

ME.6659.16 – ANTICIPATED ACQUISITION BE JUST EAT OF HUNGRYHOUSE

HUNGRYHOUSE'S RESPONSE TO THE CMA'S PHASE 1 SLC DECISION

1. INTRODUCTION

1.1 The anticipated acquisition by Just Eat.co.uk Limited ("**Just Eat**") of Hungryhouse Holdings Limited ("**Hungryhouse**") (the "**Merger**") does not give rise to a substantial lessening of competition ("**SLC**").

1.2 The Phase 2 investigation will enable the CMA to gain an in-depth understanding of the evolving market for the provision of takeaway services, the Parties' activities within that market and the various constraints on their ability to compete. This investigation will demonstrate that the Phase I decision on the Merger dated 10 May 2017 (the "**Phase 1 Decision**") is flawed in the following respects:

1.2.1 Contrary to the conclusions of the Phase 1 Decision, it is clear that, absent the Merger, [REDACTED];

1.2.2 The Phase 1 Decision adopts an unduly narrow frame of reference which is artificial and driven by an overly cautious approach to the Phase 1 legal test;

1.2.3 The Phase 1 Decision dramatically underestimates the impact of entry and expansion by innovative providers, such as Deliveroo, UberEATS and Amazon Restaurants, that have already materially affected the dynamics of competition in relation to the provision of takeaway services and whose impact will inevitably increase going forward; and

1.2.4 The Phase 1 Decision fails to properly assess or take account of the constraint of direct ordering on Hungryhouse and Just Eat. This is particularly the case in small towns and rural areas where consumers are considerably more likely to be aware of the (more limited range of) local restaurants offering takeaway services.

2. ABSENT THE MERGER, [REDACTED]

2.1 It would be incorrect at Phase 2 for the CMA to adopt prevailing conditions of competition as the relevant counterfactual against which to assess the Merger.¹ [REDACTED]

2.2 [REDACTED].

Conclusion

2.3 [REDACTED] On this basis alone, the Merger does not give rise to an SLC.

¹ The Phase 1 Decision incorrectly assessed the Merger against a counterfactual of prevailing conditions of competition (see paragraph 46).

2.4 [✂]

3. THE PHASE 1 DECISION ADOPTS AN UNDULY NARROW FRAME OF REFERENCE WHICH IS ARTIFICIAL AND DRIVEN BY AN OVERLY CAUTIOUS APPROACH TO THE PHASE 1 LEGAL TEST

3.1 The Phase 1 Decision's reference to online takeaway ordering ("**OTO**") aggregation platforms does not reflect the manner in which market players, restaurant customers or consumers view the market. Indeed, to the best of Hungryhouse's knowledge, this terminology is not recognised by anyone in the industry and, as such, does not provide an appropriate framework for the CMA's assessment.

3.2 Indeed, while there is clear guidance in the CMA's Merger Assessment Guidelines, that the relevant market should include "*the sources of competition to the merger firms that are the immediate determinants of the effects of the merger (i.e. the Authorities' aim when identifying the relevant market is to include the most relevant constraints on behaviour of the merger firms)*,"² the Phase 1 Decision adopts an unduly narrow frame of reference which does not reflect the reality of market dynamics in this sector and which excludes, or materially undervalues, important constraints on the conduct of the Parties.

3.3 In particular, the Phase 1 Decision focuses its analysis on restaurants³ and largely ignores the perspective of consumers in its conclusions. As acknowledged by the CMA, takeaway service providers operating platforms serve and bring together two distinct and unrelated groups of customers – restaurants and consumers. The value of the platform for consumers depends on the number (and variety) of local restaurants listed on it. Restaurants, on the other hand, are more likely to list on a platform if they expect a sufficiently high volume of orders (i.e. if the platform has a large number of customers).⁴ Consequently, any analysis largely ignoring the perspective of consumers when considering the frame of reference undervalues the importance of indirect network effects and provides an incomplete picture of the market dynamics at play. Previous CMA decisions in relation to two-sided markets have recognised this potential pitfall and have therefore considered demand from each separate set of customers.⁵

3.4 Perhaps in part due to its one-sided analysis focusing on restaurants, the Phase 1 Decision undervalues the constraints imposed by takeaway service providers offering delivery services, such as Deliveroo, UberEATS and Amazon Restaurants. The Phase

² Merger Assessment Guidelines (OFT1254/CC2), paragraph 5.2.1.

³ Phase 1 Decision, paragraph 65.

⁴ Phase 1 Decision, paragraph 50.

⁵ See, for example, *Anticipated acquisition by Web Reservations International (through its parent company Hellman & Friedman) of Hostelbookers.com Limited*, ME/6062/13, paragraph 42 and *Completed acquisition by Ticketmaster Europe Holdco Limited of Seatwave Limited, Seatwave Deutschland GmbH, Seatwave Nederland B.V. and Timbre Digital Limited*, ME.6505.14, paragraphs 28 to 29.

1 Decision asserts that the constraint imposed on "pure OTO aggregators" will diminish as differentiation of their services increases.⁶ This is demonstrably untrue. Last-mile delivery providers have significant expertise in relation to delivery, logistics and technology and therefore offer an attractive alternative for consumers (and restaurant customers⁷) because of, rather than despite, their differentiated offering. It is clear that the Parties have sought to adapt their behaviour in response to this increasing competitive threat by adding delivery services to their offering. [X] As such, as set out in further detail in section 4 below, greater account should be taken of their impact in the CMA's competitive assessment of the Merger.

3.5 Crucially, as set out in greater detail in section 5 below, the Phase 1 Decision errs in restricting its analysis of the market to online only options and to exclude direct ordering from the frame of reference. As recognised in the CMA's Merger Assessment Guidelines, when considering two-sided markets, "*the constraints on the merger firms' products may come not only from other two-sided intermediaries but also from 'one-sided' firms serving one set of customers*";⁸ i.e. individual restaurants serving consumers directly. These restaurants have an incentive to 'cut out the middle man'. Hungryhouse has reacted to this strong and increasing constraint from direct ordering by [X]. The Phase 1 Decision's failure to properly take account of the direct ordering constraint is a serious shortcoming in its attempt to assess the actual competitive dynamics in this sector.

4. **THE PHASE 1 DECISION DRAMATICALLY UNDERESTIMATES THE IMPACT OF ENTRY AND EXPANSION BY INNOVATIVE PROVIDERS**

4.1 As recognised by KPMG in the KPMG Entry and Expansion Report, "*looking consistently across cases at evidence on factors such as patterns of innovation and product take-up of innovative products in other geographic markets [...] might also help the CMA to assess the likelihood of entry or expansion by innovative providers.*"⁹

4.2 A particularly compelling precedent is the OFT's decision in WRI/Hostelbookers.¹⁰ This merger was cleared at Phase 1, largely on the basis of Booking.com having had recently entered the hostel online booking marketplace where the merging parties, the main incumbents, had a very high combined market share. In terms of further entry or expansion, the OFT noted that Expedia had only just added the functionality to offer hostel booking going forward and there were several other players like Airbnb who offered a similar product proposition from a consumer perspective (albeit on the basis of a different business model). At the time, numerous hostels raised concerns about

⁶ Phase 1 Decision, paragraph 70.

⁷ See also paragraphs 4.5 and **Error! Reference source not found.** below.

⁸ Merger Assessment Guidelines (OFT1254/CC2), paragraph 5.2.20.

⁹ KPMG Entry and Expansion Report, paragraph 21.

¹⁰ *Anticipated acquisition by Web Reservations International (through its parent company Hellman & Friedman) of Hostelbookers.com Limited*, ME/6062/13.

potential increases in commission levels and a perceived lack of choice as the majority of hostels had been used to dealing with the merging parties only. However, the OFT adopted a dynamic (rather than a static) framework of analysis and took account of the rapidly evolving nature of the market as well as the financial strength and the strong brands of the new entrants.

4.3 The KPMG Entry and Expansion report, commissioned by the CMA, confirmed that the OFT's approach was correct. In essence, the OFT rightly concluded that the expansion of Booking.com, Expedia and a number of other online travel agents would offset any loss of competition and therefore that the merger did not result in a realistic prospect of a substantial lessening of competition.¹¹ KPMG concluded that, post-merger, these factors had led to *"if anything, the market for online hostel booking services becoming more, rather than less, fragmented."*¹²

4.4 By contrast, the Phase 1 Decision takes an overly cautious approach to the assessment of the impact of innovative providers on the competitive dynamics of the market. In particular:

4.4.1 While the CMA correctly acknowledges that [X] it nonetheless dramatically underestimates the impact of the entry and expansion of these operators in its competitive assessment. Indeed, even since the Phase 1 Decision was announced on 10 May 2017, UberEATS has expanded beyond London, Manchester and Birmingham,¹³ to launch in Edinburgh, Glasgow, Leeds, Liverpool, Nottingham and Southampton.¹⁴

4.4.2 The Phase 1 Decision is incorrect to downplay the impact of recent entrants, such as Deliveroo, UberEATS and Amazon Restaurants on the basis of its finding that *"significant amounts of funds and logistic infrastructure are required to enter and/or expand in this market."*¹⁵ Hungryhouse does not accept that this is the case - Hungryhouse itself grew from a two-man operation on the basis of only £150,000 external investment¹⁶. A more important factor in entry is the ability to provide a differentiated service offering. In this sector, there are at least three very large competitors (namely Deliveroo, UberEATS and Amazon Restaurants) that offer such a differentiated service proposition which is highly valued by consumers. These operators also have significant funds and logistics expertise and are already well established and growing rapidly both in the UK and other jurisdictions. Moreover, it is likely that other well funded technology companies, such as

¹¹ KPMG Entry and Expansion Report, paragraph 6.8.2.

¹² Paragraph 6.8.3.

¹³ Phase 1 Decision, paragraph 77.

¹⁴ https://about.ubereats.com/en_gb/cities/.

¹⁵ Phase 1 Decision, paragraph 172.

¹⁶ <http://startups.co.uk/dragons-den-success-stories-hungry-house/>.

Google and Facebook, will enter the food delivery market in the near future, rendering the sector even more competitive.¹⁷

- 4.5 The Phase 1 Decision fundamentally misunderstands the impact of last mile delivery services even though, in paragraph 136 of the Phase 1 Decision, it correctly establishes that delivery services are "*an important driver of consumer satisfaction*". Indeed, there is ample evidence supporting that consumers value receiving their food swiftly (while it is hot) and having a greater degree of control and visibility of how long it will take for their food to arrive. This strong consumer preference plays to the key strengths of takeaway service providers with the expertise and infrastructure to deliver the food rapidly and reliably. Showcasing this expertise to consumers, UberEATS offers a promise to consumers that for orders up to the value of £30, consumers will receive £30 off their next order if it takes long than 30 minutes to reach them.¹⁸ Deliveroo and Amazon Restaurants also have a proven track record of meeting consumer demand for efficient delivery – much more so than restaurants delivering food themselves.
- 4.6 However, the Phase 1 Decision erroneously concludes in paragraph 136 that the much-valued "control over delivery services", an "important driver of consumer satisfaction", would lead to restaurants preferring to deliver food themselves. This finding is completely at odds with reality and defies logic. The importance of delivery services actually means that restaurant customers are more likely, not less, to use the services of last mile providers such as Deliveroo, UberEATS and Amazon restaurants. This is precisely because these operators have significant logistics expertise and have professionalised the provision of food delivery services (resulting in consumer satisfaction and consumers coming back for more). This is in sharp contrast to the own delivery services provided by individual restaurants, which, understandably, are often ad hoc and inconsistent, given that restaurants focus on the main aim of their business: cooking and preparing food, rather than delivering it. It is disappointing that the Phase 1 Decision essentially dismisses the constraint from delivery-based takeaway service providers on the basis of an entirely wrong and illogical premise, namely that restaurants would prefer to deliver themselves because consumers value efficient delivery they have control over.
- 4.7 The same paragraph (136) of the Phase 1 Decision then recognises that restaurants value "a direct marketing channel to consumers". Whilst this is entirely true, it is actually evidence of the constraint from direct ordering given that restaurants have an incentive to 'cut out the middle man' to avoid commission payments. However, somewhat astonishingly, the Phase 1 Decision relies on this observation to dismiss the constraint from delivery services. Again, the Phase 1 Decision makes an accurate

¹⁷ Merger Notice, paragraph 16.2.3.

¹⁸ Business Insider UK, *People are gaming UberEats to get hundreds of pounds in free food*, 3 October 2016, available at <http://uk.businessinsider.com/how-to-get-free-ubereats-vouchers-promotions-food-hundreds-pounds-london-2016-9>.

observation (restaurants like to market directly to consumers) but then draws the completely wrong conclusion from this observation. Strong direct relationships between restaurants and consumers are not formed via restaurant-employed drivers (who, far from being an effective "marketing channel" often arrive at the consumer's door wearing a helmet and asking for cash). Instead, the inconsistency, lack of reliability and on average longer delivery times of restaurants' own delivery services make the use of delivery-services based takeaway service providers like Deliveroo or UberEATS attractive from the restaurant's perspective – restaurants are interested in ensuring that their customers enjoy their food (which is more likely to be the case if it is delivered hot and on time). Over time, this will entice consumers to order directly with the restaurant, either over the phone or online.

5. THE PHASE 1 DECISION FAILS TO TAKE PROPER ACCOUNT OF THE CONSTRAINT EXERCISED BY DIRECT ORDERING

- 5.1 The Phase 1 Decision fails to take proper account of the constraint imposed on takeaway service providers by direct ordering. Indeed, the narrow frame of reference adopted by the Phase 1 Decision¹⁹ means that it focuses disproportionately on online ordering, even when considering direct sales, and fails to consider the significant impact of telephone and in-person ordering.
- 5.2 Firstly, it is clear that direct ordering from larger independent operators, such as Domino's, constrains third party takeaway service providers, such as Just Eat and Hungryhouse. As the CMA acknowledges, [REDACTED].²⁰ The CMA also notes that a large chain has provided evidence that it competes with third party providers at all states of the consumer decision-making process²¹. In addition, [REDACTED]²² Moreover, the CMA notes that [REDACTED] provides evidence of competition between Just Eat and Domino's.²³ It is therefore surprising that, despite this strong evidence, the Phase 1 Decision largely ignores the impact of direct ordering from large restaurants in its analysis.
- 5.3 Secondly, while independent and small restaurants may have a smaller marketing budget than large chains,²⁴ these restaurants exercise a significant constraint on third party takeaway services providers due to the importance of direct ordering by phone and in person. Indeed, as the CMA acknowledges, market research shows that the phone is still the most common way of placing an order.²⁵ Moreover, the majority of orders received by takeaway providers come from repeat custom²⁶ and the Phase 1

¹⁹ See section 3 above.

²⁰ Phase 1 Decision, paragraphs 93(a) and 119(a).

²¹ Phase 1 Decision, paragraph 99.

²² Phase 1 Decision, paragraph 93(b).

²³ Phase 1 Decision, paragraphs 101 to 102.

²⁴ Phase 1 Decision, paragraphs 62 and 72.

²⁵ Phase 1 Decision, paragraph 160(d).

²⁶ Indeed, [REDACTED] Hungryhouse receives [REDACTED]% of its orders from repeat customers.

Decision recognises that "*direct ordering can be a valid alternative for the existing customers of a restaurant.*"²⁷ In light of these observations it remains entirely unclear why so little (if any) weight is placed on this constraint in the Phase 1 Decision.

- 5.4 The Phase 1 Decision is wrong to assert that restaurants are not effective in attracting new customers to their direct ordering channels. Apart from the fact that telephone ordering remains the predominant way to order takeaway food and at least some of the customers ordering in this manner must be new,²⁸ it is clear that independent restaurants use third party providers indirectly as a form of advertising to encourage future direct orders from new customers. As explained by one restaurant contacted by the CMA during its market testing, restaurants use the Hungryhouse platform "*to acquire new customers and then divert them to our own website and app.*"²⁹
- 5.5 Moreover, it is likely that the ability of restaurants to attract and retain customers who order directly is greater in smaller towns, where there are fewer restaurant options available and consumers have better knowledge of individual providers.

²⁷ Phase 1 Decision, paragraph 160.

²⁸ As demonstrated in an Ipsos MediaCT survey conducted on behalf of Hungryhouse (see the Merger Notice, paragraph 15.6.1), consumers use different channels to order takeaway: as of September 2016, [X] % of respondents ordered takeaway over the telephone, with [X] % being heavy users (i.e. placing an order at least once a week or once every two weeks). Indeed, telephone ordering accounted for the largest share of takeaway orders across all channels and, in particular, was used more commonly than ordering from providers of online takeaway services (which were used by [X] % of respondents).

²⁹ Phase 1 Decision, paragraph 159.