

Representations on case EC/03JJ

We refer to letter from the Competition Commission (the “**Commission**”) dated 15 November 2023 inviting us to submit representation on matters in the notice issued under Section 2 of Schedule 2 to the Competition Ordinance regarding the Commission’s proposal to accept Deliveroo’s new commitments (“**New Commitments**”) in the Online Food Delivery Platforms Case (EC/03JJ) (the “**Revised Notice**”).

As expressed in our representation submitted in response to the Commission’s notice dated 1 June 2023 (the “**First Notice**”) regarding the Commission’s proposal to accept the initial commitments proposed by Foodpanda and Deliveroo (the “**Initial Commitments**”), we appreciate the Commission’s efforts to promote competition in Hong Kong. In particular, we fully agree with the Commission’s preliminary assessment that by imposing certain terms and conditions in its Online Food Delivery Platform (“**OFP**”)/Restaurant Agreements, Foodpanda and Deliveroo are hindering entry and expansion by new and/or smaller platforms and/or softening competition in the market, potentially in contravention of the First Conduct Rule (“**FCR**”). We welcome any commitment proposal that directly and effectively addresses the competition concerns identified so that there can be healthy competition in the online food and beverage delivery market.

However, as a recent new entrant and a participant in this market, we respectfully disagree with the Commission’s proposal to accept the Initial Commitments (for Foodpanda) and the New Commitments (for Deliveroo) on the basis that they are insufficient to address the competition concerns identified by the Commission. Indeed, we respectfully did not agree with the Commission’s view that the Initial Commitments were adequate to address the competition concerns. Given the limited changes to Deliveroo’s commitment offer in the New Commitments, we maintain our view that the New Commitments are wholly inadequate and should not be accepted.

In carrying out its functions, the Commission has a duty to only pursue remedial actions that adequately resolve the competition concerns identified. This is particularly the case where it accepts commitments to end an investigation and in lieu of taking enforcement proceedings. Furthermore, the Commission has a duty to approach public consultations with a genuine and open mind and take into account the feedback received in any consultation, particularly one required by the Competition Ordinance, seriously and conscientiously. It should also provide sufficient reasons for why it considers it appropriate to accept a particular proposal. It is disappointing to see that the New Commitments have not incorporated any of the recommendations made in our previous representation submitted in June 2023, especially since KeeTa, as a new entrant, will be most affected by, and has a unique and highly relevant perspective on, the Commission’s decision. The Revised Notice does not address the inadequacies highlighted in our previous representation. As a new entrant, the recommendations are based on our first-hand experience of the immense difficulty for an OFP to enter and expand in the online food and beverage delivery market which is dominated by two players who are able to benefit from exclusivity and other anti-competitive provisions.

In response to the New Commitments, we again take this opportunity to submit to the Commission our views and to explain why we do not consider it to be an appropriate measure to address the relevant competition concerns and, indeed, why some of them may in fact be exacerbated. To take into account changes in this fast-paced market since June 2023, we have included an updated version of our previous representation in Part 2.

Meituan shares the Commission’s interest in ensuring fair and effective competition in the market, and strongly believes that our direct knowledge and experience as a new entrant in this market will assist the Commission in carrying out its function. Given the importance of this process for the market in Hong Kong, we are keen to engage further on these points and underline their importance to the Commission.

If the Commission is serious in seeking to address the anti-competitive effects in this market, it is important that it takes our comments made in this representation into account. Failure to do so could

risk the Commitments being entirely ineffective and the Commission will not have discharged its duty to accept only commitments that it “considers appropriate to address its concerns about a possible contravention of a competition rule”¹ and to “consider any representations made (and not withdrawn) in response to the Revised Notice”.²

We urge the Commission to give serious consideration and weight to this representation in its determination.

1st Part

1. 竞委会拟接受的相关承诺不能解决上述竞争担忧

1.1 两家外卖平台应该停止继续使用独家条款

竞委会在修订通知第 59 段、第 61 段和第 81 段中说明，不移除独家条款的原因是“第二次建议的承诺不会完全移除独家条款，原因是这些条款在非低市占率平台之间不大可能产生封锁效果，而且如上文所述，可能会促进户户送、Foodpanda 与其他大型外卖平台竞争。”我们认为，上述结论并不成立，原因如下：

- (1) “独家条款在非低市占率平台之间不大可能产生封锁效果”，这与事实不符，也与修订通知第 4 段的结论矛盾。

根据此次建议的承诺，第三方平台的市场份额达到 10% 以上时属于非低市占率平台。依据上述理论，假设该市场有 3 个经营者，市占分别为 80%、16%、4%，则市占 80% 的平台签订的独家条款，对于市占 16% 的平台没有封锁效果。但这显然不能成立，因为市场权势越强，独家条款对其他平台封锁或者限制扩张的效果越明显。特别是，如竞委会在修订通知第 19 段提到，“外卖平台构成了连接合作餐厅和最终顾客的多边平台……。合作餐厅和最终顾客之间存在正向的间接网络效应（换言之，外卖平台为越多餐厅提供服务，吸引的最终顾客就越多，反之亦然）。”我们认为，一个市占 16%（甚至更高）的平台在市场被一个市占 80% 的平台垄断的情况下，难以说服餐厅放弃 80% 的市占率平台，转到一个只有 16% 市占率的平台，因为这代表餐厅需放弃市占 80% 的平台提供的较低佣金和较多订单量，在商业角度来说是不合理的。再者，市占率只有 10% 的平台很大概率在规模和资金方面都比市占 80% 的平台要低，难以长期利用更有吸引力的优惠吸引餐厅转到他们的平台。在网络效应下，合作餐厅的数量少，令最终顾客的数量更加下降，市占 16% 的平台将更难与市占 80% 的平台竞争。以上例子说明，不论其他平台的市占率是否低于 10%，容许一个高市占率的平台继续使用独家条款便可能对其他市占率较低的平台造成排除效果，把低市占平台的市场份额标准订成 10% 的意义不大，无法有效停止独家性条款的反竞争效果。

而且，竞委会也没有就“市场占有率低于 10% 的平台无法在香港维持明显的竞争地位，因此 10% 属适当的标准”这一结论提供任何实质性的理据和数据支持，以证明独家条款不会对市占 10% 以上的平台构成封锁。

¹ Section 60(1) of the Competition Ordinance

² Section 2(1)(b) of Schedule 2 of the Competition Ordinance

- (2) 即使竞委会认为独家条款没有封锁效果，这可能来源于两家外卖平台互相实施违法行为的掩蔽效应，令反竞争效果难以发现，但不能得出据此“这些条款在非低市占率平台之间不大可能产生封锁效果”的结论。因此，需要单独评价如果只有一方实施该行为时，对其他平台是否产生封锁效果。

一方施行反竞争行为，另一方跟进反竞争行为，即使双方反竞争效果表面上抵消，不应得出“该行为不大可能产生封锁效果，固该行为合法的结论”。本案中是双方均实施了独家合作条款，因此，即使假定相互间没有实际产生封锁效果，这也有可能是掩蔽效应所致，而不能得出行为本身无封锁效果的结论。

- (3) 修订通知第 5 段列明，独家条款的封锁效应长期会导致餐厅需要付更高的佣金率，进而损害最终用户的利益，令社会总福利降低。且市场权势越强，危害后果越大。但相关承诺无法有效解决该部分的竞争担忧。

a. 独家条款产生不必要的佣金费率差异。对于独家合作餐厅与非独家合作餐厅，对两家外卖平台而言，成本基本相同。根据修订通知第 32 段，独家合作餐厅可能会得到一些额外的服务，但我们认为这不足以解释独家和非独家合作餐厅的佣金费率差异，尤其是对非独家合作餐厅收取更高佣金，实质是变相提高费率，损害最终用户的利益。

本案中，两家外卖平台的佣金率介乎订单价值大约四分之一（≈25%）至三分之一以上（>33%），而非独家收费高于独家收费，且通常接近佣金率范围的顶端，这并不合理。第一，非独家合作费率接近佣金范围顶端，是低费率的 1.3 倍，收费偏高。8%左右的费率差对商家是纯利润，因此对商家决策有重大影响；第二，费率差有利于锁定新商家。新商家上线外卖平台时，面对 8%费率差（等同于 8%纯利润）倾向于选择单平台独家合作，在尝试经营的阶段，通常不会选择两个平台同时经营，并承担更高费率。第三，费率差有利于维持老商家的独家合作状态。当老商家达到一定经营规模后，由于到其他平台需要从零开始，而本平台的存量规模订单将面临全量加价 1.3 倍，且还有严格的违约金条款，导致餐厅迁移成本过高，形成了封锁效应。结论是，独家和非独家合作佣金费率的不合理差异有高度的封锁性，令低市占率平台无法有效竞争。

在无独家条款的情况下，各平台从佣金费率、服务质量等方面开放竞争，而餐厅之间以产品价格、食物质量等自身因素（而非平台收取的佣金费率）激烈竞争，总体带来的社会总福利比容许独家条款的市场情况更高。

b. 餐厅多平台经营，能够更广泛地接触最终用户，获得更多交易机会。餐厅受独家条款约束，无法接触习惯使用其他平台的最终用户。容许餐厅多平台经营可以帮助餐厅接触新的客群，增加可能实现的经营收入和扩展业务的机会，而平台依赖于其市场权势所做的独家合作安排，限制了餐厅该项权益；这对小型餐厅的竞争力影响最大，因为他们特别有需要拓展客户群和服务接触点。

c. 独家条款损害了平台内经营者间的竞争。餐厅对于具有市场权势的平台依赖度高，平台内竞争激烈，平台通过费率优惠等措施，导致选择独家合作的餐厅获得额外的竞争

优势，对于非独家合作餐厅权益造成损害，对餐厅之间的竞争构成影响；而这种竞争优势并非来源于餐厅自身在价格、服务质量上的竞争力。

d.独家条款阻碍消费者获得更优质的价格和服务。 餐厅多平台经营，基于平台间的竞争，可能存在平台层面的补贴让利及服务能力竞争，消费者在各平台间可以便捷进行比较。除了多了平台的选择（因为他们想下单的餐厅与不同的平台也有合作），最终用户还多了餐厅的选择（因为他们惯用的平台可以与更多餐厅合作），并通过平台以及平台内合作餐厅间的竞争获得更优的价格和服务，而独家条款损害了上述竞争机制，侵害了消费者权益。

e.独家条款造成了社会总福利的降低。 对独家商家来说，独家合作减少了总销售量（直接抑制了在其他平台的潜在销量），因此，消费者总福利是减少的；而对于非独家商家，由于其佣金费率是可能高于合理费率的，传导至消费者端价格更贵，销量同样有所减少，因此，消费者总福利同样是下降的。

(4) 关于促进竞争效果的论述并没有相关证据支持

修订通知第 81 段指出的独家条款“可能会促进户户送、Foodpanda 与其他大型外卖平台竞争”，该部分内容缺乏有力的证据支持，而从实际情况来看，此前并不存在第三个平台与户户送、Foodpanda 进行了有效竞争。例如，UberEats 在短短五年内就退出了香港市场。户户送和 Foodpanda 在与合作餐厅的协议中强加的排他性条款显然是一种排斥竞争对手的策略。

根据我们的市场观察，在户户送和 Foodpanda 之间，双方采取的餐厅独家合作模式相似，对佣金费率设置的比例和金额差异不大，且缺少其他措施争取餐厅，并未发现所谓竞争激烈、促进竞争的实质性证据，修订通知中也未涉及相关独家餐厅在平台间迁移及费率竞争等情况的数据。反而在双寡头格局下，两个主要平台同时实施独家条款，有效封锁其他平台的进入和扩张，双方之间长期市占平稳，导致恶性循环。

综上，我们认为独家条款在各方面损害最终消费者的利益，而修订通知中不完全移除独家条款的理由并不充分，不能成立。

1.2 以上可见，完全移除独家条款是最好的做法。将低市占率平台从独家条款适用范围剔除只能够部分解决竞争担忧，而且现有的建议承诺中此种剔除是临时性和过渡性的，可能在实质上并不能解除竞争担忧，甚至反而可能有保护反竞争的效果

(1) 对低市占率平台的保护程度过低，与独家条款产生的严重封锁效果不成比例。

如前文所述，户户送、Foodpanda 作为市场双寡头的情况下均继续独家条款，对于新进入者和低市占平台显然产生了极大的封锁效应。排除独家条款对低市占平台的适用，却被限制在 10%的市场份额内，这会严重抑制现有低市占平台积极扩展业务的决心，也无法达成鼓励更多经营者投资进入市场的目的，因为只要有一个月稍微超过了 10%的市占率，即使长期仍然难以与其他大型的平台竞争，却已经失去了建议承诺里对低市占平台的保护，可能马上就会失去大部分有价值的合作餐厅（详细原因见下），对其业务造成重大打击。另外，为了避免意外达到 10%市占率标准，低市占率平台可能

因此减少向合作餐厅、最终用户提供优惠、额外服务等市场推广，更是限制了这些低市占平台与户户送、Foodpanda 之间的竞争。独家条款构成的竞争损害和承诺提供的相关保护显然不成比例，长远反而会有保护反竞争的效果。

(2) 独家条款应保护后续成长为非低市占率平台的公司至少 3 年（包括全部在两家外卖平台过去实施独家条款的期间持有低市占的平台）。

就本案而言，可以直接认定独家合作条款仅适用于户户送和 Foodpanda 之间，而不适用于其他潜在或现有的平台。户户送和 Foodpanda 实施独家条款已经对相关市场中的其他平台均产生了反竞争效果。鉴于目前其他平台长期得不到公平竞争，对这些平台的保护期应当设置足够长的时间，包括对其他平台此前受到竞争损害的补偿，使其不受干扰地发展业务，参与竞争，让这些平台有效地市场进入。否则，相关承诺构成对潜在的极低市占率的平台萌芽期的封锁，因为这些小平台的市占一旦超过 10%，两家外卖平台的独家合作餐厅就无法与之合作，这是在帮助两家外卖平台扩大其独家条款所能预期的限制范围，帮助其产生反竞争效果。

对于已经进入市场的低市占率平台来说，建议的承诺也非常不合理：此类平台已经长期受到两家外卖平台双寡头独家封锁的制约，遭受了长期的竞争损害，本应完全解除两家外卖平台独家协议对其获得餐厅的限制并予以赔偿，而目前建议的承诺在这类小平台市占达到 10%时对其进行二次限制，更加不合理。

(3) 当前该项承诺，对低市占平台存在下列严重的反竞争问题

a. 压低餐厅预期，显著减少餐厅合作意愿。低市占率平台本身订单不多，餐厅合作意愿不足，假定 10%市占平台对等带来 10%新增订单，由于可能的投入增加，餐厅在新平台甚至无法盈利。因此，餐厅和新平台作更多看中其成长性，但该平台一旦市占超过 10%，保护条款失效，餐厅将面临两个选择：一是退出该新平台，放弃前期投入；二是选择转换为非独家餐厅接受原来平台的 90%订单的费率上涨。此种制度安排，对餐厅投入具有实质性限制，进而对于低市占平台仍存在显著的封锁效果。

b. 超过低市占率标准时，对该平台产生严重的封锁效应，形成人为的门槛和陷阱。在达到临界标准时，该平台可能面临之前与之合作的两家外卖平台的独家餐厅大量选择停止与其合作，该平台又回到低市占平台状态。以 2022 年 1 月按订单价值计算的市场格局来看，此时两家外卖平台的独家合作餐厅为其带来的订单价值占其全部订单价值的 50%，假设此时一家新平台进入市场，低市占平台保护期内，一半的独家餐厅均不受限制地上线了该新平台，当该新平台被宣布市占超过 10%时，只要在新平台的收益小于原平台费率上涨产生的损失，这些餐厅多数只能被迫放弃在该平台经营，反而造成了小平台的成长中断，这种人为障碍反而有利于原平台，承诺具有反竞争效果。

(4) 以 10%作为低市占率平台认定标准，明显不合理

修订通知中指出“由于竞委会调查期间获得的证据显示，市场占有率低于 10%的平台无法在香港维持明显的竞争地位，因此 10%属适当的标准”，我们认为该项理由难以成立。如上述，竞委会并未实质性证明 10%的适当性。

如果 10%只是维持竞争地位的门槛，则 10%内的平台实质上对于实施独家协议条款的平台并无任何有效竞争制约，此时，进行所谓的排除适用，也不会对反竞争行为有任何限制；相反当低市占平台刚刚达到 10%的门槛，可能有能力对反竞争行为产生有效的竞争制约时，独家条款及时生效，不但影响该低市占平台继续发展其业务的能力，甚至严重威胁其辛苦建立的现有业务，从而帮助具有市场权势的一方继续限制竞争对手。这种承诺安排，显然有保护反竞争行为的效果，而非保护低市占率平台免受竞争损害。

我们坚决反对适用 10%低市占率平台的标准，对于低市占率平台标准及相关承诺的起算期限等细节，见本陈述第二部分的详细论述。

另外，我们认为在确定相关市场的低市占率平台时，相关市场的主要竞争者应当有参与调查和提出建议的权利，该项程序性权利需要得到充分保障，以确保竞委会得到客观和全面的信息和意见，在公平、公开的条件下做出这重要的决定。

综上，当前的承诺会进一步损害竞争、保护垄断，而非促进竞争、打破封锁。既然竞争委员会已认同独家协议对低市占率平台有反竞争效果，《竞争条例》的目的亦是“禁止任何妨碍、限制或扭曲在香港的竞争的为”，竞委会应当全面禁止两家外卖平台的反竞争行为，而非限制反竞争行为的施加对象。目前建议的承诺生效，可能造成其他竞争者在短暂情况（如突然市场变化、限时推广）下达到 10%后马上受到不合理的竞争限制，无法进一步扩大市场规模。

2. 建议竞委会关注的损害竞争的其他因素

2.1 两家外卖平台存在违反第二行为守则的可能

根据《第一行为守则指引》第 3.2 段，独家条款有可能构成具有反竞争目的的行为，加上本案两个平台共同拥有市场 90%的市占率，我们认为竞委会应考虑是否把这些独家条款认定为有反竞争目的的行为。

两家外卖平台具有市场权势，其设定了所有商家普遍适用的独家-非独家合作模式，并设定费率差异由餐厅进行选择，独家合作费率低，非独家合作费率高，从而诱导餐厅与之签订独家合作协议，禁止餐厅到其他平台经营，实际上达成了与大量餐厅独家合作的结果，可以认为两家外卖平台具有明确的封锁竞争的目的，应该停止此类损害竞争的行为。

两家外卖平台采用独家条款只是表象，实质是其滥用权势对所有餐厅施加独家交易安排。需要注意，并非只有当餐厅与两家外卖平台签署了独家协议才会产生竞争损害，事实上餐厅与之签署非独家协议同样受到竞争损害，应当同时考虑违反第二准则的可能。

(1) 户户送和 Foodpanda 具有相当程度的市场权势，双寡头市场结构下，应当格外关注垄断风险

第一，相关市场高度集中，呈现双寡头格局；户户送和 Foodpanda 在香港外卖递送服务市场（Order to Deliver Services market）长期占有相当大的市场份额。据竞争委员会在第一次拟接受承诺的调查数据，2016 年-2021 年，户户送和 Foodpanda 在外卖递送服务

市场的占有率稳定在 40%以上，两家合计市场占有率为 90%。以 2021 年为例，户户送的市场占有率为 40-45%，Foodpanda 的市场占有率为 50-55%，除 UberEats 外，其他平台的市场占有率均小于 1%，可以忽略不计，可见两家平台几乎完全瓜分香港外卖平台市场。第二，在外卖送递服务市场，长期以来没有新竞争者进入市场；户户送和 Foodpanda 两家平台在香港的高市场占有率至少已维持了七年，在此期间市场上的其他主体长期维持在非常低的市场份额，市场结构异常稳定，说明市场长期处在不充分竞争的状态。2016 年 Uber Eats 进入相关市场，发展一度向好，但在 2021 年底其宣布放弃外卖业务，UberEats 在前期通过补贴等促销方式打开了局面，但是在两家具具有相当市场权势的平台采取费率差独家条款的情况下，其他竞争者难以达到有效进入市场的临界规模。

(2) 独家条款具有全面封锁供给的目的

两家外卖平台希望每一个餐厅都与其独家合作，而不到其他平台经营，如其以此为目的进行磋商，理论上存在完全封锁供给的可能。

(3) 滥用市场权势实现排他目的

市场权势尤其是订单量份额，与餐厅的预期销量挂钩，市场份额越高则越容易达成独家；比如：单量分别为 60%、30%、10%的三个平台，同时寻求与一个餐厅独家合作，60%单量的平台提出同等甚至更加劣势的条件，都更有可能获得成功，从而实现小投入，获得排他封锁效果。

(4) 未签订独家协议同样面临竞争损害

餐厅选择非独家合作，与独家餐厅相比较，将在平台政策上形成本不应该具有的竞争劣势，从而承受损害。

2.2 在权势力量基础上，费率差异是两家外卖平台施行独家合作的核心手段，独家合作的费率与非独家合作的费率差异过大，具有显著不合理性，严重损害竞争

我们无法理解在如此高的市场权势下通过设定普遍性的费率差异寻求独家合作的正当目的，更没有证据说明相关行为对追求该正当目的的不可或缺或者符合适当比例。

(1) 费率是平台服务基础性定价，平台服务相同，不应有差别待遇。

一是，无论是独家合作还是非独家合作，平台提供的服务完全相同，设置费率差异并没有合理理由，只是单方取决于平台目的和意愿。

二是，费率差异只与是否独家合作挂钩，不存在符合商业惯例的价格差异。比如 A 餐厅只有 1 单交易，但是独家合作，则费率低；B 餐厅有 1000 单交易，900 单在本平台，100 单在其他平台，同样收取高费率。这与传统行业采购量大的折扣、折让完全不同。

(2) 将费率与独家合作绑定，损害平台间价格竞争机制

当事人通过设定差异化费率引导商家签订独家协议后，即使其他平台给出更低的费率，由于独家协议已经生效，商家受协议约束也无法与其他平台合作，导致平台间的价格竞争失效。价格更低的平台因为垄断问题无法取得竞争的胜利。

(3) 费率差异过大，排除限制竞争的目的和效果明显

本案中，当事人佣金率介乎订单价值大约四分之一（≈25%）至三分之一以上（>33%），而非独家收费高于独家收费，且通常接近佣金率范围的顶端。这并不合理。

一是，非独家合作费率接近佣金范围顶端，是低费率的 1.3 倍，收费偏高；8%左右的费率差对商家是纯利润，因此对商家决策有重大影响。

二是，费率差有利于锁定新商家。新商家上线外卖平台时，面对 8%费率差（等同于 8%纯利润）倾向于选择单平台独家合作，在尝试经营的阶段，通常不会选择两个平台同时经营，并承担更高费率。

三是，费率差有利于维持老商家的独家合作状态。当老商家达到一定经营规模后，由于到其他平台需要从零开始，而本平台的存量规模订单将面临全量加价 1.3 倍，且还有严格的违约金条款，导致餐厅迁移成本过高，形成了封锁效应。

综上，以费率差异为核心，尤其是差异过大，是独家条款竞争担忧重要要素。

2.3 在双寡头格局下，两家外卖平台一致性实施独家合作，且独家合作餐厅占比过高，严重阻碍了新进入者进入市场

(1) 双寡头下的独家合作损害竞争效果显然更为严重

市场集中越高，独家合作的竞争危害越大是基本逻辑。一家独大且实施独家合作，对新进入者封锁最大；双寡头格局下，两个平台呈现 5：5 或者 6：4 的结构，平台的单量集中度同样很高，独家合作的餐厅，转变为非独家商家时，需要放弃原平台优惠，成本依然很高，竞争损害效果也非常明显。但当市场上有 4 个以上平台时，放弃独家合作，可以获得更多平台新增交易量，封锁效应减弱。

(2) 双寡头格局下，两个垄断经营者一致性采取独家合作策略，进一步加剧了竞争损害，尤其严重阻碍了新进入者进入市场。

据我们观察，双寡头格局下，两个平台在独家合作策略上政策措施类似（整体费率在 25%-33%之间，非独家费率均接近最高值，费率差大约在 8%左右）两平台与经营者签订的协议中关于独家条款、MFN 条款的策略以及作出的承诺也十分类似。严重阻碍新进入者进入市场。

一是，双方都采取独家合作策略，可能在双方之间产生排除限制竞争效果。

若只有一个竞争者施行独家合作，则另一方将成为有力竞争者，可以提供更低费率、更优条件争取餐厅到其平台经营；但当两个平台份额均等，且均实施独家合作时，容易出现下列情况：当甲平台寻求乙的独家商家上线其平台时，甲平台需要给予餐厅更好的条件，此时，该餐厅成为双平台餐厅；但甲平台为维护其独家合作体系，无法给

予该双平台用户更好的条件，否则甲平台的其他双平台用户也会要求同等条件，原来的独家合作餐厅也会上线对方平台成为双平台商家。

二是，双方都采取独家合作策略，对于第三方，尤其是新进入者产生了严重的封锁效果。

由于市场为双寡头格局，两个平台市场份额合计长期高于 90%，超高的份额优势，使得其他平台寻求独家合作的难度远远高于两个寡头平台。新进入平台则无法获得独家餐厅的供给，形成严重的对新进入者的封锁。

最后，实际的独家合作餐厅占比过高，严重阻碍了新进入者进入市场

在竞委会 6 月 1 日《通知》的第 62 段、第 63 段以及 11 月 10 日《通知》的第 57 段、第 58 段有充分的论述，我们完全赞同。此处仅强调一点，前述第 63 段(e)中明确表述：

“封锁低市占率平台似乎较有可能发生，因为独家条款覆盖外卖递送服务市场相当大部分，让 Foodpanda 及户户送获得较高的具控制性累计市场占有率。尤其是于 2022 年 1 月按订单价值计算，看来该市场大约一半受限于 Foodpanda 及户户送的独家条款。”

在平台双边市场属性下，如果一半市场被两个寡头平台通过独家条款完全控制，对于其他经营者必然产生严重的竞争损害后果，尤其表现为进入市场困难。

综上，双寡头格局下，双方一致性实施独家协议，对新进入者形成了严重封锁。

2.4 两家外卖平台同时使用独家条款和平价条款，封锁效应和横向垄断效果叠加，严重阻碍经营者进入市场

以 2022 年 1 月的订单价值情况分析市场，其中接近一半餐厅为两个寡头平台独占，剩余部分又普遍存在平价条款，即，一半的市场被独家封锁无法进入；另一半的市场客观形成横向价格垄断效果，无法开展价格竞争，这种独家条款与平价条款的叠加，实质两种是最严重垄断行为的结合：封锁交易和横向价格垄断，是最恶劣的封锁、阻碍新进入者进入市场的垄断行为。

2.5 本次调查中缺乏使用反事实比较方法评估竞争损害效果

竞委会《第一行为守则》第 3.25 段明确：“在评估某行为是否具有或可能具有损害竞争的效果时，竞委会可评估该行为不存在时的市场情况（即与事实相反的情况），并将之与该行为存在的市场情况进行比较。竞委会一般会根据所得证据，按个案情况评估特定行为的效果。”

竞委会的指南中明确了该种评估方式，由于该案件竞争担忧持续时间较长，且从竞争结果来看，相关市场长期处于双寡头格局，没有新的竞争者成功进入，建议竞委会采取以下方式进行对建议承诺有效性的评估。

初步来看，假定完全移除以独家合作费率与非独家合作费率差异为核心的独家条款，可能出现下列情况：

- a. 餐厅获得充分的自由选择权，更多餐厅在多平台经营，订单量上涨，收益增加；
- b. 独家餐厅与非独家餐厅在平台基本服务成本上保持一致，避免了扭曲餐厅之间的竞争环境；

- c. 平台互相争夺竞对独家商家，提供优惠费率，此前过高的双平台佣金逐步下降，商家佣金负担减轻，用户端商品价格降低；
- d. 消费者可以选择更多平台，各个平台上餐厅供给丰富，平台之间因供给独占产生的竞争影响消除，需要在价格、配送服务等方面进行更为激烈的竞争。

对比之下，较之现有建议的承诺不完全移除独家条款，完全移除以费率差异为核心的独家条款，不存在反竞争效果。

3. 新的承诺建议提出

综合上述分析，我们认为，相关平台的独家协议、平价协议及相关行为，严重损害竞争，本应当依法进行处罚。因此，如果采用承诺方式处理，已经是从轻的方式，应当确保相关的竞争担忧完全消除，要求相关平台主动作出更多主动维护市场竞争的承诺，彻底避免相关行为产生竞争损害的可能：

(1) 优先建议以完全移除独家条款作为承诺条件，彻底解决竞争担忧；

(2) 如果仍需要部分保留独家条款，需要严格避免该条款产生竞争损害，至少需要符合下列条件：

- a. 需要考虑市场权势因素，户户送和 Foodpanda 市场份额继续增加则需要全面禁止任何形式的新增独家合作。
- b. **两家外卖平台充分保护新进入者和低市占率平台。对于新进入者和过去户户送和 Foodpanda 实施独家条款的期间属于低市占率的平台，排除独家条款的适用；就本案而言，可以直接认定独家合作条款仅适用于户户送和 Foodpanda 之间。**

既然竞委会确认，户户送和 Foodpanda 两个平台的独家协议行为，对存量低市占平台和近期新进入者形成了严重的封锁效果，则应采取有效措施消除两个平台因长期实施相关行为带来的反竞争效果。而存量低市占平台和近期新进入者则长期遭受反竞争封锁，应当排除原反竞争行为可能的不利影响，具体承诺为：排除独家条款对新进入者和存量低市占率平台的适用；我们认为这种保护应该是永久的，如果一定要附加期限，应当是与反竞争行为持续期限对等，至少是接受该项承诺起 3 年。

- c. **充分保护餐厅合法权益和自主选择权。**

鉴于上文分析，由于两个平台的市场权势，无论新餐厅还是老的独家餐厅，在选择上线其他平台时，有时难以给予通知。在该情况下，餐厅已将面临经营成果的不确定性和确定性的费率上涨，如果承诺还容许两个平台追溯收取两个月非独家费率佣金，这可能会被餐厅视为一项惩罚，从而不敢选择其他平台。这对餐厅是不公平的，因此，相关承诺不应提供追溯收取非独家费率佣金的可能性。

- d. 另外，我们认为在确定相关市场的低市占率平台时，相关市场的主要竞争者应当有参与调查和提出建议的权利，该项程序性权利需要得到充分保障，以确保竞委会得到客观和全面的信息和意见，在公平、公开的条件下做出这重要的决定。

4. 其他参考性建议

4.1 当前承诺对其他领域竞争也会产生负面影响

竞委会接受的承诺会成为各业务实体的参考，而此类承诺如果接受，容易拓展到其他领域，造成严重的、系统性的竞争损害。此次案件中，户户送和 Foodpanda 的行为反竞争效果更加严重，但竞争委员会却通过把市占标准定在极低水平，间接是对反竞争行为给予一定程度的认同，会使其他领域中具有相当市场权势的主体纷纷效仿，以费率差为核心的独家政策阻碍其他主体进入市场。很难想象在酒店预定、电子商务、出行打车等连接平台市场的经营者纷纷效仿使用独家条款，排除其他经营者进入市场或扩展业务。

同时，我们注意到竞委会在 2022 年 5 月网上旅行社网站一案中，三个平台承诺不会执行或订立平价条款、条件条款和房源平等条款等 MFN 类型条款。假设这些平台有对住宿提供者实施独家条款，我们深信竞争委员会不会容许他们继续有关独家行为，因为独家条款和 MFN 条款一样，具深度封锁市场的效果。我们恳请竞委会在本案中采用一致的标准，方可有效地维护竞争秩序。

4.2 该承诺与其他地区执法实践并不一致，恳请关注

该承诺对于费率差独家条款的看法与其他地区的执法实践并不一致：

在中国大陆地区，执法机构认为以费率差为核心的独家条款属于实施“二选一”行为，严重违反《中华人民共和国反垄断法》。

Google 与分销商签订了协议以通过收入共享换取“搜索的排他性”，美国司法部认为新进入者不具备 Google 的财力，无法承担相应费用，所以该行为涉嫌滥用市场支配地位和纵向垄断协议，在长期调查准备后，美国司法部目前已对谷歌的激励型排他协议提起了诉讼。

欧盟执法机构对反竞争行为的执法更加严苛，MFN、自我优待等均在其规制范围。

两家外卖平台的行为在上述任何地区均是严重违法行为，香港地区接受承诺即是对独家条款合理性的认可，与中国大陆、美国和欧盟这些具有反垄断先进执法经验的地区并不一致，建议予以关注，参考作出相关决定。

4.3 关于相关市场的界定

竞委会认为本案相关产品市场包括：外卖送递服务，包括网上平台提供的中介服务，让最终顾客可在平台上向餐厅订购餐饮，并在短时间内配送餐饮给最终顾客；及 (b) 外卖自取服务，包括网上平台让最终顾客可在平台上向餐厅订购餐饮的中介服务，以及餐厅本身提供的落单服务，其后由最终顾客自行提取餐饮。并认为上述两项服务很可能分别构成不同的相关市场。

对于上述市场界定我们有下列不同意见：

(1) 相关商品的属性、特征和范围界定不清晰

本案相关商品市场为网络餐饮销售平台服务市场。网络餐饮外卖销售平台服务，是指网络餐饮销售平台经营者为餐饮经营者和消费者进行餐饮交易提供的网络经营场所、信息发布，以及基于位置技术的信息匹配、交易撮合等互联网信息服务，具体包括商品信息展示、营销推广、搜索、订单处理、配送及自提等履约交易安排和调度、支付结算、商品评价、售后支持等。

平台因为提供了上述平台中介服务而收费，餐厅因此而付费。

平台提供产品服务是综合性的平台服务，可以建立起一个线上的餐饮商城，消费者可以在商场上挑选餐厅和菜品并下单交易，这是核心服务内容。

外卖自取服务和外卖配送服务只是平台提供服务的一个服务环节，即履约环节的两种方式。未来可能还有其他方式，比如自提柜自取，统一配送到配送站自取等。这并不是划分市场的核心要素。

(2) 需求替代分析不完整，遗漏了经营者需求替代分析，且在消费者需求替代分析中仅关注履约方式的差异而忽略了网络订餐服务这一核心内容

网络餐饮销售平台服务属于多边市场，主要服务餐饮经营者和消费者两个群体，其显著特征是具有跨边网络效应，使各边用户对网络餐饮销售平台服务的需求紧密关联。因此，界定本案相关市场，需要综合考虑平台各边用户之间的关联影响，并主要从餐饮经营者和消费者的角度综合进行需求替代分析，同时进行供给替代分析。

竞委会没有对餐厅侧需求角度进行替代分析，餐厅的核心需求是通过互联网平台完成交易，在堂食之外增加交易和收入，对餐厅而言，其关心的是是否有其他渠道可以和网络销售平台替代，比如自建网站是否可行，这是核心的替代需求；而对于网络餐饮销售平台，是采取外卖还是自取方式履约，对餐厅没有显著区别，通常具有可替代性。

关于消费者的需求替代分析，首先在通过网络平台订餐这一核心需求上并无差异，其次，自取和外送是两种履约方式，且自取履约更多的是对外卖履约的一种补充，是否能够独立存在一个仅支持自取的餐饮销售平台都难以确定；最后，消费者对配送方式的需求与消费者对餐品类型的需求、口味的需求在同一维度，按照这一逻辑，一个火锅类的平台服务和烧烤类的平台服务也不具有替代关系，可以划分为两个市场，这种划分方式偏离了产品属性和核心需求，只是不同的分类。

(3) 促销活动对于销量的影响可以客观反映出替代性，建议补充调查

从经营实践来看，同一个平台如果外卖的配送方式搞活动，自取的数量会受影响；如果自取搞活动，外卖同样会受影响，这是具有替代关系的一个证据。

(4) 其他司法辖区类似案件中界定的相关市场包括外卖送递服务和外卖自取服务

英国 CMA 在审查 Just Eat 收购 Hungryhouse 案、Takeaway 收购 Just Eat 案和 Amazon 收购户户送案中均认为相关市场为在线食品平台市场，包括食品订购市场（即平台提供点单服务，用户自提，不包括配送服务）和物流配送市场（即平台提供点单服务和配送服务）。

(5) 独家安排覆盖两种履约方式，人为划分为两个市场，极大增加承诺措施与执行的复杂度

首先，我们并没有看到单纯的只做自取履约的餐饮销售平台，自取只是对外卖配送方式的一种补充，所谓独立的自取式餐饮销售平台服务市场客观上并不存在。

其次，本案中 FP 和 DE 的独家协议行为，并不区分两个市场分别实施，或者实施不同的政策，人为区分两个市场，需要逐个市场分析竞争损害，逐项提出承诺，这并没有实际意义，且操作复杂。

(6) 如果坚持划分为两个市场，需要就两个市场分别进行承诺

在自取餐饮平台市场，同样需要明确，排除独家条款适用的平台如何确定等。需要确定在自取市场上哪些平台属于低市占率平台。

综上，我们认为，本案相关商品市场应为网络餐饮销售平台服务市场，自取和外卖只是可选的履约方式分类，且自取只是补充，难以独立存在，并不构成两个独立市场。应当在网络餐饮销售平台服务市场统一评估订单量、交易额等情况，分析市场占有率等。

2nd Part

Even if we come back and analyze the competition harms of Foodpanda and Deliveroo (the “**Two OFPs**”) and the effective measures to address such competition concerns and harms within the Competition Commission’s existing framework, we consider the following issues shall be addressed:

- Issue (I): the proposed market share threshold and market definition used for defining Low Market Share Platforms is inappropriate;
- Issue (II): the relevant duration used to calculate 10% Market Share and 30% Market Share should be adjusted and consistent;
- Issue (III): the definition of the order value should be clarified and exclude orders incentivized by promotions offered to attract end-customers to trial an OFP;
- Issue (IV): in order for the non-circumvention provision in the Commitments to be fully effective, clarifications are needed to the complaints process in the Commitments.

Issue (I). The proposed market share threshold and market definition used for defining Low Market Share Platforms is inappropriate

Recommendation for Issue I: The Commission should increase the 10% market share threshold for Low Market Share Platforms to at least 15% as 10% is unlikely to be indicative of "significant competitive presence in Hong Kong" in the Order to Deliver Service market (please refer to detailed explanation below). Additionally, the Commission should also use market share concentration ratios e.g. CR₃ or other measures to take into account the differences in the relative size of competing platforms vis-a-vis the Two OFPs to supplement the market share threshold used to define Low Market Share Platforms. Further, the proposed market definition is too narrow and, in order to more accurately reflect the relative strength of OFPs, should include both Order to Deliver Services and Order to Pick Up Services. Put another way, the Initial Commitments and the New Commitments (collectively, the “**Commitments**”) will only be sufficient in addressing the competition concerns if the threshold is increased to at least 15%, market share concentration ratios are used to define Low Market Share Platforms and the market definition is corrected to include both services offered by OFPs in this space.

Detailed Explanation

The New Commitments provide the following definition:

- “Low Market Share Platforms” means third party platforms (including their Affiliates), other than Foodpanda and any other platform which exceeds a 10% Market Share (as demonstrated by Foodpanda or Deliveroo to the Commission pursuant to clause 3.7 or 3.8 below).
- “10% Market Share” means a monthly market share by order value, measured in any calendar month since the Effective Date, of 10% for Order to Deliver Services.

We understand from paragraph 79 of the Revised Notice that 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”.

We further understand that the Commission’s intention for the proposed carve-out of “Low Market Share Platforms” from Exclusive Terms aims to limit the ability of the Exclusive Terms to foreclose Low Market Share Platforms by ensuring partnering restaurants may still use the Two OFPs. We are of the view that the 10% threshold is too low and is arbitrary, as a competing platform with even 15% market share (measured by order value) does not have sufficient market power to compete effectively with the Two OFPs and its business operations are unlikely to have a durable impact on the process of competition in the Order to Deliver Service market. Our reasoning is set out below.

a. The market is multi-sided and a market share threshold that is greater than 10% is needed to take into account other sides of the market

The Order to Deliver Service market is a multi-sided market involving at least three sides, namely Partner Restaurants, riders and end-customers. Direct and indirect network effects amongst all these sides are crucial in establishing and expanding the scale and scope of an Order to Deliver Service platform.

For example, a third-party market research report published by measurable.ai observed that only 17% of Hong Kong Order to Deliver Service end-customers use both the Foodpanda and Deliveroo app, and end-customers are becoming more loyal over time³. Without a sufficient base of end-customers, it is unlikely that Partner Restaurants would sign up to operate on the Order to Deliver Service platform.

On the other hand, having more Partner Restaurants would lead to indirect network effects on the riders’ and end-customers’ side of the markets. More end-customers are attracted to use the platform as there is a wider variety of F&B offerings by Partner Restaurants. More riders are attracted to operate on the platform as there is a higher chance of more successful matches of end-customer orders and F&B offerings by Partner Restaurants which translate to higher delivery fee revenues. This argument is evidenced by the offers provided by the Two OFPs regarding these other sides of the market *e.g.* end-customer promotions⁴, rider incentives⁵.

That said, we understand that the Commission’s competition concerns arise mainly from the Two OFPs’ conduct vis-a-vis the Partner Restaurant side of the market, and the Commitments address the Two OFPs’ conduct vis-a-vis Partner Restaurants. Consequently, the 10% Market Share threshold appears to only factor in the Partner Restaurant side of the market.

Relatedly, competition policy research by the EU Department of Competition (“EU DG Comp”) staff officers reflected that difficulties arise with metrics, in particular: (i) whether market shares are calculated at platform level, or on distinct sides of the market; (ii) whether market shares are

³ Source: <https://blog.measurable.ai/2022/10/26/hong-kong-food-delivery-market-overview-2018-2022/>

⁴ Foodpanda first time user promotions- <https://www.foodpanda.hk/contents/referral-terms>

⁵ Deliveroo- <https://riders.deliveroo.hk/en/news/weekly-incentive>

indicative of market power.⁶

Given the above, we submit that a market share threshold that is higher than 10% is required to reflect market power considerations from other sides of the market i.e. end-customers and riders. The higher market share threshold will be more reflective of when a competing platform i.e. the “Low Market Share Platform” has the ability to compete effectively against Foodpanda/Deliveroo that is able to, under the Commitments, re-introduce the Exclusive Commission Rate, and Exclusivity Terms.

b. Gap between 10% and 30% (where Foodpanda/Deliveroo is allowed to impose Breach of Exclusivity Provisions, Tying Provisions and Price Restriction Provisions) may be too wide

Relatedly, the Commitments allow Foodpanda/Deliveroo to enter into and enforce agreements with Breach of Exclusivity Provisions, Tying Provisions (applicable to Foodpanda only) and Price Restriction Provisions when Foodpanda/Deliveroo can demonstrate that it has fallen below a 30% Market Share. It can be inferred from the Commitments that a market share of below 30% means that Foodpanda/Deliveroo is no longer able to foreclose competition in the Order to Deliver Service market as a competing Platform regardless of its market shares will be able to compete effectively against Foodpanda/Deliveroo. This is defective logic from a competition economics perspective. A Low Market Share Platform would still find it difficult to enter or expand in the Order to Deliver Service market.

We assume hypothetically that Foodpanda’s market share increased to 65% while Deliveroo’s market share decreased to 29% and a Low Market Share Platform’s market share is around 6%. The Low Market Share Platform will not be able to compete effectively against Deliveroo given the significant difference in market shares between them, and the fact that Deliveroo can now reintroduce Breach of Exclusivity Provisions, and Price Restriction Provisions. It may well be the case that Deliveroo’s re-introduction of such provisions, coupled with Deliveroo’s and Foodpanda’s existing scale and scope of their respective network, effectively prevent the Low Market Share Platform from expanding in the Order to Deliver Service market. Ultimately, the Order to Deliver Service market will revert to “duopolistic” competition between the Two OFPs.

Given the above, the Commission should consider using market share concentration ratios e.g. CR₃ or other measures to take into account the differences in the relative size of competing platforms vis-a-vis the Two OFPs to supplement the market share threshold used to define Low Market Shares Platform.

c. These are dynamic markets and a 10% market share threshold for a Low Market Share Platform risks the Commitments being ineffective to address the competition harm

The Commission states that 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”.⁷ However, the Commission has not specified the evidence upon which it relies, and it is unclear whether the assessment was also conducted using a 15% threshold to see if, even at that level, platforms would not be able to maintain a significant competitive presence in Hong Kong, which we consider to be the case.

As the Commission acknowledges in both the First Notice and the Revised Notice, these are dynamic markets. In fact, this is the reason that the Commission is willing to accept a shorter duration of 3 years for the Commitments, instead of 5 years which it has commonly accepted in other cases. In any dynamic market, the Commission will appreciate that market shares can easily fluctuate, and market shares are not necessarily an accurate indicator of market power. Therefore,

⁶ Source: https://competition-policy.ec.europa.eu/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf. See pages 61 and 62

⁷ Paragraph 79 of the Revised Notice

in our view, there is a very real risk that setting the threshold for Low Market Share Platform at 10%, coupled with a shorter duration of 3 years, means that the Commitments will be ineffective in addressing the potential competition harm that the Commission has identified in its investigation.

At a minimum, therefore, the Commission should increase the market share threshold for Low Market Share Platform to at least 15% if it wishes to address the competition harm.

d. The Commitments must not only facilitate new entry, but must enable new entrants to maintain a significant competitive presence on the market

In Hong Kong, recent market dynamics demonstrate that it is extremely difficult to maintain a competitive presence for Order to Deliver Services. As noted in paragraphs 24-28 of the Revised Notice, there have been a number of attempts to enter this market, including Honestbee, UberEats, Lingduck, HKTVmall and 51wm. However, even though many of these were well-resourced international players, within a short space of time from May 2019 to October 2022, they have all exited the market, suspended their services, or altered their business model, such that none of these new entrants now offer Order to Deliver Services. It therefore suggests that the real challenge lies not in market entry, but in the ability to maintain a competitive presence. So it is all the more important to ensure that the Commitments are effective in not only facilitating entry into this market, but also in enabling these new entrants to maintain a significant competitive presence.

Indeed, the Commission's proposed approach risks being counter-productive in this respect. Rather than allowing a successful new entrant to consolidate and build on any initial growth to develop into a true challenger to the Two OFPs, through setting the market share threshold for Low Market Share Platforms so low, the Commission risks introducing a barrier to expansion for new entrants, putting them at a disadvantage far too early in their development in the Hong Kong market. By way of example, the current threshold is only slightly above UberEats' share of the market (see, for example, Figure 2 below), immediately before its share began to decline and its withdrawal from Hong Kong.

Far from encouraging significant new players in this space, the Commitments make it *less* likely that a new entrant will be able to build and maintain the scale needed (as set out in section a above) to fully challenge the Two OFPs. By setting the threshold so low, at exactly the stage new entrants are developing the required scale, the Commitments risk ossifying the market into a space with the Two OFPs as the entrenched large players with, at best, a potentially relatively large tail-end of very small rivals that cannot fully compete with the Two OFPs.

The Commission should not be looking for a 'quick fix' to the potential anti-competitive effects it has identified; it should ensure that the Commitments will be effective in facilitating lasting change to the market. Therefore, at a minimum, it needs to increase the market share threshold for Low Market Share Platform to at least 15%.

e. Threshold references from EU and Singapore in defining similar market shares

We have not sighted any market shares threshold published by competition authorities/academic researchers that is indicative of when a new entrant is large enough to be able to effectively compete in a multi-sided platform market. That said, given that the Commission's concerns relate to a possible contravention of the First Conduct Rule, inference can be drawn from indicative market share thresholds published in the EU DG Comp Article 101 Guidelines and the Competition and Consumer Commission of Singapore ("CCCS") Section 34 Prohibition Guidelines. The market share thresholds, prescribed by the EU DG Comp and the CCCS, which measure the anti-competitive effects arising from anti-competitive agreements (i.e. the relevant prohibition which is similar to the Commission's First Conduct Rule) are higher than 10%.

(i) EU DG Comp's Article 101 Guidelines

As the Commission's case is in relation to a possible contravention of the First Conduct Rule and the Commission also borrowed the 30% safe harbour threshold from the EU's block exemption regime for vertical agreements (footnote 33 of the Revised Notice), direct reference can be drawn from the EU DG Comp's Article 101 Guidelines' market share thresholds that are indicative of market power. Pertinently, the EU DG Comp noted in relation to joint purchasing arrangements, and commercialisation agreements that it is unlikely that market power exist if the combined market shares do not exceed 15% (reference: paragraphs 208, 240 and 241 of the Article 101 Guidelines). This means that the EU DG Comp is more likely to pursue enforcement if the 15% market share threshold is exceeded, as such agreements would have an impact on the process of competition in the relevant market(s).

(ii) Singapore

Aside from the EU DG Comp, due to the similarities shared between Hong Kong and Singapore where both are small and open economies, reference can also be drawn from the CCCS's Section 34 Prohibition Guidelines. The Section 34 Prohibition in Singapore is similar to the First Conduct Rule. Pertinently, the CCCS noted (paragraph 2.25 of the Section 34 Prohibition Guidelines) that the agreements will generally have no appreciable adverse effect on competition:

- if the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets affected by the agreement where the agreement is made between competing undertakings;
- if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between noncompeting undertakings;
- in the case of an agreement between undertakings where each undertaking is an SME. In general, agreements between SMEs are unlikely to be capable of distorting competition appreciably within the section 34 prohibition. Nevertheless, CCCS will assess each case on its own facts and merits and the markets concerned.

Where it may be difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors, the 20% threshold will be applicable. These market share thresholds mean that the CCCS is more likely to pursue enforcement if the 20%/25% market share threshold is exceeded, as such agreements would have an impact on the process of competition in the relevant market(s).

As we can see from the above examples, the EU DG Comp considers that market shares below 15%, while the CCCS considers that market shares below 20% threshold is unlikely to have an impact on the process of competition in the relevant market(s). Whilst these are not perfect indicators, we consider them relevant proxies which the Commission can refer to, as these competition authorities consider that market shares of parties in agreements that exceed such thresholds are capable of exerting some competitive influence on the process of competition in markets.

In applying this to case EC/03JJ, it would be more in-line with the position taken by other regulators for the Commission to recognize that a new entrant needs at least this level of market share in order to withstand potential foreclosure conduct of incumbents. Given the above, we recommend that the Commission consider increasing the 10% market share threshold for Low Market Share Platforms to *at least* 15%.

f. In any event, the Commission's suggestion that Order to Deliver Services and Order to Pick Up Services should be defined as separate markets is artificial and inaccurate.

We note that the Commission acknowledged in both the First Notice and the Revised Notice that Order to Deliver Services and Order to Pick Up Services are "likely to be distinct relevant markets

for the provision of F&B to end customers". This approach to market definition is particularly problematic here as it means the strength of the Two OFPs is not accurately reflected in the Commission's assessment, given a large part of the Two OFPs' businesses, consumer spend and Partner Restaurant business is not captured.

From a supply-side perspective, there is no difference to a Partner Restaurant and only minimal difference to OFPs between an order that customer will pick-up and an order that a customer will deliver.

From a demand-side perspective, in response to a small but significant and non-transitory increase in price in food delivery, we consider it likely that consumers would switch to picking-up the food from Partner Restaurants themselves. These services are certainly presented as substitutable on the Two OFPs' apps.

This clear substitutability shows how artificial the Commission's conclusion here is. This explains why it is out of step with international equivalents, such as the UK's Competition and Markets Authority, which found: "food ordering marketplaces and logistics-enabled marketplaces are sufficiently close substitutes to be considered part of the same product market"⁸ without making a distinction between delivery and pick-up services.

Therefore, the calculation of market share should be with respect to both the Order to Deliver Services and Order to Pick Up Services.

Issue (II): The relevant duration used to calculate "10% Market Share" and "30% Market Share" should be adjusted and consistent
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Recommendation for Issue II: Likewise, we welcome the Commission's proposed approach to define the relevant duration for calculating 10% Market Share and 30% Market Share as this will ensure effective implementation and monitoring of the Commitments. However, the Commission should increase the duration used to calculate "10% Market Share" and "30% Market Share" to *at least* a quarter, i.e., 3 months. In dynamic tech markets, that an online food delivery platform has a market share of over 10% in one calendar month in no way demonstrates definitively that they have a "significant competitive presence in Hong Kong". Put another way, the Commitments will be more effective in accurately identifying significant players, and so addressing the competition concerns in this space, if the relevant durations are increased.

Detailed Explanation

Under Annex 1 of the Revised Notice:

- "10% Market Share" means "a **monthly market share** by order value, measured in **any calendar month** since the Effective Date, of 10% for Order to Deliver Services". (emphasis added)
- "30% Market Share" means a **monthly market share** by order value, measured in **two consecutive calendar months** since the Effective Date, of 30% for Order to Deliver Services. (emphasis added)
- "Low Market Share Platform" means "third party platforms (including their Affiliates), other than Foodpanda and any other platform which exceeds a 10% Market Share (as demonstrated by Deliveroo or Foodpanda to the Commission pursuant to clause 3.7 or 3.8 below)".
- Deliveroo may submit, no more than four times within a one-year period, the relevant market share calculations in support of its position to the Commission in writing... (Clause 3.7(a)).
- Deliveroo's right to stop treating a third-party platform as a Low Market Share Platform

⁸ Paragraph 5.30 of Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo: Final report, available at https://assets.publishing.service.gov.uk/media/5f297aa18fa8f57ac287c118/Final_report_pdf_a_version_----.pdf

pursuant to clause 3.7(e) will also apply from the day the Commission indicates in writing to Deliveroo that it considers that the platform exceeds, or is deemed to exceed, a 10% Market Share following a notification made by Foodpanda under the equivalent provisions of any commitment given by it. (Clause 3.8).

This suggests that when determining whether an OFP is a Low Market Share Platform, the Commission will look at the monthly market share of an OFP. If the Two OFPs can demonstrate that the monthly market share of an OFP in *any single calendar month* exceeds 10%, Foodpanda and Deliveroo may, pursuant to the mechanism under Clauses 3.6 and 3.7 of Annex 1 of the First Notice and Clauses 3.7 and 3.8 of Annex 1 of the Revised Notice respectively, submit the underlying data to the Commission. If the Commission considers that such OFP exceeds, or is deemed to exceed a 10% Market Share, then the Two OFPs are permitted to stop treating that OFP as a Low Market Share Platform and make any Exclusive Commission Rate or obligation of exclusivity agreed between them and a Partner Restaurant conditional upon the Partner Restaurant not partnering with such OFP.

Similarly, when considering whether the market share of the Two OFPs falls below the 30% Market Share, the Commission will look at the monthly market share measured in two consecutive calendar months only.

a. The proposed approach fails to account for the significant fluctuation in shares in this market

As market share can vary significantly in a dynamic market such as this, especially for new entrant platforms, market share of one month won't be able to accurately reflect the true market position of an OFP, and therefore, the objective of the Commission to allow OFPs which have low market shares or are new entrants to effectively compete in the market may not be effectively pursued. The Commission alludes to this fluctuation in both the First Notice and the Revised Notice, yet does not appear to address it (giving the reason for the threshold as simply that "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" (emphasis added)).

As per a third-party market research report published by measurable.ai⁹, the quarterly market share of OFPs, even the Two OFPs whom the Commission described as having a relatively steady market share, fluctuates (often significantly) from quarter to quarter. We consider the monthly market share of only a calendar month to be as highly fluctuating, if not more, and therefore is not a clear representation of the market share/ market power of an OFP.

b. A temporary increase above the 10% threshold is disproportionately penalised

To further illustrate in the context of Low Market Share Platform, an OFP may have a monthly market share of less than 10% in the 11 months across the whole calendar year, except for that one month when it implements a short-term promotion which increases its market share by order value of that particular month to above 10%. Under the current drafting of Annex 1 in the First Notice and the Revised Notice, assuming the underlying data is reasonable and justifiable, such OFP would be considered exceeding the 10% Market Share, and is therefore no longer a Low Market Share Platform. Given that one month market share of the OFP is an outlier, and is not representative of the market share of the OFP nor its market power, we consider that it is more reasonable to look at the market share of an OFP over a longer duration, e.g., its market share across a quarter.

Indeed, given the consequences of exceeding the 10% threshold for just one calendar month, the Commission risks disincentivising such short-term promotions – an important element of competition in this market – by smaller players, especially those approaching the 10% threshold. Again, the Commission risks creating a barrier to expansion for successful new entrants, with

⁹ Source: <https://blog.measurable.ai/2022/10/26/hong-kong-food-delivery-market-overview-2018-2022/>

consequent negative effects on their growth and, through removing the benefits of short-term promotions, introducing potential harm to Partner Restaurants and end-consumers in Hong Kong.

c. The approach to market share for the Two OFPs is inconsistent – but still covers too short a time period

The same applies to the assessment period of the market share of the Two OFPs. Although the Commission at least appears to recognise the inadequacy of a one-month review period by looking at their monthly market share for two consecutive calendar months, we consider a two-month period is still too short to accurately reflect a player's market position.

Relatedly, paragraph 3.11 of the Commission's Guidance on the Second Conduct Rule states that "It is important to consider the evolution of the market shares of the undertakings in the relevant market, as this will often be more informative than a snapshot picture of market shares at a single point in time". Additionally, "an undertaking is more likely to have a substantial degree of market power if it has a high market share which it has either maintained or grown over time, while its competitors have relatively weak positions". The same principles would apply when comparing a one-month market shares "snapshot" to a 3-month market shares "snapshot".

d. Such a "snapshot" approach risks unpredictability and instability for restaurants and consumers

Given the fluctuation in platforms' market shares in this very dynamic market, such a "snapshot" approach to market shares and the classification of online platforms will also introduce significant unpredictability and instability for restaurants. If the classification of Low Market Share Platforms changes in reaction to such short-term fluctuations in market share, frequent changes to commercial terms are possible, and even likely, which means the OFPs with whom restaurants contract may change regularly. Introducing such instability for restaurants (including many small businesses) in Hong Kong is in itself a disincentive for restaurants to partner with Low Market Share Platforms in the first place, with a knock-on negative effect on consumers that use OFPs. This is an outcome the Commission can easily avoid through introducing longer and more accurate timeframes for the market share assessment.

e. Applying a test of at least three consecutive months would be more accurate, more predictable and less burdensome

Lastly, given that the Commission provides each of the Two OFPs the opportunity to report to the Commission regarding market share of OFPs no more than four times a year, we recommend that the assessment period of market shares should be at *least* three consecutive months for both the 10% Market Share and 30% Market Share.

Such an approach would help to address the concerns raised above that the Commission's proposed "snapshot" approach does not accurately reflect OFPs' positions and could create barriers to expansion through unduly penalising temporary increases above the 10% threshold. It would also create greater stability and predictability for restaurants, most of whom are small businesses without the resource to deal with frequent changes to their contractual positions regarding rates of commission.

Further, adopting a test of at least three consecutive months would mean updates are only needed in response to a genuine and sustained change in the OFPs' respective market positions. This would necessarily happen less often than an OFP having a 10% share in any given month, which may well be temporary (e.g. in response to short-term promotions) and not maintained by the OFP. As the Commitments specify that the Commission may "conduct its own assessment and gather information from third parties" to verify a claim by either of the Two OFPs that a Low Market

Share Platform exceeds the relevant 10% threshold,¹⁰ referring to market shares reflecting three consecutive months would not only be more accurate but would also place a lesser and more proportionate burden on the Commission's resources.

f. The proposed approach to classification unduly favours the Two OFPs

We would also like to seek clarification from the Commission on whether the protection intended for the Low Market Share Platform will continue to apply if an OFP exceeds the 10% Market Share such that it will no longer be a Low Market Share Platform, but subsequently the same OFP's market share falls below the 10% Market Share. If so, what is the Commission's proposed mechanism, given this scenario does not seem to be anticipated in the First Notice, the Revised Notice and their annexes.

In their current form, the Commitments unduly favour the Two OFPs, as they are the only players able to challenge, and propose changes to, the classification of OFPs in Hong Kong, while a Low Market Share Platform that is reclassified after a temporary rise above the 10% threshold appears to have no mechanism to apply for this to subsequently be corrected.

Issue (III): The definition of the order value should be clarified and exclude orders incentivized by promotions offered to attract end-customers to trial an OFP, which are needed for overcoming the entry barriers caused by Foodpanda and Deliveroo

If the market shares are to be calculated by reference to "order value", it is important to have a consistent definition to ensure OFPs are calculating market shares in the same way. As we failed to find a concrete definition of order value in the Notice and the Commitments, we suggest the Order Value should be clearly defined in the following ways:

1. the Order Value per order shall be the final price actually paid by the customers, i.e. the Order Value = the original price offered by the restaurants on OFPs + delivery fees + platform fees – vouchers and discounts offered by the OFPs or the restaurants.
2. the Order Value per order shall exclude any orders that were placed but subsequently cancelled by the end-customer, Partner Restaurant, rider or the OFP.
3. At least for OFPs other than the Two OFPs, any orders that result from promotions that incentivise customers to trial an OFP, should be excluded. This is because:
 - (a) The vast majority of such orders are relevant to challenger OFPs rather than the Two OFPs. These new entrants, by definition, need to incentivise end-customers to try their platform. Therefore, including the result of such incentives unfairly penalises such OFPs' efforts to expand in this space and build scale sufficient to challenge the Two OFPs effectively.
 - (b) Customers taking up such promotions may not have used the relevant OFP previously, and may not do so again after taking advantage of the incentive, so the inclusion of such promotions does not necessarily reflect any sustained growth in that OFP's position – it would therefore be artificial to include it in any measure of its strength.
 - (c) Failure to take this approach is likely to disincentivise such promotions, which, as above, are a key part of this industry and critical to the success of any new OFP. Such a disincentive would create barriers to expansion and harmful effects on Partner

¹⁰ Clause 3.6.d. of the Initial Commitments and Clause 3.7.d. of the New Commitments

Restaurants and end-customers in Hong Kong.

- (d) This issue would be compounded by a failure by the Commission to accept our submissions on the inaccuracy and ineffectiveness of a one-month “snapshot” approach to market share, as a large short-term promotion may artificially inflate an OFP’s share of the market for a month before it returns to a significantly lower level.
4. when it comes to the aggregate order values in the entire Hong Kong market, the aggregate order values generated by the two OFPs under “Outlet Expansion Terms” and “Profit Guarantee Terms” shall be included.

Furthermore, as the concept of “Low Market Share Platform” was only introduced in the Commitments and is without any other existing legislative reference/basis, only after the public consultation on the Commitments have completed, the various representations have been given due and proper consideration by the Commission, and the commitments are accepted as effective by the Commission, can a platform be recognized as a “Low Market Share Platform” by using the standards and mechanisms of “Low Market Share Platform” in the effective commitments and the order value of such platform from the effective date of the commitments (and not before). These procedural points are important to ensure that the commitments process is fairly and appropriately carried out. Failure to do so could open the Commission up to potential challenges.

Issue (IV): In order for the non-circumvention provision in the Commitments to be fully effective, clarifications are needed to the complaints process in the Commitments. For example, the Two OFPs may increase commission rates in a way that does not explicitly breach the Commitments but which has the effect of constructively dissuading Partner Restaurants from partnering with a Low Market Share Platform and the Commission should be alerted to any such incident

Recommendation for Issue IV: We consider that the proposed reporting requirements for the compliance statement at paragraph 3.4(d) of the Annex 1 of the First Notice and the Revised Notice respectively, i.e., if such complaints were received, details of the nature of such complaints and how they were dealt with, is an essential and effective mechanism to monitor the Two OFPs' compliance with the Commitments. We note that the Commitments include a non-circumvention provision (e.g. at clause 2.7 of the New Commitments), which suggests that Commission is mindful that it is possible for the Two OFPs to constructively dissuade Partner Restaurants from partnering with a Low Market Share Platform. In order to fully enforce the Commitments and, in particular, the non-circumvention provisions, we recommend that the Commission specify that all complaints received from Partner Restaurants should be included in the compliance statement, including those that the Two OFPs themselves consider not to relate to the Commitments and those that the Two OFPs reject or resolve, and that this be accompanied with a publicity campaign by the Commission to ensure Partner Restaurants are aware of the importance of the complaints process.

Detailed Explanation

We welcome the inclusion of the reporting requirements at clauses 3.3 to 3.6 of the New Commitments and in particular the clarification in clause 3.4.d. that if complaints regarding compliance with the New Commitments are received, the Two OFPs must set out “details of the nature of such complaints and how they were dealt with should be provided as part of the compliance statement”.

We note that there may be some scope for the current wording to be interpreted in a way that does not allow the non-circumvention provision at clause 2.7 of the New Commitments to be effectively monitored or enforced. This is particularly important as the New Commitments allow the Two OFPs a large amount of discretion that other OFPs, such as KeeTa, are concerned should not be abused, rendering the New Commitments ineffective at addressing the competition concerns the Commission has identified and placing us at a competitive disadvantage.

For example, the New Commitments expressly refer to “the right of Deliveroo to apply different commission rates to different Partner Restaurants which may be revised from time to time” (emphasis added).¹¹ While we support the flexibility this provides, we note that it may enable Partner Restaurants to be given a less favourable commission rate which is ostensibly for a reason unrelated to the New Commitments but in reality is due to the Partner Restaurants contracting with a Low Market Share Platform. The relevant OFP would claim this conduct was entirely unrelated to the New Commitments and, as complaints need only be disclosed by an OFP if they are “regarding its compliance with this Commitment”,¹² any complaint regarding this by a Partner Restaurant would not be disclosed. This is just one example of potential “loopholes” that may exist given the interplay, in the current drafting, of the non-circumvention provision and the complaint reporting provision.

In order to effectively address this, we would recommend:

1. Clause 3.4.d. be amended to make clear that “any complaints received regarding its compliance with this Commitment” include:
 - a. All complaints made regarding, or potentially regarding, the Commitments, even where the OFP has determined that the complaint, in its review, does not relate to the Commitments; and
 - b. Complaints the OFP has otherwise resolved or rejected.
2. The Commission ensure that the complaints process is well-publicised to Partner Restaurants, many of whom are, in our experience so far, unaware of their rights under the commitment provisions. This is particularly important given that we understand enforcement will rely on such complaints to a significant extent.

**** END OF REPRESENTATIONS****

¹¹ Clause 2.4.e. of the New Commitments

¹² Clause 3.4.d. of the New Commitments