競爭事務委員會
COMPETITION COMMISSION

EC/03JJ

NOTICE REGARDING THE COMMISSION'S ACCEPTANCE OF COMMITMENTS IN THE ONLINE FOOD DELIVERY PLATFORMS CASE

29 December 2023

競爭事務委員會
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I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The Competition Commission ("**Commission**") has conducted an investigation under section 39 of the Competition Ordinance (Cap. 619) ("**Ordinance**") into certain conduct by the 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) Delivery Hero Food Hong Kong Limited (formerly, Rocket Food Limited) ("**Foodpanda**"); and (ii) Deliveroo Hong Kong Limited ("**Deliveroo**") (together referred to as the "**Parties**" or separately as "**Party**").

3. In particular, the Commission has investigated whether Foodpanda and Deliveroo 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 Foodpanda or Deliveroo, in return for Foodpanda or Deliveroo, as the case may be, charging a lower commission rate to the restaurant.[2]

   (b) **Breach of Exclusivity Provisions**, which restrict partnering restaurants from, or penalise them for, switching from Exclusive to Non-Exclusive Terms.[3]

   (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,

   compared to their prices on Foodpanda or Deliveroo, as the case may be.[4]

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1 Unless defined otherwise, capitalized terms in this notice have the same meaning as those in the commitments offered by Foodpanda, Deliveroo and Deliveroo plc.

2 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 70 to 74 below.

3 As defined in the commitments offered by Foodpanda, Deliveroo and Deliveroo plc under section 60 of the Ordinance.

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

(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.[5]

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. <u>The proposed commitments</u>

7. Initially each of Foodpanda and Deliveroo[6] 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 ("**Initial Consultation**").

8. Under the proposed commitments, Foodpanda and Deliveroo 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 dine-in and direct delivery channels (as well as on other

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[5] See further the description of Order to Deliver and Order to Pick Up Services in paragraph 23 below.
[6] Deliveroo's commitment was also offered by its parent company, Deliveroo plc.

OFPs for Foodpanda) 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.

9. In response to the Initial Consultation on Foodpanda's and Deliveroo's proposed commitments, the Commission received eight representations, which are summarized below in Part V.

B. Foodpanda's Commitment

10. Following the Initial Consultation, Foodpanda has agreed to offer a revised commitment ("**Foodpanda's Commitment**").

11. After careful consideration of all the representations received and further discussions with Foodpanda, the following revisions have been made to its proposed commitment:

(a) clarify in clause 1.1.z for the definition of "Profit Guarantee Terms" that the purpose of the Profit Guarantee Terms is to facilitate investment in commercial initiatives by Foodpanda and the relevant Restaurant;

(b) add an obligation in clause 2.3 that Foodpanda commits from the Effective Date not to prevent Partner Restaurants from partnering, having communication or entering into Agreements for the Relevant Services with any Low Market Share Platforms;[7]

(c) clarify in clause 2.4.e that the Exclusive Commission Rate only has to be specified in those Agreements where Foodpanda and the Partner Restaurant have agreed to Exclusive Terms;

(d) clarify in clause 2.4.i that Foodpanda may offer compensation to Partner Restaurants that agree to match the prices they offer on Foodpanda's platform with the prices at their direct delivery channels, with the effect that Foodpanda would absorb all of the commission charged by Foodpanda; and

[7] A consequential amendment was made to clause 3.2.b(iii) for the written report requirement.

(e) add increased reporting requirements for the Profit Guarantee Terms and Outlet Expansion Terms in clauses 3.2.d and 3.5.

12. The Commission considers Foodpanda's Commitment appropriate to address the Commission's concerns about the possible contravention of the First Conduct Rule and has decided to accept Foodpanda's Commitment in accordance with section 60 of the Ordinance.

C. Deliveroo's Commitment

13. 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 ("**Deliveroo's Commitment**").[8]

14. Deliveroo's Commitment is largely the same as its 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 restrictions, in line with Foodpanda's proposed commitment, and including monitoring provisions covering these terms;

(b) permitting partnering restaurants to work with Low Market Share Platforms at the coming into effect of Deliveroo's 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.

15. On 10 November 2023, the Commission commenced a second consultation on Deliveroo's Commitment lasting for a period of 15 days ("**2nd Consultation**"). The Commission received representations from four parties, which are summarized below in Part V.

16. The Commission has considered the representations received from the 2nd Consultation and does not consider it necessary to make any revisions to Deliveroo's Commitment. As a result, the Commission considers Deliveroo's Commitment appropriate to address the Commission's concerns about the possible contravention of the First Conduct Rule and has decided to accept Deliveroo's Commitment in accordance with section 60 of the Ordinance.

17. Under section 60(6) and Schedule 2, section 4 of the Ordinance, where the Commission accepts a commitment, it must as soon as practicable afterwards give notice in writing of that decision to the person who made the commitment, register the commitment on the Register of

[8] Deliveroo's fresh commitment was also offered by its parent company, Deliveroo plc.

Commitments, and publish the commitment through the Internet or in any other manner the Commission considers appropriate.

18. Accordingly, the Commission issues the present notice to give notice of, and explain its decision regarding, the acceptance of (i) Foodpanda's Commitment and (ii) Deliveroo's Commitment (together, the "**Parties' Commitments**"). The Commission has also published the Parties' Commitments today in the Register of Commitments, which is available on the Commission's website and at its offices during business hours.

19. The remainder of this 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 Parties' Commitments (Part IV);

(d) the representations received (Part V); and

(e) the Commission's acceptance of the Parties' Commitments (Part VI).

II. RELEVANT FACTUAL BACKGROUND

A. The Parties

20. Foodpanda and Deliveroo are the two leading OFPs with substantial business in Hong Kong.

21. Foodpanda is a limited liability company incorporated in Hong Kong in 2014. It is a member of the Delivery Hero Group with Delivery Hero SE, a company based in Berlin, being its ultimate parent company. Foodpanda launched its OFP business in Hong Kong in 2014.

22. 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 the Parties

i. Relevant Services

23. Foodpanda and Deliveroo provide end customers with the ability to order and obtain delivery of food and beverages ("**F&B**") through their respective online platforms, which are available on

their websites and mobile phone applications. Using the respective platforms, 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**").

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

25. Restaurants are providers of F&B to paying end customers. Restaurants may partner with OFPs such as Foodpanda and 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 OFPs then intermediate 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.

26. 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.

27. 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.

28. 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

29. In addition to the Relevant Services, the services offered by Foodpanda or Deliveroo on their respective platforms include:

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

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

(c) a restaurant reservation and discount mechanism (Foodpanda only), whereby end customers with a premium subscription on its platform can reserve seats at particular restaurants partnering with Foodpanda and obtain discounts when they dine in.

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

C. Market players

i. Current players

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

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

32. 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

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

34. 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.

35. 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.

36. 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.

37. 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.

38. Shopper previously provided both Order to Deliver and Order to Pick Up Services in Hong Kong, but exited the market recently.

iii. Entry by KeeTa

39. 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 (Foodpanda and Deliveroo)

40. Under the Exclusive Terms, partnering restaurants are required to work exclusively with either Foodpanda or Deliveroo, in return for Foodpanda or Deliveroo, as the case may be, 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.

41. The level of commission rates charged by Foodpanda and Deliveroo varies between them, 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.[9]

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

ii. Breach of Exclusivity Provisions (Foodpanda and Deliveroo)

43. Through the Breach of Exclusivity Provisions, both Foodpanda and Deliveroo restrict partnering restaurants from, or penalise them for, switching from Exclusive to Non-Exclusive Terms. This includes by allowing Foodpanda or Deliveroo to:

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

(b) require a relatively long notice period of 90 days for partnering restaurants to switch (in the case of Foodpanda), or provide no option for partnering restaurants to switch at all (in the case of Deliveroo);

(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; and[10]

(d) (in the case of Deliveroo only) 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.

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

10 In the case of Foodpanda's standard terms and conditions of October 2020 and 13 January 2021, partnering restaurants that did not provide 90 days' notice and evidence of the exact date of the switch were liable to pay the difference between the exclusive and non-exclusive commission rates for a period of six months. In the case of Deliveroo, 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.

44. Foodpanda and Deliveroo each claim that while the Breach of Exclusivity Provisions are contained in their respective standard agreements with partnering restaurants, they have not enforced these provisions in practice.

iii. Price Restriction Provisions: narrow price parity (Foodpanda and Deliveroo)

45. The OFP/Restaurant Agreements of both Foodpanda and Deliveroo prevent partnering restaurants from charging lower prices, or require them to charge the same prices, for menu items on their direct channels[11] compared to those offered on the platforms of Foodpanda and Deliveroo.

46. Foodpanda may temporarily suspend the partnering restaurant from the platform if the latter is in breach of any terms of the OFP/Restaurant Agreement (which would include the narrow price parity obligation). As for Deliveroo, 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.

47. 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.

iv. Price Restriction Provisions: across platform (wide) price parity (Foodpanda only)

48. Foodpanda has the right to increase or reduce the partnering restaurant's prices on its platform to match those displayed on other OFPs without notice to the partnering restaurant. As such, Foodpanda effectively can ensure that partnering restaurants do not offer prices for their menu items on other OFPs that are lower than those offered on Foodpanda's platform.

49. As mentioned, Foodpanda may temporarily suspend the partnering restaurant from the platform if the latter is in breach of any terms of the OFP/Restaurant Agreement (which would include the across platform price parity obligation).

v. Tying Provisions (Foodpanda only)

50. Foodpanda provides no specific option in its relevant contractual documentation for partnering restaurants subscribing to its Order to Deliver Services not to subscribe to the Order to Pick Up Service. As part of their contractual arrangements with Foodpanda, partnering restaurants opting

[11] In the case of Foodpanda, the relevant restriction applies to the prices for dine-in, pick-up and delivery services provided by the partnering restaurant and, in the case of Deliveroo, to the partnering restaurant's in-restaurant menu.

for Order to Deliver Services are therefore effectively required to also opt for Order to Pick Up Services.

III. COMPETITION CONCERNS IDENTIFIED BY THE COMMISSION

51. This section explains the situation that the Parties' Commitments is seeking to deal with for the purposes of section 2(2)(d) of Schedule 2 of the Ordinance.

A. Framework for assessment

52. The OFP/Restaurant Agreements entered into between each of Foodpanda and Deliveroo and their respective 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.

53. 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.[12]

54. 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,[13] price parity[14] and tying.[15]

55. 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.

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[12] FCR Guideline, paragraphs 6.6 to 6.9.

[13] 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.

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

[15] SCR Guideline, paragraphs 5.8 to 5.12.

B. Defining the relevant market

56. 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.[16]

i. Product market definition

57. In accordance with paragraph 55 above, the Commission has not reached a firm conclusion on market definition in this case.[17] 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;[18] 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,[19] for subsequent pick-up of the F&B by the end customer.

58. 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

[16] FCR Guideline, paragraph 3.21. The SCR Guideline sets out the Commission's approach to market definition in further detail.
[17] See also Commission Notice of Acceptance in Case EC/02UB *Car Warranties*, 10 October 2022, paragraphs 35 and 71.
[18] 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.
[19] Such ordering services may be offered by phone, on the restaurant's website or mobile application or in person.

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 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.[20] In addition, for orders below a minimum order value set by each of Foodpanda and Deliveroo, 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.

[20] 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.

ii. Geographic market definition

59. 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**.

60. This is based on the following considerations:

(a) Foodpanda and Deliveroo 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.

(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.[21]

C. Assessment of effects

61. The Commission sets out below its preliminary views on the degree of market power of each of Foodpanda and Deliveroo, 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. Market power of Foodpanda and Deliveroo

62. 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.[22] The degree of market power for concerns to arise under the First Conduct Rule is not

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[21] See for instance: UK Competition and Markets Authority, decision dated 16 November 2017 regarding Just Eat/Hungryhouse Holdings Limited; and Spanish National Markets and Competition Commission, decision dated 10 September 2019 regarding Just Eat/Canary.

[22] FCR Guideline, paragraph 3.21.

the same as the degree of market power required for concerns to arise under the Second Conduct Rule and is typically less.[23]

63. The Commission believes there is a reasonable basis to consider that each of Foodpanda and Deliveroo have market power in the market for Order to Deliver Services, based on the factors set out below.

ii. Market shares

64. Between 2016 and 2021, Foodpanda and Deliveroo had high individual market shares 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 Foodpanda and Deliveroo around 90% during the same period. Based on market share data available to the Commission for 2022 and 2023, Foodpanda and Deliveroo remain the most significant players in the Order to Deliver Services market.

iii. Competitive constraints

65. In the Commission's preliminary view, Foodpanda and Deliveroo are unlikely to be sufficiently constrained by other competitors in the market for Order to Deliver Services.

66. Other competitors in the market, namely, Oddle and DimOrder, each have a very low market share, with individual market shares below 1% as of November 2023. KeeTa is an emerging competitor but has only entered the market relatively recently. These competitors do not appear capable of providing a sufficient competitive constraint on either Foodpanda or Deliveroo.

67. 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 Foodpanda or Deliveroo and constrain them sufficiently.

iv. Barriers to entry and expansion

68. The market for Order to Deliver Services appears to be characterized by the existence of a number of barriers to entry and expansion, which may impede the emergence of a sufficiently credible competitor to Foodpanda and 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 optimize an

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[23] FCR Guideline, paragraph 3.23.

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.

69. In addition, and as further described below, the use by Foodpanda and 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 (Foodpanda and Deliveroo)

70. Exclusivity arrangements are commonly used commercial arrangements and in most cases will not harm competition.[24] In this case, however, Foodpanda and Deliveroo each appear to have some degree of market power, while all other OFPs have significantly lower market shares ("**Low Market Share Platforms**"[25]). 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 Low Market Share Platforms.

71. In particular:

(a) By offering a lower commission rate under the Exclusive Terms, each of Foodpanda and Deliveroo appear 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 Foodpanda and Deliveroo to maintain and strengthen their respective positions 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 and Foodpanda.

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[24] SCR Guideline, paragraph 5.23.

[25] For the meaning of this term as used in the Parties' Commitments, see paragraph 97 below.

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

(i) The market shares of most other OFPs in the market 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 and Foodpanda being referred to as a reason 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 the Exclusive Terms cover a significant part of the market for Order to Deliver Services, giving Foodpanda and Deliveroo a high cumulative captive market share. By way of example, in terms of order value in January 2022, it appears that approximately half of the market is tied by Foodpanda's and Deliveroo's Exclusive Terms.

(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 (e.g., Pizza Hut, Tamjai Yunnan Mixian, Twelve Flavour, Ebeneezer's or Kam Kee Café). 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 are indefinite or have a relatively long duration.[26] The Exclusive Terms would apply for the same duration unless the partnering restaurant has elected to switch to Non-Exclusive Terms.

72. At the same time, the Commission recognises that the use of Exclusive Terms by Foodpanda appears unlikely to have the above foreclosure effect on Deliveroo and vice versa. Given their respective strong market positions, each of Foodpanda and Deliveroo appear able to entice

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[26] Foodpanda's standard OFP/Restaurant Agreements continue for an indefinite period of time, though later versions (from 2021 onward) also provide that the expiry of the agreement can be stated in the Vendor Registration Form. 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 Foodpanda's and Deliveroo's partnering restaurants are subject to these standard terms.

partnering restaurants to sign up with them under Exclusive Terms and may compete with each other to obtain Exclusive Terms from such restaurants.

73. 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 Foodpanda or Deliveroo would be less likely to have a foreclosure effect on that OFP.

74. Nonetheless, to cater for the fact that the Exclusive Terms would be unlikely to have a foreclosing effect as between Foodpanda, Deliveroo or a larger OFP, the Parties' Commitments provide for the cessation of the Exclusive Terms only as against Low Market Share Platforms (see paragraphs 97 to 101 below).

vi. Price Restriction Provisions: narrow price parity (Foodpanda and Deliveroo)

75. The Commission believes there is a reasonable basis to consider that the narrow price parity arrangements, whereby Foodpanda and Deliveroo prevent partnering restaurants from charging lower prices, or require them to charge the same prices, for menu items on their direct channels,[27] give rise to anti-competitive effects.

76. 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).[28] 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 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 Foodpanda and Deliveroo, should the narrow price parity arrangements decrease

[27] See footnote 11 above for further details on the relevant direct channels.

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

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 one of Foodpanda and 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.

77. 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. Foodpanda and Deliveroo have high individual and combined shares in this market (as noted in paragraph 64 above), while the arrangements are included in the standard agreements of Foodpanda and Deliveroo (to which the vast majority of their partnering restaurants are subject).

(b) The standard OFP/Restaurant Agreements in which the narrow price parity arrangements are laid down are indefinite or have a relatively long duration.[29]

78. The Commission nonetheless acknowledges the submissions of Foodpanda and Deliveroo to the effect that narrow price parity arrangements could be necessary to avoid partnering restaurants 'free-riding' on the services of the OFPs. Absent such arrangements, a partnering restaurant could use the OFP's platforms 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.

79. 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). The Parties' Commitments accordingly permit Foodpanda and Deliveroo to limit the mark-up applied by the partnering restaurant on their platform as compared to sales on their direct delivery channel, though not as compared to dine-in sales (see paragraph 96(d) below).

[29] See footnote 266 above.

vii. Price Restriction Provisions: across platform (wide) price parity (Foodpanda only)

80. The across platform price parity arrangement in Foodpanda's OFP/Restaurant Agreements prevents restaurants from setting lower prices on Deliveroo or other platforms.

81. The Commission believes there is a reasonable basis to consider that this arrangement may harm competition as follows:

(a) Such a parity arrangement may further soften price competition between Foodpanda and Deliveroo, when applied in combination with the Exclusive Terms. Together, the arrangements may have the result that there is no price competition between OFPs for partnering restaurants' menu items because the restaurants either list exclusively with Foodpanda or Deliveroo, or are subject to an across platform price parity arrangement where they list on both platforms.

(b) The arrangement may further deprive smaller OFPs from attracting a larger order and revenue base and prevent them further from gaining a sufficient size to compete efficiently with the Parties. In particular, those OFPs would not be able to entice end customers by offering lower prices for the menu items listed on their platform.

82. In the Commission's preliminary view, the above potential effects appear more likely given that the parity arrangement covers a significant part of the relevant market. It is provided for in the standard Foodpanda OFP/Restaurant Agreement, to which almost all of its partnering restaurants are subject, while Foodpanda itself has a high market share in the Order to Deliver Services market.

viii. Tying Provisions (Foodpanda only)

83. The Commission has reached the preliminary view that the Tying Provisions effectively require partnering restaurants that acquire Order to Deliver Services to also acquire Order to Pick Up Services.

84. The Commission recognises that tying and bundling are common commercial arrangements that generally do not harm competition and often promote competition.[30] In the present case, however, there is a reasonable basis to consider that the Tying Provisions may amount to anti-competitive tying on the basis that:

(a) Order to Deliver Services and Order to Pick Up Services appear to be distinct services, as outlined in paragraph 58 above.

[30] SCR Guideline, paragraph 5.9.

(b) The Tying Provisions may foreclose Foodpanda's competitors offering Order to Pick Up Services, as they may limit the number of partnering restaurants that are available as potential buyers of their services. In turn, the Tying Provisions may prevent smaller OFPs from attracting a larger order and revenue base for Order to Pick Up Services and achieving sufficient size to compete efficiently with Foodpanda as well as Deliveroo.

(c) Such a foreclosure effect appears more likely since:

(i) the number of restaurants available to competing OFPs is already limited by the use of Exclusive Terms; and

(ii) Foodpanda has a high market share in the market for Order to Deliver Services (above 40% as of October 2023 in terms of order value) and in 2021 became the leading platform for Order to Pick Up Services.[31]

85. While Foodpanda claims that its partnering restaurants can opt out of Order to Pick Up Services on its platform, this is possible only upon the restaurant's written request and with approval by Foodpanda and does not appear to be simple in practice (e.g., due to the lack of a relevant contact person or dedicated form).

IV. PARTIES' COMMITMENTS

86. 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 the Parties' Commitments; and (iii) provides a high-level summary of the Parties' Commitments.

A. Relevant legal framework

87. 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.

88. If the Commission accepts commitments, it will terminate its investigation and not bring proceedings in the Competition Tribunal regarding the matters covered by the commitments. This is subject, however, to the ability of the Commission to withdraw its acceptance of commitments under the circumstances provided for in section 61 of the Ordinance, including where there has

[31] Based on market shares compiled according to total order values provided by market players for Order to Pick Up Services.

been a material change of circumstances or the person giving the commitment has failed to comply with them.[32]

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

B. Appropriateness of the Parties' Commitments

90. The Commission considers that the Parties' Commitments 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 Parties' Commitments provide a 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 Parties' Commitments will address the Commission's concerns in a targeted and effective manner by ensuring that the Provisions will not be enforced or included in the Parties' respective OFP/Restaurant Agreements and their partnering restaurants will be duly informed.

(c) **Effective implementation and monitoring**. As described below, the Parties' Commitments include specific provisions to ensure their timely and effective implementation (including for their operation to vary in specific pre-defined circumstances) as well as ongoing monitoring by the Commission.

(d) **Other factors mentioned in paragraph 2.2**. The Parties have 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 Parties' Commitments.

[32] 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.

C. Summary of the Parties' Commitments

91. The Parties' Commitments apply to clauses in their respective OFP/Restaurant Agreements, other than those concluded with restaurants that have bespoke arrangements and where the Commission's competition concerns are less applicable, namely, restaurants subject to "Outlet Expansion Terms" or "Profit Guarantee Terms".

D. Substantive Commitment

i. Non-enforcement and removal of Relevant Provisions

92. For the purposes of the Parties' Commitments, the "**Relevant Provisions**" are defined to comprise Breach of Exclusivity Provisions, Price Restriction Provisions and Tying Provisions in OFP/Restaurant Agreements (as described in paragraphs 43 to 50 above).

93. The Parties' Commitments are designed to cease any application of the Relevant Provisions, and thus remedy the Commission's concerns about such provisions. Foodpanda and Deliveroo each commit:

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

(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).

94. In addition, Foodpanda and Deliveroo cannot prevent partnering restaurants from partnering, having any communication or entering into agreements with Low Market Share Platforms from the date the commitment comes into effect (clause 2.3).

ii. Consequential contractual amendments

95. Since the Parties' Commitments require them to cease application of the Relevant Provisions, it is necessary to specify the contractual conditions that apply in place of those provisions.

96. 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 specification of an exclusive commission rate is only required if exclusivity has been agreed between both Foodpanda or Deliveroo, as the case may be, and their respective partnering restaurant.

(b) **Notice period for switching**. Insofar as Foodpanda or 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 Foodpanda or Deliveroo cannot ascertain the date of its switch, Foodpanda or 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 must specify that the partnering restaurant may charge lower prices:

(i) on their direct delivery channels;[33]

(ii) on their direct dine-in channels; and

(iii) in the case of Foodpanda's Commitment, on competing platforms,

than those they charge on the platforms of Deliveroo or Foodpanda, as the case may be (clause 2.4.h of Foodpanda's Commitment; clause 2.4.g of Deliveroo's Commitment).

(e) **Opt-in for Order to Pick Up Services (Foodpanda only)**. In addition to Foodpanda ceasing its tying conduct, it is required in the relevant contractual documentation to specify a mechanism for it to obtain explicit consent from the partnering restaurants to acquire Order to Pick Up Services and to allow partnering restaurants to terminate Order to Pick Up Services without also terminating Order to Deliver Services (clause 2.4.j).

[33] Further to the free-riding concern outlined in paragraph 78 above, the Parties' Commitments specify that Foodpanda and Deliveroo are entitled to limit the mark-ups applied by partnering restaurants on their respective platforms (as compared to the prices on the restaurants' direct delivery channel) to the value of the commission rate charged by Foodpanda and Deliveroo.

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

97. Under clause 2.4.g of Foodpanda's Commitment and clause 2.4.f of Deliveroo's Commitment, respectively, each of Foodpanda and Deliveroo are required to carve out Low Market Share Platforms from the scope of their Exclusive Terms. For the purpose of the Parties' Commitments, "**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.[34] 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.

98. Under the carve-out, where a partnering restaurant agrees to the Exclusive Terms with Foodpanda in return for an exclusive commission rate, that partnering 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.[35]

99. 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 Parties' Commitments do 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 Foodpanda, Deliveroo and any other significant OFP, as outlined above.[36]

100. The Parties' Commitments contain 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). Each of Foodpanda and 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 participants. For the purpose of verification, the Commission may conduct its own assessment and gather information from third parties.

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[34] As at the date of this notice, all platforms other than Foodpanda, Deliveroo and KeeTa are Low Market Share Platforms. For the determination that KeeTa is not a Low Market Share Platform, see paragraph 101.

[35] The same position applies *mutatis mutandis* when a partnering restaurant agrees to Exclusive Terms with Deliveroo.

[36] For the avoidance of doubt, insofar as the Breach of Exclusivity Provisions are concerned, Foodpanda and 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.

101. Based on the best information currently available to the Commission, it has come to the determination that at present KeeTa's market share exceeds 10% of the Order to Deliver Services market in Hong Kong. As a consequence, KeeTa is not a Low Market Share Platform as defined in the Parties' Commitments.

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

102. The Parties' Commitments contain 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 Foodpanda or Deliveroo would be permitted to impose the Relevant Provisions[37] and Exclusive Terms against restaurants that are subject to the OETs or the PGTs.

103. The OETs are contractual terms whereby Foodpanda or Deliveroo, as the case may be, 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, while the PGTs are contractual terms whereby Foodpanda or Deliveroo, as the case may be, 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.

104. 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; and

(b) the OETs and PGTs require some investment by Foodpanda or Deliveroo (as the case may be) and, therefore, unlikely to be broadly applied.

105. The Parties' Commitments contain 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

106. Under clause 2.7 of the Parties' Commitments, each of Foodpanda and Deliveroo commit not to circumvent or otherwise frustrate the operation of the substantive commitments described above.

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

vi. Timeframes

107. The Parties' Commitments enter into force on the date of this notice, that is, 29 December 2023 ("**Effective Date**").

108. As of the Effective Date, Foodpanda and Deliveroo are each obliged not to enforce any Relevant Provisions or to enter into any new agreements containing such provisions.

109. Within 90 calendar days of the Effective Date, Foodpanda and Deliveroo are required to:

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

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

vii. Duration and termination

110. The Parties' Commitments remain in place for a three-year period, pursuant to clause 4.2.[38] This is subject to the Parties' Commitments being terminated at an earlier date, should:

(a) the Parties' Commitments 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 4.2.c); or

(b) either Foodpanda or Deliveroo, as the case may be, 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 its Commitment (clause 4.2.d), while Foodpanda would be permitted to enter into and enforce agreements with Breach of Exclusivity Provisions, Tying Provisions and Price Restriction Provisions, only insofar as the Price Restriction Provisions relate to a partnering restaurant's direct delivery and dine-in channels and do not relate to its prices charged on other platforms (clause 4.4.d).

111. In relation to this latter termination event, the Commission considers that the imposition of the Relevant Provisions by Foodpanda[39] or Deliveroo is less likely to give rise to the foreclosure effects

[38] 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.

[39] Except for the imposition of across platform (wide) price parity.

and other competition concerns identified above where they have a market share of below 30%.[40] Such a decrease in the relevant platform'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 Provisions by the first platform would foreclose other platforms would appear to have diminished substantially.

112. 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 90 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.

113. The Parties' Commitments contain a mechanism to determine whether Foodpanda or Deliveroo have fallen below the 30% market share threshold (clause 4.3 in Deliveroo's Commitment; clause 4.4 in Foodpanda's Commitment), similar to the equivalent mechanism for Low Market Share Platforms.

viii. Reporting, compliance and monitoring

114. In clauses 3.1 to 3.5, Foodpanda and Deliveroo are subject to the following reporting and monitoring mechanism to ensure compliance with the Parties' Commitments:

(a) **Written report**. Within 120 calendar days from the Effective Date, each of Foodpanda and Deliveroo will provide a written report to the Commission confirming its compliance with the Parties' Commitments and providing the Commission with supporting documents.

(b) **Annual compliance statement**. Each of Foodpanda and 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, Foodpanda or Deliveroo, as the case may be, continues to abide by its commitment.

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40 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*.

ix. Other matters

115. The Parties' Commitments do not constitute an admission by Foodpanda or Deliveroo of a contravention of a competition rule (recital (6)).

116. In accordance with section 60(4) of the Ordinance, in accepting the Parties' Commitments, 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 Parties' Commitments.

V. REPRESENTATIONS

117. During the Initial Consultation, the Commission received representations from:

(a) Reagan Or, President of Business Development, Taste Of Asia (a restaurant group);

(b) Ping Lin and Tianle Zhang, professors of economics from Shandong University and Lingnan University, respectively;

(c) Meituan;

(d) the Hong Kong Catering Industry Association;

(e) the Consumer Council; and

(f) three individual members of the public.

118. As for the 2nd Consultation, the Commission received representations from three members of the public and another representation from Meituan.

119. The rest of this Part of the notice summarizes the relevant issues addressed in the representations. The summary of issues is not intended to be an exhaustive, point-by-point rebuttal.

A. <u>The ability of partnering restaurants to partner with OFPs after they exceed 10% market share</u>

120. The Consumer Council submits that partnering restaurants should be able to continue partnering with an OFP even after it exceeds a 10% market share and accordingly is no longer a Low Market Share Platform. This would be better for consumers who may prefer the OFP. Moreover, consumers may be confused when a partnering restaurant stops partnering with an OFP after it loses the Low Market Share Platform designation.

121. While the Commission acknowledges the Consumer Council's concern, the Commission's view is that the Low Market Share Platform mechanism balances the need to address its competition concerns while also permitting Foodpanda and Deliveroo the contractual freedom to impose exclusivity in situations where it is unlikely to have a negative impact on competition. If and when a Low Market Share Platform exceeds a 10% market share and is no longer considered a Low Market Share Platform, Foodpanda and Deliveroo will be entitled to insist on exclusivity on such restaurants who remain free to switch from Foodpanda's and Deliveroo's respective Exclusive Terms to Non-Exclusive Terms in order to continue partnering with that OFP.

B. Guidelines to assist partnering restaurants in complying with the Exclusive Terms

122. The Consumer Council recommends that the Commission issue guidelines to help Partner Restaurants observe the Exclusive Terms and access the latest market information, especially about the market shares of OFPs, once the Parties' commitments come into effect.

123. With the Parties' Commitments now coming into effect, the Commission confirms that all OFPs other than Foodpanda, Deliveroo and KeeTa[41] are Low Market Share Platforms. If Foodpanda or Deliveroo is able to demonstrate under its commitment that an OFP is no longer a Low Market Share Platform, the Commission will issue another notification to inform the public of this change in circumstance. The Commission does not consider it necessary to issue any guidance beyond this.

C. Periodic monitoring

124. The Consumer Council suggests that the Commission engage in various periodic monitoring of developments once the Parties' Commitments come into effect.

125. The Commission does not consider it a worthwhile use of Commission resources to conduct in-depth monitoring after the commitments come into effect. The Commission believes it sufficient to rely on the annual compliance statements to ensure that the Parties' Commitments are operating effectively.

D. Re-evaluating the Low Market Share Platform threshold after three years

126. Professors Lin and Zhang submit that OFPs who have market shares a little over 10% may nevertheless continue to face obstacles in competing with the Foodpanda and Deliveroo as a result of the Exclusive Terms and network effects. Therefore, the Commission should re-evaluate

[41] See further at paragraph 101.

the suitability of the 10% market share threshold for Low Market Share Platforms three years after the implementation of the Parties' Commitments.

127. Given that the Parties' Commitments will have lapsed after three years of implementation, at that time the Commission can assess the suitability of the 10% market share threshold and consider whether to seek a fresh set of commitments. In addition, should there be a substantial change in the Order to Deliver Services market as regard Low Market Share Platforms, the Commission may seek to withdraw the Parties' Commitments in accordance with section 61(1)(a) of the Ordinance or seek to vary or substitute the Parties' Commitments under section 62(1).

E. Effective date of protection for Low Market Share Platforms

128. Meituan submits that the Parties' Commitments should allow for their respective partnering restaurants to partner with Low Market Share Platforms at the Effective Date rather than after their contractual documents have been amended, which may take up to 90 days after the Effective Date.

129. The Commission agrees with this submission and it has been incorporated as clause 2.3 of the Parties' Commitments.

F. Exclusive Terms

130. Meituan submits that Foodpanda and Deliveroo are only able to charge non-exclusive restaurants higher commission rates under their Non-Exclusive Terms, even if the costs to provide services to exclusive and non-exclusive restaurants are largely the same, due to their market power. The protection provided to Low Market Share Platforms is relatively minimal compared to the severe foreclosure effects created by the Exclusive Terms. Furthermore, the carve out for Low Market Share Platforms should last at least three years, and should include all platforms which at any point have a market share of 10% or less during the period Foodpanda and Deliveroo were imposing Exclusive Terms.

131. Meituan's claim that exclusivity is anti-competitive in all contexts is not supported by any evidence and is merely theoretical. It is generally recognized that exclusivity may have pro-competitive effects and therefore is not generally prohibited *per se*, as illustrated by for instance the EU vertical block exemption.[42] During the investigation, the Commission did not find evidence or indications that the Parties' Exclusive Terms are anti-competitive when applied vis-à-vis each other. As such, the potential anti-competitive effect arising from the Exclusive Terms, as alleged

[42] See EU Guidelines on Vertical Restraints (2022/C 248/01), paragraphs 322-323.

by Meituan, would not be a competition concern that has been identified in the Commission's investigation which the commitments must seek to address.

G. Market share threshold to determine Low Market Share Platforms

132. Meituan submits that the market share threshold used to determine whether an OFP qualifies as a Low Market Share Platform under the Parties' Commitments should be increased to 15% from 10% as the latter threshold is unlikely to be indicative of an OFP having a significant competitive presence in Hong Kong. Further, concentration ratios or other similar measures should be used to take into account the differences in the relative size of the relevant OFPs.

133. The Commission does not consider it necessary to increase the market share threshold for Low Market Share Platforms. There will be no perfect threshold for determining when an OFP becomes a significant competitive presence and the 10% threshold is justifiable based on the Commission's investigation, which uncovered that no OFPs other than Foodpanda and Deliveroo—and recently KeeTa—have been able to achieve a market share above 10%. The basis for a 15% threshold is also no stronger than the basis for 10%. With regard to adopting other measures, such as CR3, market shares are standard in competition law contexts and consistent with the approach used in the EU.[43] Meituan has also not indicated what the threshold should be under an alternative measure and why such threshold would be clearly superior to the 10% market share threshold.

H. Relevant duration to calculate market share thresholds

134. Meituan submits that the duration for calculating the market share thresholds for Low Market Share Platforms and for when Foodpanda or Deliveroo is released from its respective commitment, should be increased to three months from one and two months, respectively. Meituan argues that taking into account three months would provide a better representation of the relevant OFP's market position given that the market shares may fluctuate from month to month.

135. Based on consideration of past market share data, in particular there being no evidence to suggest that taking a quarterly approach to assessing market share would yield a different result than:

(a) taking a one-month duration to assess whether a Low Market Share Platform has exceeded the 10% market share threshold; and

43 See EU Guidelines on Vertical Restraints (2022/C 248/01), paragraphs 48-49 (explaining the safe harbours based on market shares under the EU vertical block exemption).

(b) taking a two-month duration to assess whether Deliveroo's market share has dropped below the 30% market share threshold to release it from the Deliveroo's Commitment,

the Commission is of the view that market shares have not fluctuated to a sufficient degree over a three-month period (as opposed to a one- or two-month period) to support Meituan's concern.

I. <u>Product market definition</u>

136. Meituan submits that the product market should be defined as the market for online food and beverages sales platform services, which should include both Order to Deliver Services and Order to Pick Up Services. Meituan claims that these services are substitutable both from a demand-side and supply-side perspective.

137. Meituan's claim is not supported by any evidence, nor does it address the arguments in the Notice of Proposed Acceptance dated 10 November 2023 that support a separate market for Order to Deliver Services.

J. <u>Possible contravention of section 21 of the Ordinance (Second Conduct Rule)</u>

138. Meituan submits that the Parties have a substantial degree of market power on the market for Order to Deliver Services, and have maintained very high market shares for at least seven years. The unusually stable market structure indicates there has been a lack of competition for a long period of time.

139. The Commission considers that each of the Parties appear to have a degree of market power in the market for Order to Deliver Services. However, the Commission has not come to any conclusion as to whether the Parties have a substantial degree of market power, which is required for the Second Conduct Rule to apply. In any event, the Parties' Commitments would address the conduct that could be considered a contravention of the Second Conduct Rule.

K. <u>Definition of order value</u>

140. Meituan submits that order value should: (i) be defined as the final price actually paid by the customers (i.e., including delivery fees and platform fees and excluding vouchers and discounts); (ii) exclude cancelled orders; (iii) exclude, at least for OFPs other than Foodpanda and Deliveroo, any orders that incentivize customers to trial an OFP; and (iv) include order values generated under the Outlet Expansion Terms and Profit Guarantee Terms.

141. Points (i), (ii) and (iv) above raised by Meituan are in line with the methodology that is likely to be applied by the Commission in assessing the Parties' order value for the purpose of calculating market shares under the Parties' Commitments. As regards point (iii), excluding discounts and

promotions offered by the OFP would enable the OFPs to distort and deflate their order value and would not result in an accurate representation of the market.

L. Complaints process

142. Meituan recommends that the Commission specify that all complaints from partnering restaurants should be included in the Parties' respective compliance statements, including those that the Parties do not consider to be related to their commitments and those that the Parties resolve. This should also be accompanied by a publicity campaign by the Commission to ensure partnering restaurants are aware of the importance of the complaints process.

143. In the Commission's view, it would not be practicable for the Commission to receive all complaints from partnering restaurants, whether or not they are related to the Parties' Commitments. This would not be an efficient use of the Commission's resources, nor an effective way to monitor the Parties' Commitments, as the Commission would have to review many unrelated complaints. Furthermore, the Commission does not see the need for a publicity campaign on the complaints process as the Parties' Commitments are already well publicized.

VI. THE COMMISSION'S ACCEPTANCE OF THE PARTIES' COMMITMENTS

144. In light of the foregoing and having carefully considered the representations received, the Commission considers that the Parties' Commitments are appropriate to address its concerns about a possible contravention of the First Conduct Rule by the Parties.

145. In addition, the Commission considers the Parties' Commitments will help encourage competition in the Order to Deliver Services market in Hong Kong by removing obstacles for smaller OFPs that inhibit their ability to enter and expand as well as provisions that softened competition between OFPs. Greater competitive pressure between OFPs in turn will incentivize greater choice, higher quality services and lower F&B prices for Hong Kong consumers using OFPs.

146. As such, the Parties' Commitments will resolve the Commission's competition concerns in an effective and timely manner and achieve the Remedial Goals as set out in paragraph 3.13 of the Commission's Enforcement Policy. The Commission also considers that the Parties' Commitments provide an enforcement response that is proportionate to the context of the Parties' conduct and the harm caused or likely to occur, consistent with paragraph 3.14 of the Enforcement Policy.

147. In accordance with the requirements of section 60(6) and Schedule 2, section 4 of the Ordinance, therefore, the Commission hereby gives notice that, in the exercise of its powers under section 60 of the Ordinance, it has decided to accept the Parties' Commitments.

148. Finally, and for the avoidance of doubt, the Commission's acceptance of the Parties' Commitments reflects the specific circumstances of the case and relevant market context. It is not necessarily indicative of the Commission's enforcement approach in other cases or market contexts and does not bind the Commission in this respect. Accordingly, any conduct permitted under the Parties' Commitments should not be taken as an indication that the Commission would consider the conduct permissible if undertaken by different undertakings operating in different market contexts.