

**Penalty notice under section 110  
of the Enterprise Act 2002 –  
Addressed to Hungryhouse  
Holdings Limited**

Anticipated acquisition by JUST EAT plc  
of Hungryhouse Holdings Limited

Case ME/6659-16

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Confidential information and the names of individuals in the original version of this notice have been redacted from the published version. Redacted information in the text of the published version of the notice is denoted by [X]. Non-sensitive wording is indicated in square brackets.

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## Notice of a penalty

1. Pursuant to sections 110 and 112 of the Enterprise Act 2002 ('**EA02**'), the Competition and Markets Authority (the '**CMA**') hereby gives notice of the following:
  - a) On 22 November 2017, the CMA imposed a penalty on Hungryhouse Holdings Limited ('**Hungryhouse**') under section 110 EA02 (the '**penalty**') because Hungryhouse has, without reasonable excuse, failed to comply with a requirement imposed on it by the notice issued by the CMA under section 109 EA02 dated 31 May 2017 (the '**First s109 Notice**').<sup>1</sup> More specifically, Hungryhouse failed to provide certain documents responsive to: (i) Annex 1, question 2 of the First s109 Notice ('**Question 2**'); and (ii) Annex 2, question 6 of the First s109 Notice ('**Question 6**'), by the required date, and Hungryhouse has no reasonable excuse for its failure to do so. In the case of Question 2, the required date was 5pm on 12 June 2017. In the case of Question 6, the required date was 5pm on 19 June 2017.
  - b) The penalty is a fixed amount of £20,000.
  - c) Hungryhouse is required to pay this penalty in a single payment, by cheque or bank transfer to an account specified to Hungryhouse by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice on Hungryhouse.
  - d) Hungryhouse may pay the penalty earlier than the date by which it is required to be paid.
  - e) Pursuant to section 112(3) EA02, Hungryhouse has the right to apply to the CMA within 14 days of the date on which this notice is served on Hungryhouse for the CMA to specify a different date by which the penalty is to be paid.
  - f) Pursuant to section 114 EA02, Hungryhouse has the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application under section 112(3) EA02, within the period of 28 days starting with the day on which Hungryhouse is notified of the CMA's decision.

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<sup>1</sup> The First s109 Notice is attached as Annex 1 to this notice. This notice relates only to Question 2 and Question 6 (defined below). The CMA does not comment in this notice as to whether it considers the remainder of the questions in the First s109 Notice have been fully complied with.

- g) Pursuant to section 114 EA02, Hungryhouse has the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which this notice is served on Hungryhouse in relation to:
- (i) the imposition or nature of the penalty;
  - (ii) the amount of the penalty; or
  - (iii) the date by which the penalty is required to be paid.
- h) Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 EA02, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

## Structure of this document

2. This notice is structured as follows:

**Section A** sets out an executive summary of this notice.

**Section B** sets out the factual background to this notice in chronological order. The facts in Section B are relevant to both elements of the legal assessment, which follows in Section C.

**Section C** sets out the legal assessment:

- First, it considers the statutory requirements for imposing a penalty under section 110 EA02 and sets out the reasons for the CMA's finding that Hungryhouse has **failed to comply** with the First s109 Notice **without reasonable excuse**.
- Secondly, it sets out the CMA's reasons for finding that a fixed penalty of £20,000 is **appropriate and proportionate** in this case.

## A. Executive summary<sup>2</sup>

3. Hungryhouse has **failed to comply** with a requirement of a notice issued under section 109 EA02:
  - a) The CMA has identified in Schedules 1 and 2 to this notice 49 unique documents which were responsive to the First s109 Notice, but which Hungryhouse did not provide in response to that notice.
4. Hungryhouse has **no reasonable excuse** for its failure to comply with the First s109 Notice:
  - a) The CMA considers that the processes employed by Hungryhouse failed to identify responsive documents. Hungryhouse ought to have been aware that this was a substantial risk.
  - b) Hungryhouse made no attempt to discuss the processes it employed with the CMA. If Hungryhouse had concerns about the scope of the First s109 Notice, the practicality of responding to it, or the timeframe within which it was asked to respond, it should have raised them with the CMA, particularly in circumstances where the CMA had provided Hungryhouse with a draft of the First s109 Notice and asked Hungryhouse for its comments.
  - c) The documents listed in Schedules 1 and 2 include key emails between the CEO of Delivery Hero (the ultimate parent company of Hungryhouse) and major investors, plus a key substantive document relating to the click-to-call initiative. On reviewing the output of the document searches, Hungryhouse and Delivery Hero ought to have been aware that the search processes had resulted in the omission of these documents. Further, it is reasonable for the CMA to expect main parties to merger investigations to prioritise the assessment, and production, of responsive email communications from senior management (including the CEO) in response to information requests.
  - d) Hungryhouse should have ensured that sufficient resources were allocated to ensure compliance with the First s109 Notice. If Hungryhouse had resource constraints, it could have engaged its external advisers and/or third party providers to supplement its resources.

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<sup>2</sup> An executive summary is provided in order to assist the reader. However, for the CMA's complete reasoning, this notice should be read in full. Capitalised terms in this executive summary are defined in the paragraphs above and below.

- e) The fact that Hungryhouse provided documents in response to later information requests does not excuse the failure to provide them in response to the First s109 Notice.
5. The CMA considers that a penalty of £20,000 is **appropriate and proportionate** in this case because:
- a) The failure to comply had an adverse impact on the Inquiry. As a result of the failure, the Inquiry Group had to carry out significant further information gathering under section 109 EA02. This increased the cost of the Inquiry and resulted in unnecessary duplication of work. Further, had the CMA not noticed that responsive documents had been omitted and proactively required the provision of further evidence, the responsive documents may never have come to the attention of the Inquiry Group. The failure to comply therefore risked the Inquiry Group's decision being taken on the basis of incomplete evidence. The adverse impact was particularly significant where evidence which was omitted from the response to the First s109 Notice was inconsistent with Hungryhouse's written and oral submissions.
- b) The failure to comply also had an adverse impact on the Inquiry timetable. The need for significant further information gathering at a late stage in the Inquiry, which resulted from the failure to comply, contributed to the Inquiry Group's decision to extend the reference period for the Merger by four weeks.
- c) The failure to comply was significant. Schedules 1 and 2 identify 49 unique responsive documents that Hungryhouse failed to provide in response to the First s109 Notice. Each of those documents was sent or received by senior management of Hungryhouse or Delivery Hero. As set out above, Hungryhouse and Delivery Hero ought to have been aware of the existence of certain key documents, and ought to have been aware of the substantial risk that the processes employed would result in the omission of responsive documents.
- d) The imposition of an administrative penalty under section 110 EA02 is critical to achieve deterrence, i.e. to impress both on Hungryhouse in this specific case, and more widely, the seriousness of a failure to comply with a notice issued under section 109 EA02, without reasonable excuse.
- e) The financial resources available to Hungryhouse and Delivery Hero are such that a penalty of £20,000 is not disproportionate.

6. In all the circumstances, the CMA considers that the imposition of a penalty of £20,000 (which is below the statutory maximum of £30,000 for a penalty in a fixed amount) is appropriate and proportionate in this case.

## B. Factual background

7. On 19 May 2017, the CMA made a reference to its chair for the constitution of a Group of CMA Panel Members (the '**Inquiry Group**') under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 in accordance with section 33(1) EA02, to investigate and report on the anticipated acquisition by JUST EAT plc, through its subsidiary Just Eat.co.uk Limited, (together '**Just Eat**'), of Hungryhouse (the '**Merger**').
8. Under section 36(1) EA02, the CMA was required to decide: (i) whether arrangements are in progress or contemplation which, if carried into effect, would result in the creation of a relevant merger situation; and (ii) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services (the '**Inquiry**').
9. The Inquiry concerned the restaurant food delivery industry and, more specifically, the provision of online food platforms. The Inquiry Group considered whether, following the Merger, there would be a loss of competition in the supply of online food platforms which could lead to harm on either the consumer or the restaurant side of the market, or both.
10. The key steps in the Inquiry of relevance to this notice are set out in the table below:<sup>3</sup>

Date	Inquiry step
26 May 2017	Draft of initial notice to be issued under section 109 EA02 provided to Hungryhouse for comment (draft of the First s109 Notice).
31 May 2017	First s109 Notice issued to Hungryhouse.
9 June 2017	Hungryhouse hearing with the Inquiry Group, including discussion on the relevant counterfactual. Issues Statement published.
12 June 2017 / 19 June 2017	Hungryhouse response to the First s109 Notice.

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<sup>3</sup> Capitalised terms in this table are defined in the paragraphs above and below.



<b>Date</b>	<b>Inquiry step</b>
27 June 2017	Hungryhouse response to the Issues Statement.
7 July 2017	Informal information request sent to Hungryhouse (the July Request).
13 July 2017	Hungryhouse response to the July Request.
24 July 2017	Second s109 Notice issued to Hungryhouse.
4 August 2017	Hungryhouse response to the Second s109 Notice.
11 August 2017	Third s109 Notice issued to Hungryhouse.
21 August 2017	Hungryhouse response to Third s109 Notice.
1 September 2017	Letter from the Inquiry Group to Hungryhouse, expressing concern about the manner in which information had been provided in the course of the Inquiry.
8 September 2017	Fourth s109 Notice issued to Hungryhouse.
11 September 2017	Hungryhouse response to Fourth s109 Notice.
27 September 2017	Email from CMA to Hungryhouse, asking Hungryhouse to confirm whether it considered there to be a reasonable excuse for its failure to provide certain documents in response to the First s109 Notice.
29 September 2017	Hungryhouse response to the email of 27 September 2017 (Compliance Response).
12 October 2017	Provisional findings published. Notice of extension of the Inquiry period under section 39(3) EA02 published.
8 November 2017	Provisional decision to impose a penalty of £20,000 on Hungryhouse under s110 EA02 issued (Provisional Decision).
15 November 2017	Hungryhouse response to the Provisional Decision to impose a penalty under s110 EA02 (Representations).
16 November 2017	Final report on the Merger published.

## **The First s109 Notice**

11. As part of the Inquiry, the CMA issued notices to Hungryhouse and Just Eat pursuant to section 109 EA02 requiring them to produce specified documents and supply specified information to the CMA.
12. On 26 May 2017, the CMA provided Hungryhouse with a draft of the First s109 Notice. Hungryhouse was given the opportunity to raise any questions on the content of the draft, and any concerns as to the availability of the documents, information or data requested. On 30 May 2017, Clifford Chance LLP,<sup>4</sup> on behalf of Hungryhouse, responded to the CMA with comments on the questions at Annex 1 of the draft.<sup>5</sup> Of relevance to Question 2, the response noted that:

*“More generally, we consider that several of the questions may be challenging to respond to in full within the timeframe. In particular, questions 2, 5, 6, 7, 17 and 19 depend upon access to the emails of Delivery Hero senior management, who are currently extremely busy conducting road shows for the upcoming IPO, and/or relate to topics which were within the purview of employees who have since left the business.*

*We are however progressing with the request and will of course endeavour to provide all information by the stated deadlines. We will keep you updated regularly if concerns arise in relation to specific items.”*

13. Hungryhouse did not make any comments in relation to Annex 2 (including Question 6) of the draft.
14. Hungryhouse made clear in its response to question 1 of Annex 1 of the draft that it understood the term “documents” to include, amongst other things, emails:<sup>6</sup>

*“In relation to question 1, we intend to respond by providing a list of all documents provided to Just Eat in the due diligence dataroom [...]. While we note that the CMA's definition of "documents" includes email correspondence, we do not intend for the purpose of responding to this question to provide a list of emails from Delivery Hero/Clifford Chance to Just Eat/Linklaters regarding negotiation of contract terms...”*

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<sup>4</sup> During the Inquiry, the CMA generally communicated with Hungryhouse via Clifford Chance LLP, Hungryhouse's external legal adviser. For the remainder of this notice, references to communications with Hungryhouse include communications with Clifford Chance LLP where relevant.

<sup>5</sup> See Annex 2 to this notice.

<sup>6</sup> See also paragraph 18 below which sets out the definition of “documents” as provided in the First s109 Notice.

15. On 31 May 2017, the CMA issued the final version of the First s109 Notice to Hungryhouse. The wording of Question 2 and Question 6 remained unchanged between the draft provided to Hungryhouse and the final version issued, given that Hungryhouse had not raised concerns regarding the substance of those questions.<sup>7</sup> The CMA did however extend the deadlines for Hungryhouse to respond to the First s109 Notice. The deadline to respond to the Annex 1 questions (including Question 2) was extended from 5pm on 9 June 2017 (as set out in the draft) to 5pm on 12 June 2017. The deadline to respond to the Annex 2 questions (including Question 6) was extended from 5pm on 16 June 2017 to 5pm on 19 June 2017.

16. Question 2 required Hungryhouse to:

*“Please provide the following in full and unredacted form:*

- *All emails between the groups below covering strategic options (eg sale, closure, investment) for Hungryhouse:*
    - i. *Delivery Hero GmbH Board members and UK senior management*
    - ii. *Delivery Hero GmbH Board members and Investors*
    - iii. *UK senior management and Delivery Hero senior management*
- [...]”*<sup>8</sup>

17. Question 6 required Hungryhouse to:

*“Please provide all documents and analyses prepared by, or commissioned by, Hungryhouse in the last 3 years that relate, in whole or in part, to a strategy to move consumers from ordering directly from a restaurant to ordering through the Hungryhouse platform”*.

18. In addition, the First s109 Notice provided that:

*“...”Hungryhouse” refers to Hungryhouse Holdings Limited together with (i) all entities under its ownership or control or over which it exerts material*

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<sup>7</sup> As noted in paragraph 12 above, Hungryhouse raised concerns only in relation to the fact that several of the questions may have been “challenging” to respond to in full within the timeframe. It made no comment on the wording of Question 2 or Question 6.

<sup>8</sup> Only the parts of Question 2 relevant to this notice have been reproduced in this paragraph. Note that paragraph 4 of the First s109 Notice made clear that Hungryhouse was not required to produce any documents or supply any information which it would not be compelled to produce or supply in civil proceedings before the High Court in England and Wales or Northern Ireland or before the Court of Session in Scotland.

*influence; and (ii) all entities which exert control or material influence over it, including Delivery Hero Holding GmbH...”*

and

*‘... the term “document” refers to any document in any electronic format (e.g. Microsoft Outlook, Word, Excel or Powerpoint) and/or in hard copy and includes but is not limited to e-mails or other communications, presentations, spreadsheets, charts, reports, memoranda, slides, letters, notes, minutes, and faxes....’*

### **The hearing of 9 June 2017**

19. On 9 June 2017, before Hungryhouse provided its response to the First s109 notice, Hungryhouse attended a hearing with the Inquiry Group. In attendance at that hearing were [CEO Delivery Hero] (CEO of Delivery Hero GmbH, the ultimate parent company of Hungryhouse (“**Delivery Hero**”) and director of Hungryhouse) and [Mr X] ([REDACTED]). At the hearing, there was detailed discussion of the relevant counterfactual against which the Merger should be assessed (i.e. what would have happened to Hungryhouse absent the acquisition by Just Eat). Two key points made by Hungryhouse, which are relevant to this notice, were that: (i) [Mr X] and [Shareholder A] were of key importance in Delivery Hero’s decision making process: “[REDACTED]”<sup>9</sup>; and (ii) in the absence of a sale, Hungryhouse would have been closed down.

20. Hungryhouse presented slides at the hearing, which included the following extract from an email sent by [Mr X]:

*“[Mr X], [REDACTED], August 2016*

*“[REDACTED]. If we cannot sell [REDACTED], we must close [REDACTED]”.<sup>10</sup>*

21. [CEO Delivery Hero] made reference to the email quoted in paragraph 20 above, stating:

*“[Mr X] [REDACTED] said, “If you cannot sell it [REDACTED], you shut it down”. [REDACTED]. It literally says, “[REDACTED] we shut it down”.<sup>11</sup>*

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<sup>9</sup> [CEO Delivery Hero], transcript of the hearing of 9 June 2017 (as amended by Hungryhouse), page 18, lines 21-22. See Annex 3 to this notice.

<sup>10</sup> Hungryhouse slides for the hearing of 9 June 2017, slide 30. See Annex 4 to this notice.

<sup>11</sup> [CEO Delivery Hero], transcript of the hearing of 9 June 2017 (as amended by Hungryhouse), page 22, lines 9-11. See Annex 3 to this notice.

22. At the hearing, the CMA raised the fact that it had not seen formal documentation of a decision to close Hungryhouse in the absence of a sale. Hungryhouse's external legal adviser stated:

*"but we have not found that sort of slide pack that the board would have elaborated over and thought about and considered and there is no - the best we could find having [trawled] through quite a few emails to be honest, are these pretty explicit emails from [Mr X]."*<sup>12</sup>

### **The response to the First s109 Notice**

23. Hungryhouse responded to Annex 1 of the First s109 Notice, including Question 2, on 12 June 2017.<sup>13</sup> In response to the relevant parts of Question 2,<sup>14</sup> Hungryhouse provided 29 emails, together with an accompanying narrative.

24. In relation to Question 2.i.i, the accompanying narrative read as follows:

*"The decision regarding whether to sell or shut down the Hungryhouse UK business was taken by Delivery Hero. Delivery Hero management did not involve UK senior management in discussions on this topic until their input was necessary to complete the due diligence process. As such, communications between Delivery Hero GmbH Board members and UK senior management in relation to strategic options for Hungryhouse were limited."*

25. In relation to Question 2.i.ii, the accompanying narrative included the following explanation:

*"As explained in Hungryhouse's response to the SLC Decision submitted on 2 June 2016 and at the meeting on 9 June 2016, investors, in particular [Shareholder A], have significant influence over strategically important commercial decisions at Delivery Hero. As such, their input in relation to decisions, such as whether to sell or exit a subsidiary business, carries significant weight."*

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<sup>12</sup> Hungryhouse's external legal adviser, transcript of the hearing of 9 June 2017 (as amended by Hungryhouse), page 49-50, lines 23-1. The emails referred to are those referenced in slides 29 and 30 of Hungryhouse's presentation for the hearing of 9 June 2017 (see Annex 4 to this notice). These include the email dated 16 August 2017, referred to in paragraph 20 above; and a further email from 18 August 2016 from [Mr X], which states: [redacted].

<sup>13</sup> Hungryhouse's narrative response was received by the CMA at 8.19pm. See Annex 5 to this notice. Hungryhouse also responded to the other questions set out in Annex 1 to the First s109 Notice at that time. The appendices to Hungryhouse's response to Annex 1 of the First s109 Notice were provided on the morning of 13 June 2017.

<sup>14</sup> As set out at paragraph 16 above.

...

*As explained at the oral hearing relating to the counterfactual on 9 June [...], Delivery Hero's portfolio companies must be both relevant and sustainable to merit further investment. Given the nature of the business models Delivery Hero operates and which are subject to network effects, Delivery Hero aims to be 'number 1' across all markets it operates in, or at least has a credible prospect of becoming number 1. The 4 options Delivery Hero pursues are to (i) win the number 1 position; (ii) acquire another operator with a view to becoming the number 1 player; (iii) sell the portfolio company for the best possible price or (iv) shutting down operations in that jurisdictions [sic].*

26. In relation to Question 2.i.iii, the accompanying narrative included the following:

*“As explained in the response to question 2(i) above, strategic decisions in relation to Hungryhouse are taken by Delivery Hero (with Delivery Hero itself having to ensure in practice that its key investors, in particular [Shareholder A] [redacted], approve of its decisions).*

27. Hungryhouse responded to Annex 2 of the First s109 Notice, including Question 6, on 19 June 2017.<sup>15</sup> In response to Question 6, Hungryhouse provided a narrative response as follows:<sup>16</sup>

*‘6.1 Given that direct ordering over the telephone accounts for more than half of all takeaway orders..., the constraint imposed by direct ordering on Hungryhouse is significant and continues to advance and strengthen as restaurants continue to develop their own more advanced direct ordering capabilities.*

*6.2 As such, Hungryhouse has reacted to this competition by adopting a number of strategies to encourage consumers who order direct from restaurants to instead order through the Hungryhouse platform.’*

28. The narrative continued by listing a number of strategies, the first being ‘click-to-call’. The narrative stated that the strategies included:

*‘6.2.1 Considering the introduction of the "click to call" feature (explained in Appendix 14.5 to the Annex 1 Response) which was designed to encourage*

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<sup>15</sup> Hungryhouse provided its narrative response on 19 June 2017. The appendices were provided on 20 June 2017.

<sup>16</sup> See Annex 6 to this notice.

*the large number of users who generally prefer to order over the phone to use Hungryhouse. However, this feature was never actually introduced [REDACTED].*<sup>17</sup>

29. Click-to-call is a feature which allows consumers to check online which restaurants deliver to their area, check their menus and deals, then call and order with the restaurant directly from the Hungryhouse website or app.<sup>18</sup>
30. Hungryhouse provided five documents in response to Question 6. Only one of those documents related to click-to-call (the document referred to in the narrative (see paragraph 28 above) as ‘*Appendix 14.5 to the Annex 1 Response*’). This document was a presentation on the results of a click-to-call survey run in ten UK cities, dated October 2016.<sup>19</sup> No commentary was provided about the content or context of the presentation.
31. The CMA notes that click-to-call was also referred to in documents provided by Hungryhouse in response to certain other questions in the First s109 Notice.<sup>20</sup>

### ***Hungryhouse’s response to the Issues Statement***

32. The CMA published its Statement of Issues in relation to the Merger (the “**Issues Statement**”) on 9 June 2017. Hungryhouse responded to the Issues Statement on 27 June 2017.<sup>21</sup>
33. In paragraphs 2.42 and 2.43 of its response to the Issues Statement, Hungryhouse stated:

*“[Mr X’s] emails demonstrate that [REDACTED] sell Hungryhouse [REDACTED] and that, [REDACTED] the business “must close” otherwise.*

*As explained at the Counterfactual Oral Hearing,<sup>[22]</sup> this email correspondence reflecting [REDACTED] to either sell or shut down Hungryhouse must be assessed in light of the commercial relationship between [Shareholder A] and Delivery Hero.”*

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<sup>17</sup> The document referred to in the narrative as ‘*Appendix 14.5 to the Annex 1 Response*’ is a document titled “UK Click to Call in UK’s Top 10 Cities: – October 2016 -”. This document was provided to the CMA as part of Hungryhouse’s response to Annex 1 of the First s109 Notice, and cross-referred to in Hungryhouse’s response to Annex 2 of the First s109 Notice. See Annex 7 to this notice.

<sup>18</sup> Using trackable masked phone numbers which forward to the restaurant’s phone number.

<sup>19</sup> Three of the five documents provided in response to Question 6 were emails relating to another of the strategies listed in Hungryhouse’s narrative response [REDACTED]. The fourth document was a Deutsche Bank Market Research paper dated 7 June 2017.

<sup>20</sup> Questions 2 (strategic options), 6 (changes to services or terms offered to restaurants), 17 (strategy in relation to vouchers and discounts) and 18 (marketing strategy) of Annex 1 to the First s109 Notice.

<sup>21</sup> See Annex 8 to this notice.

<sup>22</sup> This refers to the hearing of 9 June 2017, discussed at paragraphs 19 to 22 above.

34. Paragraphs 2.44 to 2.46 of Hungryhouse’s response to the Issues Statement set out details of the commercial relationship between [Shareholder A] and Delivery Hero, including that: [Shareholder A] had made a number of “[redacted]” investment contributions to Delivery Hero over time; there had been several media reports suggesting that “[Shareholder A]’s success [was] closely linked with the performance of Delivery Hero”; there were close personal ties between [Shareholder A] and senior management at Delivery Hero; [redacted].

35. Hungryhouse therefore argued in paragraph 2.47 of its response that:

*“All of this evidences the significant weight that [Shareholder A] carried in determining Delivery Hero’s strategy regarding the sale of Hungryhouse. [redacted]. [Shareholder A] was determined to either [redacted] sell Hungryhouse [redacted] or exit the market [redacted].”*

36. In addition, in paragraph 2.53 Hungryhouse stated:

*“Delivery Hero had concluded that it is not viable to continue supporting the business, meaning that it must either sell Hungryhouse or exit the UK market. This was stated clearly in an email from [Mr X] on 16 August 2016:*

*“[redacted]. If we cannot sell [redacted], we must close” (emphasis added).”*

37. Paragraph 3.15 of the response summarised Hungryhouse’s submissions in relation to the potential for there to be a sale of Hungryhouse to another purchaser:

*“In summary, [redacted] no possibility of a sale to any purchaser other than Just Eat. [redacted]:*

*“[redacted].”([redacted])”<sup>23</sup>*

### **The Information Request of 7 July 2017**

38. The Inquiry Group had certain queries regarding Hungryhouse’s interpretation of the email from [Mr X] dated 16 August 2016, on which Hungryhouse placed considerable weight in its representations, for example at the hearing of 9 June 2017 and in its response to the Issues Statement.<sup>24</sup>

39. By way of background, the quote from [Mr X]’s email of 16 August 2016, which Hungryhouse included in its response to the Issues Statement and in its

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<sup>23</sup> See Annex 8 to this notice, paragraph 3.15.

<sup>24</sup> See paragraphs 19-22 and 33-37 above.



slides for the hearing of 9 June 2017 (see paragraphs 20 and 36 above) is an extract from a longer email.<sup>25</sup> A fuller extract is set out below:

“ [✂].”

40. On 7 July 2017, the CMA sent an informal request for information to Hungryhouse (the ‘**July Request**’).<sup>26</sup> The July Request noted that the statement quoted by Hungryhouse in paragraph 2.53 of its response to the Issues Statement, which refers to the need to close [✂] if a sale is not achieved,<sup>27</sup> appeared in [Mr X]’s email under the heading “1. [another Delivery Hero business]” in which [Mr X] set out his views on future strategy for the separate [✂] business (which is owned by Delivery Hero, but does not operate in the UK). The July Request noted that [Mr X] went on to discuss his views on the UK business separately under the heading “3. *UK business*”. In light of these points, the CMA asked Hungryhouse to confirm: (i) whether its submission was that the quote reproduced at paragraph 2.53 of the response to the Issues Statement related to the Hungryhouse UK business; and (ii) if so, on what basis that submission was made, in particular given the heading and context of the relevant paragraph of the email.
41. The July Request also asked Hungryhouse to provide any documents recording or making reference to any decisions taken at any meeting of the Advisory Board of Delivery Hero (the “**Advisory Board**”)<sup>28</sup> subsequent to 19 August 2016 regarding the sale or closure of the Hungryhouse UK business or the [other Delivery Hero business].
42. Hungryhouse responded to the July Request on 13 July 2017<sup>29</sup> with a narrative response, which made reference to various documents that had previously been provided to the CMA, and 10 new documents, which had not previously been provided to the CMA. Nine of the new documents were emails and one was a presentation consisting of 13 slides.
43. On reviewing the 10 new documents, the CMA considered that certain of the emails provided in response to the July Request may have been responsive to Question 2 of the First s109 Notice. For example, Appendix 2<sup>30</sup> to the

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<sup>25</sup> See Annex 9 to this notice.

<sup>26</sup> See Annex 10 to this notice.

<sup>27</sup> See paragraph 36 above.

<sup>28</sup> Consisting of six members including [CEO Delivery Hero] (the CEO) and key investors. In 2016 the members of the Advisory Board were: [Investor A]; [Investor B]; [Investor C]; [Investor D]; [Investor E]; [Investor F]; and [CEO Delivery Hero]. (Source: Financial Statement of Delivery Hero, 31 December 2016, see Annex 27).

<sup>29</sup> See Annex 11 to this notice. The deadline to respond was 11 July 2017.

<sup>30</sup> See Annex 12 to this notice. The relevant email was also provided at Appendix 51 to the response to the Second s109 Notice. See Schedule 1 for further details.

response to the July Request, which is an email from [Mr X] to [CEO Delivery Hero] dated 23 August 2016, states:

“[redacted].”

44. A further example is the email provided at Appendix 3 to the response to the July Request - an email dated 22 September 2016 from [CEO Delivery Hero] to the Advisory Board, which included a summary of the Board discussion that week, including discussion of the [redacted] deal.<sup>31</sup> Hungryhouse noted in the narrative response to the July Request that this email recorded a decision of the Advisory Board.<sup>32</sup> The email stated as follows:

“[redacted]”<sup>33</sup>

45. On reviewing the evidence provided in response to the July Request, the CMA had concerns that: (a) documents responsive to the First s109 Notice may not have been provided to the CMA by Hungryhouse; and (b) the evidence contained in any such documents may be relevant to the submissions made by Hungryhouse in relation to the counterfactual, particularly in relation to whether Hungryhouse would have been closed in the absence of the merger.

### ***The Second s109 Notice***

46. In order to ensure that the CMA had received relevant evidence previously requested under section 109 EA02, the Inquiry Group decided to issue a further section 109 notice to Hungryhouse on 24 July 2017 (the ‘**Second s109 Notice**’).<sup>34</sup>
47. The Second s109 Notice required Hungryhouse to provide:
- 1. All emails in the period 1 January 2016 to 31 December 2016 between:*
- (i) [CEO Delivery Hero] and any member of the Delivery Hero GmbH Advisory Board*
- (ii) [CEO Delivery Hero] and any shareholder of Delivery Hero GmbH which contain any of the following terms (or any combination of the following terms):*

*(i) Hungryhouse*

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<sup>31</sup> This was the code name for the sale of Hungryhouse to Just Eat.

<sup>32</sup> See Annex 11 to this notice, page 3, penultimate paragraph.

<sup>33</sup> See Annex 13 to this notice.

<sup>34</sup> See Annex 14 to this notice.

(ii) HH

(iii) United Kingdom

(iv) UK

(v) GB

*2. All documents from 1 January 2015 to 31 December 2016 (which have not already been provided to the CMA) which record or make reference to discussions at, or decisions taken by, the Advisory Board of Delivery Hero regarding a potential sale or potential closure of the Hungryhouse UK business.*

48. The deadline to respond to the Second s109 Notice was 1 August 2017. An extension to that deadline (until 4 August 2017) was requested and granted.
49. Hungryhouse provided 216 emails and documents in response to the Second s109 Notice on 4 August 2017.
50. In reviewing Hungryhouse's response to the Second s109 Notice, the CMA identified an email<sup>35</sup> dated 5 September 2016 from [CEO Delivery Hero] to [Investor D] (a member of the Advisory Board and a key investor in Delivery Hero<sup>36</sup>) in which [CEO Delivery Hero] stated:
- “[REDACTED].”
51. This email had not been provided to the CMA in response to the First s109 Notice. On reviewing this email, the CMA had concerns that: (a) documents responsive to Question 6 of the First s109 Notice (for example, relating to click-to-call) may not have been provided to the CMA by Hungryhouse; and (b) the evidence contained in such documents may be relevant to the submissions made by Hungryhouse in relation to the counterfactual.

### **The Third s109 Notice**

52. The Inquiry Group therefore decided to send a further notice to Hungryhouse under section 109 EA02 on 11 August 2017 (the '**Third s109 Notice**').<sup>37</sup> The Third s109 Notice required Hungryhouse to provide documents and information relating to initiatives which sought to differentiate Hungryhouse from Just Eat, and other related initiatives:

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<sup>35</sup> Provided at Appendix 18 to Hungryhouse's response to the Second s109 Notice. See Annex 15 to this notice.

<sup>36</sup> See Hungryhouse slides for the hearing of 9 June 2017, slide 14 (at Annex 4 to this notice).

<sup>37</sup> See Annex 16 to this notice.

*“Please answer questions 1 to 6 in relation to each of the following initiatives:*

- *[...]*
  - *Click to call*
  - *[...]*
  - *Any other initiative considered or implemented in 2016 which sought to differentiate Hungryhouse from Just Eat.*
1. *Please confirm whether the relevant initiative was implemented.*
  2. *Please confirm the date on which the decision to implement the initiative (or not to implement the initiative) was taken.*
  3. *Please confirm who took the decision to implement (or not to implement) the initiative.*
  4. *If the answer to question 1 above is yes, please confirm:*
    - a) *On what date the relevant initiative was implemented.*
    - b) *Over what period the relevant initiative was in force.*
    - c) *How the effectiveness of the relevant initiative was measured and what the results of any such measuring were.*
  5. *Please provide all documents prepared between 1 January 2016 and 31 December 2016 which contain or refer to the results of the measuring described in response to question 4(c) above.*
  6. *If the answer to question 1 above is no, please confirm the reasons that the initiative was not implemented.*
  7. *Please provide all emails sent or received:*
    - *between 1 January 2016 and 31 December 2016;*
    - *by [CEO Delivery Hero]; [CEO Hungryhouse] or [Delivery Hero employee];*
    - *which contain any or any combination of the following terms:*
      - i. *[...]*
      - ii. *Click to call*

iii. *Click-to-call*

iv. *Clicktocall*

v. *C2C*

vi. *[...]*”.

53. The deadline to respond to the Third s109 Notice was 5pm on 18 August 2017. Hungryhouse requested, and the CMA granted, an extension until 21 August 2017.
54. Hungryhouse responded on 21 August 2017, providing a narrative response and 172 documents. Approximately 66 of those documents related to click-to-call (all except three of those documents were emails).<sup>38</sup> One of the documents provided was a detailed “Project Proposal” for Click to Call in the UK.<sup>39</sup>
55. On 1 September 2017, the Inquiry Group sent a letter to Hungryhouse to express its concern about the manner in which Hungryhouse and its advisers had provided information to the CMA in the course of the Inquiry, and that emails which appeared to be responsive to the First s109 Notice were not provided to the CMA at that time.<sup>40</sup> The Inquiry Group also expressed its concern that documents provided subsequent to the First s109 Notice included material which appeared to be inconsistent with submissions made earlier in the Inquiry by Hungryhouse. Hungryhouse was informed that the CMA was considering whether to make a provisional decision that Hungryhouse had failed to comply with the requirements of a notice under section 109 EA02 without reasonable excuse and, if so, whether to impose a penalty and in what amount. Finally, Hungryhouse was informed that the CMA would be amending its published administrative timetable and would issue further notices under section 109 EA02 in order to investigate relevant matters further.

### ***The Fourth s109 Notice***

56. On 8 September 2017 the Inquiry Group issued a further notice to Hungryhouse under section 109 EA02 (the “**Fourth s109 Notice**”).<sup>41</sup> The

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<sup>38</sup> The narrative response provided by Hungryhouse did not include a separate response to questions 1-6 for each of the initiatives set out in (a) to (d) of the Third s109 Notice. Therefore, on 4 September 2017, the CMA asked Hungryhouse to provide its response to each of the questions (clearly labelling each response with the correct question number). Hungryhouse responded on the deadline of 6 September 2017.

<sup>39</sup> See Schedule 2 and Annex 17 to this notice.

<sup>40</sup> See Annex 18 to this notice.

<sup>41</sup> See Annex 19 to this notice.

Fourth s109 Notice required the production of documents and emails sent or prepared by various members of the Delivery Hero and Hungryhouse management teams containing search terms relating to Hungryhouse's strategy and differentiation initiatives. Hungryhouse responded to the Fourth s109 Notice on 11 September 2017. In response to the Fourth s109 Notice, Hungryhouse provided 1,497 documents.

### ***Subsequent interaction between the CMA and Hungryhouse***

57. On 27 September 2017, the CMA sent an email<sup>42</sup> to Hungryhouse informing it that, following the letter of 1 September 2017<sup>43</sup> (see paragraph 55 above), the Inquiry Group was considering whether Hungryhouse had failed to comply with the First s109 Notice by not providing a material number of responsive documents (including emails) in relation to:
- a) strategic options for Hungryhouse, such as sale, closure or investment (responsive to Question 2); and
  - b) click-to-call (responsive to Question 6).
58. In order to assist the Inquiry Group in its deliberations, the CMA asked Hungryhouse to confirm whether it considered there to be a reasonable excuse for Hungryhouse's failure to provide the documents in response to the First s109 Notice.<sup>44</sup> The deadline for Hungryhouse to respond was 5pm on 29 September 2017.
59. Hungryhouse responded on 29 September 2017 (the "**Compliance Response**").<sup>45</sup> Hungryhouse considered that it had not failed to comply with the First s109 Notice; that there was, in any event, a reasonable excuse should the Inquiry Group consider that a failure to comply had occurred; and that any discretion exercised should militate against the imposition of a penalty. The arguments made by Hungryhouse in its response are considered in more detail in paragraphs 72 to 85 and 94 to 109 below.
60. On 12 October 2017, the Inquiry Group published its provisional findings, which provisionally concluded that the Merger would not give rise to a

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<sup>42</sup> See Annex 20 to this notice.

<sup>43</sup> The email erroneously referred to the date of the letter as being 31 August 2017.

<sup>44</sup> The CMA's email of 27 September 2017 clarified that: '*[s]hould it appear to the Group that Hungryhouse has failed to comply with the [First s109 Notice] without reasonable excuse, before making a final decision to impose a penalty the CMA will issue a provisional decision setting out the reasons for its proposed action, the approach that it proposes to take in imposing a penalty, and the proposed nature and level of penalty (CMA 4, paragraph 5.2)*'.

<sup>45</sup> See Annex 21 to this notice.

substantial lessening of competition. On the same date, the Inquiry Group published a notice of extension of the Inquiry period under section 39(3) of the Enterprise Act 2002 (the “**Notice of Extension**”).<sup>46</sup> The Notice of Extension confirmed that the Inquiry Group had decided to extend the reference period for the Merger by four weeks (until 30 November 2017), although the Inquiry Group aimed to complete the inquiry as soon as possible and in advance of that date. The Notice of Extension stated:

*“In taking this decision, the Inquiry Group had regard to the fact that material new evidence was provided at a late stage in the inquiry timetable, which required further investigation; the need to allow sufficient time to take full account of representations received in response to the provisional findings; and the need to provide a fully reasoned decision within the statutory time frame. The Inquiry Group considers that completion of its investigation and the publication of its final report will not be possible within the original reference period.”*

#### *The CMA’s provisional decision*

61. Following careful consideration of the relevant circumstances of the case and having regard to *Administrative penalties: Statement of Policy on the CMA’s Approach* (CMA4, the ‘**Guidance**’), the Inquiry Group provisionally concluded that Hungryhouse had, without reasonable excuse, failed to comply with a requirement imposed on it under section 109 EA02 and it was appropriate in this case to impose a penalty on Hungryhouse. In accordance with paragraph 5.2 of the Guidance, on 8 November 2017, the CMA gave Hungryhouse notice of its intention to impose a penalty under section 110 EA02 including the reasons, proposed approach and the nature and the level of the proposed penalty (the ‘**Provisional Decision**’).<sup>47</sup> The Inquiry Group informed Hungryhouse that, should it wish to make representations on the Provisional Decision, such representations should be submitted by 5pm on 15 November 2017.

#### *Hungryhouse’s Representations*

62. On 15 November 2017, Hungryhouse sent a letter to the CMA setting out its representations on the Provisional Decision (the ‘**Representations**’).<sup>48</sup> The letter also asked the CMA to reconsider carefully Hungryhouse’s Compliance Response of 29 September 2017.

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<sup>46</sup> See Annex 22 to this notice.

<sup>47</sup> See Annex 31 to this notice.

<sup>48</sup> See Annex 32 to this notice.

63. Following the Provisional Decision and Representations, the Inquiry Group has re-considered whether the imposition of an administrative penalty of £20,000 is appropriate in this case, and sets out its reasoning in paragraphs 65 to 110 below. In accordance with paragraphs 5.2 and 5.9 of the Guidance, the Inquiry Group has consulted with the General Counsel's Office on the reasons for the proposed approach to and the level of the penalty.

#### *The final report*

64. On 16 November 2017 the Inquiry Group published its final report on the Merger, which concluded that the Merger would not give rise to a substantial lessening of competition.

### **C. Legal Assessment**

65. Section 110(1) EA02 provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice under section 109 EA02, it may impose a penalty of such amount as it considers appropriate (in accordance with section 111 EA02).
66. The CMA concludes that the statutory requirements for imposing a penalty under section 110 EA02 are met, and that the imposition of a penalty of £20,000 is appropriate and proportionate in this case (see paragraphs 67 to 110 below).

#### ***Statutory requirements for imposing a penalty under section 110 EA02***

##### *Failure to comply with a requirement of a notice under section 109 EA02*

67. The CMA finds that Hungryhouse is a person within the meaning of sections 109 and 110 of the EA02 and Schedule 1 of the Interpretation Act 1978 and has failed to comply with a requirement of a notice issued under section 109 EA02:
- a) Schedule 1 to this notice identifies 31 documents relating to strategic options for Hungryhouse that the CMA finds were responsive to Question 2, but which Hungryhouse failed to provide in response to the First s109 Notice. The documents identified in Schedule 1 to this notice all fall within the scope of Question 2, in that they are emails between either: (i) Delivery Hero GmbH Board members and UK senior management; (ii) Delivery Hero GmbH Board members and investors; or (iii) UK senior management and Delivery Hero senior management, that cover strategic options (e.g. sale, closure, investment) for Hungryhouse. In particular, the



emails identified in Schedule 1 are all between [CEO Delivery Hero] (who is a member of the Delivery Hero GmbH Board) and investors in Delivery Hero GmbH which relate to the sale of Hungryhouse.<sup>49</sup>

b) Schedule 2 to this notice identifies 24 documents (of which 18 are unique documents)<sup>50</sup> relating to the click-to-call initiative that the CMA finds were responsive to Question 6, but which Hungryhouse failed to provide in response to the First s109 Notice. The documents identified in Schedule 2 to this notice are documents (defined as set out at paragraph 18 above) prepared by Hungryhouse (defined as set out at paragraph 18 above) in the last 3 years that relate, in whole or in part, to a strategy to move consumers from ordering directly from a restaurant to ordering through the Hungryhouse platform.

68. The CMA therefore concludes that Hungryhouse has failed to comply with the requirements of the First s109 Notice, specifically in relation to Question 2 and Question 6.

69. The CMA notes that Hungryhouse has accepted that it is possible that documents submitted in response to the Second s109 Notice and the Third s109 Notice would have also been responsive to the First s109 Notice:

*“to the extent documents were submitted in response to [the Second s109 Notice and the Third s109 Notice] that would also have been responsive to the [First s109 Notice], which Hungryhouse accepts is possible, Hungryhouse wishes to apologise but considers this a function of the need to put in place a process for information search in a short space of time”.*<sup>51</sup>

70. The CMA notes that the Compliance Response (see paragraph 59 above) and Representations (see paragraph 62 above) set out various reasons as to why Hungryhouse considered that it did not fail to comply with the First s109 Notice. Having reviewed the Compliance Response and Representations, the CMA considers the reasons put forward by Hungryhouse as to why it did not fail to comply with the First s109 Notice are in fact submissions as to why Hungryhouse considered it had a reasonable excuse for its failure to comply, or submissions as to why any discretion exercised should militate against the

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<sup>49</sup> As noted in footnote 119 below, the emails in Schedule 1 are not exhaustive. In particular, the CMA has only included emails between [CEO Delivery Hero] and those investors who are listed as the “largest investors” in Delivery Hero in slide 14 of Hungryhouse’s slides for the hearing of 9 June 2017. See Annex 4 to this notice.

<sup>50</sup> Five of the 24 documents are duplicates of other documents listed in Schedule 2. One is a duplicate of a document listed in Schedule 1. Therefore, the CMA has identified 18 unique documents (set out at Schedule 2) that it provisionally considers were responsive to Question 6, but which Hungryhouse failed to provide in response to the First s109 Notice.

<sup>51</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.3. See also paragraph 1.8.

imposition of a penalty. The CMA has therefore considered these submissions in paragraphs 72 to 85 and 94 to 109 below.

*Without reasonable excuse*

71. For the reasons set out below, the CMA considers that Hungryhouse has no reasonable excuse for failing to provide the documents outlined at paragraph 67(a) and (b) above in response to the First s109 Notice.
72. The CMA has considered Hungryhouse's submissions in the Compliance Response and Representations as to why Hungryhouse considered that it had a reasonable excuse should the Inquiry Group consider that a failure to comply had occurred.<sup>52</sup>
73. In relation to **the process employed by Hungryhouse for responding to Question 2**,<sup>53</sup> Hungryhouse explained that it tested a number of search terms and combinations of search terms, and carried out checks to verify the extent that those searches would yield responsive documents. For example, Hungryhouse tested the search terms "*board AND sale*" and "*sale AND hungryhouse*" for the period 2016. These searches yielded 985 and 476 results respectively. Having performed spot checks on these results, Hungryhouse concluded that this would not be an effective way – especially in the time available – of identifying responsive documents, as the searches yielded multiple irrelevant, non-responsive emails. Hungryhouse therefore narrowed the search further to combinations such as "*board AND hungryhouse AND sale*". In addition, Hungryhouse stated that it had sought to identify in a "*targeted manner*" email correspondence between specific individuals that it considered would be most relevant in the context of the CMA's request.<sup>54</sup>
74. The CMA does not accept that these submissions constitute a reasonable excuse for the purposes of section 110 EA02, for the following reasons:
  - a) Hungryhouse ought to have known that the narrowed search terms ultimately employed would have led to a substantial risk that responsive documents would be missed. For example, the CMA is not aware of any reason why Hungryhouse/Delivery Hero could have reached a sound conclusion that restricting the search to emails which included three search terms, such as "*board AND hungryhouse AND sale*" would capture all responsive emails. First, Question 2 did not only require emails sent or

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<sup>52</sup> See also paragraph 70 above.

<sup>53</sup> See Annex 21 to this notice: Compliance Response, paragraphs 2.1 to 2.4.

<sup>54</sup> See Annex 21 to this notice: Compliance Response, paragraph 2.3.

received by members of the Delivery Hero board. It also required relevant emails between UK senior management and Delivery Hero senior management. Second, Hungryhouse applied a selective approach when it identified in a “*targeted manner*” email correspondence between specific individuals that it considered would be most relevant to the CMA's request. That approach was taken notwithstanding the scope of Question 2 and the categories of custodian that Hungryhouse was required to include in its search (see paragraph 16 above). Third, the CMA considers that the inclusion of the search term “*board*” led to a substantial risk that responsive documents could have been missed: the CMA is not aware of any reason why emails sent to or from members of the Delivery Hero board which related to strategic options for Hungryhouse would necessarily include the term “board” in the email.<sup>55</sup> More generally, it is to be expected that the use of search terms to identify potentially relevant documents will also yield irrelevant, and duplicate, documents, and that a level of review will be required when responding to information requests and notices issued by the CMA under section 109 EA02. The need for review does not justify the unilateral application of narrow, or unreliable, search terms.

- b) Hungryhouse made no attempt to discuss with the CMA the fact that it had initially identified large volumes of search results, or the processes it had employed. Nor did Hungryhouse inform the CMA that it risked failing to comply with the First s109 Notice in full, or provide any reason explaining why it was not possible for Hungryhouse to comply with the First s109 Notice in full. If Hungryhouse had concerns about the scope of the First s109 Notice, or the practicality of responding to it, it could have raised them with the CMA.<sup>56</sup> Had it done so, the CMA could, for example, have discussed potential alternative approaches with Hungryhouse.<sup>57</sup> Indeed, as set out at paragraph 12 above, Hungryhouse had previously informed the CMA that it was “*progressing with the request and will of course endeavour to provide all information by the stated deadlines*” and that it would “*keep [the CMA] updated regularly if concerns arise in relation to specific items*”.

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<sup>55</sup> Indeed, 12 of the 31 responsive emails set out in Schedule 1 do not contain the word “board”.

<sup>56</sup> As set out in the CMA's published guidance 'Mergers: Guidance on the CMA's jurisdiction and procedure' (CMA2), paragraph 11.17: “*The CMA recognises that providing timely information can place a burden on parties to an inquiry and parties are encouraged to discuss with the case team as early as possible any difficulties in providing the requested information, providing it in the form requested, or meeting any deadlines for provision of information. This enables to CMA to plan its Phase 2 work within the constraints of the statutory timetable*”. See Annex 23 to this notice.

<sup>57</sup> The CMA notes that such a discussion took place for the purposes of the Fourth s109 Notice.

- c) As set out at paragraph 15 above, Hungryhouse did not raise any concerns regarding the substance<sup>58</sup> of Question 2 when it was provided with a draft of the First s109 Notice and given the opportunity to comment.
- d) The CMA does not consider that the number of emails identified prior to the use of the "*board AND hungryhouse AND sale*" search term would have been unmanageable in the present context. The CMA refers to its reasoning in paragraphs 80 and 82 below.
- e) The CMA considers that, on reviewing the output of the document searches, the senior management of Hungryhouse and Delivery Hero ought to have been aware that the search process had resulted in the omission of numerous key emails with major investors, which were responsive to Question 2 (see for example the emails referred to at paragraph 88 below). Further, it is reasonable for the CMA to expect main parties to merger investigations to prioritise the assessment, and production, of responsive email communications from senior management (including the CEO) in response to information requests.

75. In relation to **the process for responding to Question 6**, the Compliance Response explained that, as the question asked for documents and analysis "*prepared by, or commissioned by Hungryhouse*", the wording of the question did not suggest to Hungryhouse that the CMA had requested a large volume of email correspondence. Instead, Hungryhouse provided the CMA with a presentation on click-to-call dated October 2016 and noted in its response that click-to-call was "*never actually introduced*" in the UK. The Compliance Response also stated that: (i) it was Hungryhouse that had brought the click-to-call initiative to the attention of the CMA as part of its narrative response to Question 6; (ii) had the CMA sought email correspondence relating to click-to-call, it could have raised this with Hungryhouse sooner; (iii) the evidence available to the CMA shows that Hungryhouse's response to the First s109 Notice was correct; and (iv) some of the documents which were responsive to the Second s109 notice were prepared by Delivery Hero, rather than Hungryhouse, and so would not have been responsive to the First s109 Notice.<sup>59</sup>

76. The CMA does not accept that these submissions constitute a reasonable excuse for the purposes of section 110 EA02, for the following reasons:

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<sup>58</sup> See footnote 7 above.

<sup>59</sup> See Annex 21 to this notice: Compliance Response, paragraphs 3.2 to 3.5.

- a) The provision of the October 2016 presentation<sup>60</sup> by Hungryhouse in response to the First s109 Notice does not mean that Hungryhouse was not required to provide other responsive documents to the CMA, or that Hungryhouse was permitted to select which responsive documents to produce.
- b) Neither the fact that Hungryhouse had brought click-to-call to the attention of the CMA in its narrative response to the First s109 Notice, nor Hungryhouse's submission that the evidence later provided showed Hungryhouse's narrative to have been correct, are relevant to the question of whether Hungryhouse has failed to comply with Question 6 without reasonable excuse.
- c) The definition of "document" for the purposes of the First s109 Notice clearly included emails. See paragraph 18 above, and paragraph 2 of the First s109 Notice.<sup>61</sup> The CMA also notes, as set out at paragraph 14 above, that Hungryhouse understood this to be the case at the time. Furthermore, Hungryhouse did provide three emails relating to another strategy (a partnership with [X]) in response to Question 6. Had Hungryhouse not understood the question to be requesting emails, it is not clear why it would have provided emails relating to that strategy.
- d) Hungryhouse's assertion that, if the CMA had sought email correspondence on click-to-call, it could have raised this with Hungryhouse sooner, is not relevant to the question of failure to comply without reasonable excuse. The CMA also notes that, as set out in paragraphs 50 to 51 above, the CMA's concern that documents responsive to Question 6 may not have been provided at the required time was prompted when it reviewed emails provided in response to the Second s109 Notice in August 2017.
- e) The definition of "Hungryhouse" for the purposes of the First s109 Notice clearly included Delivery Hero (and, consequently, documents, including emails, prepared by Delivery Hero). See paragraph 18 above, and Annex 2 of the First s109 Notice.<sup>62</sup>
- f) The CMA notes that one of the documents that Hungryhouse failed to provide in response to Question 6 was a detailed "Project Proposal" for Click to Call in the UK (see Schedule 2 and Annex 17 to this notice). The document was initially prepared by [a Hungryhouse employee] for the UK

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<sup>60</sup> "UK Click to Call in UK's Top 10 Cities: - October 2016-". See footnote 17 above and Annex 7 to this notice.

<sup>61</sup> See Annex 1 to this notice.

<sup>62</sup> See Annex 1 to this notice.

management team on 13 July 2016, and was subsequently provided to senior staff at Delivery Hero on 15 July 2016. The CMA considers that senior individuals at Hungryhouse and Delivery Hero ought to have been aware of the existence of that document.

77. In relation to the **process for responding to both Question 2 and Question 6**, Hungryhouse submitted in its Representations that it had put in place a system that it considered to be comprehensive, with a view to ensuring that the CMA could take its decision on the basis of complete evidence. Hungryhouse submitted that, had it *“applied the extensive search terms the CMA asked to be applied later in the process, it would have been impossible for [Hungryhouse] to provide responses to numerous other questions”* and, as such, it had to *“make a judgment call as to how [its] limited resources should be prioritised”*.<sup>63</sup> Hungryhouse also argued that the CMA should take account of the business sector in which it operates: as Hungryhouse operates in the technology sector, it deals with a tremendous volume of emails on a daily basis and this makes email searches more challenging. Finally, Hungryhouse submitted that, given the costs associated with external assistance, Hungryhouse decided to perform the internal document and email searches itself, acting in good faith and in the spirit of cooperation with the CMA.<sup>64</sup>
78. For the reasons set out in paragraphs 74 and 76 above, the CMA considers that the processes employed by Hungryhouse were not comprehensive and Hungryhouse ought to have been aware that this was the case. Regarding the search terms specified by the CMA in the Second s109 Request and Third s109 Request, the CMA notes that Hungryhouse provided 216 and 172 documents respectively in response to those notices (of which at least 49 unique documents were responsive to Question 2 and Question 6). The CMA does not consider that it would have been overly burdensome for Hungryhouse to review that number of emails in parallel with responding to the remaining questions in the First s109 Notice. Furthermore, to the extent that Hungryhouse considered that performing a more comprehensive search would have been overly burdensome, it should have discussed this with the CMA (see paragraphs 74 and 80 above). Similarly, if Hungryhouse considered that the burden placed on it by the First s109 Notice was too great because it operates in the technology sector, and therefore deals with a large number of emails on a daily basis, it should have discussed this with the CMA. Finally, the fact that Hungryhouse conducted the searches itself in order to save costs does not constitute a reasonable excuse for the failure to comply with the First s109 Notice. As addressee of the First s109 Notice, it

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<sup>63</sup> See Annex 32 to this notice: Representations, paragraphs 5 and 6.

<sup>64</sup> See Annex 32 to this notice: Representations, paragraph 6.

was for Hungryhouse to ensure that it took the necessary steps to respond in full.

79. Hungryhouse made numerous references in its Compliance Response<sup>65</sup> to **the short timeframe for compliance** with the First s109 Notice, and stated that it would not have been possible to review large numbers of documents within the time permitted.
80. The CMA does not accept that these submissions constitute a reasonable excuse for the purposes of section 110 EA02. The submission as to the *“tight timeframe”* is no more than a belated request for an extension of the applicable deadline. As set out at paragraph 15 above, the CMA extended the deadlines initially specified in the draft of the First s109 Notice. At no point in the run up to the expiry of the extended deadlines, or subsequently (save for in the Compliance Response), did Hungryhouse present any reasons as to why it was unable to comply within the time specified. As set out at paragraph 12 above, Hungryhouse had informed the CMA that it was *“progressing with the request and will of course endeavour to provide all information by the stated deadlines”* and that it would *“keep [the CMA] updated regularly if concerns arise in relation to specific items”*. To the extent that Hungryhouse had concerns as to its ability to comply with the First s109 Notice by the relevant deadline, Hungryhouse should have discussed those concerns with the CMA.<sup>66</sup> Instead Hungryhouse decided, unilaterally, to follow a process which failed to identify responsive documents, and Hungryhouse ought to have been aware that this was a substantial risk.
81. Hungryhouse made submissions in its Compliance Response and its Representations regarding the burdensome nature of the CMA’s investigation and the fact that **significant resources** were required in order to comply with the CMA’s information requests. Hungryhouse stated that it submitted more than 430 documents in response to the questions in the First s109 Notice, along with several extensive explanations in response to the CMA’s questions.<sup>67</sup> Hungryhouse submitted that the Provisional Decision focussed on two questions out of almost 300 that Hungryhouse had responded to during the Inquiry.<sup>68</sup> Hungryhouse also stated that it found it difficult to cope with the numerous CMA information requests.<sup>69</sup> and it diverted significant resources away from the day-to-day management of a financially struggling

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<sup>65</sup> See Annex 1 to this notice: Compliance Response, for example paragraphs 1.3, 1.4, 1.7, 2.1.

<sup>66</sup> See footnote 56 above, and Annex 23 to this notice (‘Mergers: Guidance on the CMA’s jurisdiction and procedure’ CMA2, paragraph 11.17)

<sup>67</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.5.

<sup>68</sup> See Annex 32 to this notice: Representations, paragraph 4.

<sup>69</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.13.

company in order to comply with the CMA's requirements.<sup>70</sup> Hungryhouse stated that it had to draw on some of Delivery Hero's resources in order to respond to the First s109 Notice, even though Delivery Hero was in the midst of completing its initial public offering and was therefore extremely resource-constrained itself.<sup>71</sup>

82. The CMA does not accept that these submissions constitute a reasonable excuse for the purposes of section 110 EA02. The CMA repeats its reasoning at paragraph 80 above and makes the following additional points. First, as a public authority, the CMA is conscious of its duty to act proportionately. It is for this reason that the CMA will, where practicable and appropriate, provide parties with a draft of a notice to be issued under section 109 EA02 prior to the final notice being issued.<sup>72</sup> As set out at paragraphs 12 to 15 above, the CMA provided Hungryhouse with a draft of the First s109 Notice, and Hungryhouse was given the opportunity to raise any questions on the content of the draft, and any concerns as to the availability of the documents, information or data requested. The wording of Question 2 and Question 6 remained unchanged between the draft provided to Hungryhouse and the final version issued, given that Hungryhouse had not raised concerns regarding the substance of those questions.<sup>73</sup> Second, the CMA's guidance (*Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2)) makes clear that the CMA typically carries out the bulk of its information gathering during the initial stages of a phase 2 inquiry.<sup>74</sup> Hungryhouse and its legal advisers should therefore have been aware that Hungryhouse would be required to respond to substantial information requests during the initial stages of the Inquiry. Hungryhouse should have ensured that sufficient resources were made available in order to do so. If Hungryhouse did not have sufficient resources in-house, the CMA notes that parties to merger investigations can, and frequently do, engage their external advisers and/or third party providers to supplement their resources during information gathering processes. Third, the fact that Hungryhouse had to respond to a number of other questions in the First s109 Notice (and in other information requests) does not excuse the failure to comply with Question 2 and Question 6, both of which required the

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<sup>70</sup> See Annex 32 to this notice: Representations, paragraph 3.

<sup>71</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.13.

<sup>72</sup> See Annex 25 to this notice: Guidance ('Administrative Penalties: Statement of Policy on the CMA's Approach', CMA4), paragraph 4.3.

<sup>73</sup> As noted in paragraph 12 above, Hungryhouse raised concerns only in relation to the fact that several of the questions may have been "challenging" to respond to in full within the timeframe. It made no comment on the wording of Question 2 or Question 6.

<sup>74</sup> See Annex 23 to this notice ('Mergers: Guidance on the CMA's jurisdiction and procedure' CMA2, paragraph 11.16). As noted in footnote 56, the same guidance makes clear that parties should discuss with the case team any difficulties in providing requested information, providing it in the form requested, or meeting any deadlines for provision of information (see paragraph 11.17).



production of documents relating to key issues, such as the counterfactual, which were likely to be at the core of the CMA's reasoning.

83. Finally, Hungryhouse stated that **it took immediate steps to rectify any document gaps**,<sup>75</sup> for example as soon as the CMA asked Hungryhouse to apply numerous specific search-terms in the Second s109 Notice and Third s109 Notice, Hungryhouse immediately carried out the requested extensive search in a thorough manner.
84. The CMA does not accept that these submissions constitute a reasonable excuse for the purposes of section 110 EA02. First, the CMA does not agree that this amounts to an example of Hungryhouse taking steps to rectify a document gap. As noted at paragraphs 43 to 45 and 50 to 51, above it was the CMA's concerns, which arose in the process of reviewing subsequent evidence provided, that led to the Second s109 Notice and Third s109 Notice being issued. Second, responding to further notices issued under section 109 EA02 is a legal requirement, and does not absolve Hungryhouse from a failure to respond to the First s109 Notice.
85. In conclusion, notwithstanding the submissions in Hungryhouse's Compliance Response and Representations, the CMA considers that Hungryhouse has failed to provide the CMA with a reasonable excuse for non-compliance with Question 2 and Question 6. The Guidance sets out at paragraph 4.4 that the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the company's control has caused the failure to comply (and the failure would not otherwise have taken place). (See Annex 25 to this notice). There is nothing to suggest that any such event has occurred here, which would have prevented Hungryhouse from complying with Question 2 and Question 6.

### ***The appropriateness of imposing a penalty of the level proposed***

86. Having had regard to its statutory duties and the Guidance, and having carefully considered all relevant facts, the CMA considers that the imposition of a penalty of £20,000 (which is below the statutory maximum of £30,000 for a penalty in a fixed amount), is appropriate in this case. This is for the following reasons.
87. Hungryhouse's failure to comply has had an **adverse impact on the Inquiry**.<sup>76</sup> As a result of Hungryhouse's failure to comply with the First s109 Notice, the Inquiry Group had to carry out further information gathering under

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<sup>75</sup> See Annex 21 to this notice: Compliance Response, paragraphs 1.6 to 1.8.

<sup>76</sup> See Annex 25 to this notice: Guidance, paragraph 4.2, first bullet and paragraph 4.11, first bullet.

section 109 EA02, both in relation to Question 2 and Question 6, in order to ensure that its provisional findings were based on evidence that was not materially incomplete. This increased the cost of the Inquiry to the CMA and resulted in unnecessary duplication of work, as discussions based on documents provided in response to the First s109 Notice had to be revisited in light of the evidence subsequently provided. Furthermore, had the CMA not noticed that responsive documents had been omitted and proactively required the provision of further evidence, the responsive documents may never have come to the attention of the Inquiry Group. Hungryhouse's failure to comply therefore risked the Inquiry Group's decision being taken on the basis of incomplete evidence.

88. In addition, the CMA considers that the **adverse impact on the Inquiry** caused by the failure to comply with **Question 2** was particularly significant, because some evidence which was responsive to Question 2, but which was not provided in response to it, was inconsistent with, or did not support, Hungryhouse's submissions on the counterfactual.<sup>77</sup> Hungryhouse's failure to provide this evidence in response to the First s109 Notice therefore risked the Inquiry Group's decision being taken without access to evidence which was inconsistent with Hungryhouse's written and oral submissions. Examples of such evidence are set below (and are also included in Schedule 1 to this notice):
- a) Appendix 2 to the July Request is an email from [Mr X] to [CEO Delivery Hero] dated 23 August 2016. This was shortly after [Mr X]'s email of 16 August 2016.<sup>78</sup> As noted above, the CMA's interpretation of the 16 August 2016 email was that the phrase: "*If we cannot sell [redacted], we must close*" referred to the [other Delivery Hero business]. The email provided at Appendix 2 to the July Request was supportive of the CMA's interpretation. In that email, [Mr X] referred to the sale of the Hungryhouse business, but not a potential closure. He did, however, refer to the potential closure of the [other Delivery Hero business]: "[redacted]." The email at Appendix 2 does not therefore support Hungryhouse's submission that, absent a sale, Hungryhouse would have been closed down.

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<sup>77</sup> In the course of the Inquiry, Hungryhouse made written and oral submissions to the CMA regarding the relevant counterfactual against which the Merger should be assessed. See for example, paragraphs 19 to 37 above. Two key aspects of those submissions were that: (i) [Mr X] and [Shareholder A] were of key importance in Delivery Hero's strategy and were determined to either sell Hungryhouse [redacted] or exit the market; and (ii) absent a sale, Hungryhouse would [redacted] have been closed down.

<sup>78</sup> See Annex 9 and Annex 12 to this notice, and paragraph 39 above.

- b) Appendix 3 to the July Request is an email dated 22 September 2016 from [CEO Delivery Hero] to the Advisory Board.<sup>79</sup> Hungryhouse confirmed that this email recorded a decision of the Advisory Board.<sup>80</sup> The email stated:

“[REDACTED].”

The fact that the Advisory Board had agreed that there was “[REDACTED]” for a sale is inconsistent with Hungryhouse’s submission that, absent a sale, Hungryhouse would have been closed down [REDACTED].

- c) Appendix 19 to the Second s109 request contains emails between [CEO Delivery Hero] and [Investor A]<sup>81</sup> dated 4 September 2016. Hungryhouse submitted (in its Compliance Response<sup>82</sup>) that these emails were supportive of its case.<sup>83</sup> However, the following statement by [CEO Delivery Hero] does not support Hungryhouse’s submissions regarding the influence of [Mr X] and [Shareholder A]: “[REDACTED].”
- d) Appendix 18 to the Second s109 Request is an email chain between [CEO Delivery Hero] and [Investor D], with emails dated between 2 – 6 September 2016. In the email chain, [Investor D] states: “[REDACTED].” [CEO Delivery Hero] responded stating:

“[REDACTED].”

This email is inconsistent with Hungryhouse’s submissions on the counterfactual, including the submissions that closure was the only rational decision and that there was no other potential buyer for Hungryhouse.

- e) The CMA notes that, in response to the First s109 Notice, Hungryhouse provided an email exchange between [Mr X] and [CEO Delivery Hero],<sup>84</sup> which followed on from the same email<sup>85</sup> that features earlier in the email chains discussed in the two bullets above. Hungryhouse therefore provided only the subsequent interactions between [CEO Delivery Hero] and [Mr X] in response to the First s109 Notice, but not the subsequent

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<sup>79</sup> See Annex 13. The members of the Advisory Board are set out in footnote 28 above. They did not include [Mr X].

<sup>80</sup> See paragraph 44 above.

<sup>81</sup> A key investor in Hungryhouse, see Hungryhouse slides for the hearing of 9 June 2017, slide 14. See Annex 4.

<sup>82</sup> See Annex 21 to this notice: Compliance Response, paragraph 2.8.

<sup>83</sup> See further paragraph 96 below.

<sup>84</sup> See Annex 28 to this notice. (This document was provided to the CMA at Appendix 2.i.ii.6b to Hungryhouse’s response to the First s109 Notice).

<sup>85</sup> The email from [CEO Delivery Hero] dated 2 September 2016 features early in the email chains provided at Appendix 18 and Appendix 19 to the Second s109 Notice.

interaction that [CEO Delivery Hero] had with [Investor D] and [Investor A] (who are also key investors). The Inquiry Group therefore received an incomplete picture of the evidence on the counterfactual in response to the First s109 Notice.

- f) There are 30 emails set out in Schedule 1 between [CEO Delivery Hero] and investors and/or members of the Advisory Board, which discuss the sale of Hungryhouse without referring to closure as an option. Only one email makes any reference to the potential closure of Hungryhouse.<sup>86</sup> The CMA considers that, when considered in the round, the emails set out in Schedule 1 are not supportive of Hungryhouse's submission that, absent the Merger, Hungryhouse would have been closed down.

89. Hungryhouse's failure to comply also had an **adverse impact on the Inquiry timetable**.<sup>87</sup> As set out at paragraph 60 above, the Inquiry Group decided to extend the reference period for the Merger by four weeks, because it considered that completion of the Inquiry, and publication of the report, would not be possible within the original reference period. The decision was taken having regard to the fact that "*material new evidence was provided at a late stage in the inquiry timetable*". Hungryhouse's failure to comply with the First s109 Notice resulted in the need for significant further information gathering at a later stage in the investigation. For example, the CMA notes that Hungryhouse provided 1,497 documents in response to the Fourth s109 Notice. This in turn contributed to the need to extend the CMA's administrative timetable for notification of the provisional findings and, consequently, the reference period for the Merger. The late provision of material by parties to a merger investigation, in particular where that material requires further investigation, has an adverse impact upon the CMA's ability to conduct investigations, and to fulfil its statutory functions, within the timeframes specified.

90. Hungryhouse's failure to comply with the requirements imposed by Question 2 and Question 6 was **significant**.<sup>88</sup> This is because:

- a) Hungryhouse failed to provide a significant number of documents in response to the First s109 Notice.<sup>89</sup> Further, the fact that those documents were sent by, or received by, senior management of

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<sup>86</sup> [REDACTED]

<sup>87</sup> See Annex 25 to this notice: Guidance, paragraph 4.2, first bullet and paragraph 4.11, first bullet.

<sup>88</sup> See Annex 25 to this notice: Guidance, paragraph 4.2, second bullet.

<sup>89</sup> See Schedules 1 and 2 to this notice

Hungryhouse or Delivery Hero supports the CMA's view that the failure to provide certain documents is significant in nature.

- b) Hungryhouse was provided with a draft of the First s109 Notice on 26 May 2017, and given the opportunity to raise any questions on the content of the draft, and any concerns as to the availability of the documents or information requested. Hungryhouse did not raise any concerns regarding the substance of Question 2 and Question 6, when responding to the draft or at any time thereafter.<sup>90</sup> Rather, it decided to follow a process which risked its ability to comply with the First s109 Notice in full.<sup>91</sup> The CMA also extended the deadline for compliance set out in the draft.<sup>92 93</sup>
- c) As set out at paragraphs 74 and 76 above, the CMA considers that Hungryhouse and Delivery Hero ought to have known of the existence of certain key documents which it failed to provide in response to the First s109 Notice, and ought to have been aware of the substantial risk that the search terms ultimately used for the purposes of Question 2 would result in the omission of responsive documents.<sup>94</sup> Further, Hungryhouse should have put a process in place for the effective verification of initial search results to ensure that key documents were not omitted.

91. The CMA considers that Hungryhouse's failure to comply with the First s109 Notice was contributed to by the **failure of senior individuals to make arrangements for suitable resources to be made available** to Hungryhouse.<sup>95</sup> Hungryhouse cited resourcing difficulties due to the fact that Hungryhouse operates a very lean operation and Delivery Hero was in the midst of completing its initial public offering.<sup>96</sup> As set out at paragraph 82 above, parties to merger investigations can, and frequently do, engage their external advisers and/or third party providers to supplement their resources during information gathering processes.
92. As noted at paragraphs 71 to 85 above, the CMA's view is that Hungryhouse failed to provide a reasonable excuse as to why it was unable to comply with the First s109 Notice, specifically Question 2 and Question 6.<sup>97</sup> The CMA also considers that, for those same reasons, the submissions raised by

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<sup>90</sup> See paragraphs 12 and 15 above.

<sup>91</sup> See, for example, paragraph 74 above.

<sup>92</sup> See paragraph 15 above.

<sup>93</sup> The Guidance (see Annex 25 to this notice) at paragraph 4.3 states that "*The procedure used by the CMA when imposing Investigatory Requirements may also be relevant to the imposition of penalties. The CMA may be more likely to impose a penalty for failure to comply with Investigatory Requirements where the CMA has provided a draft request or set a deadline for compliance which takes P's comments into account.*"

<sup>94</sup> See Annex 24 to this notice: Guidance, paragraph 4.11, third bullet.

<sup>95</sup> See Annex 25 to this notice: Guidance, paragraph 4.11, eighth bullet.

<sup>96</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.13.

<sup>97</sup> See Annex 25 to this notice: Guidance, paragraph 4.11, fourth bullet.

Hungryhouse in its Compliance Response do not support the imposition of a fine at a lower level than that proposed.

93. The CMA considers that it is of utmost importance to the CMA's ability to conduct effective investigations that parties have due regard to the requirements imposed on them by, among other things, section 109 EA02. The imposition of an administrative penalty under section 110 EA02 is **critical to achieve deterrence**, i.e. to impress both on Hungryhouse in this specific case, and more widely, the seriousness of a failure to comply with a section 109 notice, without a reasonable excuse.<sup>98</sup>
94. In its Compliance Response, in addition to the points summarised above, Hungryhouse made a number of submissions as to why any discretion exercised should militate against the imposition of a penalty.
95. Hungryhouse submitted that it did not seek to take advantage or derive any benefit from not identifying and submitting certain documents and emails in response to the First s109 Notice. Hungryhouse argued that this was apparent from the fact that many documents and emails that were provided in response to the Second s109 Notice and the Third s109 Notice were supportive of Hungryhouse's case and, had Hungryhouse been aware of their existence or considered them to be responsive, it would have obviously submitted them. Hungryhouse argued that, throughout the CMA's merger control proceedings, it had been fully cooperative and provided documents supporting its case as well as documents that, at first glance, appeared to be unsupportive of its case.
96. For example, Hungryhouse referred to:
  - a) the email from [Investor A] dated 4 September 2016<sup>99</sup>, which stated: “[✂]”;
  - b) the email dated 23 May 2016,<sup>100</sup> in which [Investor A] asked [CEO Delivery Hero] “[✂]” and [CEO Delivery Hero] answered “[✂].”
  - c) The email from [Mr X]<sup>101</sup>, dated 17 July 2016 which stated: “[✂]”.
  - d) The email from [Mr X]<sup>102</sup>, dated 29 June 2016 which stated: “[✂].”

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<sup>98</sup> See Annex 25 to this notice: Guidance, paragraph 3.1, third bullet.

<sup>99</sup> Appendix 19 to the response to the Second s109 Notice.

<sup>100</sup> Appendix 190 to the response to the Second s109 Notice.

<sup>101</sup> Appendix 69 to the response to the Second s109 Notice.

<sup>102</sup> Appendix 134 to the response to the Second s109 Notice.

97. In addition, Hungryhouse argued that several emails provided in response to the Third s109 Request noted Hungryhouse's [redacted] with respect to "click-to-call". Hungryhouse quoted the following example:
- a) the email dated 18 September 2016 from [CEO Hungryhouse],<sup>103</sup> which stated that: "[redacted]?"
98. The CMA notes that, firstly, it is not necessary to demonstrate that a party sought to obtain an advantage or derive benefit from the failure to comply. Paragraph 4.2 of the Guidance (see Annex 25 to this notice) states that the presence of one or more of the factors listed in that paragraph (of which seeking to obtain an advantage or derive benefit is just one) may make the CMA more likely to impose a fine. Other relevant factors listed in that paragraph, such as the adverse impact on the investigation and significance of the failure to comply, are discussed above. Secondly the CMA notes that a number of the documents which were responsive to Question 2 were not supportive of Hungryhouse's case in relation to the counterfactual.<sup>104</sup> Thirdly, the CMA does not agree that the documents to which Hungryhouse referred are all "very supportive" of Hungryhouse's case. For example, although the email from [Investor A] dated 4 September 2016<sup>105</sup> may lend some support to Hungryhouse's arguments regarding [Mr X]'s influence, at least in relation to one investor, it is also relevant to note that, as set out in paragraph 88 above, [CEO Delivery Hero] responds to that email stating: "[redacted]." In addition, the CMA notes that the email from [Mr X] dated 17 July 2016<sup>106</sup> relates to the [other Delivery Hero business].
99. In relation to timing and process, Hungryhouse stated that it was not apparent that any failure to comply with the First s109 Notice would have impacted on the CMA's ability to meet statutory or administrative timetables. Hungryhouse submitted that, to the extent that responsive documents were not provided in response to the First s109 Notice, such documents would not have been outcome-determinative.<sup>107</sup> Hungryhouse submitted that it is common for merger control proceedings to be an iterative process of asking for and analysing additional data and documents<sup>108</sup> and noted that the majority of

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<sup>103</sup> Appendix 12 to the response to the Third s109 Notice.

<sup>104</sup> See paragraph 88 above.

<sup>105</sup> Appendix 19 to the response to the Second s109 Notice (see Schedule 1 to this notice).

<sup>106</sup> See paragraph 96 above.

<sup>107</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.14. Hungryhouse also noted in paragraph 8 of its Representations that, in its provisional findings, the CMA reached the view that Hungryhouse is not and would not have been a significant competitor of Just Eat.

<sup>108</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.14.

additional documents submitted by Hungryhouse would not have been responsive to the First s109 Notice.<sup>109</sup>

100. For the reasons set out in paragraphs 87 to 89 above, the CMA considers that the failure to comply with the First s109 Notice had an adverse impact on the investigation, including on the ability of the Inquiry Group to meet the statutory deadlines. It is not necessary for the CMA to demonstrate that the responsive documents which Hungryhouse failed to provide in response to Question 2 and Question 6 would have been outcome-determinative in order to impose a penalty under s110 EA02.<sup>110</sup> The fact that the merger control process may often involve a number of information requests in an “iterative process” does not excuse Hungryhouse’s failure to comply with the First s109 Notice. As noted at paragraph 87 above, were it not for the fact that the CMA noticed that responsive documents may have been omitted and issued further notices under section 109 EA02, the documents set out in Schedules 1 and 2 to this notice may not have come to the attention of the Inquiry Group. It should not be incumbent on the CMA to discern that parties to merger control proceedings may not have complied in full with notices under section 109 EA02 and take steps to remedy the failure.
101. Hungryhouse also submitted that substantial delays can and frequently do occur in any administrative process during the summer holiday period and that the PowerPoint format of certain working papers produced by the CMA earlier in the investigation would have delayed the process of drafting and finalising the CMA’s provisional findings in any event.<sup>111</sup>
102. In relation to Hungryhouse’s reference to the summer holiday period, the CMA notes that merger control proceedings frequently take place over the summer period without resulting in substantial delay to timetables. In relation to the format of the working papers, there is no basis for the allegation that the format of the papers would have resulted in a delay to the Inquiry timetable or, specifically, to the process of drafting and finalising the provisional findings. There is no requirement as to the format which working papers must take and, as in other merger cases, the use of Powerpoint presentations has sometimes been a more effective way of communicating issues under consideration to the parties concerned. Furthermore, in other merger cases, the production of

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<sup>109</sup> See Annex 32 to this notice: Representations, paragraph 9.

<sup>110</sup> Note that paragraph 3.2 of the Guidance (see Annex 25 to this notice) lists a number of potential adverse consequences of a failure to comply with a notice issued under section 109 EA02. The CMA coming to a different decision than it would otherwise have done is just one of the potential adverse consequences listed in that paragraph. The Guidance notes that this would only occur in the “most extreme circumstances”.

<sup>111</sup> See Annex 21 to this notice: Compliance Response, paragraph 1.15, footnote 7.



certain working papers in a Powerpoint presentation has not resulted in a delay to the investigation.

103. Hungryhouse submitted that, despite the fact that the CMA reviewed a much larger volume of documents from Just Eat during late August and September than that which it reviewed from Hungryhouse, the CMA has singled out Hungryhouse in order to impose a penalty and create deterrence.<sup>112</sup>
104. It is correct that the CMA also requested and reviewed a large number of documents from Just Eat. However this does not alter the fact that Hungryhouse's failure to comply with the First s109 Notice resulted in the need for significant further information gathering. This in turn resulted in Hungryhouse providing material new evidence at a late stage in the inquiry, some of which was inconsistent with, or did not support, Hungryhouse's previous submissions on the counterfactual. As set out at paragraph 89 above, this contributed to the need to extend the reference period for the Merger.<sup>113</sup> Furthermore, had the CMA been in possession of the documents provided by Hungryhouse in response to the Second s109 Notice and Third s109 Notice at an earlier stage in the Inquiry, it would likely have requested the additional documents from Just Eat at an earlier point.
105. Hungryhouse submitted that the documents responsive to Question 2 and Question 6 have now been provided in response to the Second s109 Notice and Third s109 Notice and, as such, the imposition of a penalty is not required to encourage swift compliance. Hungryhouse also submitted that it has not previously failed to comply with an information request or CMA decision, whether in the current investigation or previously and that any failing to provide responsive documents was entirely unintentional and not born out of any lack of diligence.
106. It is not necessary for the CMA to demonstrate that a penalty is required to encourage swift compliance in order to impose a fixed penalty.<sup>114</sup> Furthermore, whilst recidivism is one factor which may be taken into account in determining whether to impose a penalty and the level of any relevant penalty, it is not a necessary prerequisite to a decision to impose a penalty.

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<sup>112</sup> See Annex 32 to this notice: Representations, paragraph 9.

<sup>113</sup> See paragraphs 60 and 89 above.

<sup>114</sup> Paragraph 4.10 of the Guidance third bullet states that: "*in some cases where an initial failure has been remedied, it may still be appropriate to impose a penalty to reflect the nature and gravity of the failure and/or to achieve deterrence. In those circumstances, only a fixed penalty would be available...*"

107. Hungryhouse submitted that a penalty for late submission of documents is a disproportionate measure, in particular given that it is targeted at a heavily loss making business.<sup>115</sup>
108. The CMA has had regard to certain key indicators relating to the financial resources available to Hungryhouse. Whilst the CMA accepts that both Hungryhouse and its ultimate parent company Delivery Hero made an operating loss in 2016, the turnover of Hungryhouse.com Limited in 2016 was £21.29 million<sup>116</sup> and Delivery Hero's turnover in 2016 was €297.0 million.<sup>117</sup> Furthermore, the CMA notes that Delivery Hero floated on the Frankfurt stock exchange via an initial public offering on 30 June 2017 at a valuation of €4.6 billion,<sup>118</sup> raising around €483.2 million.<sup>119</sup> In addition, the CMA notes that Just Eat has agreed to pay Delivery Hero £200 million (subject to an [✂] adjustment to a maximum price of £240 million) for its purchase of Hungryhouse.
109. These indicators show that Hungryhouse and its ultimate parent company Delivery Hero have significant financial resources available and will not be materially affected in a disproportionate manner by a penalty of £20,000.
110. In all the circumstances, the CMA considers that the imposition of a penalty of £20,000 (which is below the statutory maximum of £30,000 for a penalty in a fixed amount) is appropriate and proportionate in this case.

Martin Cave  
Inquiry Chair  
24 November 2017

## Competition and Markets Authority

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<sup>115</sup> See Annex 32 to this notice: Representations, paragraph 3.

<sup>116</sup> See Annex 26 to this notice: Hungryhouse.com Limited's annual report for the year ending 31 December 2016. Hungryhouse.com Limited is the trading subsidiary of Hungryhouse Holdings Limited.

<sup>117</sup> See Annex 27 to this notice: Delivery Hero GmbH annual report for the year ending 31 December 2016.

<sup>118</sup> Calculation based on IPO share price x amount of shares in the free float x percentage of share capital represented by the free float. See Annex 24 to this notice: Delivery Hero IPO prospectus.

<sup>119</sup> See Annex 24 to this notice: Delivery Hero IPO prospectus. The valuation has since increased to €6.4 billion (as at 14 November 2017).

## **Schedule 1**

**Schedule of documents not provided in response to First s109 notice**

**Strategic options**

[✂]

## Schedule 2

Schedule of documents not provided in response to First s109 notice

[✂]

### **Schedule 3**

#### **Schedule of documents referred to in this notice**

[✂]