

Case ME/6659/16: Just Eat plc’s response to the CMA’s Phase I SLC Decision and the issues raised in it

- 1 Just Eat (“**JE**”) does not believe that its acquisition of Hungryhouse (“**HH**”) will give rise to a substantial lessening of competition (“**SLC**”) in the supply of online takeaway ordering platforms in the UK and it considers that the CMA’s Phase I reference decision (the “**SLC Decision**”) is therefore misguided.
- 2 Given the low bar for reference to a Phase II review, namely the appearance of a “realistic prospect” of an SLC, JE understands that the Phase I analysis is likely to be affected by the appearance of competitive overlap. The depth of investigation in Phase II, requiring a higher evidentiary standard, will allow the CMA to go beyond such appearances. This in-depth analysis will demonstrate that, whatever the situation historically, HH is not a competitive constraint on JE today, and has no realistic prospect of being a competitive constraint in the future. As a result, the acquisition of HH by JE will not reduce competition.

Introductory overview of JE’s response to the SLC Decision

- 3 The SLC Decision takes a static approach to the analysis and relies on a series of observations, that at best reflect the history of the market, as representative of the status quo or future. The SLC Decision therefore fails to assess fully the implications of it being a two-sided market with indirect network effects on both sides – a platform with more restaurants is more attractive to consumers, and vice versa - even though these features are accepted by the SLC Decision. Nor does the SLC Decision properly recognise the dynamic nature of the market and its level of innovation as being an important dimension of competition. In these regards, the SLC Decision ignores recent, authoritative literature on online markets commissioned by the UK Government and the CMA itself,¹ and the CMA’s own Merger Assessment Guidelines.² As a result:

3.1 The SLC Decision fails to recognise that HH is a weak constraint on JE today

- 3.1.1 HH has historically competed in the market and that is why it has the geographic and restaurant footprint the SLC Decision observes. However, the market it originally competed in (namely the traditional OTO platform model, without delivery) is subject to significant network effects and therefore, as is widely recognised, has a “winner-takes-all” nature.
- 3.1.2 HH has lost this “winner-takes-all” market to JE, as evidenced by its small market share of orders (less than one-tenth the size of JE) and total restaurant offering (less than 40% of the size of JE) and its even smaller share (less than 15% of HH’s restaurant base) of “unique” restaurants (which the SLC Decision acknowledges at paragraph 106 of the SLC Decision).

¹ See, for example the Department of Business, Energy and Industrial Strategy report, *Dynamic Competition in Online Platforms: Evidence from five case study markets*, March 2017, (the “**BEIS Report**”) at pages 6-7 and 64; and *Entry and expansion in UK merger cases: An ex-post evaluation*, KPMG LLP, April 2017 (the “**KPMG Report**”) at paragraph 21.

² OFT and Competition Commission Merger Assessment Guidelines, OFT 1254, CC2 (Revised), September 2010, paragraph 5.8.6, discussed in further detail below.

- 3.1.3 Detailed econometric evidence and material supplied by HH directly suggests that [REDACTED];³ and that HH has a [REDACTED].⁴ This shows that HH does not constrain JE today and has limited prospects of constraining JE in the future.
- 3.1.4 HH's current position is [REDACTED] because of the indirect network effects recognised – but not fully worked through – in the SLC Decision, and it offers no effective competition to JE on competitive parameters.
- 3.1.5 Moreover, there is no realistic prospect of HH achieving a competitive position in the future - [REDACTED] as the market evolves in light of the emergence of the delivery model. In the terms set out in the CMA's merger guidelines, the market has "tipped" in favour of JE so that *"the balance of power in the market (has) move(d) in its direction, leaving it as the unassailable leader"*⁵ and this is [REDACTED];⁶
- 3.1.6 The apparent similarity of HH's model to JE's and their overlapping geographic footprints reflect past competition entered into between the two companies when the market was still in a [REDACTED], and does not show that HH is now, or can be expected to be going forward, a competitive force, particularly as JE continues to [REDACTED] for consumers and restaurants. HH offers no credible constraint now or in the future.
- 3.1.7 The lack of any material constraint from HH on JE is borne out by [REDACTED] by JE in the [REDACTED] postcode districts (20-30% of the total), making up over [REDACTED] worth of orders, where JE is active and HH is not present.⁷ This emphasises that the competitive constraints on JE come from channels other than HH;
- 3.1.8 HH's recent competitive initiatives [REDACTED] and HH has been [REDACTED]. For instance, [REDACTED]. The SLC Decision notes that that these initiatives were *"targeted"* at JE,⁸ rather than providing evidence that these initiatives resulted in significant and sustainable levels of switching from JE to HH. Such initiatives are therefore consistent with the conclusion that HH is constrained by JE because JE is the leading player in a market, and with the conclusion that [REDACTED], but do not suggest that HH constrains JE in the absence of evidence to support this.

3.2 The SLC Decision fails to recognise that HH will not be an effective competitor to JE in the future based on any reasonable counterfactual

- 3.2.1 The SLC Decision fails to recognise that HH's position is so weak that it cannot be expected to be an effective competitor going forward:
- (i) absent this transaction, HH would offer no effective competition to JE. On the contrary, [REDACTED] absent the transaction, given its [REDACTED], its competitive position has become, and would continue to be, hopeless and, in any event, not a constraint upon JE.

³ Annex 5 to the Merger Notice: [REDACTED].

⁴ Exhibit 4 to the Merger Notice: Hungryhouse's retention rate for end customers.

⁵ OFT Merger Assessment Guidelines, paragraph 5.8.6.

⁶ Paragraph 93(b) and (d) SLC Decision.

⁷ See Table 2 SLC Decision.

⁸ Paragraph 119(c) SLC Decision.

- (ii) Even [REDACTED], there is also no prospect of HH “catching up” with JE in a manner that would allow it to provide a competitive constraint upon JE. HH’s portfolio of restaurants is considerably smaller than JE’s. Its end consumers are [REDACTED]. This makes its offer correspondingly [REDACTED]. HH is therefore stuck in a vicious cycle resulting from the two-sided indirect network effects recognised in the SLC Decision, which [REDACTED]. HH’s ability to invest in marketing [REDACTED].⁹ This is the “[REDACTED]” HH faces.
- (iii) Much effort can no doubt be spent on considering whether these points go to a “[REDACTED]” or not, within the nomenclature of merger common jargon. JE is not privy to information available to the owners of HH or to the CMA, and so it is unable to debate these points fully. That said, from a practical model and market perspective, it is clear to JE that HH’s position as a competitor in this market is [REDACTED], offering only imitation rather than innovation, and the CMA’s own logic in the SLC Decision, if consistently applied and brought to its full conclusion, evidences this.

3.2.2 As a result, irrespective of the SLC Decision’s conclusion as to the strength or otherwise of the constraints imposed by other models (whether traditional or innovative), there can be no SLC from the transaction because there is no merger-specific loss of competition, given that HH is not currently, and will not be in the future, a competitive constraint on JE.

3.3 Notwithstanding that there is no merger-specific loss of competition from the transaction, the SLC Decision nonetheless fails to appreciate the dynamic impact of the newer delivery model and the importance of the consumer side of the market

3.3.1 Consistent with the recent literature on online markets in general,¹⁰ it is clear that the market is changing, and changing quickly. The convergence of business models commonly identified as driving competition in online and tech-driven markets is evident here through the enhanced offering to consumers of both traditional and innovative ordering options, which has led to increased multi-homing by consumers,¹¹ something that the SLC Decision itself acknowledges at paragraph 115.

3.3.2 As the SLC Decision also notes,¹² more restaurants, and a broader range of restaurants, are using platforms because of the availability of outsourced delivery and the popularity of the Deliveroo app and model:

- (i) this is changing consumers’ expectations and both attracting new consumers and [REDACTED], in addition to driving competition between restaurants (who offer their own delivery) and OTO platforms;
- (ii) the SLC Decision fails to properly consider how this broader competition for end consumer app-download and usage bears upon JE (and [REDACTED]). These forces ensure that (a) JE must remain attractive and relevant to consumers,

⁹ In this regard, JE does not consider that [REDACTED] is sustainable.

¹⁰ See BEIS Report and KPMG Report.

¹¹ “BEIS report” at pages 6-7 and 64.

¹² Paragraph 69, 130 and 152(b) SLC Decision.

given the success of Deliveroo and UberEATS; and (b) JE has to maintain a competitive offering for [X], which now face increasing competition from restaurants that offer delivery services from Deliveroo and UberEATS – any attempt to “exploit” such a position would risk damaging the restaurant base that underpins JE’s commercial success; and

- (iii) as the SLC Decision itself recognises,¹³ the merged entity will be compelled, at the very least, by competition for consumers who regard a wide restaurant offering as the critical competitive parameter (but likely also by other ordering and marketing options), to ensure it provides attractive terms to restaurants.

3.3.3 The net effect of these forces is recognised in the SLC Decision, which notes that “*all the above-mentioned routes [i.e. from direct online ordering to both delivery and pure OTO aggregators options] are available to consumers, such that there is a competitive interaction between all of them.*”¹⁴ These models, along with the phone orders that the SLC Decision concedes are “*still the most common way of ordering takeaway food*”,¹⁵ collectively constrain JE’s actions and pricing precisely because their different features each meet different consumer preferences and needs.

4 HH is not a close competitor to JE and does not constrain JE today

4.1 The SLC Decision is wrong in concluding that JE and HH are “*each other’s closest competitors and constrain each other*”.¹⁶ At paragraph 126, the SLC Decision states that “*on the restaurant side of the market the Parties are each other’s closest competitors, and on the customers side the Parties compete with each other and with a number of other competitors*”. However, the SLC Decision at its core fails to account for the two-sided nature of the market in its assessment of the way in which online takeaway service providers compete for restaurants and consumers.

4.2 The SLC Decision draws the conclusion that JE and HH compete closely based on the following observations:

4.2.1 in terms of restaurants:

- (i) the similarity between the Parties’ service propositions;¹⁷
- (ii) the degree of geographic and restaurant overlap between the Parties;¹⁸ and
- (iii) the extent to which the Parties monitor and react to each other.¹⁹

4.2.2 in terms of consumers:

- (i) the diversion from JE to HH during outages on JE’s website;²⁰
- (ii) consumer surveys;²¹ and

¹³ Paragraph 92 SLC Decision.

¹⁴ Paragraph 63 SLC Decision.

¹⁵ Paragraph 164 SLC Decision.

¹⁶ Paragraph 164(a) SLC Decision.

¹⁷ Paragraphs 110-112 SLC Decision.

¹⁸ Paragraphs 113-117 SLC Decision.

¹⁹ Paragraphs 118-124 SLC Decision.

²⁰ Paragraph 95 SLC Decision.

²¹ Paragraphs 96-98 SLC Decision.

- (iii) the degree of consumer overlap between the Parties, based on internal documents.

4.3 JE sets out below why the observations relied on in the SLC Decision do not indicate that HH exercises a competitive constraint on JE, both in terms of restaurants and consumers.

4.4 JE and HH do not compete closely for restaurants

4.4.1 The SLC Decision wrongly concludes from the fact that the Parties offer a similar service proposition to restaurants that they compete closely for restaurants.²² In a two-sided market, restaurants choose to list on platforms principally because they provide access to consumers. Therefore, the value of a platform to restaurants depends on the number and nature of consumers visiting that platform.

4.4.2 Although JE and HH have similar business models from the perspective of restaurants (in that both offer pure OTO aggregation services), the number of consumers that use HH is substantially lower than JE. In fact, JE generates [X]. Table 1 of the SLC Decision indicates that JE generates around [X] orders per year, whilst HH generates around [X] orders per year. Paragraph 142 of the SLC Decision indicates that around 27,000 restaurants are listed on JE, whilst around 11,000 restaurants are listed on HH. Therefore, JE generates on average around [X] orders per restaurant each year, whilst HH generates on average around [X] orders per restaurant each year.

4.4.3 It is precisely for this reason that restaurants are unlikely to consider JE and HH to be substitutes, as switching from JE to HH would require restaurants to replace an existing platform with a similar – but inferior – platform. Paradoxically, and contrary to the SLC Decision’s conclusion, this means that HH does not pose a competitive constraint on JE despite having a similar business model. In fact, the more similar that HH is to JE in business model terms, the more likely it is to be considered an inferior alternative to JE from the consumer perspective, because it does not offer consumers many restaurants that are new or different from JE. As a result, given the low consumer base, restaurants will not be attracted to HH’s proposition.

4.4.4 This is the underlying rationale for the “winner-takes-all” nature of competition between firms with similar business models where indirect network effects are present. In this case, HH has fallen so far behind JE that it cannot be considered a credible substitute for JE from the perspective of restaurants – HH has lost the “winner-takes-all” market (based on traditional OTO platforms without delivery) to JE.

4.4.5 The SLC Decision cites significant restaurant overlap as evidence that the Parties compete closely for restaurants. However, this reveals a misunderstanding of the two-sided nature of the market. The extent to which the Parties compete for restaurants is determined by the level of overlap between the consumers that use the platforms, rather than restaurants, as the main “product” that platforms offer to restaurants is access to consumers. The SLC Decision does, however, mention consumer overlap within the context of competition for consumers. In particular, the SLC Decision refers to the level of audience duplication between JE and each of Deliveroo, HH and Domino’s based on data from [X], noting that the market is

²² Paragraphs 106-107 SLC Decision.

“[REDACTED]”. However, [REDACTED]. As the Parties have previously demonstrated, there is limited overlap between consumers who have ordered from both JE and HH. Based on data from the YouGov survey, only [REDACTED]% of consumers placed an order [REDACTED] during the three months before they were surveyed (October 2016).²³ It is also clear from the data in the SLC Decision on the number of orders through each website – [REDACTED] through JE and [REDACTED] through HH – that the level of consumer overlap cannot be very large, at least in terms of the extent to which JE’s customer base overlaps with HH.

4.4.6 Given that there is minimal overlap between consumers using JE and HH, restaurants are, if anything, more likely to consider HH to be an additional route to market, in that they gain access to a different – albeit significantly smaller – group of consumers by listing with HH. This is confirmed by the data, which indicates that around 80-90% of HH restaurants are also listed on JE, with 30-40% of HH’s restaurants being unique to HH.²⁴

4.4.7 Third, in relation to JE’s internal documents referred to at paragraph 119 of the SLC Decision:

(i) JE’s analysis of HH’s advertising strategy in October 2015 is a poor basis for concluding that HH imposes an ongoing constraint on JE, given the significant market developments since then (or even at face value). The fact that JE has reviewed HH among a number of competitors is not probative evidence that HH imposes a constraint on JE now or in the future. Moreover, JE had analysed the marketing strategy of other players so it is misleading for the SLC Decision to suggest HH was being treated as a special competitor even at that time (paragraph 119(a));

(ii) paragraph 119(b) of the SLC Decision refers to the fact that in an internal briefing document relating to a JE commission rise from 12 to 13%, JE noted that HH’s rate was 14% and the SLC Decision takes this as “*demonstrating that JE has regard to the prices of HH when setting its own rates*”. This is not probative of HH providing a competitive constraint now or going forward for the following reasons:

- the document post-dates the making of the decision and so is not evidence that HH’s commission rate was considered; moreover, the document is a script for discussion with other parties and therefore a comparison point for sales and marketing rather than a driver of, or constraint upon, the commission change;
- looking at the documents submitted to the CMA in relation to the [REDACTED] as a whole, it is clear that [REDACTED] in JE’s decision: rather the decision was motivated by [REDACTED].

4.4.8 The SLC Decision also fails to recognise that HH’s competitive position today [REDACTED]. As set out above, JE has not [REDACTED].

²³ Annex RFI1.26A.1 and Annex RFI1.26A.2. to the Merger Notice.

²⁴ Paragraph 106 SLC Decision.

4.4.9 In fact, the SLC Decision is notable for the absence of any evidence that HH in fact competes with or constrains JE.²⁵

4.5 JE and HH do not compete closely for consumers

4.5.1 JE's offering is also likely to be considerably more attractive compared with HH from the perspective of consumers. Within the context of a two-sided market, the value of a platform to consumers depends primarily on the number and nature of restaurants on the platform (as the SLC Decision recognises at paragraph 50). As noted above, however, the vast majority of restaurants listed on HH are also available on JE, while the reverse is not true. The number of restaurants that are listed on JE and not HH (i.e. "unique" restaurants) is considerably higher than the number of unique restaurants on HH (around 17,500 on JE compared with around 1,500 on HH). This means that HH's restaurant base is effectively a small subset of the restaurants listed on JE.

4.5.2 Given this, consumers are likely to consider HH to be a similar but inferior alternative to JE – and would therefore be unlikely to use HH instead of JE. This is supported by data from the [REDACTED] survey, which shows that [REDACTED].²⁶ As explained above, there is also a [REDACTED] on the consumer side of the market, as the incremental benefit for consumers from using HH is likely to be small (i.e. gaining access to a small number of additional restaurants not available on JE).

4.5.3 The SLC Decision ignores this framework in its assessment of the extent to which JE and HH compete for consumers. Instead, the SLC Decision relies on evidence that has been interpreted incorrectly to argue that the Parties are close competitors.

4.5.4 First, the SLC Decision has misinterpreted the analysis of the impact of JE's outages on HH's order volumes.²⁷ The estimated diversion ratio of [REDACTED]% implied by this analysis is [REDACTED] that would be expected if JE and HH were close competitors based on the SLC Decision's frame of reference.

4.5.5 In any case, the estimated diversion ratio implied by the analysis of JE's outages is likely to overestimate any diversion from JE to HH. This is because the analysis looks at the diversion from JE to HH based on the extreme scenario when JE is entirely unavailable to consumers. The relevant question for the assessment of the merger is the extent to which consumers would switch from JE to HH if there were a marginal deterioration in JE's offering. In some markets, this can be reasonably estimated by the diversion when one of the merging parties is no longer available, as the behaviour of marginal consumers (i.e. those who are most likely to switch) does not differ materially from the behaviour of inframarginal consumers (i.e. the entire customer base). In this case, however, it is likely that marginal consumers may behave differently from inframarginal consumers.

4.5.6 In particular, in response to a [REDACTED], consumers may switch to an alternative provider, such as Deliveroo or UberEATS. However, if JE were [REDACTED], then those consumers may instead seek to use a platform that offers a more similar set of restaurants,

²⁵ The only evidence that the SLC Decision mentions is the anecdotal views of one restaurant about events that happened shortly after JE and HH entered, i.e. over ten years ago, and which in any event are factually incorrect.

²⁶ Annex RF11.26A.1 and Annex RF11.26A.2. to the Merger Notice.

²⁷ Paragraph 95 SLC Decision.

namely HH, even if this were an inferior alternative to JE. HH would not be a credible substitute [REDACTED] – which is not the relevant post-merger counterfactual.

- 4.5.7** As an alternative estimate for the diversion ratio from JE to HH, one can look at the number of restaurants that [REDACTED] from JE when it most recently increased its standard commission rate for existing restaurants (i.e. those that had signed up with JE before October 2015) from 12% to 13% in April 2016 (i.e. equivalent to an 8.3% increase in prices). As shown in the chart below, the number of restaurants listed on JE [REDACTED] by this increase in JE’s standard commission rate. In particular, [REDACTED] chose to de-list from JE’s platform in the immediate aftermath of that increase, representing around [REDACTED]% of JE’s base of active takeaway restaurants.

[REDACTED]

- 4.5.8** To JE’s knowledge, none of the restaurants that [REDACTED]. This data shows that the constraint of HH on JE is limited.
- 4.5.9** Second, the SLC Decision also fails to present an accurate and balanced picture of the overall survey evidence adduced by the Parties, which on the whole is entirely consistent with the market dynamics the Parties set out. In particular, the SLC Decision ignores the [REDACTED] surveys supplied which emphasise [REDACTED] between JE, Deliveroo and UberEATS,²⁸ and puts undue weight on two isolated aspects of the [REDACTED] survey (quoted at paragraph 97) as apparent evidence of [REDACTED] between JE and HH. Even on the metric quoted, in absolute terms the [REDACTED] for JE than for HH (which the SLC Decision itself acknowledges) and JE also shows [REDACTED], consistent with the indirect network effects and “winner-takes-all” nature of the market JE has set out. The headline summary of the survey (p.3) is that JE is [REDACTED] overall on key image measures.
- 4.5.10** Similarly, in absolute terms, the survey figure quoted at paragraph 98 of actual last three months’ usage for JE is [REDACTED]. The failure to properly contextualise the figures quoted is evident also from the slide immediately before the quoted reference, which provides that [REDACTED] consumers report using JE “most often” than HH; [REDACTED] consumers report using JE in the last three months than HH, and [REDACTED] report having ever used JE compared to HH. By contrast, on two of these three metrics, the equivalent numbers for Domino’s are [REDACTED]. The overall survey material is therefore consistent with the evidence the Parties have provided about the [REDACTED] of HH, who as noted above, receives only around one tenth of the number of orders of JE.
- 4.5.11** The SLC Decision also does not materially comment on the Parties’ econometric analysis of the impact of HH’s presence (and that of others) on JE’s orders. In particular, while the SLC Decision mentions concerns about the robustness of the Parties’ impact analysis as a result of the results differing in different specifications,²⁹ no detail is provided around these concerns, and the SLC Decision does not discuss why it disagrees (if it does) with the Parties’ comments on the initial criticisms of the

²⁸ Annex RF11.26A.1 and Annex RF11.26A.2. to the Merger Notice.

²⁹ Paragraph 103 SLC Decision.

analysis submitted on 21 March 2017.³⁰ Given that the CMA appears to be exploring this exact issue in its Phase 2 analysis, these comments may be moot. However, for the avoidance of doubt, the Parties entirely disagree with the concerns around the econometrics expressed in the SLC Decision.

4.6 The SLC Decision’s “postcode analysis” is unsound and fails to show that HH constrains JE

4.6.1 The SLC Decision suggests that because consumer demand for takeaway food is local the best “*indicator of the constraint*”³¹ imposed by HH on JE from a consumer perspective is their geographic overlap. The SLC decision then provides an analysis of this overlap, for all OTO aggregators, in terms of “*presence*” (measured by reference to whether an aggregator has a single restaurant listed within a postcode area) both in terms of shared operational areas and order value. Based on this analysis, the SLC Decision concludes that JE and HH are each other’s closest competitors because:

- (i) The Parties are both “*present*” in [70-80]% of postcode districts served by an OTO aggregator and it is only in less than [20-30]% of postcode districts that another aggregator is “*present*”,³² and
- (ii) HH is present “*as a constraint*” from a consumer perspective in postcode districts that account for 95% of the value of JE’s orders.³³

4.6.2 While the analysis does illustrate that there is some level of overlap in the geographic footprint of the two Parties (an obvious and natural implication of the fact that, as the SLC Decision concedes, HH offers very few unique restaurants³⁴), the analysis fails to demonstrate its stated objective, which is to show that HH *provides a constraint* on JE. There are several reasons for this:

- (i) The SLC Decision conflates “*presence*” in terms of bare restaurant listings with competitive constraint. Under the SLC Decision’s binary approach to “*presence*” (whether in terms of operational overlap or order value), a single restaurant within a postcode is sufficient to show presence, and from this the SLC Decision assumes competitive constraint. In reality, an OTO aggregator that offered only a single (or other very small number) of restaurants in a postcode area would not provide *any* meaningful constraint from a consumer perspective on another aggregator with a wide restaurant offering, something acknowledged at paragraph 92 of the SLC Decision, which emphasises that “*in order to remain competitive on the consumers’ side, the merged entity will have to continue to provide access to a large and varied range of restaurants*”,³⁵
- (ii) If, on the contrary, and as the SLC Decision’s approach to “*presence*” suggests, a single restaurant listing in a postcode area *does* suggest a competitive constraint, then the CMA cannot consistently exclude other

³⁰ Response to the CMA’s review of the Parties’ econometric analysis dated 10 February 2017, submitted on 21 March 2017.

³¹ Paragraph 113 SLC Decision.

³² Paragraph 114 SLC Decision.

³³ Paragraph 188 SLC Decision.

³⁴ Paragraph 106 SLC Decision.

³⁵ Paragraph 92 SLC Decision. See also Paragraph 77(b) SLC Decision.

ordering methods from its analysis of presence. In particular, the geographic footprint of important non-aggregator competitors of JE such as Domino's (who has an exceptionally wide geographic footprint) should be included. This would make it clear that the key sources of competitive constraint on JE, even at a local level, are not from HH. This is further evident from [REDACTED];

- (iii) The SLC Decision ignores the econometric evidence supplied by the Parties³⁶ which tests in a more robust, sophisticated and statistically valid way the relationship between "presence" and competitive effects. Unlike the CMA's own analysis, the analysis supplied by the Parties: (a) considers the *number* of restaurants offered by aggregators within each local area, rather than adopting a simple binary threshold of a single restaurant listing; and (b) directly examines the impact of this upon order volumes, rather than simply assuming the existence of a constraint from the presence of a single listed restaurant in that area;
- (iv) The error in conflating "presence" with constraint is further evident when the SLC Decision's postcode analysis is properly contextualised against its own conclusions as to the Parties' shares of supply. The SLC Decision suggests that HH is JE's closest competitor because, *inter alia*, it is present in postcode districts that account for 95% of the value of JE's orders and it is only in less than 20-30% of postcode districts that another aggregator is present. But as the SLC Decision notes, JE is, at a minimum, *seven times* as large as HH in terms of order numbers overall,³⁷ which, given HH's broad geographic scope, suggests that its *presence* in each postcode area is on a much more limited scale than JE: i.e. it has a very limited restaurant offering across many geographic areas, meaning it is unattractive to consumers (who then do not order from HH in significant volumes). As such, the SLC Decision's postcode analysis greatly overstates HH's competitive significance by referring to HH's "*presence*" alone. The evidence is in fact more consistent with the Parties' submission that HH's wide geographic "presence" is a relic of past competition which has now been "lost"; and
- (v) Like the rest of the SLC Decision, the inference of competitive constraint based on "presence" in a postcode area is a static and backwards-looking approach. It ignores the levels of dynamism and innovation that is driving change in the market and the rapid expansion of the delivery model [REDACTED]

4.7 These points stand in the way of a finding that HH and JE are close competitors, in the sense of HH providing a meaningful competitive constraint on JE, [REDACTED]. Applying the correct conceptual framework and viewing the evidence available fairly and in its totality, it is already clear there can be no SLC because the acquisition of HH does not result in any *merger-specific* loss of rivalry – let alone a substantial one.

5 The SLC Decision fails to set out how HH might be expected to constrain JE in the future

5.1 The SLC Decision does not adequately identify how HH is supposed to recover in the market sufficiently to pose a competitive constraint on JE in the future. The observations around

³⁶ Exhibit 21 and Annex 5 of the Merger Notice, referenced at Paragraph 93(c)-(d) SLC Decision.

³⁷ Table 1 SLC Decision.

business similarity or geographic overlap between JE and HH are not probative of competitive impact, as demonstrated above. Equally, the fact that HH [REDACTED] does not prove either that HH has imposed any competitive constraint on JE, given that [REDACTED].

5.2 To the extent that the SLC Decision refers to evidence that HH is affected by JE and targets its actions on JE (see, for example, paragraphs 119(c) and 164(a)), this is not evidence that HH constrains JE. Rather, it is evidence that [REDACTED]. However, given that there is no evidence that [REDACTED], or that they constrain JE, they are simply not probative of an SLC from the loss of independent competition from HH. They are instead consistent with a “winner-takes-all” market whereby JE is the winner in this round, i.e. in respect of traditional OTOs not offering delivery services.

5.3 The fact is that HH’s actions are:

5.3.1 [REDACTED] (and likely driven by [REDACTED]);

5.3.2 [REDACTED];

5.3.3 [REDACTED]; and

5.3.4 not reflective of any structural reason why the loss of HH should be regarded as giving rise to an SLC.

5.4 JE notes that whilst the SLC Decision recognises that this is a two-sided market with indirect network effects,³⁸ the SLC Decision fails to recognise the implications of these observations. In particular, HH’s [REDACTED] from consumers significantly – and indeed fatally – weakens its attraction to restaurants and [REDACTED] to consumers, explaining its [REDACTED].

5.5 HH’s [REDACTED] both reflects these factors and is a further obstacle to [REDACTED]. This is because any hypothetical future world in which HH has become a credible competitor to JE must involve [REDACTED].

5.6 Moreover, for HH to have the incentive to engage in such activities, it must have a belief that its competitive position will [REDACTED], although without explaining why HH’s commercial judgement in these matters was incorrect.³⁹

6 The SLC Decision has also failed to appreciate the dynamics of innovation in the market and the impact of competition from Deliveroo and UberEATS

6.1 The SLC Decision recognises that JE faces competition for consumers from Deliveroo, UberEATS and Domino’s.⁴⁰ However, the SLC Decision incorrectly concludes that these providers exercise only a limited constraint on JE on the restaurant side of the market.

6.2 Perhaps constrained by the limited time available in the Phase I context, the SLC Decision fails to acknowledge or consider the implications of the wider market changes driving competition in the online takeaway market. In the entire 40+ page SLC Decision, there is only a single reference to the role of innovation, despite this being the primary factor driving competition in fast-moving online markets and the focus of recent literature suggesting that

³⁸ Paragraph 50 SLC Decision.

³⁹ Paragraph 122 SLC Decision.

⁴⁰ Paragraph 102 SLC Decision.

a broad and dynamic lens must be adopted to identify the varied sources of competitive constraint.⁴¹

- 6.3** In markets characterised by indirect network effects, there is typically a “race” in which firms with a particular business model incur large losses at the early stage of the “race” to try to get ahead of their rivals. Firms will only do this if they think there is a prospect of “winning” and making large profits. Once one firm has “won”, the lagging firms will typically cut their losses – since the probability of further investment leading to a position where these firms will become profits is vanishingly small. The process of dynamic competition therefore switches to finding an alternative business model which is preferred by consumers and/or restaurants and which may then supersede the existing business model.
- 6.4** This process is summarised in the BEIS Report into online platforms, which notes that, *“network effects, which might otherwise act as a barrier to entry, encourage dynamic competition in online markets. Entry is common and tends to materially affect the market: concentration tends to increase over time in each sector, but competition from other sectors often intensifies – some sectors become more concentrated as more successful networks grow, e.g. search engines, but there is competition on both sides of the market from other types of platforms”*.⁴² New entrants are therefore drawn to these markets by the knowledge that: (a) given their fast-moving nature and the focus on innovative service models, rapid changes in market share are possible; and (b) given the presence of indirect network effects, which gives these markets a “winner-takes-all” nature, the prize for successful entry is great. As the BEIS report concludes, *“The value of network effects on the one hand and their fragility on the other might create an incentive to innovate and otherwise invest in growing networks.”*⁴³
- 6.5** In platform markets, when a new platform is differentiated from the consumer perspective from existing platforms (e.g. in terms of offering access to different restaurants), it provides an incentive for consumers to use this platform in addition to or instead of existing platforms. As Deliveroo and UberEATS offer delivery services to restaurants, unlike JE and HH traditionally, this has allowed these platforms to widen the range of restaurants available to consumers and has therefore attracted consumers to use their platforms. Given the two-sided nature of the market, this will provide an incentive for restaurants to multi-home with their existing platforms to gain access to these consumers, and [redacted]. As the BEIS Report notes, this means that *“online platform market shares tend to be fragile [...] Multi-homing means (those) offering services through the platforms can generally move too if platforms are not competitive.”*⁴⁴
- 6.6** The application of these factors can be clearly seen in the online takeaway market in which the Parties operate, and is borne out by JE’s commercial strategy, which seeks to [redacted] from the [redacted] like the delivery models of Deliveroo and UberEATS. In particular, the advent of the delivery model led by Deliveroo and then UberEATS in the UK has had the following effects:
- 6.6.1** it has extended choice for consumers at the level of restaurants and platforms, because (as the SLC Decision acknowledges at paragraph 69), consumers see pure and delivery OTO aggregators as alternatives as, from the consumer side, it does

⁴¹ See the BEIS Report and the KPMG Report.

⁴² BEIS Report, page 6.

⁴³ BEIS Report, page 28.

⁴⁴ Ibid

not matter whether the restaurant or the OTO aggregator provides the delivery service;

6.6.1 it has led to many more restaurants and branded chains moving into delivery and indeed onto OTOs for the first time. There are many lower-end restaurants that are now listed on Deliveroo, including - amongst those the CMA will know well - Burger King, KFC, Roosters Piri and Tops Pizza, all of which [redacted]. The net result is to create a functionally comparable but also differentiated offering, which is needed to overcome the network effects inherent in the segment, and as noted above, to provide an incentive for consumers to use this platform in addition to existing platforms (in contrast to the situation of identical platforms) [redacted]; and

6.6.2 it has therefore increased competition at restaurant/consumer level to the traditional take-away restaurants, whose previous competitive advantage by offering delivery has been eroded. This has, in turn, made the lower-end restaurant delivery market more competitive, compelling JE to [redacted] (a point acknowledged at paragraph 92 of the SLC Decision).

6.7 The SLC Decision has understated the impact of competition from Deliveroo and UberEATS. Specifically:

6.7.1 the SLC Decision states that Deliveroo and UberEATS target higher end restaurants and consumers⁴⁵):

- (i) whilst this may initially have been the case when Deliveroo and UberEATS first started, again the SLC Decision has missed the dynamic nature of this market. As noted above, there are now many restaurants on Deliveroo and UberEATS which have [redacted]. This makes sense as these firms seek to take advantage of increasing orders to drive utilisation of their systems and delivery agents, and it rebuts both the argument that the delivery providers are focusing on higher end restaurants, and the position that delivery-based aggregation models are less viable in smaller geographic areas due to the need to achieve viable delivery scale; and
- (ii) furthermore, even if this were the case in the past, the SLC Decision fails to consider the impact of consumers being attracted to those platforms by virtue of the restaurant choice and the dynamic effect this has in a two-sided market with network effects.

6.7.2 The SLC Decision puts weight on the current geographic footprint of Deliveroo and UberEATS to support its view that they impose a limited constraint on JE.⁴⁶ The SLC Decision is flawed in several respects here:

- (i) first, it fails to consider the rate of expansion of Deliveroo and UberEATS and their publicised plans to expand (including UberEATS' recent announcement that it plans to expand by "one city a week" for the duration of 2017, and that it "believes (it) can change eater behaviour"⁴⁷), despite conceding at

⁴⁵ Paragraph 139 SLC Decision.

⁴⁶ Paragraph 164(b) SLC Decision.

⁴⁷ MCA Insight, 'UberEATS: We believe we can change eater behaviour', 12 May 2017 available at: <https://www.mca-insight.com/market-intelligence/suppliers/technology/ubereats-we-believe-we-can-change-eater-behaviour/552726.article?redirCanon=1>

paragraph 130 that since its founding Deliveroo “has rapidly increased the number of restaurant customers it lists (currently over 8,000) and the volume of orders it delivers”. In the latter case, rather than drawing the natural conclusion from this expansion, which is that Deliveroo is a strong and dynamic competitor with a presence likely to continue to strengthen in the future, the SLC Decision instead suggests that *precisely because* of the speed of its expansion, the CMA cannot draw an inference about its future role;⁴⁸ and

- (ii) second, the footprints of Deliveroo and UberEATS are already extensive by reference to locations where JE and, especially, HH receive orders. For example, Deliveroo was already present in competition with 62% of HH’s orders in 2016, as shown in Table 4 of the SLC Decision [§]. JE also has [§], which is already present against more than 30-40% of JE’s orders, as shown in Table 3 of the SLC Decision [§]. This is just one example of how competition from Deliveroo/UberEATS has [§] towards all restaurants;
- (iii) third, it ignores or gives insufficient weight to direct evidence of JE [§].

6.7.3 The SLC Decision argues that restaurants with their own delivery services will be slow to use them or switch to them from JE.⁴⁹

- (i) this again suggests the unduly static nature of the SLC Decision, and its failure to properly consider the scale of the changes currently taking place in the takeaway ordering sector (as set out in fuller detail above).
- (ii) at the same time, the SLC Decision itself recognises that “responses to the CMA’s merger investigation indicated that many restaurants see all types of OTO aggregators as providing access to a potentially greater number of consumers and therefore from that perspective OTO aggregators with and without delivery services appear, at least in principle, to serve similar needs. This may reflect that it is likely that many consumers would also consider the two types of platforms alternatives as, from the consumer side, it does not matter whether the restaurant or the OTO aggregator provides the delivery service”;⁵⁰
- (iii) in fact the dynamism of this market is seeing more restaurants multi-home given the value to them of incremental orders via Deliveroo/UberEATS.

The chart below shows the [§] on average as of March 2017, split by the following types of postcode district:

- postcode districts where [§];
- postcode districts where [§];
- postcode districts where [§]; and
- postcode districts where [§].

⁴⁸ Paragraph 177 SLC Decision.

⁴⁹ Paragraphs 68 and 136 SLC Decision.

⁵⁰ Paragraph 69 SLC Decision.

The chart indicates that [REDACTED]. In postcode districts where [REDACTED] has been present since before February 2016, [REDACTED]. This suggests that the [REDACTED] [REDACTED] is likely to continue increasing, not only because [REDACTED]UK but also because the number of restaurants [REDACTED] in those areas where [REDACTED] is likely to [REDACTED] over time.

[REDACTED]

- (iv) this observation also fails to give proper weight to the attraction of the Deliveroo and UberEATS platforms to end-users and the dynamic effect and constraint this has given the vastly larger untapped restaurant market available to them. Given the massive scale of UK takeaway restaurants who do not currently provide delivery (according to paragraph 142 of the SLC Decision, around 85,000 restaurants, compared to only 35,000 who currently provide some form of delivery), [REDACTED] (and to create further commercial rivalry to the business models of [REDACTED]), which would be highly attractive to consumers – and so restaurants;
- (v) contrary to the SLC Decision’s conclusion at paragraph 154 that the competitive constraint of Deliveroo on JE is not strong in relation to its established customer base of takeaway restaurants that carry out their own delivery, JE’s internal modelling split between its “core” aggregator services and delivery business does not show that it anticipates that its core business will be immune from competition (and, even if it did, this would in any case evidence the lack of constraint provided by HH, which emphasises the lack of a merger-specific loss of competition from the transaction).

6.7.4 The SLC Decision questions the ability of Deliveroo and UberEATS to persist in their growth.⁵¹ However, JE notes that Deliveroo seems so far to have attracted external financing for each phase of its growth. The financial ability of UberEATS and Amazon Restaurants to expand in this market is self-evident. Recent successful fund raising exercises by Jinn and Quiq⁵² demonstrate the continued belief of investors and companies in the delivery-based model and the attempts by other external delivery companies to challenge the model of restaurants providing their own delivery network. They illustrate that the size of the potential prize available for successful and innovative entrants will continue to draw financial support for existing and new players.

7 By not accounting for the consequences of competition in two sided markets, the SLC Decision errs in assuming the importance of HH in relation to independent restaurants who may not switch to Deliveroo or UberEATS

7.1 Understandably, the SLC Decision identifies that there may be restaurants for whom Deliveroo and UberEATS may not be suitable alternative platforms but JE is.⁵³ The SLC Decision concludes that:

⁵¹ Paragraph 173 et seq.

⁵² Both have raised significant funds in the last month: see <https://techcrunch.com/2017/05/12/jinn-locates-10m/>; and <https://techcrunch.com/2017/05/23/quiq-series-b/>

⁵³ Paragraph 164(b).

7.1.1 Deliveroo and UberEATS may not expand their geographic footprint to serve them;⁵⁴ and

7.1.2 those restaurants will then be left with no choice of platform, and that platforms are particularly important for winning new customers (the restaurants having the choice of direct order relationships with existing customers).⁵⁵

7.2 The SLC Decision's analysis of the impact of the transaction in this context is, however, flawed for the following reasons:

7.2.1 HH is no longer credible in that segment as a *substitute* choice of platform given its [redacted]. It is at most a complementary route to market for restaurants which they may choose to use in addition to JE, whose [redacted]. As such, there is no merger-specific loss of competition from the transaction even if some restaurants may decide not to use Deliveroo and/or UberEATS;

7.2.2 in any case, if the analysis in the SLC Decision were correct, one would reasonably expect to see evidence of [redacted] where HH is not present already, compared to those districts where HH is present. However, the SLC Decision does not provide any evidence of [redacted]. This emphasises that the competitive constraints on JE come from channels other than HH.

7.2.3 it ignores the logical progression of new market entrants from concentrated urban areas, which helps build up a critical mass of core profitability, and then, having proven that the model is sustainable, into smaller and smaller regions. Evidence of this progression exists already, as Deliveroo is already present in over 50 towns with a population below 150,000, including in St Andrews, which has a population of around 17,000. On the assumption that Deliveroo could successfully penetrate all towns with a population of 15,000 residents, JE estimates that Deliveroo's coverage could eventually extend to up to 90% of the UK's population. By way of comparison, JE's current coverage of the UK population is about [redacted]%; and

7.2.4 many of the restaurants that may choose not to list with Deliveroo or UberEATS will face competition from other restaurants serving overlapping catchment areas who are supported by Deliveroo and UberEATS. As the SLC Decision recognises at paragraph 92, the merged entity will therefore be compelled, at the very least by competition for consumers who regard a wide restaurant offering as the critical competitive parameter (but likely also by other ordering and marketing options), to ensure it provides attractive terms to its current restaurants who face intensifying competition from [redacted] who Deliveroo and UberEATS have introduced to the delivery market. In this regard, the interests of JE and these restaurants will be closely aligned: JE will not have the ability nor incentive to [redacted] than that of Deliveroo and UberEATS.

8 The SLC Decision understates the importance of direct ordering

8.1 Although logically distinct from the question of whether HH currently imposes any material competitive constraint upon JE (and so whether there is a transaction-specific SLC), JE notes that it remains constrained by a wide range of factors. As noted above, the failure of

⁵⁴ Paragraphs 177 and 180.

⁵⁵ Paragraph 72 et seq.

any evidence of [REDACTED] where HH is not present already emphasises the existence of material constraints on JE outside HH.

8.2 One of the most significant of these is direct ordering, which by virtue of its differentiated nature and established appeal retains an ongoing significance amongst the convergence of ordering routes. Although the implications of direct ordering are not properly reflected in its conclusions, the SLC Decision nonetheless makes several important factual points in this regard, namely that:

8.2.1 phone orders are still the most common way of ordering takeaway food,⁵⁶ and [REDACTED]% of JE customers still order directly from the restaurant;⁵⁷

8.2.2 direct ordering can be a valid alternative for the existing customers of a restaurant, particularly those who use the Parties' platforms to transact with a limited range of preferred restaurants on a regular basis;⁵⁸

8.2.3 it has become increasingly cheaper for restaurants to offer their own online ordering interface (or use a third party to build their own – e.g. Preoday), and restaurants often seek to steer consumers away from OTO aggregation platforms to direct ordering via their own websites and apps;⁵⁹ and

8.2.4 restaurants have an incentive to divert customers towards their own websites or to phone orders. In fact, one restaurant contacted by the CMA stated that it uses the HH platform “to acquire new customers and then divert them to our own website and app”.⁶⁰

8.3 These findings confirm that direct ordering continues to be an important competitive constraint in the market.

8.4 In addition, the SLC Decision fails to give proper weight in its conclusions to a significant body of evidence provided by the Parties that emphasises the constraint imposed by Domino's (in particular). This is despite the fact that JE provided compelling evidence about Domino's in the merger notice, at the issues meeting and in the response to the issues paper, and the fact that the SLC Decision itself acknowledges that:

8.4.1 JE's internal documents consistently include Domino's (as well as Deliveroo, UberEATS, and often Papa John's and Pizza Hut) in their analysis of competition for consumers;⁶¹

8.4.2 one JE internal document, which documents the relative spend shift from competitors to JE as a result of a general consumer discount over a trial period, shows that [REDACTED];⁶² and

8.4.3 the Parties submitted econometric evidence [REDACTED].⁶³

⁵⁶ Paragraph 160(d) SLC Decision.

⁵⁷ Paragraph 158(a) SLC Decision.

⁵⁸ Paragraph 160 SLC Decision.

⁵⁹ Paragraph 158(b) SLC Decision.

⁶⁰ Paragraph 159 SLC Decision.

⁶¹ Paragraph 93(a) SLC Decision.

⁶² Paragraph 93(b) SLC Decision.

⁶³ See Paragraph 93(c) SLC Decision and Annex 5 of the Phase I Merger Notice.

8.5 In fact, as noted in Section 4 above, the SLC Decision selectively quotes the few portions of the Engage customer survey that reference HH, while omitting to note that in fact on almost all measures considered by the survey, [REDACTED], with absolute figures on most visibility metrics [REDACTED].

8.6 The above signifies that the SLC Decision has failed to give due weight and consideration to the forms of competition that JE faces in reality, and it has therefore, erroneously concluded, without proper evidence to support its conclusions, that HH must impose a competitive constraint on JE.

Concluding comments – Implications for the Phase II Issues Statement

8.7 There are points in the SLC Decision which JE commends, particularly having regard to the Phase I case team's earlier views:

- (i) the recognition that this is a national market;
- (ii) the recognition of a wider competitor set on the consumer side of the market including Domino's; and
- (iii) the recognition that this is a two-sided industry.

8.8 Nevertheless, JE believes that the SLC Decision is flawed in certain key respects which will require detailed consideration in Phase II:

- (i) its appreciation of the dynamics of these two-sided markets and the scope for innovation is incomplete;
- (ii) it significantly fails to appreciate the weak position of HH now;
- (iii) in this it places too much weight on HH's geographic footprint and too little weight on its [REDACTED], its geographic reach is merely the reflection of past competition;
- (iv) it fails to appreciate that HH's [REDACTED] and [REDACTED] performance condemn it to [REDACTED] and an inability to [REDACTED]; and
- (v) it fails to appreciate the dynamism affecting both restaurant take-up (e.g. new restaurants using Deliveroo and UberEATS to access online takeaway) and expanded consumer engagement (more consumers with a wider repertoire of online restaurant access and expectations set by the newer entrants).

8.9 Consequently, the SLC Decision:

- (i) very substantially overstates the competition (if any) from HH on JE that will be lost from the merger;
- (ii) provides only speculation about HH's prospects of becoming a credible competitive force in the future, without establishing any means by which it may [REDACTED] be expected to do so; and
- (iii) underestimates the impact of competition from providers with new business models, notably Deliveroo and UberEATS, for both restaurants and consumers served by JE.

8.10 The Parties look forward to engaging with the CMA on all these issues in the Phase II process and are confident that a full and balanced examination of the evidence will support the view that there is no SLC resulting from this transaction.