

ANTICIPATED ACQUISITION BY JUST EAT.CO.UK OF HUNGRYHOUSE HOLDINGS LIMITED

JUST EAT'S RESPONSE TO THE CMA'S PROVISIONAL FINDINGS

This is Just Eat's response to the CMA's provisional findings published on the CMA's website on 12 October 2017 (the "PFs").

1 Summary

1.1 Just Eat very much welcomes the CMA's findings that support a conclusion that the Proposed Transaction cannot be expected to result in a substantial lessening of competition and that the case merits an unconditional clearance. Just Eat is very pleased that many of the points made in its submissions are reflected in the PFs.

1.2 However, Just Eat notes that the PFs do not always acknowledge or give proper weight to the evidence presented by the Parties throughout the Merger Inquiry. This response addresses those points in order to ensure that the CMA's final decision addresses these gaps and is robust to challenge. In particular, Just Eat believes that:

- the CMA's survey and the Parties' internal documents firmly support the fact that direct ordering is a significant constraint on the Parties and should be included in the relevant market;
- Just Eat's econometric analysis and internal documents also support the inclusion of 'vertically integrated food chains' such as Domino's as part of the relevant market and as an important constraint on the Parties; and
- there are strong indirect network effects, which drive competition in the market and which have resulted in a "winner-takes-all" structure in 'v1.0' of the market. These have led to Hungryhouse being a weak player which does not pose any material competitive constraint on Just Eat.

1.3 These points are expanded upon further in this submission.

2 Frame of reference and market definition

2.1 Direct ordering

2.1.1 Just Eat considers that the CMA's final report should include direct ordering in the relevant market and that it should be recognised as posing a significant competitive constraint on the Parties.

The CMA's survey and the Parties' internal documents strongly support the inclusion of direct ordering as part of the relevant market and as a significant constraint on the Parties

2.1.2 The PFs do not consider that direct ordering channels "*are sufficiently close substitutes to the Parties' services to be included in the same product market*".¹ The PFs also conclude that "*while many elements of [the CMA's] survey evidence and the Parties' internal documents and research indicate*

¹ Paragraph 4.26 of the PFs.

that Just Eat (...) [is] constrained on the consumer side by direct ordering, certain aspects of consumer behaviour (found in [the CMA's] consumer survey) and the price guarantee clauses imposed by the Parties on restaurants, mean that in practice this constraint is limited".²

- 2.1.3 Just Eat has consistently maintained and demonstrated that it regards direct ordering (via the telephone, walk in orders or online) to be one of its most important competitors. As acknowledged by the PFs,³ the CMA's survey strongly bears this out. For example:
- (i) from the restaurant perspective, direct ordering⁴ is the most commonly cited response given by restaurants switching away from Just Eat and Hungryhouse, and usually by some margin.⁵ This is the case for every type of diversion question included in the restaurant survey, as is evidenced by Charts 13, 14, 15, 17, 18, 19, 20 and 22 of the report summarising the results from the CMA's survey (the "**Survey Report**"); and
 - (ii) from the consumer perspective, direct ordering is also by far⁶ the most commonly cited response given by Just Eat consumers in response to all of the diversion questions included in the consumer survey. This can be seen in Charts 40, 42, 44, 48 and 52 of the Survey Report.

The Parties' internal documents also demonstrate Just Eat's management's [§<].

All restaurants take telephone and collection orders and almost all consumers have phones, so the PFs overplay the importance of online ordering when assessing the constraint imposed by direct ordering

- 2.1.4 The PFs note that the CMA's survey suggests that direct ordering may not be viewed as a close substitute for the Parties by restaurants or consumers because, on the one hand, only 60% of restaurants have a website and, of those, only 60% allow consumers to order online,⁷ and on the other hand, consumers cited online ordering as their most frequent method of ordering takeaway food.⁸
- 2.1.5 As explained to the CMA in Just Eat's response to the Annotated Issues Statement,⁹ these are not the relevant metrics to be used here because all restaurants take telephone and collection orders and, given the nature and demographic of Just Eat's consumer base, almost all consumers will have phones (particularly if they have online access). In fact, in the era of smartphones, direct ordering has never been easier – a consumer need only search on Google for a restaurant or cuisine and they can phone the

² Paragraph 6.141 of the PFs.

³ Paragraphs 4.20 and 6.135 of the PFs.

⁴ This relates to the response "not replace platform", i.e. delisting without replacing Just Eat with another platform.

⁵ For instance, in response to the price diversion question, 57% of Just Eat restaurants who would switch away from Just Eat would rely on direct ordering (Chart 19 of the Survey Report).

⁶ For instance, in response to the forced diversion question, 55% of consumers would switch to ordering directly (Chart 40 of the Survey Report); in response to the "if chosen restaurant not on platform" question, 73% of Just Eat customers who would switch away from Just Eat would choose direct ordering (Chart 52 of the Survey Report).

⁷ Paragraph 4.22 of the PFs.

⁸ Paragraph 4.23 of the PFs.

⁹ [§<].

restaurant in one click using Google’s “Call” button. Indeed, virtually all of Just Eat’s independent restaurants operated in the takeaway market before they joined any platform. Online food takeaway platforms are therefore only a portion of their existing activity and a source of incremental orders if or when they want them.

- 2.1.6 In addition, the vast majority of restaurants’ revenues that comes from online food takeaway platforms is likely to come from consumers who have ordered from the restaurant before and who would likely continue to be customers were the restaurant to rely on direct ordering in response to a price increase or marginal depreciation of Just Eat’s offering, as shown by the diversion questions of the CMA survey.¹⁰ The CMA’s survey also indicates that a material proportion of consumers would be likely to switch from using Just Eat to ordering directly via offline channels. As shown in Chart 52 of the Survey Report, a higher proportion of respondents stated that they would use direct ordering via offline channels than via online channels if the restaurant that they last ordered from had not been available on Just Eat.

Low levels of switching following commission rate increases which reflect an increased level of service are not probative of a limited constraint posed by direct ordering

- 2.1.7 Despite the compelling evidence about the constraint imposed by direct ordering, the PFs appear reluctant to acknowledge that direct ordering forms part of the relevant market¹¹ and is a significant constraint on Just Eat.¹²
- 2.1.8 Just Eat understands that the CMA might have reservations in accepting survey evidence as having a significant probative value,¹³ as evidence based on actual observed behaviour is likely to be more reliable than survey evidence reflecting anticipated behaviours in response to hypothetical scenarios. Just Eat agrees that where real data exists on an issue, this should be preferred to responses from hypothetical survey questions. However, where there is no alternative source of actual data, survey-based evidence may be informative.
- 2.1.9 In line with these views, the CMA considers that the results of its survey require a “*degree of caution*” given that “*there is evidence of actual past behaviour which is not in line with the survey answers to hypothetical questions*”.¹⁴ The PFs use this argument to cite low levels of restaurant switching when Just Eat increased its commission rates as actual evidence of the fact that direct ordering poses a limited constraint on Just Eat.¹⁵

¹⁰ Survey Report Chart 29 (89% of Just Eat consumers and 86% of Hungryhouse consumers say they tend to buy from the same restaurant or set of restaurants) and Chart 34 (77% of Just Eat consumers and 73% of Hungryhouse consumers have ordered from the last restaurant they ordered from before that order).

¹¹ Paragraph 4.26 of the PFs.

¹² Paragraph 6.141 of the PFs.

¹³ Paragraph 4.21 of the PFs.

¹⁴ Paragraph 4.21 of the PFs.

¹⁵ Paragraphs 4.21 and 6.137 of the PFs.

- 2.1.10 However, as Just Eat has previously noted,¹⁶ its commission increases corresponded with it offering more value-added services to restaurants, and incurring increased costs to offer these services. [§<].¹⁷
- 2.1.11 Therefore, Just Eat does not consider that the level of restaurant switching following its April 2016 commission rate increase is evidence of the fact that direct ordering on the restaurant side is limited, as the PFs suggest.

Uniform PQRS offering demonstrates the material constraint from direct ordering in areas outside the footprints of Hungryhouse or other platforms

- 2.1.12 Following the CMA's line of argument that direct ordering does not form part of the relevant market, the SSNIP test would suggest that in areas where Just Eat is the only online food takeaway platform, it could profit from a commission rate increase of 5% (i.e. a small but significant non-transitory increase in price). [§<].

Just Eat's price match provisions are a reaction to the threat of direct ordering and do not preclude it

- 2.1.13 The PFs consider that the price guarantee clause imposed by Just Eat is in place to limit the constraint from direct ordering, as it limits the ability of restaurants to incentivise consumers to order directly by offering lower prices.¹⁸
- 2.1.14 However, Just Eat's price match clause is in place because of the constraint of direct ordering, not to preclude it. It is precisely because Just Eat faces a constraint from direct ordering that Just Eat has [§<].
- 2.1.15 Just Eat's business model allows restaurants to be easily identified by consumers. Once consumers have found the restaurant of their choice and reviewed the menu on the Just Eat website or app, they can [§<] order directly from the restaurant, thereby bypassing Just Eat, either at the time of placing their first food order from a particular restaurant or when making repeat orders from a restaurant that they like. This behaviour of consumers bypassing Just Eat and ordering directly from the restaurant [§<].
- 2.1.16 This is the reality of the constraint that Just Eat faces from direct ordering. Just Eat therefore includes the price guarantee clause in its standard terms and conditions [§<].

2.2 Vertically integrated food chains

- 2.2.1 Just Eat considers that the CMA's final report should include vertically integrated food chains, especially Domino's, in the relevant market and these players should be recognised as posing a significant competitive constraint on the Parties.

¹⁶ [§<].

¹⁷ It is inherently difficult to quantify the extent to which restaurants and consumers use direct ordering and regard direct ordering as a substitute for receiving orders (on the restaurant side) or ordering through a platform (on the consumer side). On the restaurant side, the Parties do not have access to data on the orders that restaurants receive through direct ordering channels; and on the consumer side, the Parties do not have access to data on the orders that consumers place directly with takeaway restaurants.

¹⁸ Paragraph 6.139 of the PFs.

The competitive constraint posed by vertically integrated food chains is supported by an extensive body of evidence

- 2.2.2 Just Eat considers that the PFs do not give proper weight to the significant body of evidence which demonstrates the constraint imposed by vertically integrated food chains (notably Domino's). For example:
- (i) as acknowledged by the CMA,¹⁹ Just Eat's internal documents consistently include Domino's (as well as Deliveroo, UberEATS, and often Papa John's and Pizza Hut) [redacted];
 - (ii) the CMA's 'Competition for Consumers' working paper acknowledges that the proportion of spending by Just Eat's consumers on Domino's ([redacted]% as of July 2015 and [redacted]% as of September 2016) is [redacted] than the proportion spent on Hungryhouse ([redacted]%).²⁰ In terms of share of spending specifically on competitors, Domino's is [redacted];²¹ and
 - (iii) [redacted].²²

Vertically integrated food chains impose a constraint on the Parties, notwithstanding the fact that they do not offer a variety of cuisines

- 2.2.3 The PFs attempt to dismiss the constraint from vertically integrated food chains, stating that "[t]he narrow range of food types available mean that they would be considered close substitutes by consumers only in relation to a subset of consumer orders".²³ However, this fails to appreciate that the chains in question (Domino's, Papa John's and Pizza Hut) are primarily pizza companies and a significant proportion of Just Eat's orders are for pizza and pizza based items. Just Eat's website allows consumers to apply a filter for cuisine type to identify all available restaurants that offer food of that type. Based on Just Eat's [redacted]²⁴. [redacted].

3 Closeness of competition between Just Eat and Hungryhouse

Just Eat welcomes the CMA's findings regarding the limited constraint that Hungryhouse poses on Just Eat

- 3.1 Just Eat welcomes the CMA's findings that "[w]hile [the CMA] survey evidence shows that both consumers and restaurants perceive Just Eat and Hungryhouse as close competitors, the documentary evidence we have obtained and econometric analysis we have conducted indicate that in practice Hungryhouse is imposing a limited competitive constraint on Just Eat".²⁵

¹⁹ Paragraph 4.27 of the PFs.

²⁰ Page 3, Working Paper 'Competition for consumers'.

²¹ [redacted].

²² Although the PFs note that the CMA's econometric analysis "did not find evidence that Domino's (...) exerted a discernible competitive constraint on the Parties" (paragraph 4.27(a) of the PFs), Just Eat has been unable to confirm the accuracy of the CMA's econometric evidence as its economic advisers have not been granted access to the CMA's data, despite requests for it.

²³ Paragraph 4.27(b) of the PFs.

²⁴ [redacted].

²⁵ Paragraph 14(a) of the PFs.

3.2 The CMA's econometric analysis appears to be consistent with Just Eat's econometric analysis, which indicates that [REDACTED]. However, Just Eat has been unable to verify whether the CMA's results are accurate, and in particular the time period for which they are relevant (i.e. whether it is limited to [REDACTED]), as its economic advisers have not had access to the CMA's data.

3.3 In relation to the survey evidence, Just Eat emphasises that limited evidential weight should be placed on this in relation to the competitive interaction between the Parties, considering that there is evidence based on actual behaviour on the limited extent of competitive interaction between Just Eat and Hungryhouse, which is preferable to responses to hypothetical questions, including:

(i) [REDACTED]

(ii) [REDACTED]

(iii) [REDACTED]

3.4 These findings are also consistent with [REDACTED].²⁶

Just Eat also welcomes the CMA's findings that Deliveroo and UberEATS pose a greater competitive constraint on Just Eat than Hungryhouse does

3.5 Just Eat agrees with the CMA's view that Deliveroo and UberEATS pose a greater competitive constraint on Just Eat than Hungryhouse does. Just Eat notes that both of these firms have continued to grow their restaurant base rapidly in recent months, as shown in Figure 1 and Figure 2 below. Just Eat estimates that the number of restaurants signed up with Deliveroo is now [REDACTED], while the number of restaurants signed up with UberEATS is approaching [REDACTED].

Figure 1: Recent growth in Deliveroo restaurants

[REDACTED]

Source: Just Eat estimates

Figure 2: Recent growth in UberEATS restaurants

[REDACTED]

Source: Just Eat estimates

3.6 In particular, UberEATS has more recently continued to expand its operations into different areas, opening in Worcester, Watford, Coventry, Slough, St Albans, Oxford, Leamington Spa, Newport and Warwick in October alone.

Valk Fleet's market exit left Hungryhouse too far behind in the race for the 'v2.0' delivery model

3.7 While Just Eat is unaware of the specific financial and commercial reasons that led Valk Fleet to go into administration, and, without speculating about the reason for Delivery Hero's decisions in relation to Valk Fleet, Just Eat would be surprised if Delivery Hero's relationship with Valk Fleet had collapsed if Valk Fleet had been successful for Hungryhouse. In any event, it is clear that Delivery Hero's exit from the UK delivery market left Hungryhouse far behind in the race for the 'v2.0' model of the market, given the

²⁶ [REDACTED].

substantial growth of Deliveroo and UberEATS, the entry into the market of Amazon Restaurants and the fact that Just Eat has started to develop its own delivery proposition.

- 3.8 The result is that if Hungryhouse attempted to enter into the delivery space now, it would be unable to succeed, given that it would be entering a crowded space where it would be at a competitive disadvantage to other more established players.

4 Analytical framework / indirect network effects

Competition is driven by the two-sided nature of this market and the existence of strong indirect network effects, which favour the larger player in the market

- 4.1 Section 6 of the PFs (in particular paragraphs 6.56 et seq.) sets out the CMA's analytical framework for assessing competition in the relevant market, and hence the effects of the merger. The framework starts from the observation that there may be indirect network effects that apply in this platform market. The framework then identifies factors that are important for platform competition such as the level of single- and multi-homing.

- 4.2 The existence of indirect network effects in platform markets is consistent with the economic literature on platform markets. For instance, the first paragraph of Rochet and Tirole, "Platform Competition in Two-Sided Markets" (2003), one of the seminal papers in this area, starts with the following statement:

"Buyers of video game consoles want games to play on; game developers pick platforms that are or will be popular among gamers. Cardholders value credit or debit cards only to the extent that these are accepted by the merchants they patronize; affiliated merchants benefit from a widespread diffusion of cards among consumers. More generally, many if not most markets with network externalities are characterized by the presence of two distinct sides whose ultimate benefit stems from interacting through a common platform. Platform owners or sponsors in these industries must address the celebrated "chicken-and-egg problem" and be careful to "get both sides on board."

- 4.3 It also seems to be a matter of common sense, as well as the strongly held view of both the Parties and other market participants, that indirect network effects exist in 'v1.0' of the pure online takeaway aggregator model of the market. In particular, restaurants (other things equal) prefer platforms with more consumers, and consumers (other things equal) prefer platforms with more restaurants. The evolution of the market, and the behaviour of the market participants within it, is clearly consistent with the existence of indirect network effects in 'v1.0' of the market.

- 4.4 Just Eat welcomes the fact that the CMA has considered as part of its analysis the existence of indirect network effects. However, the CMA appears to conclude that the evidence in this regard is mixed.²⁷ Just Eat believes that this conclusion is contrary to the evidence which supports the existence of strong indirect network effects or, at the very least, strongly supports that there are sufficient indirect network effects in place to support a finding that the Proposed Transaction does not result in a substantial lessening of competition.

- 4.5 Just Eat also does not consider that the analytical approaches that the CMA has used are necessarily informative as to the strength of indirect network effects. For instance:

²⁷ Paragraph 6.84 of the PFs.

- 4.5.1** It is clear from evidence provided by Just Eat at the Site Visit and Oral Hearing, [§<], that Just Eat is strongly of the view that there are indirect network effects.²⁸ The CMA appears to be compelled by the oral statements of Deliveroo, UberEATS and Amazon Restaurants on this matter (see paragraph 32 of Appendix E of the PFs), so it is unclear why the CMA seems to take a different view when considering the evidence from the Parties – for example, the evidence presented in paragraph 31 of Appendix E of the PFs appears to be more selectively chosen and does not fully reflect the general views of the Parties.
- 4.5.2** The CMA's econometric exercise has been primarily used to consider whether there was a constraint from Hungryhouse on Just Eat. To shed light on the existence and strength of indirect network effects, one would need to employ a different analysis using the relative positioning of Just Eat and Hungryhouse, over a longer time period, and with use of lag structures, rather than the approach taken in the CMA's econometric exercise. Just Eat does not therefore think that this exercise is informative in relation to the existence of indirect network effects (contrary to the view reported in paragraph 6.84 of the PFs).
- 4.5.3** The questions in the survey (as reported in paragraph 33 of Appendix E of the PFs) do not directly tackle the existence of indirect network effects by looking specifically at the relative positions of different online takeaway platforms. The survey includes questions that relate to the extent to which customers place weight on their choice of restaurant when ordering takeaway food. However, as these are hypothetical and to some extent ambiguous questions, it is likely to be difficult to draw any meaningful conclusions from the responses to these questions in relation to the existence of indirect network effects. For instance, the survey asks a question about "choice mindset" (see Chart 33 of the Survey Report), but this relates to that specific purchase decision (where the customer may have had a particular restaurant in mind), rather than the entirety of their relationship with the platform. Indirect network effects are also unlikely to be directly visible to individual restaurants or consumers. However, they are clearly observable from data based on actual observed behaviour at a more aggregate level. As noted above and by the Parties in previous submissions, this is likely to be more probative than survey evidence, as the former reflects actual decisions taken by restaurants/consumers, whilst the latter only reflects the stated responses to questions, which may be driven by the design of the questions asked or subject to misinterpretation, misunderstanding or other biases.²⁹ Just Eat therefore has doubts as to whether the survey provides useful evidence about the strength or existence of indirect network effects.

4.6 Just Eat also notes the following points in relation to the discussion around whether the market is "winner takes all":

- 4.6.1** the international evidence indicates that, in virtually every country, the 'v1.0' model (i.e. the pure aggregator model) tends to result in only one operator.

²⁸ For example, see: [§<].

²⁹ [§<].

The isolated examples that the CMA has found where this is not the case (reported in paragraph 6.92 of the PFs) are exceptions to this. In particular, competition persists in the market in Germany because no firm has yet achieved a clear leading position;

- 4.6.2 Hungryhouse's share of orders is less than 10% of that of Just Eat and has been for some time (and is also forecast to decline further). This is consistent with the "winner takes all" nature of the market, or at the very least, this strongly demonstrates that, regardless of whether the market is characterised as "winner takes all" or "winner takes most", Hungryhouse's precarious position is irreversible and the Proposed Transaction does not give rise to a substantial lessening of competition under any conceivable framework;
- 4.6.3 it is unclear which internal documents are quoted from in paragraph 6.90 of the PFs, but it is important for the CMA to bear in mind that there has understandably been a strong internal incentive for Hungryhouse to play up its prospects even if this has not been true in practice;
- 4.6.4 the conclusion that "*Hungryhouse has grown at a significant rate*"³⁰ appears to be inconsistent with the facts. Given the dramatic increase in the overall size of the market, Hungryhouse's growth has been poor, which explains why it has lagged further behind Just Eat, and its inability to catch up has been fixed by the existence of indirect network effects in 'v1.0' of the market.

³⁰ Paragraph 6.94 of the PFs.