

## JUST EAT / HUNGRYHOUSE MERGER INQUIRY

### HUNGRYHOUSE RESPONSE TO THE CMA'S PROVISIONAL FINDINGS

#### 1. INTRODUCTION

1.1 Hungryhouse strongly supports the CMA's conclusion in its provisional findings report published on 12 October 2017 (the "**Provisional Findings**") that the anticipated acquisition by Just Eat of Hungryhouse will not result in a substantial lessening of competition within any market for goods or services in the United Kingdom.

1.2 In particular, Hungryhouse supports the CMA's conclusions that:

1.2.1 The residual constraint which Hungryhouse imposed on Just Eat has declined – indeed, from April 2016 to April 2017, there was no discernible constraint from Hungryhouse on Just Eat;<sup>1</sup> However, the evidence shows that Hungryhouse had already not been a material constraint on Just Eat in the period preceding April 2016;

1.2.2 Hungryhouse has been loss-making [X]. The Provisional Findings also note that there was uncertainty regarding how long Delivery Hero would have continued to support it;

1.2.3 There is no evidence that the various initiatives considered by Hungryhouse would have improved Hungryhouse's performance. Indeed, Hungryhouse tried numerous initiatives and projects to improve its performance as would be expected but none of them were effective in materially improving Hungryhouse's prospects or sustainability;<sup>2</sup>

1.2.4 The restaurant food ordering industry is dynamic and evolving and Just Eat is being challenged by well-funded competitors with strong brands and technological and logistics experience and expertise. These operators pose a greater competitive constraint on Just Eat than Hungryhouse does and this constraint is likely to grow;<sup>3</sup> and

1.2.5 The evidence shows that direct ordering poses a strong competitive threat to Just Eat in areas in which neither Deliveroo nor UberEATS operate.<sup>4</sup>

1.3 While Hungryhouse welcomes the CMA's overall conclusion, it considers that the Provisional Findings do not take sufficient account of some of the compelling evidence presented to the CMA during the course of the investigation which further supports this conclusion. As a result, Hungryhouse disagrees with some aspects of the Provisional Findings.

1.4 In particular, Hungryhouse considers that:

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<sup>1</sup> Provisional Findings, paragraph 7.1(b).

<sup>2</sup> Provisional Findings, paragraph 7.2(b) and (c).

<sup>3</sup> Provisional Findings, paragraph 7.2(d) and (e).

<sup>4</sup> Provisional Findings, paragraph 7.2(f).

- 1.4.1 While the CMA rightly identifies logistics providers as a strong competitive constraint on Just Eat, the Provisional Findings underestimate the extent of this constraint and the speed at which it is further increasing.
- 1.4.2 The Provisional Findings fail to take sufficient account of the competitive constraint imposed on Just Eat and Hungryhouse (the "**Parties**") by direct ordering. There is clear evidence that the Parties compete directly with restaurants' direct ordering activities, including vertically-integrated food chains. As such, the final report should acknowledge that direct ordering is not only a very important competitive constraint, but also forms part of the same relevant product market as online food platforms.
- 1.4.3 The counterfactual adopted in the Provisional Findings does not properly take into account clear evidence of Hungryhouse's continued declining performance and Delivery Hero's explicit intention to sell or shut down the business. While the CMA correctly notes that Hungryhouse has been continuously loss-making<sup>5</sup> and is reliant on parent support for its continued existence,<sup>6</sup> the Provisional Findings underestimate the materiality of these concerns and fail to reflect Delivery Hero's commercial response to Hungryhouse's significant performance issues. The evidence submitted to the CMA thus far, and the updated evidence provided as part of this submission, demonstrates that the correct counterfactual against which the proposed transaction should be considered is Hungryhouse's exit from the market.
- 1.5 This submission sets out:
- 1.5.1 Further evidence supporting the CMA's conclusion that ordering and logistics specialists exercise a significant constraint on the Parties;
- 1.5.2 Additional evidence showing that the constraint by direct ordering on the Parties is of a magnitude that must result in the conclusion that direct ordering forms part of the same relevant product market; and
- 1.5.3 Finally, more evidence that the correct counterfactual which should be adopted by the CMA in its final report is that, absent the transaction, Hungryhouse would inevitably have exited the market, in particular in light of its poor, continuously declining performance.

## 2. **THE SIGNIFICANT AND INCREASING COMPETITIVE CONSTRAINT FROM NEW AND INNOVATIVE PROVIDERS**

- 2.1 Hungryhouse welcomes the CMA's evidence-based conclusions that:
- 2.1.1 *"the services of ordering and logistics specialists are sufficiently close substitutes to the Parties' services to be in the same product market"*<sup>7</sup>;
- 2.1.2 *"the restaurant food ordering and delivery industry has changed considerably*

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<sup>5</sup> Provisional Findings, paragraph 5.10.

<sup>6</sup> Provisional Findings, paragraph 5.10.

<sup>7</sup> Provisional Findings, paragraph 4.19.

*in the past few years and continues to evolve*"<sup>8</sup>;

2.1.3 *"30-40% of restaurants are likely to consider using an external company to provide their delivery service within the next couple of years, so for some current restaurant customers of Just Eat and Hungryhouse, services like Deliveroo and UberEATS may be considered to be viable alternatives"*<sup>9</sup>;

2.1.4 *"in the areas in which Deliveroo is present, it appears to exert a stronger constraint on Just Eat than Hungryhouse does"*<sup>10</sup>;

2.1.5 *"the Parties' internal documents show that a number of suppliers, particularly Deliveroo, are seen as important competitors"*<sup>11</sup>; and

2.1.6 The CMA would *"expect there to be stronger competition on the restaurant side between each Party and [Deliveroo and UberEATS] than between the Parties themselves"*<sup>12</sup>.

2.2 However, the Provisional Findings do not fully reflect the extent of this constraint and the speed at which it is increasing. Moreover, the Provisional Findings do not consider the additional constraint imposed on the Parties by the threat from further new entrants.

2.2.1 Non-stop rapid expansion of existing online food platforms:

(a) UberEATS' rapid growth in the UK has continued apace. It recently announced partnerships with over 20 restaurants in Coventry,<sup>13</sup> 15 restaurants in Newport<sup>14</sup> and 35 restaurants in Bournemouth.<sup>15</sup> According to the Financial Times, *"during the second quarter [of 2017] UberEATS accounted for 8-10 per cent of global gross bookings, around \$700m-\$870m of gross turnover, a level that implies the unit is on track to exceed \$3bn in gross sales this year."*<sup>16</sup> The expansion and strength of this player is clearly attractive to restaurant customers. McDonald's, for example, which began to offer McDelivery

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<sup>8</sup> Provisional Findings, paragraph 6.4.

<sup>9</sup> Provisional Findings, paragraph 4.17(b).

<sup>10</sup> Provisional Findings, paragraph 6.131.

<sup>11</sup> Provisional Findings, paragraph 6.130.

<sup>12</sup> Provisional Findings, paragraph 6.153.

<sup>13</sup> Coventry Telegraph, *UberEATS takes on Deliveroo with Coventry restaurant delivery*, 5 October 2017, <http://www.coventrytelegraph.net/whats-on/food-drink-news/ubereats-takes-deliveroo-coventry-restaurant-13719408>.

<sup>14</sup> Wales Online, *Food delivery service UberEATS is launching in Newport*, 4 October 2017, <http://www.walesonline.co.uk/whats-on/food-drink-news/food-delivery-service-ubereats-launching-13718076>.

<sup>15</sup> Daily Echo, *Customers will have choice of 35 restaurants*, 5 October 2017, [http://www.bournemouthecho.co.uk/news/15577718.UberEATS\\_launches\\_its\\_food\\_delivery\\_app\\_in\\_Bournemouth\\_and\\_35\\_restaurants\\_are\\_signed\\_up/](http://www.bournemouthecho.co.uk/news/15577718.UberEATS_launches_its_food_delivery_app_in_Bournemouth_and_35_restaurants_are_signed_up/).

<sup>16</sup> Financial Times, *UberEats a bright spot on menu with \$3bn potential sales*, 15 October 2017, <https://www.ft.com/content/a40e56f2-b056-11e7-aab9-abaa44b1e130>

through UberEATS in June, has already made this service available in 270 locations. According to some reports, this has helped *"McDonald's report a global rise of 6% in comparable sales for the third quarter to the end of September."*<sup>17</sup> In addition, Uber is continuing to innovate to differentiate its UberEATS service from that of its competitors and provide a more compelling offer to consumers. For example, it has recently announced the launch of its own credit card which incentivizes consumers to use the UberEATS service by offering 4% cashback on all orders.<sup>18</sup> Despite TfL's announcement that it would not renew Uber's car-booking licence, UberEATS continues to operate separately and successfully. Indeed it has just launched an extensive advertising campaign on the London underground.<sup>19</sup> In addition, Uber confirmed to various media outlets that the suspension of its car-booking licence would not have an adverse impact on UberEATS' growth since the *"licence only applies to private-hire operations."*<sup>20</sup> As the Financial Times notes, *"regulatory burdens are lighter when you deliver food rather than people. So Uber has hard fights with taxi regulators but no problem delivering meals."*<sup>21</sup>

- (b) Deliveroo also continues to strengthen its presence in the market. It recently raised a further £385 million in new funding, resulting in the company now being valued at over \$2 billion making it *"the fastest growing UK tech company and one of Europe's biggest tech success stories."*<sup>22</sup> The company has said that it will use the new funding to *"invest further in [their] delivery-only kitchens Editions, in developing technology and in taking Deliveroo to more towns and cities."*<sup>23</sup> The focus on delivery-only kitchens Editions is clearly an attractive option for restaurants that are looking to introduce their brands to new areas within two or three months and need the data and know-how to do so.
- (c) Amazon's restaurant delivery service has also continued to expand. It recently announced a US partnership with Olo, an online restaurant

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<sup>17</sup> Sky News, *Home delivery roll-out boosts McDonald's UK sales*, 24 October 2017, <http://news.sky.com/story/home-delivery-roll-out-boosts-mcdonalds-uk-sales-11096645>

<sup>18</sup> Business Insider, *Uber is launching its own Visa credit card for buying meals and booking travel*, 25 October 2017, <http://www.businessinsider.de/uber-launched-its-own-visa-credit-card-for-buying-meals-and-booking-travel-2017-10?r=US&IR=T>

<sup>19</sup> See, for example, the advertisements pictured in Annex 1. Based on standard media rate cards, Hungryhouse estimates that this advertising space will cost approximately £900,000.

<sup>20</sup> Metro, *UberEATS will not be impacted by Uber losing its licence in London*, 22 September 2017, <http://metro.co.uk/2017/09/22/how-ubereats-will-be-impacted-by-uber-losing-its-licence-in-london-6948140/#ixzz4tQQ5XL1V>.

<sup>21</sup> Financial Times, *Uber: food fight*, 16 October 2017, <https://www.ft.com/content/e17f343a-b109-11e7-a398-73d59db9e399>.

<sup>22</sup> Eater London, *Deliveroo Prioritise 'Rapid Growth' of 'Dark Kitchens'*, 27 September 2017, <https://london.eater.com/2017/9/27/16372708/deliveroo-rapid-growth-dark-kitchens-after-284m-investment-restaurant-delivery>

<sup>23</sup> Techcrunch, *Deliveroo raises \$385M in new funding, now valued at 'over \$2 Billion,'* 24 September 2017, <https://techcrunch.com/2017/09/24/deliveroo-raises-385m/>

platform, whose customers already include well-known brands such as Chipotle, Shake Shack, Five Guys and Cold Stone Creamery. Starting in November, Amazon customers in certain US cities will be able to order take-out from certain local restaurants directly through the Amazon app.<sup>24</sup> The news had an immediate impact on other US take-out food service providers; for example, it was reported that "*since [the] announcement, GrubHub's sales have been down nearly six percent, despite recent sales having been up 35 percent for the year of 2017.*"<sup>25</sup> These innovations will certainly be rolled out to other jurisdictions, including the UK.

### 2.2.2 Further threats from powerful new entrants

- (a) Stelios Haji-Iannou, EasyJet's founder and main shareholder, recently announced that he will launch EasyFood within the next two months. EasyFood is a UK based takeout delivery service which provides an offering similar to Just Eat and Hungryhouse. After the announcement, it was reported that "*Just Eat shares fell as much as 2.1 percent to 666 pence in London,*"<sup>26</sup> underscoring the expectation that this will further intensify competition in the market. Hungryhouse understands that EasyFood will commence operations by providing aggregator services with a view to adding last-mile delivery capabilities in due course.
- (b) Facebook has formally announced its 'Order Food' feature which enables users to order food delivery from their Facebook page by linking them to either third-party delivery services, like DoorDash, or directly to a group of restaurants, including well-known brands like Five Guys, Papa John's, TGI Friday's and Chipotle, among others. Although the feature and service is currently only available in certain cities in the US, it is likely to expand to the UK given the attractiveness of the proposition to customers who want to check out reviews from people in their friends list which may allow them to make better restaurant choices.<sup>27</sup> Indeed, the value of Just Eat's shares fell in response to this announcement<sup>28</sup> demonstrating the expected impact of this development on the market.

### 2.3 The dynamism of this fast-moving market should be fully reflected in the CMA's final

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<sup>24</sup> CNBC, *Amazon will soon let you order from restaurants using the Amazon app on your phone*, 23 October 2017, <https://www.cnn.com/2017/10/23/amazon-smartphone-app-now-allows-ordering-from-dozens-of-restaurants.html>

<sup>25</sup> Loquitur, *Amazon establishes new food chain delivery*, 18 October 2017, <http://www.theloquitur.com/amazon-establishes-new-food-chain-delivery/>

<sup>26</sup> Bloomberg, *EasyJet Founder Set to Launch Just Eat Rival EasyFood*, 3 October 2017, <https://www.bloomberg.com/news/articles/2017-10-03/easyjet-founder-set-to-launch-just-eat-rival-easyfood>

<sup>27</sup> Bloomberg, *Facebook to Take Food Delivery Orders Directly on Its Website*, 13 October 2017, <https://www.bloomberg.com/news/articles/2017-10-13/facebook-seeks-to-tap-into-demand-for-online-restaurant-orders>

<sup>28</sup> [http://www.livecharts.co.uk/share\\_prices/Facebook-starts-taking-food-orders--hitting-J-news26562950.html](http://www.livecharts.co.uk/share_prices/Facebook-starts-taking-food-orders--hitting-J-news26562950.html).

report.

### 3. DIRECT ORDERING FORMS PART OF THE RELEVANT PRODUCT MARKET

3.1 The CMA's Provisional Findings recognise that:

3.1.1 The diversion estimates from their own consumer survey "*imply that direct ordering may impose a significant competitive constraint on both Parties*"<sup>29</sup>;

3.1.2 The "*majority of consumers either had a specific restaurant or set of restaurants in mind*" when ordering from the Parties and therefore were "*much more likely to divert to direct ordering*"<sup>30</sup>;

3.1.3 A number of vertically integrated food chains "*are monitored and are often considered to be within the 'competitor set' by the Parties*"<sup>31</sup>; and

3.1.4 The CMA's restaurant survey shows that "*In response to an increase of 1% of the commission rate they pay, 56% of Just Eat's single-homing restaurants leaving Just Eat would not join another online food platform (implying that they would make greater use of direct ordering.; similarly, 46% of Just Eat's single-homing restaurants would not replace Just Eat if it were to close permanently (again, implying that these would rely on direct ordering)*".<sup>32</sup>

3.1.5 The CMA concludes that its "*survey evidence provides evidence of a constraint from direct orders; while the extent of this constraint may vary across local areas, we did not find any evidence to support the proposition that Hungryhouse currently posed (or was likely to impose in the future) a stronger competitive constraint on Just East compared to direct ordering in those local areas.*"

3.2 The significance of direct ordering was further evidenced in the CMA's view when a chain restaurant explained that, when it tested switching some restaurants away from the Parties' platforms, it noticed a dip in orders for only approximately two weeks, after which orders recovered and returned to normal levels.<sup>33</sup> This evidence shows that restaurants do not require the services of the Parties in order to maintain order levels and, contrary to the assertion made in the Provisional Findings,<sup>34</sup> are more than willing to risk delisting and indeed do so.

3.3 Despite the CMA's recognition of these points, the Provisional Findings do not acknowledge that direct ordering forms part of the same market as the Parties.<sup>35</sup> In

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<sup>29</sup> Provisional Findings, paragraph 6.135.

<sup>30</sup> Provisional Findings, paragraph 6.136.

<sup>31</sup> Provisional Findings, paragraph 4.27.

<sup>32</sup> Provisional Findings, paragraph 6.160.

<sup>33</sup> Provisional Findings, paragraph 6.163.

<sup>34</sup> Provisional Findings, paragraph 6.137 and 6.161.

<sup>35</sup> Provisional Findings, paragraphs 4.26 and 4.28.

particular:

- 3.3.1 The Provisional Findings erroneously dismiss the CMA's own survey evidence as being inconsistent with past actual behavior;<sup>36</sup>
  - 3.3.2 The Provisional Findings do not place appropriate weight on the constraint from direct ordering based on the number of restaurants who had a transactional website at the time of the CMA's restaurant survey.<sup>37</sup> In doing so, the Provisional Findings do not take account of the ease with which restaurants can obtain a transactional website (as evidenced by their readiness to delist from the Parties in response to a commission increase) and the significant growth in the number of providers offering white-label website services;
  - 3.3.3 The Provisional Findings do not recognise the means through which direct orders can be made other than a transactional website, including by phone (which continues to represent the most common source of take-away orders) or in the restaurant itself;
  - 3.3.4 The suggestion in the Provisional Findings that direct ordering, including the services offered by vertically integrated food chains, is incomparable to the service offered by platforms<sup>38</sup> is not supported by the evidence; and
  - 3.3.5 The Provisional Findings mischaracterise the Parties' attempts to combat the constraint from direct ordering.<sup>39</sup> Attempts to prevent consumers from making a larger proportion of their orders through direct channels, including through the use of a price guarantee, are clear evidence of direct competition between the Parties and direct ordering.
- 3.4 These points are expanded further below.

***The Provisional Findings erroneously dismiss the CMA's own survey evidence as being inconsistent with past actual behaviour***

- 3.5 The assertion in the Provisional Findings that little weight can be placed on the CMA's own survey due to its hypothetical nature<sup>40</sup> is based on a misreading of the evidence. While actual behaviour of course forms a vital component of an analysis of competition, it can only be considered directly relevant where the actual behaviour and the "hypothetical" response being compared relate to the same fact pattern.
- 3.6 Importantly, restaurants' responses to Just Eat's commission rate increase in April 2016, or Hungryhouse's commission rate increase in 2013, cannot reasonably be considered to provide an indication of their likely response to a *further* commission increase. Restaurants may well have been prepared to pay 13% commission instead of

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<sup>36</sup> Provisional Findings, paragraph 6.161.

<sup>37</sup> Provisional Findings, paragraph 4.22.

<sup>38</sup> Provisional Findings, paragraphs 4.24 and 4.27.

<sup>39</sup> See, for example, Provisional Findings, paragraphs 4.25 and 6.138.

<sup>40</sup> Provisional Findings, paragraph 6.161.

12%, if, as was the case in relation to the increase in Just Eat's commission in April 2016, this rise coincided with it offering more value-added services to restaurants (and incurring increased costs to offer these services). However, if the Parties were to unjustifiably increase commission rates, without any corresponding enhancement to their value proposition, Hungryhouse believes that restaurants would leave the Parties' platforms and revert to direct ordering.

- 3.7 The CMA is addressing what it believes to be conflicting evidence of restaurants' likely response to a hypothetical commission rate increase by dismissing what restaurants stated they would do without any evidence to suggest the survey methodology was flawed or that restaurants did not understand the question. Instead, the CMA questions the reliability of this evidence by comparing it to the historical behavior of restaurants to a lower commission rate increase in entirely different circumstances (i.e. where Just Eat believes there was no, or minimal, commission rate increase on a quality adjusted basis).
- 3.8 As a competition authority, the CMA relies heavily on the stated responses of customers in its merger inquiries. To dismiss these stated responses by customers, in circumstances where there is no evidence to suggest the CMA's survey methodology was flawed or that restaurants did not understand the questions, the CMA must have compelling evidence that restaurants are not telling the truth or are confused about what their actual behavior would be in practice. No such evidence has been presented.

***Restaurants who do not currently have a transactional website can obtain this functionality cheaply and easily – indeed a rapidly increasing number of restaurants are doing so***

- 3.9 The Provisional Findings fail to take account the significance of the ease with which restaurants can cheaply set up their own transactional websites, which has further increased the competitive constraint imposed on the Parties by direct ordering. Indeed, the CMA's survey evidence<sup>41</sup> shows that, from the restaurant perspective, the most commonly cited response to every type of diversion is to de-list from Hungryhouse and Just Eat and rely more heavily on direct ordering (including through restaurants' own websites).
- 3.10 In order to assist the CMA in understanding the magnitude of the constraint imposed by restaurants setting up their own websites, this section of Hungryhouse's response sets out new information in relation to the ease with which restaurants can set up an online presence and the proliferation of companies offering these services.
- 3.11 Restaurants leaving Hungryhouse and Just Eat in response to a commission increase, as envisaged by the CMA's survey, would be able to find white label solutions through numerous providers that charge 0% commission.<sup>42</sup> Indeed, some white label providers market themselves as a direct alternative to Just Eat and Hungryhouse, urging restaurants to "*stop giving [their] profits away and take back control*"<sup>43</sup>.

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<sup>41</sup> See charts 13, 14, 15, 17, 18, 19, 20 and 22 of the report summarising the CMA's survey.

<sup>42</sup> Details of some of these providers are provided as **Annex 2** to this response.

<sup>43</sup> App4Takeaways website: <https://www.app4takeaways.com/#How-It-Works>



- 3.12 White label online ordering providers are offering restaurants the opportunity to save on commission and retain loyal customers. White label website companies therefore offer to work with restaurants to avoid paying commission on orders that they would have received anyway, by encouraging customers to order directly through the restaurant's own branded website or app. Appaway's slogan encapsulates this message "*Join The Revolution. Stop paying commission on orders from regular customers*"<sup>44</sup>.
- 3.13 Providers such as App4Takeaways, Zuppler, Apper Street and Order Tiger, amongst others, are offering restaurants more than just a website in order to build their online presence. Their offering focuses on brand development and process optimisation through providing reporting dashboards and marketing services. These tools allow restaurants to track ordering patterns and incentivise customers to return directly to their own website. As online ordering platforms, therefore, white label website providers are making themselves even more competitive by offering a wider range of services.
- 3.14 Competition in providing white label websites is further intensified by companies like 3s POS, traditionally a provider of in-restaurant till technology, that are also offering a broad range of restaurant management tools including online ordering services<sup>45</sup>. By offering restaurants an online ordering system at 0% commission, 3s POS can compete with aggregators such as Hungryhouse and Just Eat. In addition to enabling restaurant customers to save on commission, 3s POS provides a restaurant with its own branded desktop and mobile site as well as integration with hardware within the restaurant itself. An online order will be received, synced with the in-store EPOS and printed or displayed on a display system in the kitchen.
- 3.15 White label website providers are positioning themselves as a cheaper alternative to Hungryhouse, Just Eat, Deliveroo and UberEATS for restaurants to get access to customers ordering online. App4Takeaways, for example, charges a fee of £109 per month (when paid annually) with no set up fee or order fee<sup>46</sup>, in return for which it provides restaurants with a custom built website and app as well as marketing services. Order Tiger offers online ordering through a responsive website and mobile app for £59 a month with a set up fee of £249, where the first three months are free<sup>47</sup>.
- 3.16 It is important for the CMA to recognise that Hungryhouse has reacted to this material threat to its business by offering free white label website services to its restaurants. It would not make commercial sense for Hungryhouse to make this investment if it was not certain that restaurants would otherwise, with great ease, create their own websites with a view to bypassing Hungryhouse.

***Restaurants who do not currently have a transactional website can still obtain orders by phone***

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<sup>44</sup> Appaway website:  
[http://www.appaway.co.uk/?gclid=EAIaIQobChMI\\_4fTnvmL1wIVIRgbCh0DzAULEAAYASAAEgLS\\_vD\\_BwE](http://www.appaway.co.uk/?gclid=EAIaIQobChMI_4fTnvmL1wIVIRgbCh0DzAULEAAYASAAEgLS_vD_BwE)

<sup>45</sup> 3s POS website: <https://3s-pos.com/online-ordering-system/>

<sup>46</sup> App4Takeaways website: <https://www.app4takeaways.com/#Packages>

<sup>47</sup> Order Tiger website: <http://www.ordertiger.com/pricing/>

- 3.17 The CMA notes that independent estimates indicate around 55% of UK takeaway orders are currently placed by telephone and even following growth in the online proportion of sales in the coming years, offline sales are likely to remain 30% to 35% of total orders (by different metrics) in 2020.<sup>48</sup> Telephone direct ordering will remain a significant competitor to Just Eat.<sup>49</sup>
- 3.18 A website without a transaction function still provides a marketing channel for the restaurant and, with an advertised telephone number featured prominently on the website, consumers can quickly and easily contact the restaurant to place their order. This method gives customers immediate peace of mind that the order has been made and can be quicker than online ordering.
- 3.19 Evidence supports this interchangeable use of different ordering methods by consumers. For example, Hungryhouse's brand trackers demonstrate that almost 70% of consumers use both phone and online order methods.<sup>50</sup>

***Direct ordering, including through vertically integrated food chains, is a strong competitive constraint to the services offered by the Parties***

- 3.20 The Provisional Findings' assertion that direct ordering, including the services offered by vertically integrated food chains, is not substitutable with the service offered by platforms<sup>51</sup> is not supported by the evidence.
- 3.21 The CMA's consumer survey demonstrates that 47% of consumers would switch to direct ordering if either Just Eat or Hungryhouse was unavailable.<sup>52</sup> This is because consumers are interested in getting good food delivered to their home, irrespective of whether this service is offered by a platform or by an individual restaurant. Indeed, as the Provisional Findings rightly acknowledge, the "*majority of consumers either had a specific restaurant or set of restaurants in mind*" when ordering from the Parties and therefore were "*much more likely to divert to direct ordering*".<sup>53</sup>
- 3.22 Moreover, it is clear that direct ordering is also a substitute for the services offered by the Parties from the perspective of restaurant customers. The CMA's restaurant survey shows that "*In response to an increase of 1% of the commission rate they pay, 56% of Just Eat's single-homing restaurants leaving Just Eat would not join another online food platform (implying that they would make greater use of direct ordering.; similarly, 46% of Just Eat's single-homing restaurants would not replace Just Eat if it were to close permanently (again, implying that these would rely on direct ordering)*".<sup>54</sup> This reflects the fact that, from a restaurant perspective, the important element of the service provided by the Parties is the ability to sell their food to

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<sup>48</sup> Provisional Findings, paragraph 2.46, which references Deutsche Bank, Morgan Stanley and UBS estimates.

<sup>49</sup> See pages 11 and 16 of Just Eat's annual report 2016.

<sup>50</sup> See Annex 3B.9 to the Merger Notice, slide 9.

<sup>51</sup> Provisional Findings, paragraphs 4.24 and 4.27.

<sup>52</sup> CMA consumer survey, chart 40.

<sup>53</sup> Provisional Findings, paragraph 6.136.

<sup>54</sup> Provisional Findings, paragraph 6.160.

consumers. This need is fulfilled equally by direct sales.

- 3.23 In light of this evidence, it would be inappropriate for the CMA to conclude in its final report that direct ordering was not comparable to the services offered by the Parties from either a restaurant or a consumer perspective.

***Attempts to convert consumers from direct ordering, including through the use of a price guarantee, are clear evidence of direct competition between the Parties and direct ordering***

- 3.24 The CMA correctly recognises that "*both Just Eat and Hungryhouse pursue initiatives to convert consumers from direct ordering to ordering through their online platform.*"<sup>55</sup> However, the Provisional Findings mischaracterise the implications of these activities, stating that "*this is not evidence of direct ordering constraining either party with respect to existing consumers [...] but rather points to the Parties' efforts to expand their consumer base*"<sup>56</sup>. This represents a fundamental misunderstanding of the dynamics of the market.
- 3.25 It is clear that consumers do not order exclusively online or offline; rather, they use these different methods interchangeably. For example, Hungryhouse's brand trackers demonstrate that [ $\times$ ]<sup>57</sup> [ $\times$ ]<sup>58</sup> Consequently, it is clear that consumers view these methods of ordering food as substitutable and direct ordering remains an option for consumers who are also users of online platforms.
- 3.26 Moreover, the Provisional Findings misconstrue the implications of the price match guarantees offered by the Parties. While the CMA acknowledges that such clauses are designed to "*place a limit on the constraint from direct ordering as they limit the ability of restaurants to incentivise consumers to order directly by offering lower places*"<sup>59</sup>, the Provisional Findings fail to understand the way in which these clauses reflect competitive dynamics.
- 3.27 The price match guarantees are an attempt by the Parties to combat the competitive constraint that they face every day from direct ordering. Rather than indicating that restaurants do not compete because they cannot undercut the Parties, they demonstrate clearly that the Parties feel sufficiently threatened by direct ordering to take direct action to implement these clauses and to enforce them. Indeed, the CMA implicitly acknowledges that consumers would be likely to switch to direct ordering if they had a financial incentive to do so<sup>60</sup> - i.e. if ordering through the Parties was to become a small but significant amount more expensive than ordering directly, consumers would switch to ordering directly. This is the very definition of the hypothetical monopolist test.<sup>61</sup> As such, it is clear that direct ordering should be included in the same product

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<sup>55</sup> Provisional Findings, paragraph 4.25.

<sup>56</sup> Provisional Findings, paragraph 4.25.

<sup>57</sup> See Annex 3B.9 to the Merger Notice, slide 9.

<sup>58</sup> See Annex 3B.9 to the Merger Notice, slide 9.

<sup>59</sup> Provisional Findings, paragraph 6.139.

<sup>60</sup> Provisional Findings, paragraph 6.139.

<sup>61</sup> Market Definition: OFT403, paragraphs 2.5 *et seq.*

market as the supply of online food platforms in the UK.

**4. THE CORRECT COUNTERFACTUAL THAT SHOULD BE ADOPTED BY THE CMA IN ITS FINAL REPORT IS THAT, ABSENT THE TRANSACTION, HUNGRYHOUSE WOULD INEVITABLY HAVE EXITED THE MARKET**

4.1 The Provisional Findings' conclusion regarding the counterfactual is at odds with Hungryhouse's actual (rather than predicted) performance and the CMA's own findings that Hungryhouse has been loss-making [3<] and is entirely reliant on Delivery Hero to remain as a going concern.<sup>62</sup> Hungryhouse considers that the evidence shows that it would have exited had it not been for the Merger, in particular in light of its continuously declining performance in an increasingly competitive landscape.

4.2 In particular:

4.2.1 The Provisional Findings suggest that the financial forecast produced by Delivery Hero in December 2016 was not necessarily a poor indicator of future performance.<sup>63</sup> As set out in greater detail below, this is at odds with evidence of Hungryhouse's actual performance, which clearly demonstrates that this forecast is, like all previous forecasts, entirely unrealistic and therefore of no probative value. The CMA is required to take as the counterfactual the "*most likely scenario*"<sup>64</sup>. As such, it would be not be appropriate for the CMA's final report to conclude on the basis of a single unreliable forecast (as the Provisional Findings do) that Hungryhouse would not necessarily continue to be loss making.<sup>65</sup>

4.2.2 The Provisional Findings note that Hungryhouse's incentives under the earn out provisions in the SPA were significantly different than they would have been in the absence of the agreement, therefore limited weight has been placed on Hungryhouse's recent performance (which has been extremely poor).<sup>66</sup> This argument demonstrates a clear misunderstanding of the impact of the SPA on Hungryhouse's strategy. The SPA in fact hugely incentivised Hungryhouse to compete more strongly with Just Eat, Deliveroo and individual restaurants (amongst others) than it otherwise would have sustainably been able to. This is because it encouraged Hungryhouse to compete to capture as many orders as possible, even at high cost, in order to materially increase the purchase price payable by Just Eat.

4.2.3 The counterfactual section of the Provisional Findings states, [3<],<sup>67</sup> that "*the profitability of Hungryhouse could potentially have been improved through*

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<sup>62</sup> Provisional Findings, paragraph 5.10.

<sup>63</sup> Provisional Findings, paragraph 5.16.

<sup>64</sup> Merger Assessment Guidelines, paragraph 4.3.6.

<sup>65</sup> Provisional Findings, paragraph 5.17.

<sup>66</sup> Provisional Findings, paragraph 5.15.

<sup>67</sup> Provisional Findings, paragraph 5.22.

*the initiatives that were identified by its management, had Delivery Hero been prepared to allocate the resources necessary".*<sup>68</sup> This conclusion is unsupported by the evidence. It is abundantly clear that the initiatives considered by Delivery Hero and Hungryhouse (which were primarily minor variations on previous failed ideas<sup>69</sup>) were wholly insufficient to turn around its dire performance. Indeed, the CMA itself recognises this in its assessment of the competitive effects of the transaction, in which it concludes that "*it is not possible to determine whether these would have been effective strategies*".<sup>70</sup>

4.2.4 The Provisional Findings rely on the unsupported assertion that the CMA has seen "*no evidence*" that the closure of the UK was considered or that this would have been the rational course of action.<sup>71</sup> Contrary to this contention, a large amount of evidence regarding Delivery Hero's portfolio strategy and the resultant clear imperative to sell or close the business has been provided to the CMA.<sup>72</sup> This large body of emails, internal documents and statements from Delivery Hero's IPO prospectus demonstrates a cohesive approach to investment in, and indeed withdrawal from, subsidiaries. It would be inappropriate for the CMA to fail to give this evidence due consideration in its final report.

4.2.5 The Provisional Findings suggest that the market is not intrinsically 'winner-takes-all' and that smaller operators can succeed in increasing their market shares.<sup>73</sup> This statement is at odds with Delivery Hero's extensive experience of the industry, which demonstrates clearly that an undifferentiated operator, such as Hungryhouse, will inevitably lose market share to a larger player, rendering it unsustainable in the medium to long term. Indeed, the examples of "smaller competitors" cited in the Provisional Findings do not suggest the contrary:

(a) In both Germany and Korea,<sup>74</sup> the relevant operators have roughly equal shares, meaning that no player has yet reached the relevant scale to benefit from indirect network effects. However, Delivery Hero firmly expects this to happen in the future.

(b) In Denmark, the market dynamics are unique as it is a small country in

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<sup>68</sup> Provisional Findings, paragraph 5.23.

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<sup>70</sup> Provisional Findings, paragraph 6.121.

<sup>71</sup> Provisional Findings, paragraph 5.26.

<sup>72</sup> See, for example, the paper submitted to the CMA on 22 March 2017 regarding the background to the counterfactual, section 5; the annex to the response to the CMA's Issues Paper submitted to the CMA on 12 April 2017, paragraph 2.4 *et seq.*; Hungryhouse's response to the CMA's Phase I decision submitted to the CMA on 5 June 2017, paragraph 2.10 *et seq.*; Hungryhouse's response to the CMA's first information request dated 7 July 2017; Hungryhouse's response to the CMA's information request dated 11 July 2017; Hungryhouse's response to the CMA's information request dated 24 July 2017; Hungryhouse's response to the CMA's counterfactual working paper, paragraph 1.5 *et seq.*

<sup>73</sup> Provisional Findings, paragraph 6.92.

<sup>74</sup> Provisional Findings, paragraph 6.92(b) and (c).

which competition is focused around one city and the minor success of a small player (Hungry.dk) is based primarily on personal relationships with restaurant owners.<sup>75</sup> It is not possible to transfer this model to other jurisdictions – it is very much an exception to the rule. Indeed, even Hungry.dk itself has not been able to transfer its moderate success to other countries. Despite attempts, it has failed to become a profitable or sustainable second player in either Ireland or the Netherlands.

Given that it was significantly smaller than Just Eat, and did not offer consumers or restaurants a differentiated proposition, Hungryhouse inevitably lost market share to Just Eat and was eventually forced to exit the market.

***Hungryhouse's recent actual performance demonstrates that, not only was the December 2016 forecast wholly inaccurate, but also that Hungryhouse's performance has continued to decline from an already poor level***

- 4.3 The statement in the Provisional Findings that the CMA has "*provisionally not accepted Hungryhouse's position that it would necessarily continue to be loss-making*"<sup>76</sup> is at odds with the evidence of Hungryhouse's recent performance. As correctly acknowledged by the CMA in the annotated issues statement "*in previous years Hungryhouse [has] consistently underperformed against forecasts [...] therefore limited weight can be attached to such forecasts*".<sup>77</sup> This is shown clearly in Figure 1 below.

**Figure 1: Hungryhouse estimated annual EBITDA vs. Actual EBITDA (€m)**  
[redacted]

- 4.4 This trend has continued in 2017 as compared to the forecast prepared in December 2016, demonstrating that these estimates were equally unreliable and no weight should be placed on them in the CMA's final report. This is shown clearly in Figure 2 below.
- 4.5 Note that these forecasts represent the 2017 business plan prior to the signing of the SPA. The CMA correctly notes that subsequent forecasts for 2017, which predicted [redacted],<sup>78</sup> were prepared in a different context and at a later stage. Nevertheless, actual performance YTD (updated figures to September 2017) of [redacted] show that Hungryhouse's performance has been [redacted].

**Figure 2: Hungryhouse estimated annual EBITDA 2017 vs. Actual EBITDA 2017 YTD (£)**  
[redacted]

- 4.6 Indeed, even where Hungryhouse has achieved a growth in orders, this has been at the direct expense of profitability, therefore the suggestion in the Provisional Findings

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<sup>75</sup> See Hungryhouse's follow up submission to the oral hearing on 31 July 2017, which was submitted to the CMA on 11 August 2017.

<sup>76</sup> Provisional Findings, paragraph 5.17.

<sup>77</sup> Annotated Issues Statement, page 13.

<sup>78</sup> Referred to in paragraph 5.14 of the Provisional Findings.

that this growth represents any degree of sustainable success<sup>79</sup> is not supported by the evidence. As shown in Figure 3 below, customer growth was only achieved through huge expenditure on customer acquisition marketing. Such expenditure was consistently loss making and followed a clear pattern: the greater the marketing spend, the greater the loss. Thus, while in a certain month customer acquisition growth may be high, this is meaningless for sustainability given that losses would also have grown by a much greater amount. [X].

- 4.7 Figure 3 below, updated to September 2017, shows that as marketing costs increase (green), the total number of orders also increases (blue). Crucially however, EBITDA also decreases significantly as every customer acquired is loss-making given the low cohort rate.

**Figure 3: Hungryhouse total orders, marketing costs and EBITDA**  
[X]

- 4.8 [X].

**Figure 4: Hungryhouse reorder rate of cohorts<sup>80</sup>**  
[X]

- 4.9 Importantly, even if the CMA was to conclude (incorrectly) that growth of order numbers in itself was an indicator of success or sustainability, it should be recognised that, even on the basis of this metric, Hungryhouse's performance has declined materially. As set out in Figure 5 below, Hungryhouse's year on year growth in order numbers [X]. This is in the context of an overall market which is growing extremely rapidly.<sup>81</sup> [X].

**Figure 5: YoY order volumes in October 2017<sup>82</sup>**  
[X]

- 4.10 Overall it is clear that Hungryhouse's performance has continued to decline from already extremely low levels. As such, the Hungryhouse business is completely unsustainable and it would not be appropriate for the CMA's final report to take the view that the "*most likely scenario*"<sup>83</sup> in the absence of the transaction would be for Hungryhouse to continue trading. Rather, the evidence clearly demonstrates that, absent the transaction, Delivery Hero would cease to support Hungryhouse and Hungryhouse would exit the market.

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<sup>79</sup> Provisional Findings, paragraph 5.32.

<sup>80</sup> Delivery Hero management information systems.

<sup>81</sup> Provisional Findings, paragraphs 2.44 and 2.47.

<sup>82</sup> Figures provided based on available data up to 22 October 2017.

<sup>83</sup> Merger Assessment Guidelines, paragraph 4.3.6.

ANNEX 1  
UBEREATS ADVERTISEMENTS ON THE LONDON UNDERGROUND

