terms.

(d) cease all marketing activities on behalf of the partnering restaurant, remove the partnering restaurant from its platform, restrict the partnering restaurant from procuring the Relevant Services or suspend or terminate the relevant OFP/Restaurant Agreement.

34. Deliveroo claims that while the Breach of Exclusivity Provisions are contained in its standard agreements with partnering restaurants, it has not enforced these provisions in practice.

iii. Price Restriction Provisions: narrow price parity

35. Deliveroo's OFP/Restaurant Agreements prevent partnering restaurants from charging lower prices, or require them to charge the same prices, for menu items on their direct channels[8] compared to those offered on Deliveroo's platform.

36. A material breach by a partnering restaurant of any of its obligations under the OFP/Restaurant Agreement would constitute a grounds for Deliveroo to suspend the restaurant from the platform.

37. Deliveroo claims that while the Price Restriction Provisions are contained in its standard agreements with partnering restaurants, it has not enforced these provisions in practice.

[8] The relevant restriction applies to the partnering restaurant's in-restaurant menu. Deliveroo's 2nd Proposed Commitment targets specifically restrictions on the partnering restaurant's direct delivery and dine-in channels (see paragraph 78(d) below).

III. COMPETITION CONCERNS IDENTIFIED BY THE COMMISSION

38. This section explains the situation that Deliveroo's 2nd Proposed Commitment is seeking to deal with for the purposes of section 2(2)(d) of Schedule 2 of the Ordinance.

A. Framework for assessment

39. The OFP/Restaurant Agreements entered into between Deliveroo and its partnering restaurants fall within the meaning of "agreements" under section 2(1) of the Ordinance. These agreements constitute vertical agreements, i.e., agreements between undertakings that operate at different levels of the stream of commerce and are not competitors.

40. The Commission's Guideline on the First Conduct Rule ("**FCR Guideline**") recognizes that whilst vertical agreements frequently improve economic efficiency within a chain of production or distribution, some vertical agreements may, nonetheless, cause harm to competition. This may be the case where vertical agreements include restrictions that foreclose existing competition or limit the scope for market entry or expansion.[9]

41. The Commission has assessed whether the Provisions have the actual or likely effect of preventing, restricting or distorting competition in Hong Kong within the meaning of the First Conduct Rule. In doing so, the Commission has had regard to its guidance and decisional practice on exclusive dealing,[10] price parity[11] and tying.[12]

42. Section 60 of the Ordinance does not require the Commission to reach a firm conclusion on whether there has been a contravention of the First Conduct Rule to resolve a matter by a commitment. The assessment that follows therefore comprises only the preliminary views that the Commission has formed as a result of the investigation it has conducted to date.

B. Defining the Relevant Market

43. When assessing anti-competitive effects, the exercise of defining the relevant market assists in identifying in a systematic way the competitive constraints that undertakings face when operating in a market.[13]

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9 FCR Guideline, paragraphs 6.6 to 6.9.

10 Commission's Guideline on the Second Conduct Rule ("**SCR Guideline**"), paragraphs 5.23 to 5.32. Footnote 24 of the SCR Guideline confirms the application of such guidance to vertical agreements under the First Conduct Rule.

11 See Commission Notice of Acceptance in Case EC/02NJ *Online Travel Agents*, 13 May 2020.

12 SCR Guideline, paragraphs 5.8 to 5.12.

13 FCR Guideline, paragraph 3.21. The SCR Guideline sets out the Commission's approach to market definition in further detail.

i. Product market definition

44. In accordance with paragraph 42 above, the Commission has not reached a firm conclusion on market definition in this case.[14] Nonetheless, the Commission believes there is a reasonable basis to consider that the relevant product markets for the purpose of assessing the Provisions comprise:

(a) **Order to Deliver Services**, which include intermediation services by an online platform enabling F&B to be ordered from restaurants on the platform and delivered to end customers within a short timeframe;[15] and

(b) **Order to Pick Up Services**, which include both intermediation services by an online platform enabling F&B to be ordered from restaurants on the platform and the ordering service provided by the restaurant itself,[16] for subsequent pick-up of the F&B by the end customer.

45. The Commission has reached the preliminary view that these are likely to be distinct relevant markets for the provision of F&B to end customers, based on the following considerations (which are related to the 'demand-side' or end customers' perspective on substitutability):

(a) **Order to Deliver and Order to Pick Up Services address different needs of the end customers**. The evidence available to the Commission suggests that the primary motivations for end customers to opt for Order to Pick Up Services are to save time and get their food quicker, followed by an absence of minimum order value which may allow them to save money, and the ability to plan their time better by being able to schedule their orders. In contrast, the primary motivation for end customers to opt for Order to Deliver Services is that they do not want to leave their premises to obtain their F&B. Accordingly, for these end customers, Order to Pick Up Services would be unlikely to be a viable substitute. In addition, the evidence also suggests that if Order to Deliver Services are not available on a particular OFP, the end customers who prefer Order to Deliver Services are more likely to turn to other similar platforms, instead of using Order to Pick Up Services or dining in at the restaurant.

(b) **Location and distance of the restaurants are relevant considerations for end customers**. End customers are likely to only consider Order to Pick Up Services for restaurants located within short distance from their location. On the other hand, Order to Deliver Services can allow end customers to order from restaurants further away. Further, end customers

[14] See also Commission Notice of Acceptance in Case EC/02UB *Car Warranties*, 10 October 2022, paragraphs 35 and 71.

[15] The delivery services in this market may ultimately be provided by the platform or, in a more limited number of cases, by the restaurant itself.

[16] Such ordering services may be offered by phone, on the restaurant's website or mobile application or in person.

opting for Order to Deliver Services do not need to travel to the restaurant to get the takeaway F&B, minimising the time and potential travel costs incurred.

(c) **Total price paid by end customers when opting for Order to Deliver Services compared to Order to Pick Up Services**. End customers who opt for Order to Deliver Services will have the F&B delivered to their addresses by paying a delivery fee, which may range from around HK$5 to HK$40.[17] In addition, for orders below a minimum order value set by each of Deliveroo and Foodpanda, end customers will be required to pay the difference between the menu item(s) and the minimum order value. In contrast, when using Order to Pick Up Services, an end customer can avoid such fees and will not be subject to any minimum order value, while the OFP may offer additional special offers.

(d) **Occasion on which F&B is ordered by the end customers**. Whilst the evidence available to the Commission suggests that some end customers may use both Order to Deliver and Order to Pick Up Services interchangeably, this does not necessarily mean that the two are substitutable. Whether or not the two are substitutable depends on the occasion on which F&B is ordered by the end customers. For instance, for a dinner party or a family gathering, end customers may consider delivery to be the better option as the order size is larger and hence the delivery fee would represent a small share of the total costs. Picking up a large order may also not be practical for such occasions. In contrast, for a workplace lunch, end customers may consider Order to Pick Up Services to be a more appropriate option due to the convenience and lower prices for pick-up orders.

ii. Geographic market definition

46. The Commission believes there is a reasonable basis to consider that the relevant geographic market for the provision of the Relevant Services comprises the **Hong Kong Special Administrative Region**.

47. This is based on the following considerations:

(a) Deliveroo and Foodpanda each provide the Relevant Services in the same manner throughout Hong Kong, including with respect to the terms of their OFP/Restaurant Agreements, their offer to end customers and the various fees that they charge to such customers. These terms are applied irrespective of the locations of the partnering restaurants and end customers within Hong Kong.

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[17] In the case of Foodpanda, delivery fees chargeable to the end customers will vary depending on a number of factors and they range from HK$5 to HK$35. In the case of Deliveroo, the delivery fees range from HK$5 to HK$40, although it is a dynamic figure in the sense that it may increase with distance. In addition, the delivery fee could be zero upon fulfilling a minimum order value.

(b) Once they have established a presence in one area, OFPs can expand quickly into other areas in Hong Kong using their existing infrastructure (in terms of the platform, logistics, rider fleet, etc.), potentially without having to incur very high costs.

(c) Several other jurisdictions have reached a similar view, finding the relevant geographic markets to be city-wide, or even national, in their cases concerning online food ordering and delivery platforms.

C. Assessment of effects

48. The Commission sets out below its preliminary views on Deliveroo's degree of market power, as well as the potential anti-competitive effects of each of the Provisions. It notes that the Provisions should not be assessed in isolation to each other, as the potential anti-competitive effects of one Provision may be significantly reinforced when applied in combination with another.

i. Deliveroo's market power

49. When assessing the actual or likely effects of an agreement, the Commission will generally consider the extent to which the undertakings concerned have market power in a relevant market.[18] The degree of market power for concerns to arise under the First Conduct Rule is not the same as the degree of market power required for concerns to arise under the Second Conduct Rule and is typically less.[19]

50. The Commission believes there is a reasonable basis to consider that Deliveroo has market power in the market for Order to Deliver Services, based on the factors set out below.

ii. Market shares

51. Between 2016 and 2021, Deliveroo had a high individual market share exceeding 40% in the market for Order to Deliver Services in terms of order value. Overall, the Order to Deliver Services market is highly concentrated, with the combined market share of Deliveroo and Foodpanda around 90% during the same period. Based on market share data available to the Commission for 2022, Deliveroo remains one of the most significant players in the Order to Deliver Services market.

[18] FCR Guideline, paragraph 3.21.
[19] FCR Guideline, paragraph 3.23.

iii. Competitive constraints

52. In the Commission's preliminary view, Deliveroo is unlikely to be constrained by other competitors in the market for Order to Deliver Services, save for any competitive constraint imposed by Foodpanda.

53. Other competitors in the market (e.g., Oddle and DimOrder) generally each have a very low market share, with individual market shares considerably below 1% in 2021. Such competitors do not appear capable of providing a sufficient competitive constraint on Deliveroo.

54. Moreover, neither the partnering restaurants (with very few exceptions) nor end customers individually are likely to have bargaining power to negotiate individual contractual terms with Deliveroo and constrain it sufficiently.

iv. Barriers to entry and expansion

55. The market for Order to Deliver Services appears to be characterised by the existence of a number of barriers to entry and expansion, which may impede the emergence of another credible competitor to Deliveroo. In particular, the market for Order to Deliver Services appears to entail indirect network effects in the sense that it is necessary for a new OFP to gain a sufficient number of users on one side of the platform before users on the other side may find the OFP attractive to join. In addition, the market involves important economies of scale, with large investments and a significant amount of time being required to develop and optimise an OFP's technology and substantial resources needed to set up a logistics network for the OFP with sufficient coverage and delivery speed. Substantial marketing and advertisement expenses are also needed to create and establish the brands.

56. In addition, and as further described below, the use by Deliveroo of Exclusive Terms, Breach of Exclusivity Provisions and Price Restriction Provisions appear likely to themselves increase barriers to entry and expansion for competing platforms.

v. Use of Exclusive Terms and Breach of Exclusivity Provisions

57. Exclusivity arrangements are commonly used commercial arrangements and in most cases will not harm competition.[20] In this case, however, Deliveroo appears to have some degree of market power, while all other OFPs have significantly lower market shares, with the exception of Foodpanda. The Commission believes there is a reasonable basis to consider that the use of Exclusive Terms and Breach of Exclusivity Provisions may have anti-competitive effects, when applied against OFPs with low market shares ("**Low Market Share Platforms**"[21]).

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20 SCR Guideline, paragraph 5.23.

21 For the meaning of this term as used in Deliveroo's 2nd Proposed Commitment, see paragraph 79 below.

58. In particular:

(a) By offering a lower commission rate under the Exclusive Terms, Deliveroo appears to entice partnering restaurants to agree to partner exclusively with them for Order to Deliver Services. In addition, the potential effect of the Exclusive Terms in 'locking in' partnering restaurants to one OFP appears amplified by the concurrent use of the Breach of Exclusivity Provisions, which make it more difficult for partnering restaurants to switch away from Exclusive Terms and start partnering with other OFPs.

(b) Together, the use of the Exclusive Terms and Breach of Exclusivity Provisions may deter partnering restaurants from using Low Market Share Platforms and thus create a significant barrier to entry and expansion for those platforms. Conversely, they may help Deliveroo to maintain and strengthen its position in the market for Order to Deliver Services.

(c) The Exclusive Terms and Breach of Exclusivity Provisions may thus deprive Low Market Share Platforms of the possibility to attract a larger order and revenue base and prevent them from gaining a sufficient size to compete effectively against Deliveroo.

(d) In this respect, the Commission notes the following indicative (albeit not conclusive) matters:

   (i) The market shares of the other OFPs in the market, with the exception of Foodpanda, have remained limited over several years.

   (ii) The Commission has received evidence during its investigation of a competing OFP having partnering restaurants de-list from its platform, with the Exclusive Terms of Deliveroo being referred to as one of the reasons for the decision to de-list. Some of the partnering restaurants to whom this applied were significant to the business and were difficult to replace. It is understood that this was relevant to the decision of the particular OFP to leave the market.

(e) The foreclosure of Low Market Share Platforms appears more likely since Deliveroo's Exclusive Terms together with Foodpanda's cover a significant part of the market for Order to Deliver Services, giving Foodpanda and Deliveroo a high cumulative captive market share.

(f) In addition, the Exclusive Terms cover an important segment of the market for Order to Deliver Services, and thus deny access by Low Market Share Platforms to those restaurants. Specifically, the Exclusive Terms cover restaurant chains with a significant number of outlets, premium restaurants and popular restaurants that have a large consumer base and corresponding order value. Such restaurants appear to generate higher than average order value or drive end customers to the platform.

(g) The standard OFP/Restaurant Agreements in which the Exclusive Terms are laid down have a relatively long duration.[22] The Exclusive Terms would apply for the same duration unless the partnering restaurant has elected to switch to Non-Exclusive Terms.

59. At the same time, the Commission recognises that the use of Exclusive Terms by Deliveroo appears unlikely to have the above foreclosure effect on Foodpanda. Given its strong market position, Deliveroo appears able to entice partnering restaurants to sign up under Exclusive Terms and may compete with Foodpanda to obtain Exclusive Terms from such restaurants.

60. The same would be the case if a third-party OFP gained significant size in the market, in which case the use of Exclusive Terms by Deliveroo would be less likely to have a foreclosure effect on that OFP. At present, it remains to be seen whether a third-party OFP would indeed be able to achieve sufficient size, given the foreclosing effect of the Exclusive Terms as discussed above.

61. Nonetheless, to cater for the fact that the Exclusive Terms would be unlikely to have a foreclosing effect on Foodpanda or a larger OFP (if one emerges), Deliveroo's 2nd Proposed Commitment provides for the cessation of the Exclusive Terms only as against Low Market Share Platforms (see paragraphs 79 to 82 below).

vi. Price Restriction Provisions: narrow price parity

62. The Commission believes there is a reasonable basis to consider that the narrow price parity arrangements, whereby Deliveroo prevents partnering restaurants from charging lower prices, or requires them to charge the same prices, for menu items on their direct channels,[23] give rise to anti-competitive effects.

63. In particular:

(a) The narrow price parity arrangements may decrease incentives of partnering restaurants to charge lower prices on rival OFPs (for example, in return for being charged a lower commission rate). This is on the basis that such lower prices would risk undercutting the direct sales of the partnering restaurant (which are fixed at a higher level by the narrow price parity obligation).[24] As the partnering restaurant's direct sales tend to be the most profitable, it would likely wish to avoid such a scenario.

(b) From the perspective of rival OFPs wishing to enter or expand in the market, the narrow price parity arrangements would thus deprive them of the opportunity to offer the

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22 The initial term of Deliveroo's standard agreement is typically between 6 to 24 months and thereafter the contract may be extended to a maximum of five years. The vast majority of Deliveroo's partnering restaurants are subject to these standard terms.

23 See footnote 8 above for further details on the relevant direct channels.

24 In other words, end customers might opt to purchase the F&B items from the rival platform instead of the restaurants own channel.

partnering restaurant's menu items at lower prices than their competitors and, in turn, restrict their ability to compete.

(c) In addition, the narrow price parity arrangements could soften competition between Deliveroo and Foodpanda, should the narrow price parity arrangements decrease incentives of partnering restaurants to set lower prices on one of these OFPs due to the risk of undercutting direct sales.

(d) Importantly, for partnering restaurants subject to the Exclusive Terms with Deliveroo, any price competition for their menu items may in practice be excluded due to the operation of the narrow price parity arrangement.

(e) In light of these factors, OFPs may have limited incentive to charge lower commission rates (as this may not translate into obtaining lower prices from partnering restaurants), leading them to charge higher commission rates to partnering restaurants and partnering restaurants charging higher meal prices to end customers.

64. In the Commission's preliminary view, these harmful effects appear more likely given that:

(a) The narrow price parity arrangements appear to cover a significant part of the market for Order to Deliver Services. Deliveroo and Foodpanda have a high individual and combined market share in a concentrated market (as noted in paragraph 51 above), while the arrangements are included in the standard agreements of Foodpanda and Deliveroo (to which the vast majority of its partnering restaurants are subject).

(b) Deliveroo's standard OFP/Restaurant Agreements in which the narrow price parity arrangements are laid down are of a long duration.[25]

65. The Commission nonetheless acknowledges Deliveroo's submission to the effect that narrow price parity arrangements could be necessary to avoid partnering restaurants 'free-riding' on its services. Absent such arrangements, a partnering restaurant could use the OFP merely to advertise their menu items, and entice end customers to purchase the items on the restaurant's own direct channels instead, by offering significantly lower prices on those channels.

66. The Commission considers that there may be some basis to this concern in the case of sales on the partnering restaurant's own direct delivery channel (where the partnering restaurant's services appear largely similar to those of the OFP). On the other hand, it considers the concern less likely to be well-founded for dine-in sales (which appear to relate to a different dining occasion from those on the OFP). Deliveroo's 2nd Proposed Commitment accordingly permits it

[25] See footnote 22 above.

to limit the mark-up applied by the partnering restaurant on its platform as compared to sales on its direct delivery channel, though not as compared to dine-in sales (see paragraph 78(d) below).

IV. DELIVEROO'S 2ND PROPOSED COMMITMENT

67. In this section, the Commission: (i) outlines the relevant legal framework for acceptance of commitments; (ii) explains the Commission's views on the appropriateness of Deliveroo's 2nd Proposed Commitment; and (iii) provides a high-level summary of the 2nd Proposed Commitment.

68. In doing so, it explains the intended object and effect of the 2nd Proposed Commitment for the purpose of section 2(2)(b) of Schedule 2 of the Ordinance.

A. Relevant legal framework

69. Under section 60 of the Ordinance, the Commission may accept a commitment from a person to: (a) take any action; or (b) refrain from taking any action, where it considers this appropriate to address its concerns about a possible contravention of a competition rule. The Ordinance does not require parties offering commitments to make any admission of a contravention.

70. If the Commission accepts a commitment, it will terminate its investigation and not bring proceedings in the Competition Tribunal regarding the matters covered by the commitment. This is subject, however, to the ability of the Commission to withdraw its acceptance of a commitment under the circumstances provided for in section 61 of the Ordinance, including where there has been a material change of circumstances or the person giving the commitment has failed to comply with them.[26]

71. In terms of procedure, Schedule 2 of the Ordinance requires the Commission to consult on proposed commitment before it accepts them and consider any representations received on the proposed commitment. If the Commission accepts the commitment following this consultation, under section 64 of the Ordinance, it is required to register the commitment on its Register of Commitments.

B. Appropriateness of the 2nd Proposed Commitment

72. The Commission considers that Deliveroo's 2nd Proposed Commitment would be an appropriate enforcement outcome having regard to the factors set out in paragraph 2.2 of its *Policy on Section 60 Commitments*:

(a) **Seriousness of the conduct.** The Provisions do not constitute cartel conduct involving competitors. The Commission considers that the 2nd Proposed Commitment provides a

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[26] Where the Commission has the requisite basis to consider that a party making the commitment has failed to comply with the commitment, it may either (a) withdraw acceptance of the commitment under section 61 of the Ordinance; or (b) apply to the Competition Tribunal for one or more of the orders in section 63 of the Ordinance.

resolution to its concerns that is proportionate to the context of the conduct and the harm caused or likely to occur.

(b) **Ability to address competition concerns.** As described below, the 2nd Proposed Commitment will address the Commission's concerns in a targeted and effective manner by ensuring that the Provisions will not be enforced or included in Deliveroo's OFP/Restaurant Agreements and its partnering restaurants will be duly informed.

(c) **Effective implementation and monitoring.** As described below, the 2nd Proposed Commitment includes specific provisions to ensure its timely and effective implementation (including for its operation to vary in specific pre-defined circumstances) as well as ongoing monitoring by the Commission.

(d) **Other factors mentioned in paragraph 2.2.** Deliveroo has engaged with the Commission in good faith throughout the investigation and the Commission has not identified any severity factors mentioned in the Commission's *Enforcement Policy*, timing considerations or other elements that would militate against the appropriateness of the 2nd Proposed Commitment.

C. Summary of the 2nd Proposed Commitment

73. Deliveroo's 2nd Proposed Commitment applies to clauses in its OFP/Restaurant Agreements, other than those concluded with a limited number of restaurants that have bespoke arrangements and where the Commission's competition concerns are less applicable.[27]

D. Substantive Commitment

i. Non-enforcement and removal of Relevant Provisions

74. For the purposes of Deliveroo's 2nd Proposed Commitment, the "**Relevant Provisions**" are defined to comprise Breach of Exclusivity Provisions and Price Restriction Provisions (as described in paragraphs 33 to 37 above).

75. The 2nd Proposed Commitment is designed to cease any application of the Relevant Provisions, and thus remedy the Commission's concerns about such provisions. Specifically, Deliveroo commits:

(a) not to enforce any Relevant Provisions in existing agreements with partnering restaurants (clause 2.1);

[27] Such restaurants comprise those that have concluded "Outlet Expansion Terms" or "Profit Guarantee Terms" with Deliveroo.

(b) not to enter into any new agreement with a partnering restaurant that contains the Relevant Provisions (clause 2.2); and

(c) to remove any Relevant Provisions from contractual documentation for existing partnering restaurants or template agreements for future partnering restaurants (clause 2.4(a)).

76. In contrast to Deliveroo's initial proposed commitment, the 2nd Proposed Commitment includes a provision stipulating that Deliveroo cannot prevent partnering restaurants from partnering, having any communication or entering into agreements with Low Market Share Platforms on the date the commitment comes into effect (clause 2.3).

ii. Consequential contractual amendments

77. Since Deliveroo would cease application of the Relevant Provisions under the Proposed Commitments, it is necessary to specify the contractual conditions that would apply in place of those provisions.

78. In particular:

(a) **Measures to provide clarity on ability to switch**. The relevant contractual documentation would specify that partnering restaurants may switch from Exclusive Terms to Non-Exclusive Terms (clause 2.4(b)) and specify the applicable commission rates under each set of terms (clause 2.4(e)). The 2nd Proposed Commitment contains an additional clarification that Deliveroo only has to specify the exclusive commission rate if exclusivity has been agreed between both Deliveroo and the partnering restaurant.

(b) **Notice period for switching.** Insofar as Deliveroo may require notice for the partnering restaurant to switch from Exclusive to Non-Exclusive Terms, this should be limited to a reasonable period so as not to impede such switching and be no more than two months (clause 2.4(c)).

(c) **Permissible clawback.** Insofar as a partnering restaurant switches from Exclusive to Non-Exclusive Terms without notification and Deliveroo cannot ascertain the date of its switch, Deliveroo may only clawback the difference in the applicable commission rate for a maximum of two months (clause 2.4(d)).

(d) **Non-restriction of partnering restaurant's pricing**. To provide clarity that the pricing restrictions no longer apply, the relevant contractual documentation would specify that the partnering restaurant may charge lower prices:

(i) on their direct delivery channels;[28] and

(ii) on their direct dine-in channels,

than those they charge on Deliveroo's platform (clause 2.4(h)).

iii. Carve-out of "Low Market Share Platforms" from Exclusive Terms

79. Under clause 2.4(f) of Deliveroo's 2nd Proposed Commitments, Deliveroo would be required to carve out Low Market Share Platforms from the scope of its Exclusive Terms. For the purpose of the 2nd Proposed Commitment, "**Low Market Share Platforms**" are defined to comprise platforms that provide Order to Deliver Services and have a monthly market share of 10% or less measured by order value.[29] The 10% threshold is appropriate because the Commission's investigation found evidence that platforms with market shares below 10% have not been able to maintain a significant competitive presence in Hong Kong.

80. Under the carve-out, where a partnering restaurant agrees to the Exclusive Terms with Deliveroo in return for an exclusive commission rate, that partnering restaurant would:

(a) only be prevented from partnering with Foodpanda and any other platform that is not a Low Market Share Platform; and

(b) still be able to partner with a Low Market Share Platform.

81. The carve-out aims to limit the ability of the Exclusive Terms to foreclose Low Market Share Platforms by ensuring partnering restaurants may still use those OFPs. At the same time, the 2nd Proposed Commitment does not remove the Exclusive Terms entirely since they are unlikely to produce foreclosure effects as between non-Low Market Share Platforms and may promote competition between Deliveroo, Foodpanda and any other significant OFP, as outlined above.[30]

82. Deliveroo's 2nd Proposed Commitment contains a mechanism to determine when a platform is no longer a Low Market Share Platform and may become the subject of the Exclusive Terms (clauses 3.7 and 3.8). Deliveroo may provide written evidence to the Commission that another platform has exceeded the 10% market share threshold for its verification. Such evidence must give a fair and accurate representation of the market positions of the relevant market

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28 Further to the free-riding concern outlined in paragraph 65 above, the 2nd Proposed Commitment specifies that Deliveroo is entitled to limit the mark-ups applied by partnering restaurants on its platform (as compared to the prices on the restaurants' direct delivery channel) to the value of the commission rate charged by Deliveroo.

29 As at the date of this notice, all platforms other than Foodpanda would be Low Market Share Platforms.

30 For the avoidance of doubt, insofar as the Breach of Exclusivity Provisions are concerned, Deliveroo may not apply these to any partnering restaurant, regardless of whether the restaurant wishes to partner with a Low Market Share Platform or another OFP). This aims to ensure that partnering restaurants may switch freely between Exclusive and Non-Exclusive Terms.

participants. For the purpose of verification, the Commission may conduct its own assessment and gather information from third parties.

iv. Carve-outs for Outlet Expansion Terms and Profit Guarantee Terms

83. In contrast to Deliveroo's previous proposed commitment, the 2nd Proposed Commitment contains carve-outs for Outlet Expansion Terms ("**OETs**") and Profit Guarantee Terms ("**PGTs**") (clauses 1.1(w) and 1.1(z), respectively). The carve-outs would mean that Deliveroo would be permitted to impose the Relevant Provisions[31] and Exclusive Terms against restaurants that are subject to the OETs or the PGTs.

84. The OETs are contractual terms whereby Deliveroo would pay a certain amount to a restaurant for the purposes of meeting such restaurant's capital expenditure needs, for example, to open up a new location. The PGTs are contractual terms whereby Deliveroo would guarantee that a restaurant will receive a target amount of gross food value on its platform for the purpose of facilitating investment in joint commercial initiatives, such as joint marketing.

85. The Commission does not have significant concerns regarding the carve-outs since:

(a) the OETs and PGTs may be procompetitive in that they facilitate activities such as the expansion of new outlets and joint marketing;

(b) the OETs and PGTs require some investment by Deliveroo and, therefore, unlikely to be broadly applied; and

(c) the same carve-outs are included in Foodpanda's proposed commitment.

86. Deliveroo's 2nd Proposed Commitment contains monitoring provisions to allow the Commission to closely monitor the use of the OETs and PGTs (clauses 3.2(d) and 3.5).

v. Non-circumvention

87. Under clause 2.7 of the 2nd Proposed Commitment, Deliveroo commits not to circumvent or otherwise frustrate the operation of the substantive commitments described above.

vi. Timeframes

88. The 2nd Proposed Commitment would enter into force on the date Deliveroo receives a Notice of Acceptance from the Commission ("**Effective Date**").

[31] Namely, the Breach of Exclusivity Provisions and the Price Restriction Provisions.

89. As of the Effective Date, Deliveroo would be obliged not to enforce any Relevant Provisions or to enter into any new agreements containing such provisions.

90. Within 90 calendar days of the Effective Date, Deliveroo would be required to:

(a) amend its contractual documentation for existing partnering restaurants and update its template agreements for future partnering restaurants in the manner described above; and

(b) issue a communication to all of its respective partnering restaurants which confirms in clear and unambiguous language the amendments made.

vii. Duration and termination

91. Deliveroo's 2nd Proposed Commitment would remain in place for a three-year period, pursuant to clause 4.2.[32] This is subject to the 2nd Proposed Commitment being terminated at an earlier date, should:

(a) the 2nd Proposed Commitment be withdrawn, released, varied or substituted in accordance with the processes in sections 61, 62(1) and 62(2) of the Ordinance (clauses 4.2(a) to (c)); or

(b) Deliveroo falls below a 30% market share in Order to Deliver Services measured by order value, in which case Deliveroo would no longer be subject to the Proposed Commitments (clause 4.2(d)).

92. In relation to this latter termination event, the Commission considers that the imposition of the Relevant Provisions by Deliveroo is less likely to give rise to the foreclosure effects and other competition concerns identified above where it has a market share of below 30%.[33] Such a decrease in Deliveroo's market share would necessarily entail that other platforms had significantly increased in size and the Commission's concerns that the use of the Relevant

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32 It is noted that this is a shorter period than the duration of commitments accepted by the Commission in relation to other investigations. Those other commitments have commonly been of five years' duration. In the specific circumstances of the dynamic nature of this market, the Commission believes that a shorter period is justified.

33 The Commission notes that the block exemption regimes for vertical agreements in the European Union and the United Kingdom would provide for block exemption of much of the Relevant Provisions where the supplier's market share does not exceed 30% in the relevant market. See *Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices* and *The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022*.

Provisions by Deliveroo would foreclose other platforms would appear to have diminished substantially.

93. The Commission is prepared to accept commitments that provide for the Relevant Provisions to be dis-applied on the occurrence of this event because such a criterion is transparent, objective and proportionate in the circumstances. There was some consideration as to whether a broader range of circumstances might also be captured but the Commission does not consider, at this time, it would have the same degree of confidence that it would no longer have competition concerns. Accordingly, the Commission, taking into account the factors referred to in its guidelines (see paragraph 72 above) did not consider it appropriate for a wider range of factors to be included. To the extent other circumstances arise, it remains open for a review and possible release or variation in accordance with the statutory process to be undertaken.

94. The 2nd Proposed Commitment contains a mechanism to determine whether Deliveroo has fallen below the 30% market share threshold (clause 4.3), similar to the equivalent mechanism for Low Market Share Platforms.

viii. Reporting, compliance and monitoring

95. In clauses 3.1 to 3.6, Deliveroo would be subject to the following reporting and monitoring mechanism to ensure compliance with the 2nd Proposed Commitment:

(a) **Written report**. Within 120 calendar days from the Effective Date, Deliveroo will provide a written report to the Commission confirming its compliance with the 2nd Proposed Commitment and providing the Commission with supporting documents.

(b) **Annual compliance statement**. Deliveroo will also provide an annual compliance statement to the Commission, signed by an authorised officer confirming that to the best of his or her knowledge, Deliveroo continues to abide by the 2nd Proposed Commitment.

ix. Other matters

96. The 2nd Proposed Commitment does not constitute an admission by Deliveroo of a contravention of a competition rule (recital (6)).

97. In accordance with section 60(4) of the Ordinance, should the 2nd Proposed Commitment be accepted by the Commission, the Commission will not continue its investigation, or bring proceedings in the Competition Tribunal, with regard to the matters (i.e., the Relevant Provisions) that are addressed in the 2nd Proposed Commitment.

V. MAKING REPRESENTATIONS IN RESPONSE TO THIS NOTICE

98. The Commission invites representations from interested parties on the matters in this notice, including the Commission's proposed acceptance of the 2nd Proposed Commitment. The Commission will consider all representations received within the deadline below before making its decision on whether to accept the 2nd Proposed Commitment.

99. Any party wishing to provide representations should do so in writing **no later than by 6:00 pm on 24 November 2023**. **Representations received after this time will not be considered.**

100. Representations should be sent to the Commission as follows:

   (a) by email (preferred) to Consultation@compcomm.hk, with the case reference number EC/03JJ quoted in the subject line of the email;

   (b) by fax to +852 2522 4997; or

   (c) by post to:

   Representations on Case EC/03JJ
   Competition Commission
   19/F South Island Place
   8 Wong Chuk Hang Road
   Wong Chuk Hang.

101. The Commission will publish the representations received on its website.

102. If a party would like to claim confidentiality over some or all of its representation, it should identify the relevant material and set out reasons why the identified material is, in its opinion, confidential pursuant to section 123(2) of the Ordinance. The party should also provide a non-confidential version for publication purposes, from which all confidential information has been redacted.

ANNEX 1

DELIVEROO HONG KONG LIMITED'S 2ND PROPOSED COMMITMENT (ATTACHED SEPARATELY)