



消費者委員會 CONSUMER COUNCIL

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來函檔號 YOUR REF.

本函檔號 OUR REF.

CC 1/267

15 June 2023

Representations on Case EC/03JJ
Competition Commission
19/F South Island Place
8 Wong Chuk Hang Road
Wong Chuk Hang, Hong Kong

By Email: Consultation@compcomm.hk

Dear Sir/Madam,

**Notice issued under section 2 of Schedule 2 to the Competition Ordinance
regarding the Commission's proposal to accept commitments in
the Online Food Delivery Platforms Case (EC/03JJ)**

The captioned Notice issued regarding the Commission's proposal to accept commitments in the Online Food Delivery Platforms Case (EC/03JJ) refers. Please find attached views from the Consumer Council for Competition Commission's consideration.

Should you have any queries on the issue, please feel free to contact Mr Michael KAN, Head, Legal Affairs Division at 2856 8576 or via email: michaelkan@consumer.org.hk.

Yours faithfully,

Gilly WONG
Chief Executive
Consumer Council

Encl.

**The Consumer Council's Submission to Competition Commission
regarding the Proposal to Accept Commitments
offered by Foodpanda and Deliveroo**

A. Introduction

1. The Consumer Council (the "**Council**") is pleased to submit views on the Competition Commission's (the "**Commission**") proposal to accept certain commitments (the "**Proposed Commitments**") from Foodpanda and Deliveroo annexed to the Commission's Notice dated 1 June 2023 issued under section 2 of Schedule 2 of the Competition Ordinance.
2. Unless stated otherwise, definitions in the Notice are adopted in this submission, and paragraph references herein are references to paragraphs of the Notice.
3. The Council appreciates the Commission's efforts in reducing the competition barriers for OFPs to enter the market or expand their market share. According to complaints received by the Council, delayed or non-deliveries are common, with 529 complaints received in 2022 and 240 complaints received in the first 6 months of 2023. The Council anticipates that increased competition will prompt OFPs to improve the quality of their services, whilst allowing consumers more choice from a wider variety of services based on their needs.
4. Whilst the Commission's investigation focused on the anti-competitive effects of the Provisions, in particular their effect on a restaurant's ability or incentive to subscribe to delivery and/or pick-up services from more than one OFP (or to provide such services directly), the Council wishes to offer views from the consumer and consumer protection perspective.

B. Observations and Suggestions of the Council

5. The Exclusive Terms

- (1) The Council supports the cessation of the Exclusive Terms as against Low Market Share Platforms, namely, platforms that provide Order to Deliver Services and have a monthly share of 10% or less measured by order

value¹ (“**Cessation**”). The ability of restaurants partnering with Foodpanda or Deliveroo (as the case may be) to also partner with Low Market Share Platforms would increase the choice of restaurants by consumers who prefer to use those platforms.

- (2) On the other hand, it should be clarified whether the partnering restaurants would be allowed to continue partnership with a Low Market Share Platform once it attains a 10% share and thus ceases to become a “Low Market Share Platform”. The Council’s position from the consumer’s perspective is that they ought to be able to do so (or at least to do so until expiry of their current contract with Foodpanda or Deliveroo), as otherwise, consumers who have grown accustomed to ordering from such restaurants on the Low Market Share Platform may be compelled to switch to Foodpanda or Deliveroo (as the case may be). This may not only defeat the purpose of the Cessation², but may also be detrimental to consumers who prefer the Low Market Share Platform for various reasons (such as better services offered by that platform or eligible discounts by having subscribed to paid membership). Secondly, the “listing” and “delisting” of restaurants from an OFP from time to time based on fluctuations in its monthly share, and thus their status as a Low Market Share Platform or non-Low Market Share Platform, may also cause confusion to consumers.
- (3) From restaurants and OFPs’ perspective, the Commission should consider issuing guidelines to assist them to observe the Exclusive Terms. As the contract periods may differ between the contracts that a restaurant has entered into with Foodpanda / Deliveroo and other OFPs and individual restaurants may not have access to the latest market information especially about the market share of OFPs, the ability of restaurants to obtain current information on market share would be paramount to avoid inadvertently joining a non-Low Market Share Platform. The Commission may consider establishing a channel to disseminate up-to-date market information to players in the industry, apart from posting a notice on its website to inform “if Foodpanda and Deliveroo are allowed to stop treating a third-party platform as a low market share platform” mentioned in the QA. A simple and fair mechanism may also be considered to minimize risk of inadvertent breach, such as requiring Foodpanda or Deliveroo (as the case may be) to

¹ The Council defers to the professional judgment of the Commission and its evidence obtained that platforms with market shares below 10% have not been able to maintain a significant competitive presence in Hong Kong (Paragraph 90).

² In addition, it is noted that Paragraph 94 requires Foodpanda and Deliveroo not to circumvent or frustrate the operation of the Proposed Commitments.

provide information on non-Low Market Share Platforms to a restaurant at the time of renewal of their contract. Partnering restaurants should also have the right to know the different commission rates under different circumstances, as this will influence their pricing strategies and option of alternative choices, which may affect consumers in the end.

- (4) Further, whilst the Proposed Commitments permit Foodpanda or Deliveroo to apply for cessation of a OFP as a Lower Market Share Platform (Paragraphs 3.6 to 3.7 of the Proposed Commitments), the Council suggests that consideration be given to periodically monitoring changes in market share of OFPs³. This is because there is no certainty that an OFP would be able to continuously maintain a 10% share or more per month. In this regard, other OFPs should also be allowed to seek the Commission's approval of their status as a Low Market Share Platform, as well as challenge Foodpanda / Deliveroo's application for cessation. The Commission should keep all OFPs informed of any change of status.
- (5) As part of ongoing review of the effectiveness of the Cessation in protecting and improving consumer welfare, consideration should be given to monitoring the effect of the Cessation on the exclusive commission rates and meal prices through information provided as part of the annual compliance statement (Paragraph 102). As the Commission noted (Paragraph 63(a)), restaurants are enticed by lower commission rates to agree to the Exclusive Terms. The Council expresses concern that as the exclusivity becomes watered down, higher commission rates may be charged and translate into higher meal prices to the possible detriment of consumers utilizing Foodpanda and Deliveroo (as the Commission appears to recognize at Paragraph 68(e)).

6. The Price Restriction Provisions

- (1) The Council appreciates the anti-competitive concerns raised on the price parity arrangements, effectively prohibiting partnering restaurants from charging lower prices for menu items on their direct dine-in and delivery channels, i.e. narrow price parity (and in the case of Foodpanda, other platforms, i.e. wide price parity) than that on Deliveroo or Foodpanda. The Council agrees that removing such price parity could incentivize restaurants

³ Consistent with the Commission's reservation of right to conduct its own assessment and gather information from third parties to verify information provided by Foodpanda and Deliveroo (Paragraph 93).

to offering lower prices on their direct channels⁴ and other OFPs⁵ for consumers' benefit, which may be made possible due to no or lower commission rates. In fact, according to a study conducted by the Council in 2017, it was common for Order to Deliver items to be marked up on OFPs (ranging from 3 to 56 percent) than if bought as a takeaway at the restaurant. Restaurants may also from time to time offer lower prices on Foodpanda or Deliveroo through different promotions based on commercial considerations⁶. As a result of removal of price parity, restaurants will have more control over their food revenue and consumers will have more competitive market in which to search for the best price and services suitable for their needs.

- (2) On the other hand, the Council recognizes that, as a result of the removal of price parity, different sales channels and OFPs may offer different prices on the same item. Consumers who place orders on Deliveroo and, in particular, Foodpanda which implemented wide price parity, no longer have the "assurance" of the best price. They may have to conduct their own price comparison among different channels and OFPs. Consumers may also expect parity of prices. In 2022, a consumer complained that a platform offered monthly subscription plans with various discounts, but the discounted Order to Pick Up price turned out to be more expensive than the dine-in price⁷.
- (3) Thus, the effects of removal of price parity should be monitored to ensure that the anticipated consumer benefits are achieved as a result. For instance, consumers who subscribed for paid membership with Foodpanda or Deliveroo are currently able to exit without notice period or penalty. Whether these exit arrangements may become more onerous to the consumers' detriment in attempt to lock in their patronage, despite availability of lower prices on other channels or platforms, awaits to be seen.
- (4) It may also be clarified in the relevant contractual terms at Paragraph 89(d) that partnering restaurants may advertise on their own medium in both

⁴ Which as noted in Paragraph 68(a), tend to be most profitable.

⁵ Which as noted in Paragraph 68(e), may be incentivized to charge lower commission rates, translating into lower food prices, as a result of removal of price parity.

⁶ Notwithstanding the Commission's position that restaurants are unlikely to offer lower prices on OFPs than on their direct channels, as this could undercut direct sales which are most profitable (Paragraph 68).

⁷ <https://www.consumer.org.hk/tc/article/549-food-delivery-platform/549-food-delivery-platform-case>

traditional and digital media, lower prices and/or inform consumers that they would be able to obtain a lower price through direct ordering channels.

7. Foodpanda's Tying Provisions

- (1) With respect to Foodpanda's Proposed Commitment to effectively allow a partnering restaurant utilizing its Order to Deliver Services an option not to use its Order to Pick Up Services (Paragraph 89(e)), the Council believes that allowing restaurants higher flexibility to choose which Order to Pick Up Services providers to cooperate with would increase variety of consumer choice.
- (2) The Council considers that the extent of tangible consumer benefits arising (if any) as a result of removing the Tying Provisions would need to be monitored. In particular, given the relaxation of the Exclusive Terms and Price Restriction Provisions, partnering restaurants would already be at liberty to utilize Order to Pick Up Services offered by other OFPs and charge any price subject to those OFPs' contractual provisions. From the consumer's perspective, the convenience of being able to choose between the two types of services based on his needs in a particular purchase would be beneficial. As the Commission noted (Paragraph 48), consumers may use the two types of services interchangeably. Consumers may also enjoy certain benefits such as no delivery fee, no minimum order value and/or additional special offers if he chooses Order to Pick Up Services. As the consumer (if he opts for ordering from OFP) would in practice only be able to order from restaurants within reasonable proximity (irrespective of the type of service), it is conceivable that he may choose to pick up his order to enjoy those benefits for a particular purchase.

8. Other comments

- (1) The Council is pleased to see the flexibility brought by setting up a 3-year effective period with reporting and monitoring mechanisms in place (Paragraphs 98 and 102). As the Commission recognized, this is shorter than the usual five-year period, given the dynamic nature of the OFP market. The Council considers that the market is also relatively young. In this context, the Council suggests that proactive monitoring of market developments as per the above suggestions would be highly beneficial. This is given in particular that the Proposed Commitments may introduce market disruptive practices that potentially transform the industry, with a

wider variety of services, business models and entailing trade practices. The Council further suggests that the written reports and annual compliance statements provided by Foodpanda and Deliveroo should be made available to the public for market surveillance.

- (2) The Council considers that maintaining some of the Proposed Commitments even after the 3-year period is legitimate, for example, measures to provide clarity on ability to switch (Paragraph 89(a)) which stated that *“the relevant contractual documentation would specify that partnering restaurants may switch from Exclusive Terms to Non-Exclusive Terms and specify the applicable commission rates under each set of terms”*.
- (3) In this regard, whilst a healthy, competitive market is necessarily beneficial to consumers, an oversaturated market may be undesirable and result in OFPs resorting to unscrupulous trade practices or lowering of prices at the expense of quality goods / services in order to compete for business. The Council also notes that there had been a number of entrants that exited from the market in the past (Paragraphs 21 to 28). The reasons for their exit may need to be further investigated into, including whether it is related to consumption behaviour⁸ and/or anti-competitive practices perpetrated by dominant market players.
- (4) It is noted that the Proposed Commitments have expressly excluded other services offered by Foodpanda and Deliveroo, such as catering, grocery delivery and restaurant reservation services (Paragraphs 19 and 20). On the other hand, in a report published jointly by InvestHK and PwC⁹, it was stated that Foodpanda’s Pandamart was a key player in the growth of online grocery shopping and retail value sales of supermarkets. Given that these services are becoming more popular in Hong Kong in recent years, the Council considers it beneficial to consumers if the Commission would closely monitor developments for anti-competitive arrangements in other core services provided by these dominant OFP players.

⁸ Such as whether consumers in practice are likely to shop around only a few platforms that serve their vicinity.

⁹ Food Services: Accelerated Digital Growth and Development – You’re your Success in Hong Kong’s Thriving Food Industry, October 2021
(https://www.investhk.gov.hk/sites/default/files/Food%20Services_Accelerated%20Digital%20Growth%20and%20Development_2.pdf)

(5) In this regard, the Council also notes that, according to Paragraph 100, there have been considerations as to whether a broader range of circumstances might also be captured, and the Commission tended to remain open for a review and possible release or variation in accordance with the statutory process to be undertaken. The Council suggests that the Commission may pay attention especially when there exists new OFPs with market share of 30% or more by adopting similar tactics as Foodpanda and Deliveroo do or forming a coalition, and see if similar constraints are appropriate to them. The Commission should also stay alert when there is a sudden significant change in the percentage of exclusive partnering restaurants on a particular OFP, and investigate whether new anti-competition tactics have been adopted.

(6) Lastly, to cater for changes in different markets in the digital economy, the Mainland sought comments for the Draft of Amendments to the Anti-Unfair Competition Law in November 2022¹⁰. New proposal of provisions includes prohibiting traders from adopting unfair ranking in search results to influence consumers' choices (Clause 13.6). The Commission may consider monitoring players in the Order to Deliver Services market regularly to see if they have adopted new technologies to distort market competition.

C. Conclusion

9. The Council is grateful for the Commission's consideration of consumer interests towards ensuring that the Proposed Commitments would not prejudice consumers. In this regard, the Council supports in principle the relaxation/removal of the Provisions set out in the Proposed Commitments, subject to the observations and suggestions above. The Council looks forward to the Commission's further endeavours in continuous monitoring with the ultimate goal of attaining a fair, healthy and competitive OFP market that best serves consumer interest and meets consumer expectations.

**Consumer Council
June 2023**

¹⁰ <http://finance.people.com.cn/BIG5/n1/2022/1122/c1004-32571968.html>