

Representations on case EC/03JJ

We refer to Competition Commission's letter dated 2 June 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 commitments in the Online Food Delivery Platforms Case (EC/03JJ) (the "Notice"). We appreciate the Commission's efforts in creating a better environment for enterprises development and competition in Hong Kong and welcome the proposed commitments made by Foodpanda and Deliveroo (the "Two OFPs"). That being said, we would also like to provide our views on the following issues:

- Issue (I) the market share used for defining Low Market Share Platforms;
- Issue (II) the relevant duration used to calculate 10% Market Share and 30% Market Share;
- Issue (III) the effective date for the protection of Low Market Share Platforms (in particular, Clause 2.3(g) of Annex 1 of the Notice, and Clause 2.3(f) of Annex 2 of the Notice); and
- Issue (IV) the circumventing effects of the raising of the rate for Order to Pick Up Services.

Issue I. The market share used for defining Low Market Share Platforms

Recommendation for Issue I: We welcome the Commission's proposed bright-line market share threshold test for defining Low Market Shares Platforms as this will ensure effective implementation and monitoring of the Commitments. However, the Commission should consider increasing 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 consider using market share concentration ratios e.g. CR-3 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. Put another way, the Commitments will become more effective in addressing the competition concerns if the threshold is increased to at least 15% and market share concentration ratios are used to define Low Market Shares Platform.

Detailed Explanation

The proposed commitment provides the following definition:

- "Low Market Share Platforms" means third party platforms (including their Affiliates), other than Deliveroo/Foodpanda and any other platform which exceeds a 10% Market Share (as demonstrated by Foodpanda or Deliveroo to the Commission pursuant to clause 3.6 or 3.7).
- "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 90 of the 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 a competing platform with 10% 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. 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 getting loyal throughout the years¹. 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 partnering 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 partnering restaurants which translate to higher delivery fee revenues. This argument evidenced by the offers provided by the Two OFPs regarding these other sides of the market *e.g.* end-customer promotions², rider incentives³.

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 proposed 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 indicative of market power.⁴

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 proposed 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 proposed 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 proposed commitment 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%.

¹ Source: <https://blog.measurable.ai/2022/10/26/hong-kong-food-delivery-market-overview-2018-2022/>

² Foodpanda first time user promotions - <https://www.foodpanda.hk/contents/referral-terms>

³ Deliveroo - <https://riders.deliveroo.hk/en/news/weekly-incentive>

⁴ Source: https://competition-policy.ec.europa.eu/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf. See pages 61 and 62

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. CR-3 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. 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 relates 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 36 of the 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 could 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.

The argument in relation to case EC/03JJ would be that a new entrant needs at least this level of market shares 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%.

Issue II: The relevant duration used to calculate “10% Market Share” and “30% Market Share”
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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. A market share calculated based on a calendar month is unlikely to be representative of an online food delivery platform’s “significant competitive presence in Hong Kong”. Put another way, the Commitments will be more effective in addressing the competition concerns if the relevant durations are increased.

Detailed Explanation

Under Annex 1 of the 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 Deliveroo and any other platform which exceeds a 10% Market Share (as demonstrated by Foodpanda or Deliveroo to the Commission pursuant to clause 3.6 or 3.7 below)”.
- Foodpanda 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 3.6(a)).
- Foodpanda’s right to stop treating a third-party platform as a Low Market Share Platform pursuant to clause 3.6(e) will also apply from the day the Commission indicates in writing to Foodpanda that it considers that the platform exceeds, or is deemed to exceed, a 10% Market Share following a notification made by Deliveroo under the equivalent provisions of any commitment given by it. (Clause 3.7).

Similar clauses are included in Annex 2 of the Notice which apply *mutatis mutandis* to Deliveroo.

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 calendar month* exceeds 10%, they may, pursuant to the mechanism under Clauses 3.6 and 3.7 of the respective Annex, 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.

As market share can vary significantly, 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.

As per a third-party market research report published by measurable.ai⁵, the quarterly market share of OFPs, even the Two OFPs whom the Commission described as having a relatively steady market share, fluctuates from quarter to quarter. We consider the monthly market share of only a calendar month to be as fluctuating, if not more, and therefore is not a clear representation of the market share/ market power of an OFP. 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 the Annexes, 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.

The same applies to the assessment period of the market share of the Two OFPs. Although the Commission will look 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 "snap shot" to a 3-month market shares "snap shot".

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.

For completeness, we would like to seek clarifications 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 Notice or the Annexes.

⁵ Source: <https://blog.measurable.ai/2022/10/26/hong-kong-food-delivery-market-overview-2018-2022/>

Issue III: The effective date for the protection of Low Market Share Platforms

Recommendation for Issue III: As of Effective Date, each of the Two OFPs should commit that the Exclusive Commission Rate or obligation of exclusivity agreed between Foodpanda / Deliveroo and a Partner Restaurant do not prevent the Partner Restaurant from partnering, having any communication or entering into Agreements for the Relevant Services with any Low Market Share Platforms.

Detailed Explanation

Pursuant to the Annexes, each of the Two OFPs commits from the Effective Date not to enforce any Relevant Provisions with respect to any existing Agreements applicable to Partner Restaurants and issued before the Effective Date.

In Annex 1 of the Notice:

- “Relevant Provisions” means the Breach of Exclusivity Provisions, Price Restriction Provisions, and Tying Provisions.
- “Breach of Exclusivity Provisions” means any provisions contained in any of Foodpanda’s Agreements with Partner Restaurants in relation to switching from Exclusive Terms to Non-Exclusive Terms, insofar as such provisions:
 - (i) require a minimum of 90 days’ notice by a Partner Restaurant to Foodpanda to switch from Exclusive Terms to Non-Exclusive Terms;
 - (ii) allow Foodpanda to claw back from Partner Restaurants the difference between the Exclusive Commission Rate and the Non-Exclusive Commission Rate for six months preceding Foodpanda’s discovery of the switch;
 - (iii) restrict Partner Restaurants from approaching for talks or negotiations, entering into any Agreement or otherwise have any dealings with any third party online platforms providing the Relevant Services; or
 - (iv) in any other way restrict Partner Restaurants from, or penalise them for, switching from Exclusive Terms to Non-Exclusive Terms,**(for the avoidance of doubt, not including provisions (i) pursuant to which Foodpanda charges the Non-Exclusive Commission Rate to Partner Restaurants which switch from Exclusive Terms to Non-Exclusive Terms or (ii) permitted by operation of clause 2.3 below).** (emphasis added)
- Within 90 calendar days from the Effective Date, Foodpanda will (i) amend its contractual documentation for existing Partner Restaurants; and (ii) update its template Agreements for future Partner Restaurants, so as to in clear and unambiguous language:
 - ...
 - (g) *specify that any Exclusive Commission Rate or obligation of exclusivity agreed between Foodpanda and a Partner Restaurant do not prevent the Partner Restaurant from partnering, having any communication or entering into Agreements for the Relevant Services with any Low Market Share Platforms. (Clause 2.3(g)) (“Low Market Share Platform Protection”).*

Similar clauses are included in Annex 2 of the Notice which apply *mutatis mutandis* to Deliveroo.

While we appreciate the Commission’s efforts to reduce barriers to entry and expansion for Low Market Share Platforms, we respectfully ask the Commission for clarification on whether the Low Market Share Platform Protection should be applicable as of Effective Date, instead of by the end of 90 calendar days from the Effective Date latest.

At first glance, subsections (iii) and (iv) of the definition of “Breach of Exclusivity Provisions” may seem to have covered the Low Market Share Platform Protection. On a closer (and plain) reading, they do not.

- Subsection (iii) prohibits the Two OFPs to restrict Partner Restaurants from approaching for

talks or negotiations, entering into any Agreement or otherwise have any dealings with any third-party online platforms providing the Relevant Services. However, it does not exclude the ability of the Two OFPs to increase the commission rate charged to Partner Restaurants if they end up partnering with these other third party online platforms during the 90 calendar days from Effective Date.

- Subsection (iv) aims to operate as a catch-all provision to prohibit the Two OFPs to penalize its Partner Restaurant when it switches from Exclusive Term to Non-Exclusive Term. However, it will still not catch the scenario where a Partner Restaurant continues to work exclusively with either Foodpanda or Deliveroo, but opts to also partner with Low Market Share Platforms. This is because “Exclusive Term” means to “... require the Partner Restaurant to **partner only with Foodpanda [/Deliveroo]**” (emphasis added), and “Non-Exclusive Terms” means “terms which Foodpanda [/Deliveroo] applies to a Partner Restaurant **where the Exclusive Terms do not apply**” (emphasis added). This does not take into account the protection the Commission intended by way of the carve-out as against Low Market Share Platform.

The proposed commitment of the Two OFPs as of Effective Date is only limited to not enforcing the Relevant Provisions (which includes the Breach of Exclusivity Provisions), and that the definition of Breach of Exclusivity Provisions expressly excludes the Low Market Share Platform Protection. Given so, it is not entirely clear whether, within the 90 calendar days from the Effective Date, the Two OFPs may increase the commission rate charged to its Partner Restaurants solely because they partner with Low Market Share Platforms. A plain reading of the Annexes seems to suggest that they can do so.

Despite the plain reading, we consider it appropriate that the Low Market Share Platform Protection be effective **as of the Effective Date** for the following reasons:

- it is more in line with the Commission’s intention in the Notice (as illustrated in paragraphs 66 and 92, as well as footnote 33 of the Notice), i.e., limiting the foreclosure effect on Low Market Share Platform and ensuring Partner Restaurants may still use the Low Market Share Platforms without being penalized.
- Following the publication of the Notice, one restaurant [REDACTED] has claimed that Deliveroo notified them of their breach of the exclusivity obligation by partnering with us and that Deliveroo would raise their commission rates. Deliveroo argued that its proposed commitment has not become effective yet, given it is still in the public consultation period, and therefore, it could enforce the terms under the existing contracts with Partner Restaurants. We are concerned that without clear provisions in the Notice and the commitments addressing this issue, Foodpanda or Deliveroo may delay amending their agreements, thereby prolonging the foreclosing effect of Foodpanda/Deliveroo on Low Market Share Platforms for almost 90 days after the Effective Date.

We appreciate that Clause 2.3 of the Annexes (including Clause 2.3(g) of Annex 1 and Clause 2.3(f) of Annex 2) may have taken into consideration the time required by each of Foodpanda and Deliveroo to practically negotiate and update the terms in the agreements with Partner Restaurants as a matter of formality. Given so, we recommend clarifying the languages in the Annexes such that the Low Market Share Platform Protection will be in force as of Effective Date while giving Foodpanda and Deliveroo the 90 calendar days to reflect these in the agreements as a matter of formality.

Issue IV: The Two OFPs may increase commission rates e.g. for Order to Pick Up Services in order to constructively dissuade Partner Restaurants from partnering with a Low Market Share Platform

Recommendation for Issue IV: We consider that the proposed reporting requirements for the compliance statement at paragraph 3.4(d) of the Annexes, 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. In this regard, we recommend that the Commission specify that complaints received from Partner Restaurants as to whether the Foodpanda’s

and Deliveroo's determination of commission rates comply with Commitments fall within the scope of the "complaints" to be documented in the compliance statement.

Detailed Explanation

In relation to Foodpanda, we understand that the proposed carve-out provides that where a Partner Restaurant agrees to the Exclusive Terms with Foodpanda in return for an Exclusive Commission Rate, the Partner Restaurant would:

- a. only be prevented from partnering with Deliveroo 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.

We note that the Commission acknowledged in the 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*". However, it is likely the case that given the scale of the operations of the Two OFPs, their existing and potential Partner Restaurants would choose to purchase both Order to Deliver Service and Order to Pick Up Service from them. This is because:

- a. there is no cost difference in purchasing Order to Deliver Service only or both services. In particular, the operational costs for food preparation and packing for delivery and self-pickup are the same; and
- b. enabling both Order to Deliver Service and Order to Pick Up service will allow the Partner Restaurant to tap into a wider pool of potential end-customers.

We would highlight that the Commission's proposed mechanism (per Clause 2.3(i) of Annex 1) where Foodpanda has to:

- request and obtain the explicit consent in writing from Partner Restaurant to acquire Order to Pick Up Services when they are acquiring Order to Deliver Services from Foodpanda; and
- allow Partner Restaurant to terminate Order to Pick Up Services from Foodpanda to do so without also terminating Order to Deliver Services

is unlikely to lead to a significant change in Partner Restaurants' preference to purchase both services.

As the protection for Low Market Share Platform in the Commitment only applies to delivery services, not including pick up services, there is a real risk that even if Partner Restaurants only partner with a Low Market Share Platform for delivery services, either Foodpanda or Deliveroo may still consider Partner Restaurants to have switched from exclusive to non-exclusive terms and charge the Non-Exclusive Commission Rate on the Order to Pick Up Services to Partner Restaurants. This practice indirectly dissuades Partner Restaurants from partnering with Low Market Share platforms. For example, we received feedback from a Partner Restaurant that Deliveroo proposed to increase the commission rate of Order to Pick Up Service if such Partner Restaurant partners with Low Market Shares Platform concurrently for the Order to Deliver Service.

**** END OF REPRESENTATIONS****