

ANNEXURE 6

FOOD DELIVERY

1. Market delineation and dependency

- 1.1. Findings from the Provisional Report..... 403
- 1.2. Stakeholder submissions: views on market delineation and dependency..... 403
- 1.3. Response by the Inquiry to stakeholder submissions on market delineation and dependency..... 403

2. Structure and competitive dynamics

- 2.1. Findings from the Provisional Report.....410
- 2.2. Stakeholder submissions: views on structure and competitive dynamics..... 410
- 2.3. Response by the Inquiry to stakeholder submissions on structure and competitive dynamics..... 411

3. Leading platforms

- 3.1. Findings from the Provisional Report..... 416
- 3.2. Stakeholder submissions: views on leading platforms..... 416
- 3.3. Response by the Inquiry to stakeholder submissions on leading platforms..... 416

4. Platform competition issues

Predatory conduct and/or below-costs practices

- 4.1. Findings from the Provisional Report..... 422
- 4.2. Stakeholder submissions: views on below-cost practices..... 422
- 4.3. Response by the Inquiry to stakeholder submissions on below-cost practices..... 423

- 4.4. Conclusion on below-cost and/or variable cost loss-making strategy..... 430

Access to restaurant chains and limited choice for franchisees

- 4.5. Findings from the Provisional Report..... 431
- 4.6. Stakeholder submissions: views on lack of access to restaurant chains..... 431
- 4.7. Response by the Inquiry to stakeholder submissions on lack of access to restaurant chains..... 433
- 4.8. Conclusion on lack of access to restaurant chain..... 441

Price Parity Clauses

- 4.9. Findings from the Provisional Report..... 441
- 4.10. Stakeholder submissions: views on price parity clauses..... 441
- 4.11. Response by the Inquiry to stakeholder submissions on price parity clauses..... 442
- 4.12. Conclusion..... 446

Transparency in Menu Surcharge

- 4.13. Findings from the Provisional Report..... 446
- 4.14. Submissions from stakeholders on transparency in menu surcharge..... 446
- 4.15. Response by the Inquiry to stakeholder submissions on transparency in menu surcharge..... 447
- 4.16. Conclusion..... 452

5. Business user competition issues

Discrimination and/or differentials in commission fees

- 5.1. Findings from the Provisional Report..... 453
- 5.2. Stakeholder submissions: views on commission fee discrimination and/or differentials..... 453
- 5.3. Inquiry's response to third party submissions on price discrimination and/or differentials..... 454
- 5.4. Conclusions on price differentials..... 460

Promotional Spend and Marketing Commitments

- 5.5. Findings from the Provisional Report..... 461
- 5.6. Submissions from stakeholders on promotional spend and marketing commitment..... 461
- 5.7. Response to stakeholder submissions on promotional spend and marketing commitment..... 461
- 5.8. Conclusion..... 464

Lack of transparency, participation and spending patterns of business users in pay-for-position

- 5.9. Provisional Report findings..... 464
- 5.10. Submissions from stakeholders on transparency and pay-for-position..... 464
- 5.11. Response to stakeholder submissions on transparency and pay-for-position..... 465
- 5.12. Conclusion..... 468

6. Remedial actions

- 6.1. Remedial actions from the Provisional Report..... 469
- 6.2. Leading platforms submissions to the Inquiry's provisional remedies..... 470
- 6.3. Other stakeholders submission to the Inquiry's provisional remedies..... 472
- 6.4. Inquiry's response to stakeholder submissions and final remedial actions.. 472

Appendix 1:

Menu Pricing Comparison 473

Appendix A:

Stakeholder Engagements..... 476

List of Diagrams

- Diagram 1: Characteristics of online intermediate platforms that drive unfair practices against business users in the European Union 418
- Diagram 2: Example of Mr D Food and Uber Eats customer costs per order on the platform 448

List of tables

- Table 1: Comparison of Mr D Food, Uber Eats and In-store menu prices for several restaurants in Johannesburg for the year 2019 period.....443
- Table 2: Platform menu pricing comparison for Paarl Easts and Uber Eats.....450

[1. Market delineation and dependency]

1.1. Findings from the Provisional Report

1. The Inquiry found that there has been rapid adoption of food delivery and restaurants are dependent on established food delivery platforms. Evidence collated by the Inquiry revealed that other alternative channels (e.g., takeaway, restaurant own website and app, home cooked meal) impose an insignificant competitive constraint on food delivery platforms such as Uber Eats and Mr D Food. Therefore, other alternative channels were not considered to be substitutable with food delivery platforms.

1.2. Stakeholder submissions: views on market delineation and dependency

2. The established platforms (Uber Eats and Mr D Food)¹ disagree with the Inquiry's assessment of market delineation and dependency. In particular, these platforms argue that:²
 - 2.1. The Inquiry's approach in its market delineation assessment is incorrect and seeks to avoid a robust assessment of identifying contestable markets.³
 - 2.2. The market is highly competitive and the established platforms are constrained by other channels (other delivery platforms, takeaway, restaurant own website and app,

etc.) and firms in adjacent market (e.g., supply-side constraints – Netflorist, Pick n Pay Bottles).⁴

- 2.3. Restaurants are not dependent on established platforms and no credible evidence supports the notion that restaurant are dependent.⁵
3. The Inquiry notes that other platforms did not disagree with the Inquiry's assessment of market delineation and dependency. For instance, one platform states that it *"is largely in agreement with the manner in which the Inquiry has characterised the markets, the market features and the competitive dynamics"*.⁶

1.3. Response by the Inquiry to stakeholder submissions on market delineation and dependency

4. The Inquiry's assessment of market delineation and dependency takes into account relevant factors that are considered in defining the relevant market. The Inquiry has considered whether food delivery platforms are constrained from both sides of the market (customer and business user). Further, demand and supply side factors have been considered. In reaching its conclusion on whether other channels constrain and/

1 Annexure 6: Food Delivery, uses established platforms and leading platforms interchangeably. Thus, both established and leading platforms refer collectively to Uber Eats and Mr D Food.

2 Uber Eats submissions dated 10 September 2022, Mr D Food submissions dated 16 September 2022 and 15 June 2023.

3 The established platforms state that the Inquiry has failed to define the relevant market, conclude on the relevant market and accordingly account for competitive constraints.

4 The established platforms state that the Provisional Report has failed to properly consider the economic features of two-sided platforms and its approach to identifying competitive constraints is not robust as it focuses on characteristics of each platform and whether customers prefer the characteristics (and associated benefits) of one platform over the characteristics (and associated benefits) of another. Established platforms indicate that their own research shows that customers order from delivery platforms as well as directly from restaurant chains own platform/websites and that firms in adjacent markets can easily expand into food delivery as established platforms have also expanded from food delivery into other markets (e.g., grocery and alcohol).

5 The established platforms state that the existence of historic price increases (or alleged price increases) is insufficient to support a claim of any kind of dependency. It is further stated that restaurant chains derive majority of revenue from walk-in customers with delivery platform being supplementary revenue stream.

6 [REDACTED]

or are considered substitutable with food delivery platforms, the Inquiry's Provisional Report considered several factors that would ordinarily be taken into account when defining the relevant market. Accordingly, the established platforms' assertion that the Inquiry has *"failed to define the relevant markets...and account for competitive constraints"* is incorrect and unfounded.⁷ Various factors considered by the Inquiry that are consistent with factors generally considered in a market definition exercise include, *inter alia*, the following.⁸

1.3.1. Demand-side (customer and business user side of the market)

5. In terms of the customer-side, the Inquiry considered customer journey and preference and noted that customers prefer food delivery platforms over other channels due to a variety of factors, including convenience (e.g., saves time) and choice (i.e., ability to compare different restaurants in one app). The Inquiry also noted that the customer journey for each alternative channel differs (e.g., a take-away is convenient for a consumer in a shopping area or on the way home whilst food delivery is convenient for a busy or lazy customer that wants food delivered quickly to their preferred location).
6. In terms of the business user-side, the Inquiry noted that business users consider food delivery platforms as an important additional sales channel that complements their existing channels.⁹ Thus, business users do not join food delivery platforms to substitute revenue generated from other sale channels. The non-substitutability of food delivery platforms by

other channels is also supported by several factors. For instance:

- 6.1. Restaurants continue to use food delivery platforms despite raising concerns about substantial increases in commission fees.
- 6.2. It would take restaurants longer periods (in some instances more than a year)¹⁰ to replace revenue generated from food delivery platforms.
- 6.3. Often, a restaurant's own delivery and/or online platform has shortcomings or limitations in attracting customers (e.g., lacks the choice and range, does not run promotions on the same scale and frequency as food delivery platforms).

1.3.2. Food delivery platforms are each other's closest competitors

7. The Inquiry noted that established food delivery platforms are the closest competitors to each other. The Inquiry has observed that these platforms consider each other to be head-to-head and/or key and/or main competitors whilst other alternative channels are not generally recognised in the same light. There is also the fight for market share amongst food delivery platforms, namely, Uber Eats, Mr D Food and more recently Bolt Food. The Inquiry has observed that each platform's strategic response to capturing and/or re-capturing market share and/or expanding seem to be motivated by the action and/or behaviour of other food delivery platforms and not by other alternative channels. The Inquiry considers these dynamics to be central in explaining platform competition and support the Inquiry's view that the primary competitive constraint food delivery platform face is primarily from one another.

7 In some extracts of its submissions (dated 16 September 2022) it appears that Takealot (Mr Food) does accept that the Inquiry has defined the relevant market (although it might not agree with the findings and/or approach). These extracts state that (i) *"it is accordingly clear that the 'market delineation' assessments contained in Provisional Report in practice amount to market definition exercises"* and (ii) *"from the outset it should be noted that, for the reasons set out above, the Provisional Report's market share analysis is based on an overly narrow definition of the relevant market"*.

8 The full detailed assessment is contained in page 4 to 28 of the Provisional Report (chapter 6 - food delivery).

9 Delivery platforms allow business users to access new and greater customer base and achieve incremental sales.

10 In some circumstances such revenue cannot be replaced.

8. As noted by the then Office of Fair Trading (“OFT”)¹¹, “company documents may indicate which products the undertakings under investigation believe to be the closest substitute to their own products” (Own emphasis). From Inquiry’s interpretation and observation of food delivery platforms’ internal documents, it is evident that they consider each other to be ‘closest substitute’.

1.3.3. Firms in adjacent market are not effective supply-side constraint

9. The Inquiry acknowledges and accepts that established food delivery platforms have entered other adjacent markets such as alcohol, grocery and pharmacy. However, the Inquiry disagrees with the assertion by the established platforms that their entry into other adjacent markets suggest that platforms in the adjacent markets (e.g., Pick n Pay, Checkers60, One Cart) can easily enter and expand into restaurant (food) delivery. The Inquiry’s Provisional Report noted that the dynamics in other markets (grocery, alcohol, pharmacy) are different and distinct from online food delivery.¹²
10. As noted by the European Commission,¹³ supply-side substitution process “means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices” (Own emphasis). Similarly, the OFT¹⁴ avers that “supply side substitution can be thought of as a special case of entry – entry that occurs quickly (e.g. less than one year), effectively (e.g. on a scale large enough to affect prices), and without the need for substantial sunk

investments” (Own emphasis). In this regard, the established platforms have failed to provide sufficient evidence that entry from firms in adjacent markets will (i) occur quickly (ii) effectively and (iii) without substantial sunk costs.

11. Moreover, the Inquiry notes that there are various barriers that a platform in an adjacent market will have to face and overcome in operating a food delivery platform of a sufficient scale to effectively constrain Uber Eats and Mr D Food. Some of these barriers include, *inter alia*:

- 11.1. Large investment required in operating a food delivery platform and the associated marketing and promotional costs.
 - 11.2. The need to sign national restaurant chains and meet their stringent criteria.
 - 11.3. The ability to sustain losses for some time (i.e., number of years) whilst relying on parent and/or holding company to provide funding and on-going capital.
12. There is also no evidence of supply-side entry into the food delivery platform market. Quench is the closest insofar as it attempted and/or intended to expand from grocery, alcohol and pharmacy into restaurants (i.e., food delivery), however, as noted in the Provisional Report¹⁵ (i) there are no restaurants listed on Quench platform to-date (ii) even if Quench list restaurants on the platform it has indicated that it does (will) not offer promotions to attract customers and has not approached and/or contracted restaurant chains. It is also apparent from the Inquiry’s previous engagement with other players in adjacent market¹⁶ (i.e., national retailers with focus on groceries, alcohol,

11 OFT (2004) document on “Market Definition, Understanding Competition Law”. OFT was a non-ministerial government department of the United Kingdom which enforced both consumer protection and competition law.

12 See page 27 (paragraph 69 and 70) of the Provisional Report (chapter 6 – food delivery) for detailed assessment of these differences.

13 “Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03)”. *Official Journal of the European Communities*.

14 OFT (2004) “Market Definition, Understanding Competition Law”.

15 Provisional Report (chapter 6 – food delivery) page 30 – paragraph 76.1.

16

beauty and fashion products) that the primary focus of these players was to build their own online and/or platform channel that sell their own retail products rather than focusing on operating a platform that would list and sell a variety of third party product(s).

13. Evidence before the Inquiry suggests that these national retailers focus is not to operate a delivery platform model similar to that of Uber Eats and Mr D Food (whereby they list third party restaurant or business users on their platform). These national retailers focus is on listing and selling their own retail products on their platforms. Moreover, some of these national retailers indicated that they had faced some challenges in operating their platforms in adjacent markets. Some of these challenges include, *inter alia*, low customer adoption rate, high delivery cost that reduces affordability and high upfront capital and operational costs.¹⁷ Thus, these platforms are still attempting to overcome challenges in their adjacent markets and are unlikely to enter and expand into food delivery. Even if these players were to attempt to enter the Mr D Food and Uber Eats' food delivery space, they would still face supply-side barriers that cannot be timeously and effectively overcome.
14. Furthermore, the fact that several food delivery platforms have either downsized their operations or completely shut down is an indication that there are barriers to entry that make entry and sustained participation in this market difficult. Firms in adjacent markets would be faced with similar barriers which would inevitably make it difficult for them to enter the online food delivery market quickly and without incurring significant additional costs or risks.

1.3.4. The Inquiry's characterisation of dependency is supported by evidence

15. The Inquiry maintains that restaurants are dependent on established food delivery platforms and a credible framework for defining and assessing dependency has been explained in the Provisional Report.¹⁸ It is also worth noting that the assessment of dependency is based on evidence from different sources (e.g., business user survey, restaurants and established platforms submissions) and cannot be reduced to a single source of evidence (e.g., surveys).
16. From the Inquiry's perspective, business user dependency occurs when, *inter alia*, the online platform is crucial for the commercial success of the business user (e.g. accessing greater pool of customers and generating more revenue via increased sales channels). As a result of dependency, business users are unlikely to completely switch to other channels and/or platforms. An example is the case where commission fee increases overtime and some restaurant chains continue to use the delivery platforms despite their unhappiness with the increased fee levels. In Inquiry's view, these restaurant chains' continued use of the platform reflects the recognition that food delivery platforms are indeed crucial to the restaurants overall commercial success. Some restaurant chains' operations run on 'razor thin margins'¹⁹ in a competitive environment. Thus, various revenue streams (including food delivery platform revenue stream) contribute to the overall commercial success of the restaurant.
17. As already explained in more details in the Provisional Report²⁰, dependency in the context of restaurants is driven by various factors, including:

17 [REDACTED]

18 Provisional Report (chapter 6 – food delivery), the detailed framework and analyses of dependency is contained in page 9 to 17.

19 [REDACTED]

20 Provisional Report (chapter 6 – food delivery) page 17 – paragraph 43.

- 17.1. The restaurants' need to access the platforms' large and broader customer database created by among other things, aggressive marketing and discounts. The Provisional Report points to the millions of customers that restaurants can potentially access via food delivery platforms.
 - 17.2. Food delivery platforms' significant increase (well-over 100% consistent increase overtime) in order volume as a facilitator of dependency and some restaurants' inability to avert raising commission fees.
 - 17.3. The difficulties, challenges and the costs associated with replacing sales generated from food delivery platforms with restaurants' own online and non-online channels.
18. The established platforms have not provided credible evidence that suggests that the above factors are irrelevant when assessing business user dependency.²¹ Again, the Inquiry notes that the above factors cannot be assessed individually or in isolation with the other as one factor alone is a not definitive indicator of business user dependency. Thus, the Inquiry considered these factors holistically in reaching its conclusion on dependency.

1.3.5. Factors considered by the Inquiry in market delineation are also taken into account by international competition authorities when defining the relevant product market

19. In the Just Eat and Hungryhouse Merger ("Just Eat Merger"),²² the Competition and Markets

Authority in the United Kingdom ("CMA") assessed the appropriate scope of the product market which considered the extent of substitutability between food ordering marketplaces and:

- 19.1. Services from ordering and logistics specialists which are similar to food ordering marketplaces, but in addition, they manage the delivery function on behalf of restaurants.²³
 - 19.2. Direct ordering from restaurants, on their own websites or apps, by telephone, or in-person.
 - 19.3. Vertically integrated food chains, in particular large, national brands, like Domino's, Pizza Hut and Papa John's.
20. The merging parties argued that the relevant product market was broad and included amongst others direct ordering (on the restaurant's own websites or apps, by telephone, or in-person) from chain restaurants (e.g., Domino's) and independents and ordering takeaway food for delivery directly from restaurants. CMA disagreed with a broader product market definition and concluded that the relevant product market was narrow and comprised of food delivery platforms.²⁴ Other channels such as direct ordering from restaurant and takeaways did not form part of the relevant product market. In reaching its conclusion CMA noted the following:
 - 20.1. In terms of the restaurant chains with own delivery, website or app²⁵ it was found that on the consumer side²⁶ (i) the

21 The Inquiry notes that the concept of business user dependency in online intermediate platform is not a novel concept introduced by the Inquiry. Business user dependency on online platforms has been noted, considered and assessed in the EU. For instance, see studies (i) An online survey forming part of the EU's Observatory on the Online Platform Economy (technical paper on differentiated treatment) (ii) European Union's Expert Group for the Observatory on the Online Platform Economy (2021) "Measurement and Economic Indicators" and (iii) European Commission's Staff Working Document Impact Assessment Study.

22 CMA, Just Eat/Hungryhouse, Final Report, 16 November 2017.

23 In South Africa, the service that Uber Eats and Mr D Food provides to the restaurants is a combination of the food ordering marketplace and ordering and logistics services. Therefore, it is not necessary to consider the extent of substitutability between these services.

24 This includes platforms such as Uber Eats, Deliveroo, Just Eats that offers the food ordering marketplace (i.e., the app) as well as those that offers logistics services (i.e., delivery services) in addition to the app.

25 This includes chains with strong brands (such as Domino's, Pizza Hut and Papa John's).

26 CMA noted that from the restaurant side restaurants chains do not directly constrain the food delivery platforms as they do not offer services to restaurants.

- econometric analysis did not find evidence that Domino's²⁷ exerted a discernible competitive constraint on the food delivery platforms (ii) the narrow range of food types available from restaurant chains mean that they would be considered close substitutes by consumers only in relation to a subset of consumer orders²⁸ (iii) the responses to the consumer survey did not point towards restaurant chains being close substitutes to food delivery platforms for them to be included in the same market.
- 20.2. In terms of directly ordering from restaurant (e.g., by telephone or in-person), it was found that on the consumer side²⁹, it was not a close substitute to food delivery platforms due to³⁰ (i) food delivery platforms being more frequently used than any of the direct ordering channels (ii) consumers' preference for convenience, speed and experience of online food delivery platforms compared to direct ordering and (iii) very few consumers using direct ordering channel when searching for their last takeaway order (under 1 in 10).
21. In a more recent merger involving Amazon and Deliveroo ("Amazon Merger"),³¹ CMA maintained that food delivery platforms constitute a relevant product market on their own and other channels do not form part of the relevant market. Some of the factors considered by CMA in reaching its conclusion include, *inter alia*:³²
- 21.1. Food delivery platforms internal documents revealed that these platforms impose a competitive constraint on each other. For instance, (i) Deliveroo internal document focussing on Uber Eats and Just Eat as Deliveroo's 'key' competitors, (ii) Just Eat and Uber Eats internal documents showing that these firms monitor their performance against, and have ambitions to win market share from, Deliveroo and each other and (iii) Just Eat's board meeting with senior management that describes Deliveroo and Just Eat as 'top' competitors. CMA argued that the foregoing points to the fact that food delivery platforms "*primary competitive constraint they face is from one another*".
- 21.2. Restaurants (including chains) indicated that they used online food delivery platforms for several reasons, including their delivery capabilities and access to customers that they would not otherwise be able to reach. CMA noted that restaurants chains had created their own online (ordering) sale channel, however, faced difficulties with offering operating and offering services via this channel. This affected the extent to which they can meaningfully impose a competitive constraint to food delivery platforms.
- 1.3.6. What is the relevant product market?
22. The above factors³³ together with guidance from international Competition Authorities, assisted the Inquiry in reaching its conclusion that other sales channels impose an insignificant competitive constraint on food delivery platforms. For avoidance of doubt, the Inquiry hold the view that the relevant product market is for the supply of online food delivery platforms.³⁴ Other sales channel do not form part of the relevant product market.

27 The largest of the restaurant chains by revenue and store branches.

28 CMA noted that restaurant chains did not provide consumers with choice of either restaurants or cuisines that a food delivery platform would offer.

29 On the restaurant-side CMA noted that direct ordering was not a close substitute to delivery platforms for number of reasons such as (i) gaining more customers is the frequently mentioned reason for having joined the platform and this suggests that relying on direct orders could harm restaurants' revenues at least in the short term and (ii) online food delivery platforms representing, on average, half of a restaurant's revenues from takeaway orders.

30 CMA, Just Eat/Hungryhouse, Final Report, 16 November 2017, paragraph 4.26.

31 CMA, Amazon/ Deliveroo Final Report, 4 August 2020.

32 The Inquiry focuses on additional factors that might not have been considered in the previous Just Eat Merger.

33 Including those highlighted in details in the Provisional Report - chapter 6 Food Delivery, page 4 to 28.

34 Please see page 4 of the Provisional Report as it provides a detailed description of 'food delivery platforms'.

1.3.7. What is the relevant geographic market?

23. The food delivery platform's market has a mixture of local and national geographic dynamics. The local dynamics emanate from the fact that food delivery is restricted in the range of only a few kilometres. Customers purchase a meal from the food delivery platform on the restaurant that is within their limited radius and/or locality. Furthermore, competition between food delivery platforms (including national platforms) also exhibit some local dynamics. For instance, a national platform can charge a different delivery fee (promotion) depending on the location and the state of platform competition in different localities. Delivery fees might be lower in highly competitive localised areas and/or in the area with lower level of customer adoption. On the other hand, the food delivery platforms (especially national platforms) exhibit some national dynamics which also influence competition. Established platforms conclude contracts with national restaurant chains at the national level and the commission fee charged for these chains are national (i.e., are the same regardless of the location of the store). Some of the promotions are also national (e.g., pizza week) regardless of the location of the store.
24. In the Amazon Merger,³⁵ CMA considered both the national and local market dynamics when defining the relevant geographic market. Nationally, CMA found that food delivery platforms make strategic decisions at a national level, which will influence their effectiveness as a competitor across multiple or all local areas. Other aspects such as improvements to logistic algorithms and app functionality, advertising strategy, as well as terms of membership to subscription services are determined centrally. Furthermore, online restaurant platforms are competing for and signing up exclusive partnerships

with nationwide restaurant chains such as McDonald. At a local level, the CMA noted that consumers order from restaurants that deliver to their address and the restaurants list on the platforms to tap into local consumer demand. Ultimately, the CMA found that there are several factors that point towards a national market and defined the online food platform market as a national market.

25. In the Just Eat Merger,³⁶ CMA found that several of the most important parameters for competition between food delivery platforms are, for the most part, set at a national level such as, restaurant commission rates and sign-up fees, consumer charges (where applicable), marketing spend, vouchers and discounts. Though, the parameters of competition that are set nationally could potentially be varied at the local level e.g. targeting of specific areas with lower restaurant commission rates or local advertising to consumer. Furthermore, the intensity of local competition varies across different local areas with offers on the online food platforms varying by local area. Based on the foregoing, CMA concluded that the relevant geographic market is likely to be national in scope, but with important local elements.
26. The Inquiry has identified numerous local delivery platforms that only operate in one town and the conduct of the national platforms can differentiate those areas. It is therefore an important dimension to consider in the context of these local delivery platforms. In light of the above (acknowledging the presence of local and national dynamics), the Inquiry is of the view that the relevant geographic market should account for both geographic dynamics.

35 CMA, Amazon/ Deliveroo Final Report, 4 August 2020, paragraph 5.125 to 5.127.

36 CMA, Just Eat/Hungryhouse, Final Report, 16 November 2017, paragraph 6.143.

they had exited the market⁴⁷ (ii) the second smaller player stated that they continued to struggle to contract some restaurant chains⁴⁸ and (iii) the third smaller player indicated that they initially operated in an area where established platforms are not active, shared the experiences and challenges of competing with established platforms' promotions, funding and range (containing restaurant chains) as one of the established platforms has entered into the local area they service. This smaller platform is struggling to compete head-head with established platforms.⁴⁹

2.3. Response by the Inquiry to stakeholder submissions on structure and competitive dynamics

30. The Inquiry maintains that the established platforms collectively hold more than 90% of the online food delivery platform's market. Individual market share of these platforms for 2020 and 2021 (Jan-Jun) suggest that for these periods, each established platform can be considered to be dominant within the meaning of the Act.⁵⁰ In this regard, the Act clearly states that "A firm is dominant in a market if – it has at least 45% of that market". Evidence before the Inquiry suggests that these platforms had more than 45% national market share each in the online food delivery platform market – a position supported by their own internal market share estimates.⁵¹

The Provisional Report noted that the share of other platforms in the overall market is relatively small with several firms exiting the market. It further noted that only Bolt Food (an international delivery platform valued at over billions USD with sophisticated technology and brand recognition) had appeared to be making strides (at a significant loss)⁵² in the market albeit in some few local areas (e.g., Cape Town). Whilst Bolt Food is a credible player with the potential to challenge the established platforms, it will take time to possibly reach the scale (at national and across several regions)⁵³ of the established platforms and current market features make that extremely difficult to realise at all unless they are addressed.

31. Over and above high market shares, the Inquiry's Provisional Report noted that the online food delivery platforms market is characterised by high barriers to entry (at the national level) and barriers to expansion (at the local level).⁵⁴ These high barriers to entry and expansion, coupled with business user dependency, have entrenched the market position of the established food delivery platforms and made it difficult for other market participants (i.e., competitors and customers) to challenge and/or constraint the incumbents.

47 [REDACTED] This platform had previously raised concerns with the nature and frequency of promotions, access to restaurants chains and competing against platforms that can sustain losses due to funding.

48 [REDACTED]

49 [REDACTED]

[REDACTED]

[REDACTED]

50 [REDACTED]

[REDACTED]

51 Inquiry notes [REDACTED] Provisional Report, [REDACTED]

[REDACTED]

[REDACTED] Provisional Report [REDACTED]

52 And facing challenges of access to some restaurant chains and those that are associated with fighting for market share against the entrenched incumbents.

53 Bolt Food services certain areas of Cape Town and Johannesburg and does not service other key Metros such as City of Tshwane (Pretoria East, Pretoria West, Pretoria North), City of Durban.

54 Provisional Report (chapter 6 – food delivery) the detailed assessment is in page 38 and 39.

2.3.1. The food delivery platform market is characterised by barriers to entry and expansion

32. It is widely accepted that digital platform markets (including intermediate digital platforms) are characterised by high barriers to entry such as strong network effects, high switching costs, self-reinforcing advantages of data and significant economies of scale and scope. As noted by the US Subcommittee (investigation into competition in digital markets) these *“high barriers to entry may diminish the ability of new firms to challenge incumbent firms, further undermining the competitive process and protecting the dominance of existing firms”*. Similarly, the Stigler Committee on Digital Platforms in the US notes that *“entrants find it difficult to overcome the high barriers to take on digital platform incumbents. Economies of scale, economies of scope, network effects, and negligible marginal cost all work together to make entry difficult in existing markets”*.⁵⁵
33. The Inquiry notes that the aforesaid market features and dynamics (of digital platforms) that make effective entry (to challenge the incumbents) difficult are also present and relevant in the context of South Africa (and not unique to the EU and the US). One of the established platforms acknowledges some of the structural barriers that exist in the food delivery platforms by stating that *“it should be highlighted that the need for significant capital investment to achieve scale is not due to any strategy of established platforms, but rather is a feature of the food delivery platform business model such as high fixed costs and*

significant economies of scale and scope”.⁵⁶

However, as noted in the Provisional Report, there are also significant behavioural barriers that exist, such as (i) aggressive marketing and promotional tactics and (ii) refusal by many restaurant chains to contract with new entrants.

34. It is worth noting that the Inquiry’s Provisional Report did acknowledge the different capital and other requirements for local *versus* national delivery services – and accepted that a platform can launch in a local area and incrementally expand.⁵⁷ However, the Provisional Report disputed the assertion that this was a signal of the existence of low barriers to entry and expansion.⁵⁸ The Inquiry maintains that the food delivery platforms market is characterised by significant barriers that inhibit the ability of platforms to expand successfully and compete effectively with established platforms. In particular, smaller and HDP platforms face barriers to expansion as they are unable to compete effectively due to, *inter alia* (i) limited funds (ii) inability to onboard restaurants chains (iii) existence of network effects, (iv) first-mover to scale and (iv) limitations to multi-homing.⁵⁹
35. Market participants (including established platforms) have not furnished any credible evidence to suggest that these barriers do not exist in the food delivery platform’s market. In fact, the exit of several smaller platforms, with the most recent exit occurring in 2022⁶⁰, signal that there are significant barriers to entry and expansion in this market.

55 See for instance the following reports in the US and EU (i) Report in the United States by the House of Representative’s Subcommittee on Antitrust, Commercial And Administrative Law (“US Subcommittee”) into Digital Market Investigation. Barriers to entry assessment. (ii) Stigler Committee on Digital Platforms, Final Report, September 2019, available at <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report>. Discussions on network effects and barriers to entry and (iii) European Commission’s Staff Working Document Impact Assessment Study.

56 Mr D Food submissions dated 16 September 2022.

57 This suggests that as a small platform launches locally and incrementally expand less capital might be required at the initial launch and/or entry.

58 Provisional Report (chapter 6 – food delivery) analysis on page 38 and 39.

59 For detailed discussion on how these factors raises barriers to entry and expansion see Provisional Report (chapter 6 – food delivery) page 29 – 50.

60 Dryvar Foods initially downsized its operations and was subsequently forced to shut down.

2.3.2. Prospects of the potential effective entrants is limited

36. As already indicated above (market delineation and dependency), there is no sufficient evidence that suggests that entry from firms in adjacent markets is plausible and will (i) occur quickly (ii) effectively and (iii) without substantial sunk costs or risks. Furthermore, any potential entrant will have to overcome barriers to entry and expansion associated with food delivery platforms. Current evidence suggests that there has been several exits in the food delivery platform market, particularly, from firms that attempted to compete head-to-head with established platforms.
37. On the other hand, new entrants (other than Bolt Food) that have entered the food delivery platform's market have targeted areas not serviced by established platforms (i.e., deliberately avoided competing head-on with established platforms). To this end, the Inquiry has not received evidence that suggests that there is an imminent entry into the market that will occur quickly and effectively. Any potential entry in the market will take time to be an effective competitor to the established platforms and will require such an entrant to have access to significant funding. Such a potential entrant will also be required to (i) make substantial upfront capital investment, (ii) aggressively invest in marketing and promotions and (iii) sustain losses overtime (thus relying on its parent company to access funding and sustain such losses).⁶¹

2.3.3. Current rivals in the market: Only Bolt Food as a recent entrant has the potential to be an effective constraint *albeit* it will take time

38. The Provisional Report noted the difficulties that Bolt Food has experienced in tackling the established platforms. The Provisional Report further noted that Bolt Food's attempts to challenge the market position of established platforms in few areas have been a costly exercise characterised by aggressive promotions, low commission fees across restaurants segments and loss making - even despite making substantial upfront capital investment, Bolt Food overall market share remained relatively low.⁶²
39. Notwithstanding the difficulties that Bolt Food has experienced and barriers that exist in the food delivery platform market, the Inquiry is of the view that Bolt Food is a credible player with the potential to challenge the established platforms. This is due to its, *inter alia*, (i) the global position and brand equity (ii) valuation and access to capital/funding and (iii) technological sophistication. These factors are discussed in detail under leading platforms section. However, Bolt Food's biggest threat is to local delivery platforms currently as it has the capital to invest in aggressive promotions.

2.3.4. There are limitations and barriers to multihoming

40. The Inquiry acknowledges that multi-homing has the potential to prevent the formation of monopolies and encourages competition (i.e., it can solve and/or mitigate entry barriers). However, the provisional summary report noted the complexities and limitations to multi-homing and cautioned against simply identifying its [multi-homing] existence and assuming it solves entry barriers.⁶³ In this regard, the Inquiry has noted some barriers and limitations to multi-homing in the food delivery platforms market. The existence of these barriers and limitations reinforces

61 Provisional Report (chapter 6 - food delivery) page 46 and 47 (paragraph 117.2). See the Inquiry's assessment of Bolt Food experiences in the market.

62 Provisional Report (chapter 6 - food delivery) page 46 and 47.

63 See the Inquiry's summary report, paragraph 67.

the entrenched position of the established incumbents:

- 40.1. From the customer-side, the Inquiry's Provisional Report noted evidence that suggested that many customers [40-50%] are loyal to a single platform and do not multi-home whilst consumers that are open to multi-homing across platforms tend to multi-home between the two established platforms.⁶⁴ Similarly, in the EU it has been observed that *"the food delivery platforms are 'sticky'. Once customers choose a platform, 80% of them never or rarely leave for another platform"*. Part of the reasons for this barrier(s) to multi-homing in the EU is that *"platforms provide loyalty incentives to consumers, which may include free delivery, loyalty points"*.⁶⁵
- 40.2. Similarly, in South Africa multi-homing behaviour amongst customers appears to be largely driven by promotions (e.g., free delivery, discounts)⁶⁶ and established platforms have loyalty incentives/schemes that reward customers. Thus, consistent with the observations from the EU, the Inquiry finds that platforms seem to design a system of incentives that reward customer loyalty – these include loyalty bonuses, discounts, bundling of services, etc. In turn, these systems of incentives limit the extent and ability of customers multi-homing between competing platforms.
- 40.3. The Provisional Report also noted that the wide parity clauses contained in some

of the established platforms' contracts encourage customers to multi-home less, especially if they consistently find that the leading platform is never more expensive than the alternatives that exist in the market (even in circumstances where competing platforms charge lower commission fees). Established delivery platforms use their superior data collection abilities to make their services ever more targeted and personal to customers. Often the data is used to the convenience and benefit of businesses and the end users (customers), helping the former to reach more clients and helping the latter to receive better buying deals. This entrenches the loyalty of customers and business users in established platforms⁶⁷ and puts any emerging market entrant at an immediate disadvantage.⁶⁸

- 40.4. From the business user-side, the provisional summary report noted that business users are less likely to put the same amount of management effort in supporting the smaller platform sales channel in many other ways because it delivers fewer customer sales – thus limiting their extent of multi-homing.⁶⁹ If a restaurant believes it has enough orders from the established platforms, it tends to use these platforms and not smaller competing platforms.⁷⁰ As noted in the Provisional Report, many restaurant chains prefer to use only two platforms (Uber Eats and Mr D Food) thus from the business user-side multi-homing

64 Provisional Report (chapter 6 – food delivery) page 48, paragraph 120.

65 European Union Observatory on the Online Platform Economy Paper on Multi-homing: obstacles, opportunities, facilitating factors. The Observatory on the Online Platform Economy monitors the evolution of the online platform economy to advise and support the EU in its policy making in relation to online platforms.

66 Provisional Report (chapter 6 – food delivery) page 48, paragraph 121. In particular, over 60% of customers multi-home due to promotions. The Provisional Report noted that this kind of behaviour as driven by promotions favours established platforms.

67 Customers and business users might see no value in using alternatives and/or even multi-homing.

68 This aspect also represent a barrier to multi-homing. As noted by the European Union Observatory on the Online Platform Economy Paper on Multi-homing: "Insufficient interoperability and limited options for transferring data from one platform to another is another obstacle to multi-homing". This implies that new entrant(s) and/or smaller players are unable to come up with more targeted deals that might attract customer and business users (i.e., lack market intelligence) and encourage multi-homing due to limitations in the kind of data they have at their disposal.

69 See the Inquiry's summary report, paragraph 68 and 69.

70 The provisional summary report further noted that the level of effort, cost and other frictions from using multiple platforms can also result in business users not supporting more than a few platforms, obviously to the detriment of smaller platforms as users will list first on the scaled provider of the most customer sales.

is limited to these platforms.⁷¹In this regard, some restaurant chains stringent criteria in determining which food delivery platform to list-on present a significant barrier to multi-homing.⁷²

2.3.5. Conclusion on structure and competitive dynamics

41. The Inquiry finds that the established platforms individually hold high market shares in the relevant market. Furthermore, the online food delivery platforms market is characterised by high barriers to entry and expansion. The existence of barriers and limitations to multi-homing have reinforced the entrenched position of the established platforms.

71 Provisional Report (chapter 6 – food delivery) page 48, paragraph 122.

72 Some of aspects of this criteria include: the platform must have well-established national and regional footprint, dedicated account management, brand and marketing team.

[3. Leading platforms]

3.1. Findings from the Provisional Report

42. The Inquiry found that Uber Eats and Mr D Food can be considered to be leading platforms in the food delivery platform market. Furthermore, the Inquiry stressed that the conduct of leading platforms can have negative competition implications and harm/ impedes growth and expansion – innovation.

3.2. Stakeholder submissions: views on leading platforms

43. Uber Eats and Mr D Food disagree with the Inquiry's assessment of leading platforms. In particular these platforms argue that:⁷³
- 43.1. The Inquiry has impermissibly created a novel classification of 'leading platforms' which is not provided for in the Act.⁷⁴
- 43.2. The criteria and/or the test used to identify leading platforms is unclear and inconsistent (i.e., no proper assessment has been conducted).⁷⁵
- 43.3. The exclusion of a well-resourced Bolt Food that according to the Inquiry also engages in 'aggressive marketing' as a

leading platform is incorrect and unfair.⁷⁶

Bolt Food must also be categorised as a leading platform.

- 43.4. The application of proposed remedies to leading platforms risks distorting competition with adverse consequences.⁷⁷

3.3. Response by the Inquiry to stakeholder submissions on leading platforms

44. The Inquiry maintains that it does not have to establish that any firm is dominant for purposes of the Market Inquiry. However, the Inquiry is not precluded from making observations regarding the structure of the market, the competitive dynamics and the market position of the established platforms. In the event where evidence suggests that the market position of the established and/or leading platforms bear features of dominant firms (e.g., due to high market shares, barriers to entry and limited constraint from customers), the Inquiry may express such observations.
45. The identification of leading platforms and formulation of remedies that are applicable to leading platforms are aimed at facilitating a

73 Uber Eats submissions dated 10 September 2022 and Mr D Food submissions dated 16 September 2022.

74 Established platforms state that there is no definition in the Act of a 'leading firm' or a 'leading platform'. Thus, the Act does not contemplate and/or empower the Inquiry to establish such a category.

75 The established platforms state that (i) on the one hand, the Inquiry suggests that it does not have to establish that any firm is dominant for purposes of the Inquiry whilst on the other hand, the Inquiry argues that the leading firms all bear features of dominant firms, and it is for that reason that they must be the subject of remedial recommendations (ii) the Inquiry has not performed any proper assessment of dominance and has no basis for concluding established platforms bears the features of a dominant firm, or that either of them have engaged in any abuse of dominance as contemplated in sections 8 and 9 of the Act.

76 The Established platforms state that Bolt Food is an efficient entrant with international capital backing. Some of the points raised includes: (i) the Inquiry cannot only label Mr D Food and Uber Eats as "leading" with Bolt Food remaining unconstrained in its competitive conduct (ii) there can be no argument that Bolt Food is adept and that it is well-resourced (iii) there is no reason to think that in the very short-term, Bolt Food will not grow to be of a similar size and presence to Mr D Food and Uber Eats – it has already successfully entered the market and is competing (iv) the ability of Mr D Food and Uber Eats to now compete on a level playing field with Bolt Food is severely constrained if they are to adopt the recommendations as they are and the same does not apply to Bolt Food.

77 Established platforms state that the application of the Inquiry's proposed remedial action to leading platforms will create an unlevel playing field which risks distorting competition with potential unintended consequences for all stakeholders. For instance, leading platforms ability to respond to competition, including by offering consumer promotions, will be limited. Thus, impacting on leading platforms ability to compete on an even playing field with other online food delivery platforms.

fair competitive process rather than distorting competition. This is in line with the Terms of Reference ("ToR") of the Inquiry which identified the need to act pre-emptively to ensure that intermediation platform markets where there are already established leaders do not irreversibly tip towards a single dominant operator, and ensure these markets become more contestable in future to the benefit of consumers and business users. The provisional summary report also noted that the conduct of leading platforms can have negative competition implications and harm/impede growth and expansion – innovation.⁷⁸

46. It is worth noting that the Inquiry's approach and objectives is shared by many competition authorities and policy makers globally. It has been noted in the EU and US that online platforms have become the main vehicle of access to markets. These platforms are characterised by features such as strong network effects, high switching costs and the self-reinforcing advantages of data and increasing returns to scale. These features make online platform markets prone to the winner take-all economics. As a result, many online platform markets "tip" in favour of one or two large companies.⁷⁹ In the United States it has been noted that online platforms such as Amazon, Apple, Facebook and Google have come to function as gatekeepers and in some instances exploit this gatekeeper power to dictate terms and extract concessions that third parties would not consent to in a competitive market.⁸⁰

47. Similarly, the European Commission has noted that the features of online platforms, in particular gatekeepers, lead to increased business user dependency on platforms and bargaining power imbalanced. The European Commission further argues that these online market features can also enable platforms to behave or impose (unilaterally) unfair practices on business users. These unfair practices can be harmful to the legitimate interests of business users.⁸¹

48. It is against the above background that the authorities globally have found it prudent to propose interventions (by way of remedies/recommendations/regulations) that are aimed at protecting the competitive process (i.e., making the digital markets more contestable and competitive) from unfair practices of gatekeepers.⁸² It is worth noting that absent remedies / recommendations / regulations aimed at gatekeepers where necessary, the market structure and feature of digital platforms (one or two large player market) will become irreversible.

78 See the Inquiry's summary report, paragraph 19 and OIPMI Terms of Reference, 9 April 2021 – paragraph 2.19.

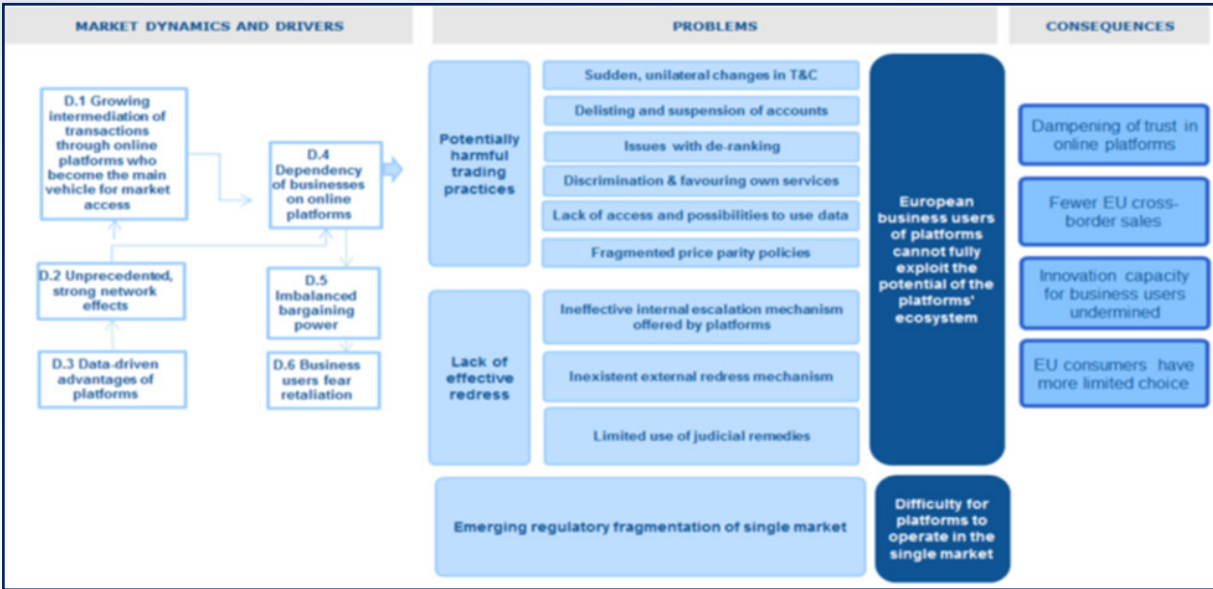
79 See, *inter alia*, (i) Report in the United States by the House of Representative's Subcommittee on Antitrust, Commercial And Administrative Law ("US Subcommittee") into Digital Market Investigation. (ii) Stigler Committee on Digital Platforms, Final Report, September 2019, available at <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report> and (iii) European Commission's Staff Working Document Impact Assessment Study.

80 See report in the United States by the House of Representative's Subcommittee on Antitrust, Commercial And Administrative Law ("US Subcommittee") into Digital Market Investigation.

81 Refer to the aforementioned European Commission's Commission Staff Working Document Impact Assessment

82 See for instance, the European Parliament 'Briefing' document on "Regulating digital gatekeepers - background on the future digital markets act".

Diagram 1: Characteristics of online intermediate platforms that drive unfair practices against business users in the European Union



Source: European Commission’s Staff Working Document Impact Assessment Study

3.3.1. The criteria used to identify leading platform is justifiable and aligns with the Act

49. The Inquiry has identified that in all the intermediation platform categories with a sizeable level of adoption there are one or two leading platforms. The provisional summary report provides guidance on the criteria used to identify leading platforms. For instance, the provisional summary report states that leading platforms are those which:⁸³
- 49.1. Attract the pre-dominant online consumer traffic in their market category, on which business users are relatively dependent already to access online customers.
 - 49.2. Are either entrenched or likely to become entrenched given the observed market dynamics.
 - 49.3. Their conduct (as a result of their market position) can impact on platform competition, business user competition and participation, consumer choice.
 - 49.4. The dependency of business users places them in a position to potentially exploit that market position.

- 49.5. Have the features of dominance given their position in their markets.

50. It is evident that the Inquiry has relied on several credible factors to identify the leading platforms. These factors align with, *inter alia*, the observed structural and competitive dynamics that exist in the food delivery market. The Inquiry has already presented relevant evidence on the (i) dependency of established food delivery platforms, (ii) online customer traffic and level of adoption of established food delivery platforms, (iii) high market share of established food delivery platforms and barriers to entry and expansion that exists. All these factors point to the established platforms being leading platforms and entrenched in the market.
51. The Inquiry notes that the assertion that leading platforms “have the features of dominance given their position in their markets” (own emphases) has attracted criticism from established platforms. In this regard, it has been argued that the statement implies that the Inquiry has to show that the

83 See the Inquiry’s summary report, paragraph 19.

established platforms are dominant within the meaning of the Act. As already indicated, the Inquiry's position is that, generally, it does not have to establish that any firm is dominant for purposes of determining whether there is any feature or features of the market that impedes, restricts or distorts competition. However, given the Inquiry's view that the existence of features of dominance may be one of the factors considered when identifying a leading platform, the Inquiry will elaborate on the features of dominance referred to in the provisional summary report.

3.3.2. Leading platforms' features of dominance

52. Section 7 provides three possible scenarios in relation to the assessment of dominance. Scenario 1: if a firm has 45% market shares in the relevant market, it is considered dominant and no further assessment is required. Scenario 2: Where a firm has 35% market shares, but less than 45%, it is presumed dominant unless it (the firm) can prove that it lacks market power. Scenario 3: Where a firm has less than 35% market shares but the Commission can establish that it has market power, such a firm is considered dominant.

53. The above suggests that in terms of section 7, dominance can be assessed using the firm's market shares or based on the concept of market power, or both. The Act defines market power as the ability/power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers. In other words, a firm has market power if its behaviour in the market cannot be constrained by competitors, its customers or suppliers. Some of the relevant factors considered in the

assessment of market power include market shares, entry conditions, and the degree of buyer power from the customers.⁸⁴

54. As already indicated the market share of established platforms at national level and within some localities is significantly high. At the national level the established platforms in some periods had more than 45% national market share in food delivery. The Inquiry noted in its Provisional Report that these established platforms' market share overtime is generally [40-50%] and [50-60%]. Thus, the Inquiry is of the view that there is evidence that suggests that the established platforms (even on their own internal version of market share estimates) have over 45% market shares and, accordingly, are considered as dominant.⁸⁵ Over and above high market shares, the assessment of competitive dynamics has revealed that the food delivery platforms market is characterised by high barriers to entry and expansion - which limits the ability of competitors to constrain established platforms. The existence of barriers and limitations to multi-homing have also reinforced the entrenched position of the established platforms.

55. As the United Kingdom's Competition and Markets Authority explains:

"[I]f potential competitors face substantial barriers to entry and expansion, such that the market is no longer properly contestable, then a high market share can translate into market power, giving the platform the opportunity to increase prices, reduce quality or leverage market power to undermine competition in potentially competitive markets and deny innovative rivals the chance to bring new services to market".⁸⁶

84 See (i) European Commission (2018). Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (Text with EEA relevance) (2018/C 159/01) and Office of Fair Trade (2004). Assessment of Market Power - Understanding Competition Law.

85 [REDACTED]

86 Competition & Mkts. Auth., Online Platforms And Digital Advertising, Market Study Final Report 10 11 (2020) [hereinafter Competition & Mkts. Auth. Report].

56. Similarly, the Inquiry notes that features of dominance in the food delivery platforms market is explained by, *inter alia*, high market shares held by the established platforms and barriers to entry. The benefits derived by established platforms from the network effects also place them in an advantageous position. In this regard, Mr D Food and Uber Eats have managed to secure and list all the national restaurant chains and many independent restaurants, enabling them to offer consumers a wide range of choice in any local area and benefit from network effects – this position enables the established platforms to be an attractive proposition to consumers. On the other hand, smaller platforms (including the late international entrant Bolt Food) have struggled to secure and list national restaurant chains to support them, thus, limiting the smaller platforms' ability to generate network effects that may propel them to grow sustainably.

57. The Inquiry is of the view that the presence of these network effects reinforce the established platforms' market position. As correctly pointed out by the OECD *"network effects may spur a self-reinforcing positive feedback loop, i.e., a situation where success feeds success; this is an important factor in strengthening a company's market power and might even create a lock-in effect for its customers"*.⁸⁷ In another paper reflecting on the Google AdSense case, the OECD notes that *"the Commission considered network effects (together with scale) as a decisive element for the finding of Google's dominance in the markets for online search advertising in the Google AdSense case"*.⁸⁸ Similarly, the Inquiry has considered network effects, among other things, as a critical element for the observation that the leading platforms have features of dominance. The established platforms have a vast range and quantity of restaurants listed on their platforms and have used aggressive

marketing strategies to win customers and benefit from network effects.

58. Furthermore, as already indicated under market delineation, the ability of customers of leading platforms to constrain them is limited:
- 58.1. From the business user-side: the limitations emanate from their dependency on leading platforms (e.g., the need to access the platforms' large and broader customer database and the increasing order volumes overtime generated from established platforms). Furthermore, the difficulties, challenges and the costs associated with replacing sales generated from established food delivery platforms with restaurants own online and non-online channels also implies that the ability of restaurant to constrain established platforms is limited.
 - 58.2. From the consumer-side: the barriers and limitations to multi-homing also show a certain degree of consumer loyalty and/or preference towards established platforms. The loyalty incentives offered coupled with established platforms access to consumer data (and spending patterns) also suggests that platforms understand the mindset and the behaviour of their customers. They also provide the platform with the opportunity to build consumer loyalty or channel the mindset of the consumer and in turn limit the extent to which consumers can constrain the platform – as they [consumers] would believe they are getting the best possible deals from platforms.

3.3.3. Treatment and categorisation of Bolt Food

59. Bolt Food, an Estonian international company, launched in Cape Town in 2020 and later expanded to Johannesburg, in 2021. Although Bolt Food is a recent entrant with smaller share of the overall national market, the Inquiry is of

87 See Organisation for Economic Co-operation and Development (OECD) 2022 "The Evolving Concept of Market Power in the Digital Economy – Note by Germany". Available on: <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf>

88 See Organisation for Economic Co-operation and Development (OECD) 2022 "The Evolving Concept of Market Power in the Digital Economy – Note by the European Union" Available on: [https://one.oecd.org/document/DAF/COMP/WD\(2022\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)30/en/pdf)

the view that it has the ability to be a leading platform overtime if impediments are removed but also it has the capacity to influence local delivery platform competition. The Inquiry's assertion is based on the following factors:

- 59.1. Evidence indicate that upon entry Bolt Food managed to implement aggressive promotions (e.g., 50% discounts, free delivery) in an attempt to compete with established platforms. This enabled Bolt Food to increase its order volume and gain some traction in local/regional areas it competes with established platforms. The Inquiry notes that this came at the price (increasing loss making overtime). However, Bolt Food has been able to rely on its parent international company to sustain such losses and remain in the market.
- 59.2. Bolt Food has the capabilities to scale, fund its operations and become an effective national platform. This view stems from Bolt global position. Bolt is valued at €7.6bn⁸⁹ and has (at least for the past two years) consistently raised well-over €500million in various rounds of funding.⁹⁰ The scale and sophistication of Bolt delivery services and operations globally is well-reported. Its website states that it has (i) operations in 45 countries and over 500 cities across Africa and Europe and (ii) tripled customer base to over 100 million since the beginning of 2020.⁹¹
- 59.3. Aside from the capital resources (linked with its ability to acquire customers), Bolt has the sophisticated software and expertise based on its lessons globally. This provides it with operational sophistication and a user interface. It already has systems development operations in South Africa from its ride-hailing services. Bolt can

also leverage off its relationship with international restaurant chains due to its strategic relationship with global chains. It is also worth noting that Bolt has brand equity – South African customers are already familiar with the brand.

60. In the context of the above, the Inquiry has reviewed whether aspects of the provisional findings requiring remedial actions are of relevance to Bolt Food and its impact on competition from local delivery platforms. In this regard, evidence before the Inquiry suggests that there are two recommendations that might also be applicable to Bolt Food. These recommendations relate to (i) price parity clause, and (ii) below-costs conduct.

3.3.4. Conclusion

61. The Inquiry concludes that Uber Eats, Mr D Food and potentially Bolt Food⁹² can be considered to be leading platforms in the food delivery platform market. Further, the Inquiry concludes that the identification of leading platforms and formulation of remedies that are applicable to leading platforms are aimed at facilitating a fair competitive process rather than distorting competition. The criteria used to identify leading platform is justifiable and aligns with the Act and the Inquiry's ToRs. Bolt Food, due to being differently placed as an international player, is considered relevant to competition with local delivery platforms only.

89 See Bolt website: <https://blog.bolt.eu/en-za/bolt-announces-ongoing-post-pandemic-growth-to-mark-ninth-anniversary/> "Bolt announces ongoing post-pandemic growth to mark ninth anniversary" August 31, 2022.

90 See Bolt own website on various rounds of funding and several news outlets - <https://blog.bolt.eu/en/bolt-closes-a-600m-funding-round/> also see the same news reported on <https://www.cnn.com/2021/08/02/uber-rival-bolt-valued-at-4point75-billion-in-new-funding-round.html>. <https://techcrunch.com/2022/01/10/bolt-raises-709m-at-an-8-4b-valuation-to-expand-its-transportation-and-food-delivery-super-app/>.

91 See Bolt website: <https://blog.bolt.eu/en-za/bolt-announces-ongoing-post-pandemic-growth-to-mark-ninth-anniversary/> "Bolt announces ongoing post-pandemic growth to mark ninth anniversary" August 31, 2022.

92 For Bolt Food, this is considered within the context of its impact on competition from local delivery platforms.

[4. Platform competition issues]

62. The Inquiry made several findings in respect of features which impede, restrict or distort online intermediation food delivery platform competition in South Africa. These findings largely relate to (i) lack of access to restaurant chains, (ii) price parity clauses and (iii) predatory and/or below-cost pricing practices. This section provides stakeholder submissions on each of these findings and the Inquiry's response to stakeholder submissions.

Predatory conduct and/or below-costs practices

4.1. Findings from the Provisional Report

63. The Inquiry found that the online food delivery platforms market is characterised by predatory conduct as a result of aggressive promotional and delivery subsidisation strategies which have driven some of the local delivery platforms out of the market. The Inquiry found that this predatory conduct is largely perpetrated by leading platforms, whereby they fail to recoup their variable costs (including delivery, transactional, platform funded discounts and food losses) in respect of local area markets or specific restaurant chains, has materially contributed to the exit of competitors and inhibits new entry and expansion. It is also a direct result

of extracting more from business users to subsidise consumers.

4.2. Stakeholder submissions: views on below-cost practices

64. Uber Eats and Mr D Food disagree with the Inquiry's assessment and findings on predatory conduct and below-cost pricing practices. In particular, these platforms argue that:⁹³

- 64.1. The Inquiry has not made a finding that the established platforms are dominant.⁹⁴ Therefore there is no basis to classify the alleged conduct as predatory.⁹⁵
- 64.2. The Inquiry has not provided reliable evidence and/or robust analysis of predatory pricing conduct. It has merely cited few isolated examples of aggressive price setting. These examples do not establish that the established platforms have engaged in predatory pricing.⁹⁶
- 64.3. The Inquiry has not furnished a coherent theory of anti-competitive effects. In other words, the alleged predatory conduct does not have any adverse effects on competition.⁹⁷

93 Uber Eats submissions dated 10 September 2022, 23 January 2023, 13 June 2023, 4 July 2023 and Mr D Food submissions dated 16 September 2022.

94 Established platforms dispute that they are dominant.

95 Established platforms argue that the evidence before the Inquiry falls far below the standard of evidence required to sustain a charge of predatory conduct under section 8(d)(iv) of the Act.

96 Established platforms argue that (i) their 'aggressive pricing' is consistent with healthy pro-competitive pricing that benefits consumers and business users, (ii) they are merely responding to aggressive competition rather than implementing a strategy to foreclose rivals, (iii) there is no evidence that the 'so-called' short-term profit sacrifice will be recouped in future as delivery platforms continue to face aggressive competition from established rivals and new and emerging platforms (i.e., no market power argument).

97 Established platforms argue that (i) the entry of Bolt Food and other local delivery platforms shows that the effects arising from alleged pricing conduct are unlikely to be significant (ii) there is no reliable evidence that smaller platforms that have exited is due to established platforms pricing strategies – other factors that may have led to the exit of these smaller platforms are not considered or the possibility that they were inefficient businesses. In the main, it is argued that the Inquiry has neither provided evidence of a causal relationship between the exit of the smaller online food delivery platforms that the Inquiry references in its provisional report and the conduct of the established platforms nor of intentions by established platforms to price in a predatory manner.

65. One platform submits that it has been a victim of the established platforms' exclusionary pricing practices such as pricing below variable cost. In turn, this smaller platform has been forced to engage in aggressive pricing strategies (e.g., aggressive promotions) to simply gain a foothold in the market.⁹⁸ The platform further argues that its attempt to win market share from the established platforms should not and/or cannot constitute predatory and/or exclusionary pricing practices.⁹⁹

4.3. Response by the Inquiry to stakeholder submissions on below-cost practices

66. The relevant test in a market inquiry is whether any feature of a market impedes, restricts or distorts competition within the market, and whether such a feature has an adverse effect on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.¹⁰⁰ Therefore, the Inquiry is not required to establish dominance or that there is a 'significant prevention or lessening of competition' as suggested by established platforms. Furthermore, the Inquiry maintains that the below-costs pricing behaviour by established platforms (as a result of an aggressive promotion and delivery subsidisation strategy) has driven out several competing local delivery platforms and, as

such, this conduct can be categorised as a market feature that has impeded, restricted and/ or distorted competition in the market, and has had an adverse effect on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.

4.3.1. Below-cost pricing strategy can raise barriers to entry and expansion

67. The established platforms have argued that their pricing strategy is consistent with innovative firms and healthy pro-competitive outcomes that benefit consumers and business users.¹⁰¹ However, these platforms have not provided any solid evidence on what is 'innovative' about a below-cost pricing strategy that is underpinned by significant customer discounts. To the contrary, a below-cost pricing strategy¹⁰² can be used by the incumbents to lock-in customers and make it difficult for other competitors (without large capital base) and potential entrants to successfully contest for such customers. This implies that for other players to effectively challenge the incumbents they will have to match the extent of the below-cost (or even predatory) strategy of the incumbents in order to win some market share.¹⁰³ In short, the below-cost pricing strategy akin to the one implemented by the established platforms

98

[REDACTED]

99

[REDACTED]

100 This position is noted in the provisional summary report and chapter 9 of the provisional report dealing with findings and recommendations.

101 For instance, see Mr D Food submissions dated 16 September 2022.

102 As noted in the Provisional Report (Chapter 6): this strategy has been in place for a prolonged period of time (even after the established platforms scaled their operations).

103 In some instances, competitors (including potential) might have to offer customers better pricing than the incumbents to encourage switching – See Bolt Food (Mr Townsend-Rose) Public Hearing Transcript dated 18 November 2021, in particular evidence on Bolt Food entry strategy.

can create a market environment whereby only firms with deep pockets can potentially win and contest for market share.

68. As observed by the US Sub-committee with respect to e-Commerce online platforms *"Amazon has historically placed a higher premium on long-term growth at the expense of short-term profitability...consistent with this trend, Amazon has adopted a predatory-pricing strategy across multiple business lines at various stages in the company's history. Because of the nature of its marketplace business, Amazon's below-cost prices on products and services tend to lock customers into Amazon's full marketplace ecosystem... once a customer is locked in, they are less likely to change their behavior even when Amazon's pricing is not competitive"* (Own emphasis).¹⁰⁴ Similarly, Khan (2017) has characterised Amazon's business strategy as one that is *"willing to forego profits to establish dominance"* – pursuing market share at the expense of profit.¹⁰⁵ In the US, the Sub-committee also raised concerns with large well-funded online platform's (e.g., Amazon) use of below-cost pricing strategy to sacrifice profit, capture the market and drive-out rivals.¹⁰⁶

69. The afore-mentioned observations are consistent with the Inquiry's assessment of the established food delivery platforms' business strategy – i.e., the use of below-cost pricing

strategy to lock-in customers,¹⁰⁷ sacrifice profits and win market share. As noted in the Provisional Report (i) the aggressive growth path pursued by the established platforms includes sacrificing profits to gain market share¹⁰⁸(ii) internal documents of the established platform show that the aggressive growth path has adverse effects on profitability but allows the established platforms to maintain and/or gain market share (via increased customer acquisition and order volume)¹⁰⁹ (iii) only firms with deep pockets and/or significant funding can sustain the losses associated with this strategy. The consequence of this strategy is the elimination of smaller platforms in the market (i.e., platforms that cannot sustain losses overtime as they attempt to match the below-cost strategy).

4.3.2. Evidence of established platforms pricing below-cost and/or average variable costs is undisputed

70. The Provisional Report noted that the established platforms are loss making even at variable costs level at least for (i) certain restaurant chains that get favourable commissions (ii) certain geographic (local) areas. The financials of the platforms (at the time the provisional report was published) depicted some periods of below variable cost pricing through subsidising delivery charges to the consumer and engaging in substantial

104 It is worth noting that once customers are locked into a specific platform, business users have to remain in that platform to access these potential buyers – thus it reinforces dependency. Also it means that it becomes difficult for other competing platforms to contest for such customers.

105 Khan (2017) "Amazon's Antitrust Paradox". *Yale Law Journal*. Khan argues that Amazon has established dominance as an online platform due to two main business strategies: (i) a willingness to sustain losses and invest aggressively at the expense of profits, and (ii) integration across multiple business lines. Amazon has been able to use a strategy of pursuing market share at the expense of short-term returns.

106 US Sub-committee summary findings states that *"the sub-committee's investigation identified several instances in which a dominant platform was pricing goods or services below-cost in order to drive out rivals and capture the market. For example, documents produced during the investigation revealed that Amazon had been willing to lose \$200 million in a single quarter in order to pressure Diapers.com, a firm it had recognized as its most significant rival in the category. Amazon cut prices and introduced steep promotions, prompting a pricing war that eventually weakened Diapers.com... Amazon documents provided in response to the Committee's requests show the extent to which Amazon was committed to below-cost pricing"*.

107 It raises the costs of rivals (new entrants), in particular, customer acquisition costs. This in turn affects the attractiveness of the platform (in terms of business user acquisition).

108 Chapter 6 of the Provisional Report (food delivery) page 52, paragraph 131.

109 Chapter 6 of the Provisional Report (food delivery) page 58, paragraph 145.

promotions, including restaurant funded promotions.¹¹⁰ This included below variable cost pricing for strategic corporate restaurant chains which, on the established platforms version, are important drivers of new eaters. The below cost practices also happened in local geographic areas where established platforms faced competitive pressure, through lower delivery fees than average and greater promotional intensity.

71. The foregoing suggests that even after a considerable number of years of scaling and growing operations in the market, these platforms still failed to recoup their variable costs (including delivery, transactional, platform funded discounts and food losses) in respect of local area markets or specific restaurant chains. Evidence of established platforms being loss-making at variable costs level for some restaurant chains and local markets has not been disputed by the platforms themselves – i.e., some platforms have conceded and acknowledged this observation and/or facts.¹¹¹
72. Furthermore, it is also evident from Mr D Food submissions¹¹² that evidence of below-cost pricing is undisputed – what is disputed is the significance of the instances of below-cost pricing (i.e., it is argued instances of below-cost pricing are of insignificance, limited historical period and do not have any adverse competitive effects). Some extracts from Mr D Food submissions are as follows:

“...even when focussing on certain chain restaurants in isolation, there is no evidence that MrD Food has priced below variable costs since November 2020. At most, the analysis

presented in the Provisional Report shows that MrD Food priced below variable cost in certain geographic areas, in respect of some chain restaurants, and for a limited period of time...this indicates that the extent of any below-cost pricing by MrD Food is materially limited in scope”.

“...in particular, the few instances of below-cost pricing by MrD Food have occurred in wealthy, urbanised areas (e.g. Umhlanga, Pretoria, Sandton and Cape Town Central)”.

73. The Inquiry notes that even if it accepts the argument that¹¹³ the below-cost and/or variable cost pricing is of limited historical period and scope, it does not preclude the practice from having adverse effects on competition at the time it was in place. For instance, most of the exits in the market are historical and occurred at the time that coincided with these below-cost and/or variable cost loss making periods – e.g., Appetite exited in 2020 and operated in urbanised areas such as Pretoria; OrderIn exited in 2020 and operated in urbanised areas.¹¹⁴ Thus, the test is whether these instances of below-cost and/or variable costs pricing by established platforms have an adverse effects on competition. The Inquiry maintains (as noted in the Provisional Report) that this conduct and/or practice has contributed materially to the exit of competitors and inhibits new entry and expansion. Further, this also suggests that other restaurants (namely independents) or local markets might be subsidising the variable loss-making local areas or restaurant chains.

110 See Provisional Report (Food Delivery, Chapter 6), sections 3.1.6. and 3.1.7. dealing of profitability of national platforms and impact of aggressive growth strategy on profitability. The analysis are based on platforms own financial information submitted to the Inquiry

111 See Chapter 6 of the provisional report (food delivery) – footnote (confidential) 168 and 169 which shows some instances of below-variable cost loss making by established platforms and acknowledgement of this practices by some platforms during In-Camera Confidential Session. The Inquiry also notes that the confidential financial spreadsheets showing the Inquiry’s calculations in reaching its observations were furnished to the established platforms.

112 Mr D Food submissions dated 16 September 2022.

113 This should not be construed as the Inquiry accepting the position of Mr D Food.

114 Chapter 6 of the Provisional Report (food delivery) – page 31, paragraph 77.

74. Subsequent to the publication of the provisional report, the Inquiry observed that one of the established platforms continued to price certain restaurant chains below its variable costs.¹¹⁵ The Inquiry engaged the platform on this aspect and/or observation. However, this established platform disputed the Inquiry's observation and maintained that it is not pricing below variable costs for some restaurants, once certain costs (i.e., [REDACTED] [REDACTED]) are added and/or accounted for in their variable costs.¹¹⁶ The Inquiry did not agree with the approach and adjustments conducted by the leading platform for several reasons: (i) the adjustment made were not an appropriate adjustment as it was not the leading platform cost and (ii) some of the [REDACTED] efforts were not variable in nature. The Inquiry maintained that the financials as prepared by the platform for the purpose of internal reporting and tracking performance represented a good measure of what the platform considers as a cost (and classification of such a cost item). Thus, the Inquiry had relied on these financials in reaching its observation of a persistent below variable cost pricing for certain restaurants even after the publication of the provisional report.

75. The leading platform maintained that its approach was correct and consistent with internal business operations.¹¹⁷ The platform also argued that the most recent financial records¹¹⁸ show that it has more than recovered the variable costs for the restaurants (the Inquiry was concerned about) even before accounting for certain additional

costs [REDACTED]
[REDACTED]
[REDACTED]. In other words, the platform argues that based on the most recent financial records its prices are above variable costs for these restaurants even when employing the Inquiry's preferred approach and/or classification of 'variable' costs.

76. Currently, (i.e., based on the evidence before the Inquiry and the latest financials available to the Inquiry), the established platforms do not appear to price below variable cost at an aggregate level, nor for certain strategic restaurants. However, it is not possible for the Inquiry to conduct the same assessment on individual localised areas.

4.3.3. There is sufficient and solid evidence on the adverse effects of below-costs and/or variable cost pricing on competition

77. The Provisional Report noted that the conduct of the established platforms whereby they fail to recoup their variable cost (as a result of an aggressive promotion and delivery subsidisation strategy) in respect of local area markets or specific restaurant chains, has materially contributed to the exit of competitors and inhibits new entry and expansion.¹¹⁹ The Inquiry notes that platforms such as OrderIn¹²⁰ and [REDACTED] [Platform B]¹²¹ appear to have historically managed to scale and run their operations successfully. However, they ultimately exited the market and their exit clearly coincided with the period the established platforms had implemented their aggressive loss-

¹¹⁵ [REDACTED]

¹¹⁶ [REDACTED]. In essence, this platform furnished additional evidence including the revised accounts and records accounting for additional costs not contained [REDACTED] to argue that its prices are above variable costs for certain sub-set of restaurants.

¹¹⁷ [REDACTED]
[REDACTED]

¹¹⁸ [REDACTED]
[REDACTED]

¹¹⁹ Chapter 6 of the Provisional Report (food delivery) page 66, paragraph 165.

¹²⁰ As noted in the Provisional Report, page 31, paragraph 77 – OrderIn website states that in March 2017 it had completed 1 million plus deliveries and by December 2017 Grossed R100 million plus in annual sales.

¹²¹ As noted in the Provisional Report, page 62, paragraph 160 – at its peak (prior to 2018), [REDACTED] would deliver over 40 000 orders per month.

making strategy (even at variable cost level). During the public hearings, the Inquiry heard evidence from smaller players that have exited, such as Dryvar, that it was insurmountable to compete against the established platforms' aggressive strategy without deep pockets to sustain significant losses.¹²²

78. For any platform to compete successfully with the established platforms, it would be required to also implement the same strategy that requires periods of loss-making and 'profit sacrifice' – in other words, it would require significant funding to sustain the loss-making periods. For instance, even the established platforms are able to continue adopting aggressive competitive strategies whilst making losses due to their deep pockets and financial backing from their holding companies. Without funding and financial backing it is unlikely that these established platforms would be able to sustain losses overtime whilst also increasing marketing spending and absorbing more delivery costs.¹²³
79. As noted in the Provisional Report, the internal documents of established platforms also confirm that their aggressive strategy can result in EBITDA losses increasing by tens of millions of Rands and suppress gross profits.¹²⁴ Thus, the Inquiry does not accept the submissions from established platforms that the exits of competing platforms might have been as a result of in-efficiency or other factors. What is evident from several pieces of evidence before the Inquiry is that established platforms'

strategy requires (i) deep pockets and (ii) some acceptance of loss making and/or profit suppression. Therefore, any player that wants to compete successfully with the established platforms' strategy under the current market conditions (regardless of how efficient they are) must have deep pockets and be willing to sustain losses overtime – in other words, the competitive strategy employed by the established platforms raises barriers to entry and expansion.¹²⁵

80. The afore-mentioned observation by the Inquiry is also supported by Bolt Food's entry strategy. Even Bolt Food, an international platform with sophisticated technology and knowledge of the online delivery market had to introduce a similar loss-making strategy in an attempt to compete with the established platforms. The Inquiry has observed from Bolt Food's submissions (including documents) that its growth appeared to be stagnant and slow at its inception – i.e., Bolt Food was unable to get traction.¹²⁶ It is only when Bolt Food started to introduce the same strategy as the established platforms that it made inroads into the market (in terms of increasing order volumes and revenue) – however, this came at the cost as it meant that Bolt Food had to (like the established platforms) operate at a loss.
81. As a new entrant, its losses increased significantly overtime as it attempted to compete head-to-head with established platforms.¹²⁷ The main driver of these losses was aggressive marketing campaigns (e.g.,

122 Public Hearing Transcript of Dryvar (Ms Naidoo) dated 22 November 2021.

123 Chapter 6 of the Provisional Report (food delivery) page 57 - 60 noted that the established platforms cumulative losses (2017 - 2021-Jun) runs well over hundreds millions of rands - in some instances these losses increase year-on-year whilst on the other hand the marketing spend by established platforms has been increasing considerably on a year-by-year (in some years increasing by more than 100%). The same trend is observed with the extent of delivery costs absorption by established platforms (i.e., the costs of delivery versus the revenue from delivery).

124 Chapter 6 of the Provisional Report (food delivery) page 58, paragraph 145 and confidential footnote 170.

125 It ensures that for any platform to compete head-to-head with the established incumbents in the market it must have large capital base and also be willing to sustain losses overtime (it introduces an element of behavioral reputational barriers).

126 Although Bolt Food had entered the market with low commissions fees for restaurants (relative to the established platforms), its anticipated entry was announced via various media outlets, its brand is recognised in South Africa and it already had ride-hailing customer on its database to market directly to.

127 Chapter 6 of the Provisional Report (food delivery) on Bolt Food entry onto the market and its experiences - page 53 and 54 (paragraph 134 and 135) and page 46 (paragraph 117.2). Confidential footnote 167 showed Bolt Food losses

free delivery and 50% discounts) aimed at gaining a foothold in local markets¹²⁸ dominated collectively by the established platforms. In short, the established platforms' strategy and/or practices has created a market environment in the online food delivery space whereby for any player to be an effective competitor they require significant financial resources and acceptance of loss making overtime, level of 'profit sacrifice' – this is regardless of that player's international and local experience, technological sophistication, brand recognition, etc.

4.3.4. Future below-cost and/or variable cost pricing strategy to be prosecuted

82. The Inquiry notes that the online food delivery market has developed overtime. There has been a high level of adoption and use of food delivery platforms in South Africa. Furthermore, some platforms (e.g., established platforms) have scaled their operations nationally. The Inquiry does acknowledge that in developing the online food delivery market there might have been a need for platforms to utilise strategies (e.g., discounts) that encourage customer adoption and the use of platforms.¹²⁹ Therefore, the Inquiry has opted not to make a finding and/or take any remedial action against the established platforms' previous pricing conduct.
83. However, it is important to emphasise that in future the Commission will investigate and possibly prosecute any firm found to be engaging in the conduct of predatory pricing, especially if such conduct has the effect of driving the firm's competitors out of the market or affects their ability to compete

effectively. The Inquiry has identified some localised markets that might be susceptible to below-cost and variable cost pricing that drives SMEs and HDPs platforms out of the market. What is common about these markets is that they were initially developed by SMEs and HDPs platforms and the established platforms did not historically participate and/or compete in these markets. Below are examples of these localised markets.

4.3.4.1 Some examples of niche localised markets developed by SMEs and HDP platforms

84. As noted in the Provisional Report, there are some SMEs and HDPs platforms that identified niche market(s) in townships and underserved delivery areas. As part of their strategy, these platforms identified areas that were predominantly not serviced by established platforms at the time of their entry. Example of these platforms and some areas serviced include: Delivery ka Speed (Hammanskraal),¹³⁰ WeDash (Mitchells Plain, Langa, Gugulethu, Khayelitsha), Paarl Eats (Wellington). These local markets have historically been viewed as difficult and challenging to operate in due to, *inter alia*, size (small market), safety issues, technological barriers (where online Maps are not available in some townships).¹³¹
85. Furthermore, these SMEs and HDPs platforms have made investment in these niche markets, which include (i) investing time in teaching business users and customers about the delivery technology and how it operates, (ii) introducing customers to the card payment methods and building trust with consumers (iii) having staff at the malls that approaches

128 This is largely areas around the Cape Town and later on Johannesburg.

129 However, the Inquiry maintains that even in developing markets firms should be cautious of engaging in below-cost (in particular variable costs) conduct that raises barriers to entry and expansion – and drive competitors out of the market.

130 Delivery ka Speed has expanded into other townships such as Mabopane, Soshanguve, Ga-Rankuwa, Mamelodi and Atteridgeville.

131 See for instance (i) Meeting between the Inquiry and Paarl Eats – 08 October 2021 (ii) Meeting between the Inquiry and Delivery Ka Speed – 22 September 2021 and (iii) Paarl Eats (Mr Petersen & Ms Erasmus) Public Hearing Transcript dated 22 November 2021.

potential customers and encourages them to download and activate the app and (iv) training delivery drivers – linked to hiring local delivery drivers that are familiar with the routes and the area.¹³² Some of the established platforms have acknowledged that these smaller SMEs and HDPs platforms have paved the way for new platforms that will enter these localised and underserved markets. For instance, the Inquiry notes the following exchange between the Chairperson and Uber Eats at the public hearings:¹³³

Chairperson: *"...I mean, would you accept that in the townships it is exactly you that is benefitting from the paving the way done by others, that it is exactly the order Khazi Spaza Eats, and the like that have familiarised consumers, worked how to operate in those more difficult environments, signed up restaurants, got the restaurants familiar with their app and train delivery drivers. So they have done the disruption. They were first. Would you accept that?"*

Mr Molewa: *"I think that is a fair comment. I mean just by their very nature that they were first there".*¹³⁴

4.3.4.2 SMEs and HDP platforms business model and the entry of established platforms in townships and underserved market

86. Some of the SMEs and HDPs platforms have indicated that at the launch of their apps the aim was to target townships and underserved areas where there are no delivery services

offered and/or there is minimal competition from the established platforms. Due to lack of deep pockets (i.e., consistent funding and/or backing from well-resourced investors), large marketing budgets and significant promotional discounts are not the main drivers of customer acquisition and retention in these markets. Platforms acquire most of their customers through word of mouth and rely on their local networks and advertising.¹³⁵ As WeDash explained during the public hearings, the strategy is to be at the 'ground' (particularly at the malls) building customer trust and encouraging customers to download the app.¹³⁶ On the restaurant-side, the SMEs and HDPs platforms' strategy is to charge restaurants low commission fees and motivate that the platform will provide incremental sales as there are no or there is limited presence of competing delivery platforms.¹³⁷

87. The Inquiry has observed that established platforms are expanding into areas where SMEs and HDP platforms are active and have already developed the market. As Uber Eats [Mr Molewa] stated during the public hearing:

*"this year for the first time I think we have made a concerted effort to try to enter some of these markets [townships]...to enter some of these markets outside of Soweto which was the only one that we have been operating in. But these markets are difficult and what we are finding is that there are these smaller players who seem to have started there".*¹³⁸

¹³² See for instance (i) WeDash (Mr Zondi) Public Hearing Transcript dated 12 November 2021.

¹³³ Uber Eats (Mr Molewa) Public Hearing Transcript dated 11 November 2021.

¹³⁴ Further exchange between the Inquiry and Uber Eats that solidify this observation includes:

CHAIRPERSON: *Ja, well the township consumer cannot get UberEats, is not familiar with food delivery. He needs to have that trust built. Needs to know it works. Sometimes payment methods have to be you know determined. But that has been the innovation of exactly these companies, and now consumers are more comfortable, merchants are more comfortable. The delivery driver is going to come, they will get credited in their bank account and it works. Not so? MR MOLEWA: Fair assessment Mr Hodge.*

¹³⁵ For example, the use of local radio stations, newspaper and influencers.

¹³⁶ WeDash (Mr Zondi) Public Hearing Transcript dated 12 November 2021.

¹³⁷ Paarl Eats (Mr Petersen & Ms Erasmus) Public Hearing Transcript dated 22 November 2021 – on the competitive edge to win restaurants in the market via commission fee %: MS ERASMUS: *So get the restaurant onboard because we, of course, are fairly new and which was, of course, also one of the challenges are that to get them onboard we keep our fee structure very low. So there is no joining fees involved at the moment and we take about 15% commission from the restaurants as well.*

¹³⁸ Uber Eats (Mr Molewa) Public Hearing Transcript dated 11 November 2021.

88. Evidence before the Inquiry shows that the established platforms have started expanding into townships and underserved areas such as Mamelodi, Umlazi, Mitchells Plain and Atteridgeville. The Inquiry notes that SMEs and HDPs platforms have anticipated the entry of established platforms once the township delivery market is developed.¹³⁹ Thus, there is an acknowledgement that the future of the townships and underserved markets will include established players entering the space and competing head-to-head with smaller platforms. As WeDash (Mr Zondi) argues *"there is no doubt that the big players will start coming into these channels very soon, it is imperative that we do eventually find ourselves with bigger budgets and more bucks to spend when it comes to the marketing side of things"*.¹⁴⁰
89. While any firm is at liberty to enter and compete in any market, the Inquiry cautions against the adoption and use of exclusionary pricing strategies, such as the below cost/variable costs pricing strategy, in townships and underserved areas, especially by established platforms. Just like in urbanised areas, the use of this pricing strategies in townships and underserved areas is likely to lead to the exist of smaller platforms most of whom have invested in developing these markets. As indicated above, the Inquiry has not sought to recommend the investigation and prosecution of historic predatory conduct observed in urbanised areas. However, the

Commission will not hesitate to investigate and prosecute any future predatory conduct or any exclusionary conduct observed in any localised market, especially in townships and underserved areas that are contested by established platforms. The Inquiry notes that the established platforms have two key advantages over SMEs and HDPs platforms that were first to enter and develop these markets. These advantages include (i) restaurant selection mix, including restaurants chains¹⁴¹ and (ii) deep pockets to run aggressive promotions. The Inquiry notes that in some instances, the established platforms' entry strategy into new geographic markets has been to offer customers discounts as high as 50% and free delivery.¹⁴²

90. A pricing strategy of this nature can drive a platform towards loss-making (even at variable cost level) and, most importantly, is likely to drive competitors out of the market, especially those without the above mentioned advantages. As WeDash (Mr Zondi) pointed out during the public hearing, *"will we ever compete with those guys at their level? I do not think it makes sense, nor will we have the financial muscle to be able to...it is going to be very, very difficult naturally, it will be very difficult to compete with 50% off for a whole week, free delivery drives that run for the whole month"*.¹⁴³

139 For instance, (i) Paarl Eats (Mr Petersen & Ms Erasmus) Public Hearing Transcript dated 22 November 2021 - observes that *"...But I think once Mr Delivery, the big guys see, look here, there is actually a market there because we just branched out to Wellington and Wellington is one of the areas where Mr Delivery just refuses to do deliveries because they are too small. So we are starting there and I promise once it starts getting and growing there, we will probably see that changing as well"* (ii) WeDash (Mr Zondi) Public Hearing Transcript dated 12 November 2021 - *"we have no doubt that the bigger players, which you guys have probably heard their presentations, that we know of, will probably be going into some of the areas that we are going into so I guess it is also quite critical for us to look at expanding fast and get our traction in most areas and forming some form of foundation before they come in"*.

140 WeDash (Mr Zondi) Public Hearing Transcript dated 12 November 2021.

141 The established platforms have already onboarded national and international restaurant chains in townships and under-served markets they have entered as it can be observed in these townships that established platforms' apps already contains a mix of chains and independents - also (See Mr D Food submissions dated 17 January 2022 and Uber Eats submissions dated 31 January 2022) whilst the smaller platforms are struggling to sign these restaurant chains.

142

143 WeDash (Mr Zondi) Public Hearing Transcript dated 12 November 2021.

4.4. Conclusion on below-cost and/or variable cost loss-making strategy

91. The Inquiry is of the view that the past aggressive strategy employed by established platforms drove them to engage in conduct that resembles predatory pricing. The Inquiry maintains that the practice, whereby established platforms fail to recoup their variable costs (including delivery, transactional, platform funded discounts and food losses) in respect of local area markets or specific restaurant chains, has materially contributed to the exit of competitors and inhibits new entry and expansion. The Inquiry notes that the established platforms argue that below cost pricing is a necessary period of investment to build national scale, and more recently, responding to aggressive entry by Bolt Food. Having considered all the evidence, the Inquiry does not make a finding or propose any remedial action on the observed past pricing practices.

Access to restaurant chains and limited choice for franchisees

4.5. Findings from the Provisional Report

92. The Inquiry's provisional report contains two main findings that relate to competing platforms' lack of access to restaurant chains. These findings are as follows: (i) the contracting of restaurant chains by the leading platforms incentivises restaurant chains to focus their support on these platforms, and

to bring in their franchise restaurants, by rewarding restaurant numbers and volumes. This results in a lack of support for competing national and local food delivery platforms by restaurant chains, impeding their ability to enter, expand and compete effectively in the market, and (ii) either as a result of the contract incentives, or otherwise, numerous national restaurant chains actively prevent franchisees from contracting with competing national or local delivery platforms that are not approved, limiting them to the leading platforms only.

4.6. Stakeholder submissions: views on lack of access to restaurant chains

93. Uber Eats and Mr D Food disagree with the Inquiry's assessment and findings on lack of access to restaurant chains by competing platforms. In particular, these platforms argue that:¹⁴⁴

- 93.1. The Inquiry's findings on access to restaurant chains are inconsistent with

its findings on price differentials in commission fees.¹⁴⁵

- 93.2. It is unclear whether the Inquiry is concerned about contract incentives or loyalty inducements. Further, the Inquiry has not identified any relevant clauses, provisions or details of such incentive or inducement.¹⁴⁶

- 93.3. Any incentives¹⁴⁷ offered to restaurant chains form part of normal competition

144 Uber Eats submissions dated 10 September 2022 and Mr D Food submissions dated 16 September 2022.

145 Established platforms state that in assessing the rationale for charging lower commission fees to chain restaurants (under price discrimination assessment), the Inquiry seeks to downplay the value that these restaurant chain groups bring to platforms in terms of attracting customers and transaction volumes while at the same time, the Inquiry (under access to restaurant chain assessment) finds that signing up chain restaurants is essential to the ability of smaller platforms to attract customers and scale effectively. According to established platforms the two findings are inconsistent.

146 Established platforms state that the Inquiry does not set out any feature of contractual arrangements with restaurant chains that incentivises them to direct additional traffic to their platforms or that restricts them from allowing their franchisees to utilise other platforms. Ultimately, restaurant chains make their own decisions as to whether and to what extent their corporate and franchisee stores are permitted to utilise any platform. It is further argued the Inquiry has failed to establish an adverse effect on competition caused by established platforms contractual arrangements and negotiations with chains.

147 Which some established platforms argue do not exist.

on merits¹⁴⁸ and, therefore, are not anti-competitive. It is argued that it is only if the incentives offered to restaurant chains could not be sustainably matched by an as-efficient rival platform that they could give rise to the foreclosure of effective competitors.¹⁴⁹

94. Other platforms maintain that they continue to struggle to contract some restaurant chains and this in turn has impeded their ability to grow and expand in the online food delivery market. For instance, one platform approached various international and national restaurant chains to onboard¹⁵⁰ subsequent to the publication of the Provisional Report. Most of the restaurant chains still refuse to contract with the platform on the basis that they are not interested, or the platform's services do not suit their current business needs.¹⁵¹
95. Another platform also indicated that it continues to have limited access to a significant number of international and national restaurant chains – with more than 1 000 restaurant stores refusing to onboard.¹⁵² This has adversely affected the platform's ability to offer sufficient variety and selection of restaurants (i.e., sufficient restaurant

mix). As discussed in the Provisional Report, variety and selection are critical in attracting customers to a platform.

96. Evidence from the restaurant chains is mixed. Those whose head office actively prevent franchisees from contracting with delivery platforms that are not approved (i.e., chains that largely use the two established platforms) disagree with some aspects of the Inquiry's findings. These restaurant chains state that:¹⁵³
- 96.1. The criteria used to approve delivery platforms is fair and justifiable. Restaurant chains are willing to partner with any platforms subject to these platforms meeting the 'conditions or criteria' set-out by the restaurant chains.¹⁵⁴
- 96.2. There is a significant cost and effort involved in managing online delivery channel. Therefore, franchisees are not able to carry-out the responsibilities of appointing delivery partners on their own (or without head office approval).¹⁵⁵
- 96.3. The practice and/or conduct of restaurant chains does not have any adverse effects on competition.¹⁵⁶

148 Established platforms state that any negotiation with a firm (restaurant chains) the platform will seek to incentivise the restaurant to do as much business with it as possible. Therefore, the provision of 'incentives' to customers to drive sales through a given platform forms part of normal competition the merits. The established platforms state that removing the ability for platforms to provide such incentives for restaurants would dampen competition, both between platforms and between restaurants.

149 Thus, be considered anti-competitive.

150 The platform had sent a business proposal to the restaurant chains.

151

152

153

154 These restaurant chains argue that they have considered small players in the past and they did not meet the minimum criteria. Some of the criteria include, *inter alia*, competencies (having the required set of skills, proper investment to run delivery operations), capacity (training on restaurant operations / delivery drivers, ability to deal with peak-periods when demand outstrips capacity), marketing (having initial and on-going marketing budget to drive awareness, customer adoption and sales), growing database and volume potential (large-scale database to ensure efficiency – having new and repeat consumers) and customer service (platform user interface and ability to deal with complaints). Also some chains submit that the platform needs to have a proven track record and capacity and meet vetting requirement such as great customer experience track record, support office for the customer and franchisee, dedicated account manager, menu management team, marketing support team and well established national and regional presence. It is submitted that the platform's regional and national presence as a requirement is due to the logistical efficiencies derived.

155 These restaurant chains argue that even after listing on the platform there are ongoing resources required from restaurant chains to manage: menu, pricing, brand approved promotions, customer service metrics, etc. on a daily, weekly and monthly basis.

156 The restaurant chains state that there are no adverse effects on competition since the online food delivery market is competitive, individual restaurant chains are not dominant and/or dominant purchaser of services provided by food delivery platforms and contracts are non-exclusive.

97. On the other hand, restaurant chains whose head office allows independent franchisees from appointing and contracting with small and local delivery platforms submit that:^{157 158}

97.1. They have no objections to partnering (through their franchisees) with smaller and/or local food delivery platforms. Opportunities to partner with them should be commercially feasible and aligned to the restaurant objectives.¹⁵⁹

97.2. Franchisees can partner with any local food delivery platform of their choice. Franchisees are not contractually restricted from concluding agreements with small and/or local food delivery platforms.¹⁶⁰

97.3. Franchisees need to be transparent (with the head office) about their choice of delivery platform partner. This is to ensure that the menus and further information regarding the brand are reflected correctly on the platform of their choice and in line with brand standards.

97.4. Smaller and/or local delivery platforms are required to comply with food safety protocols (e.g., how the food is handled, transported, etc), reporting system (e.g., being able to report on order volume), data privacy, etc.

4.7. Response by the Inquiry to stakeholder submissions on lack of access to restaurant chains

98. The Inquiry notes that the established platforms argue that the findings on lack of access to restaurant chains by competing

platforms are inconsistent and contradictory with findings on price differentials in commission fees. It is further argued that the Inquiry has sought to downplay the importance and value of restaurant chains in attracting customers¹⁶¹ under the price differentials assessment whilst at the same time under lack of access to restaurant chains, the Inquiry states that restaurant chains drive volume and scale for food delivery platforms.

99. The Inquiry does not agree with the above submissions and contentions made by established platforms. The Inquiry has not sought to downplay the importance and value of restaurant chains under its price differentials assessment. Rather, the Inquiry acknowledged the importance of restaurant chains in this assessment. In this regard, the Provisional Report (under price differentials assessment) states that *"the Inquiry acknowledges the role that restaurant chains play on the platform in attracting customers. As already indicated elsewhere in the report, restaurant selection and variety (which includes both independent, and restaurant chains) are important in attracting customers to the platform. Thus, restaurant chains are important to platform success"*.¹⁶²

100. Over and above highlighting the importance of restaurant chains, the Inquiry stressed, *inter alia*, in the Provisional Report (under price discrimination assessment) (i) the value and importance of independent restaurants¹⁶³ (ii) the value and importance of restaurant mix (i.e., having both restaurant

157

158 The Inquiry has classified these restaurant chains as those that have onboarded small and local delivery platforms such as Paarl Eats, WeDash, Buzz Group, etc.

159 The restaurant chains submit that the chains consider all opportunities that could potentially contribute to the restaurant sales objectives – ability to drive traffic and sales for the restaurant.

160 The restaurant chains submit that they support prospective opportunities for franchisees depending on the viability, and the effect of the agreement (with the platform) on the franchisees' operations commercially. Any platform (including local or small) are required to have a business proposal as a minimum for restaurant chains to consider and subsequently have a meeting with them – the chain assesses the commercial viability of the potential partnership.

161 Subsequently volume.

162 Chapter 6 of the Provisional Report (food delivery) page 98, paragraph 256.

163 This include local heroes (popular within their locality) that the established platforms accepts have the same characteristics as restaurant chains in their area/locality.

chains and independent restaurants), (iii) the extreme degree of price differentials and (iv) lack of proper justification for such extreme levels of price differentials.¹⁶⁴ By highlighting the importance and value of independent restaurants and the extreme degree of price differentials that exist, the Inquiry did not seek in any way to suggest that restaurant chains are less important.

101. Against this background, the Inquiry maintains that the Provisional Report does not downplay the importance of restaurant chains and its findings on lack of access to restaurant chains by competing platforms are consistent with its findings on the price differential assessment.

4.7.1. Established platforms do reward store numbers and volume in the contracting process

102. One of the Inquiry's main concerns regarding lack of access to restaurant chains is the contracting process between established platforms and restaurant chains (i.e., the process prior to the conclusion and finalisation of contracts). The provisional summary report acknowledged that there are no explicit contractual provisions and/or clauses on volumes¹⁶⁵, however, discussions on store numbers and volume form a critical part of contract negotiations. The reward to store numbers and volume by the established platforms is linked to commission fees charged to restaurant chains – i.e., a commitment by restaurant chains to bring more store numbers and volume result in better commercial terms, including commission fees.

103. There are various instances that demonstrate that established platforms reward store numbers and volume:

103.1. As noted in the Provisional Report, during the contract negotiation process established platforms consider various factors in determining and negotiating commission fees to charge restaurant chains. Some of these factors relate to the store (restaurant) numbers including future stores that will be covered by the contracts – i.e., the number of stores the restaurant chain commits.¹⁶⁶ It is also apparent from the contract negotiations that the number of stores that a restaurant chain brings to the established platforms influences the commercial terms in a positive manner.¹⁶⁷

103.2. Related to store numbers is the established platforms' reward for volume. In this regard, during the contract negotiation and re-negotiation process, established platforms consider the [REDACTED]

[REDACTED].¹⁶⁸

Thus, restaurant chains that bring more order volumes are viewed in positive light. The Inquiry also found that in determining appropriate commission fees for a specific year, established platforms actively assess the store numbers and order volume brought by the restaurant chains – if a restaurant chain is performing well in these aspects (i.e., brings more order volume and store numbers) it is able to negotiate for a better fee.

103.3. The afore-mentioned factors are also reinforced by the fact that some of the platforms that reward top performing restaurants consider, *inter alia*, order

¹⁶⁴ All these aspects are discussed in details under business user section.

¹⁶⁵ See the provisional summary report, page 51, paragraph 136.

¹⁶⁶ See Chapter 6 of the Provisional Report (food delivery) page 68, paragraph 171 – which sets out the exact specific confidential factors considered by each established platforms when negotiating and determining commission fees.

¹⁶⁷ As argued in Chapter 6 of the Provisional Report (food delivery) page 68, paragraph 171, the more stores the restaurant chains onboard, the better position the chain will be in terms of negotiating favourable commercial terms such as lower commission fees.

¹⁶⁸ See Chapter 6 of the Provisional Report (food delivery) page 68, paragraph 172 and confidential footnote 180 – which discusses the specific factors related to order volumes negotiations and its impact on established platforms when negotiating and determining commission fees.

volume generated by the restaurant. The reward associated with top performing restaurants includes increased/greater visibility on the platform and potentially increased sales.¹⁶⁹ Thus, restaurant chains may want to tap into the benefits associated with being a top performing restaurant by ensuring that more volumes are channeled towards established platforms.

104. As pointed out in the Provisional Report,¹⁷⁰ the reward to restaurant numbers and volumes by established platforms has the potential of incentivising restaurant chains to focus their support on these platforms, and to bring in their corporate and franchisee restaurants. This is because the restaurant chains are already the source of most of eater orders in the market, and allowing their corporate or franchisee restaurants to support competing platforms would dilute order volumes generated from established platforms and potentially reduce restaurant numbers (if the franchisee elected to only support a limited number of platforms), leaving them more vulnerable to commission fee increases. Also, agreements on marketing commitments are another means to drive volume as restaurant chains commit to promotions on the platform and promoting the partnership with the delivery platform in exchange for a lower commission.¹⁷¹ Spreading orders over more delivery services works counter to the private incentives to get a better deal out of the established leading platforms, hence their reluctance to contract.

105. Furthermore, it is the Inquiry's view that the incentives for lower commission fees associated with the contract negotiation process explain in part why numerous restaurant chains (i) refuse to support local delivery platforms for corporate-owned restaurants and (ii) actively prevent franchisees from contracting with competing national or local delivery platforms that are not approved, limiting them to the established platforms only. These incentives ensure that franchise stores are not able to choose smaller platforms over the established platforms – in other words, they indirectly channel franchisee stores and volumes towards established platforms. To this end, restaurants chains continue to commit all their corporate stores with established platforms whilst the franchisees' choice of platforms is also limited to established platforms. Also, established platforms have had no difficulties onboarding restaurant chains in township markets whilst the same cannot be said about other competing platforms.¹⁷²

4.7.2. No valid and/or proper justification for restaurant chains' practice of limiting franchisees to using the established platforms to the exclusion of other competing platforms

106. As already indicated, some of the restaurant chains state that they are willing to partner with any platforms subject to such a platform meeting the criteria set-out by the

169 See Uber Eats Top Eats Guide.

170 See Chapter 6 of the Provisional Report (food delivery) page 69, paragraph 173 and confidential footnote 180 – which discusses the specific factors related to order volumes negotiations and its impact on established platforms when negotiating and determining commission fees.

171

172 In some of these township and underserved markets, smaller platforms were the first to enter and develop these township markets. However, restaurant chains refused to onboard their restaurants despite the township market not having any online delivery services. As soon as the established platforms moved into these township and underserved markets, restaurant chains did not have any difficulties onboarding their restaurants. As noted in the Provisional Report these kind of decision making by restaurant chains are unfair and can only be explained by the incentives associated with contract negotiation process for lower commission fee. As already indicated above during the negotiation process, the established platforms also consider the future growth of restaurant chains and platforms in terms of whether when a platform expand into new areas such new stores will be covered by the contract.

chain(s) – it is further argued that smaller platforms have been considered in the past and did not meet the criteria. The criteria employed by some of the restaurant chains to appoint a delivery platform appears to be skewed towards platforms with a national footprint and financial resources, in particular platforms with existing contractual relationships with restaurant chains.¹⁷³ This explains why several platforms, other than the established platforms, have experienced difficulties with contracting some of the restaurant chains. This includes platforms that (i) managed to scale at their peak (e.g., Delivery Xtreme and OrderIn), (ii) identified niche townships and underserved markets where no other delivery platform is active (e.g., Delivery ka Speed, WeDash and Paarl Eats) and (iii) others that competed locally such as Dryvar and Appetite.

107. The Inquiry finds it difficult to accept that all these competing platforms (other than established platforms) have not met the criteria set by most of the restaurant chains. The fact that most of the restaurant chains refuse to contract with the disadvantaged competing platforms even in areas where the established platforms have no presence is indicative of the unfairness of the criteria used by these restaurant chains¹⁷⁴ – this brings into question the incentive of the restaurant chain at the head office level since by adding a delivery service as an additional revenue channel in these niche markets would potentially increase sales for the

franchise store. Thus, the criteria adopted by restaurant chains appear to limit the growth potential of franchise stores. The Inquiry has also observed that as soon the established platforms expand into townships and underserved markets, they easily onboard restaurant chain stores in these localities.¹⁷⁵ This provides further evidence that the criteria used by restaurant chains serve as an impediment and artificial barrier for the disadvantaged competing platforms.

108. The Inquiry has also observed that some of the restaurant chains do not appear to be transparent with smaller platforms on the criteria used to contract with delivery platforms. In several correspondence, the restaurant chains do not mention the failure to meet any 'criteria' as the basis for refusing to onboard smaller platforms. Instead, restaurant chains simply state any of the following as the reasons for refusal, mostly in just a one sentence e-mail: (i) the smaller platforms proposal does not meet the restaurant chain's current needs, (ii) the restaurant chain is not interested to join the platform (iii) the restaurant chain has already contracted with the established food delivery platforms.¹⁷⁶ Generally, there appears to be less willingness from the restaurant chains to engage with smaller platforms.¹⁷⁷
109. The Inquiry notes that other restaurant chains, *albeit*, in limited numbers have less-stringent criteria and are willing to contract with smaller platforms. These restaurant

173 For instance, some of the requirements that are unfair towards new entrants, emerging and smaller platforms includes, *inter alia*, large marketing budget, growing or large-scale database, the need to have a proven track record, dedicated account manager for the chain, well established national and regional presence.

174 See Chapter 6 of the Provisional Report (food delivery) – page 71 to 73 where the Inquiry details experiences of the likes of WeDash and Paarl Eats in contracting with restaurant chains.

175 [REDACTED]

176 [REDACTED]

177 In some instances, the restaurant chain does not even response to the smaller platform business proposals, restaurant chains are difficult to get hold of and when the discussion do take place often the restaurant chain reject the proposal and are unwilling to look at how they might assist or support the smaller platform.

chains allow independent franchisees to contract with local delivery platforms. The main criteria used by these chains seem to focus on whether the delivery platform in question brings value (e.g., order volume and sales) to the restaurant store, adheres to food safety protocols and data privacy.¹⁷⁸ These chains do not appear to unreasonably use restrictive factors against smaller platforms (e.g., smaller platform's budget requirements, extensive customer database, reach and scale). Franchisees associated with these restaurant chains are able to partner with any local food delivery platform of their choice. Importantly, the head office assists and/or ensures that the menus (and any information regarding the brand) is reflected correctly on the platform chosen by the franchisee and in line with brand standards.¹⁷⁹ The criteria used by these restaurant chains appear to be fair, supportive and transparent – they also encourage the participation of SMEs and HDPs platforms that exist in local markets.

4.7.3. The undesirable and unintended consequences of restaurant chains unfair selection criteria on local franchise stores

110. As noted in the Provisional Report, the criteria used by some of the restaurant chains does not only stifle competition between the established platforms and smaller platforms but also denies franchise stores the opportunity to increase sales and generate more revenue. These undesirable and unintended consequences of restaurant chains selection criteria are reflected in underserved and township markets where Uber Eats and Mr D Food are not active.

111. WeDash argues that the buying power (aggregated consumer buying power) in townships and underserved areas has a significant potential for growth and returns

(i.e., in terms of order volume and sales).¹⁸⁰ The vast construction of malls and shopping centres in townships indicates that there is significant aggregated spending and buying power in these areas. Therefore, there are clear benefits and incentives that make franchise stores want to partner with local food delivery platform(s). Further, the fact that the established platforms themselves are now targeting and expanding into these areas serves as confirmation that townships and traditionally underserved areas have enormous potential and create opportunities for both restaurants and food delivery platforms. Accordingly, the partnership between franchise stores and smaller platforms in townships and underserved areas where the established platforms have no presence would certainly assist franchise stores to achieve incremental sales.

112. The Inquiry notes that even in markets where established platforms exist there is still value in franchise stores selecting their preferred platform(s). A franchise store may see value in partnering with a local delivery platform, as opposed to partnering with an established platform (or partnering with both/all platforms). For instance, a local delivery platform may be willing to deliver to secluded areas and to cover extended radius (relative to established platforms), and potentially reach new customer base or charge a low commission fee. However, the current criteria adopted by most of the restaurant chains does not allow franchise stores to fully exploit such opportunities.

113. Evidence before the Inquiry revealed that several franchisees have shown interest in partnering with delivery platforms other than Uber Eats and Mr D Food. However, head office has actively prevented these franchisees from contracting these local delivery platforms – in fact, in instances

178

179

180 See WeDash Public Hearing Presentation.

where the franchisees have contracted with delivery platforms other than the established platforms, they have been instructed by head office to offboard from the local delivery platform.¹⁸¹ The Inquiry considers this phenomenon concerning and not only harmful to platform competition but also the potential of the franchise store to generate additional/incremental customer and subsequently revenue.

4.7.4. Franchise stores are capable of making their own decisions on the choice of the delivery partner

114. It should be noted that the Inquiry is not suggesting that franchisees should and/or must use smaller delivery platforms. What the Inquiry contends is that in circumstances where a franchisee at the local store level sees value in using a local delivery platform, it should be allowed to contract with such a platform; such a franchisee is better placed to assess the competitive dynamics in its locality and decide which sales channel (including food delivery platforms) suits its needs and will assist it in fully exploiting growth potential in the local area. Head office has a role to play in the process, particularly, in ensuring that (i) menus and its brand is reflected correctly and properly in the smaller platforms app (ii) food safety protocols are adhered to and (iii) data privacy rules are also adhered to. However, head office should play a less restrictive role in the determination of which sales channel, in particular food delivery platforms, should be utilised by the franchise stores. This will ensure that there is fair and healthy competition between food delivery platforms in the relevant geographic area.
115. Of greater concern to the Inquiry is instances whereby head office imposes restrictive criteria that a small or local delivery platform must meet to be contracted to a franchisee

at a local or store level. These restrictive criteria by nature limit and impede the ability of SMEs and HDPs to effectively participate in the delivery platform market. Some examples of the restrictive criteria include, but are not limited to:

- 115.1. Requirements for a minimum geographic coverage;
- 115.2. Requirements to expand the geographic coverage;
- 115.3. Requirements for a minimum number of customers or restaurants;
- 115.4. Requirements to meet advertising or promotional spend thresholds;
- 115.5. Requirements to have a proven track record and/or capacity;

116. The Inquiry does not accept submissions from some of the restaurant chains to the effect that it is neither reasonable nor practical to expect individual franchisees to select their own delivery partners. Furthermore, the Inquiry does not accept that requiring franchisees to do this will place on them a costly, onerous and time-consuming obligation.¹⁸² As already indicated, there is evidence and examples from Nando's, Spur Corporation and Burger King that franchisees are capable of determining which platform to use in their locality and can facilitate this process without any insurmountable difficulty. Thus, it has proven to be practical and reasonable from Nando's, Spur Corporation and Burger King perspective to allow franchisees the freedom of choice in terms of which platform to use.

117. To this end, there is no evidence from these chains that suggest that allowing franchisees the freedom to choose which platform to use has placed on them a costly, onerous and time-consuming obligation, as submitted. All that is required is for the franchisee to be transparent (with head office) about their choice of a delivery platform partner and adherence of food safety protocols

181

182

amongst other things. In any event, the Inquiry is of the view that should franchisees view this task as costly, time-consuming and onerous, they will decide on their own not to entertain and/or appoint smaller local delivery platforms. Similarly, should franchisees value the services and benefits of local delivery platforms, they may be willing to engage in this 'onerous, costly and time consuming obligation' as the benefits derived may outweigh the negatives or any costs associated with this exercise.

118. As stated in the provisional report, franchisees are also likely to protect the KPIs around food safety and brand image of the restaurant chain. Further, a franchisee is invested in the franchise business and therefore has every incentive in their local catchment area to ensure the brand is not damaged or the customer experience undermined. As indicated above, the fact that Nando's and Burger King, as top local and global brands, are willing to allow franchisees the freedom of choice in this regard, approving only on menu pricing, suggests that the outright ban on local delivery partnerships is unnecessary.

119. For clarity and avoidance of misconceptions, the following points are worth highlighting:

119.1. The Inquiry does not seek to prevent restaurant chains from negotiating terms with national delivery services, which franchisees may then seek to take up. The Inquiry is concerned about the restaurant chains requiring franchisees to **only** take up delivery through the national platforms.

119.2. The Inquiry does not seek to prevent restaurant chains from negotiating terms with local delivery services for all its brands to get a better rate.

119.3. Nothing in the Inquiry's assessment requires franchisees to individually negotiate with national delivery platforms, nor does the Inquiry require individual

franchisees to negotiate with local delivery platforms.

119.4. In the main, what the Inquiry is concerned about are the restrictions imposed by restaurant chains that prevent individual franchisees from making use of the delivery platforms of their choice.¹⁸³ In relation to the criteria for assessing delivery services, the Inquiry is concerned about the application of selection criteria and conditions that are potentially exclusionary and/or restrictive by certain restaurant chains, which have the effect of excluding certain delivery platforms, in particular smaller and emerging new platforms.

119.5. For instance and as discussed above, a criterion that includes a requirement that a small or local delivery service must have national reach or plans to scale the delivery service to other areas may be restrictive and exclusionary, as it does not bare any relevance to the quality of the service that a small or local platform can offer to franchisees.

119.6. Furthermore, the Inquiry's analysis do not intend to result in restaurant chains or their franchisees not complying with their standard legal obligations arising from other legislations and regulations, such as the Consumer Protection Act, the Protection of Personal Information Act or regulations governing hygiene, food safety and control etc.

4.7.5. Evidence that established platforms and restaurant chains practices have an adverse effects on competition is solid

120. All platforms (including established platforms) acknowledge the importance of restaurant chains to a platform's stability, growth and expansion. It is undisputed that food delivery platforms would want to launch their platform with the mix of restaurant chains and independent restaurants. With specific reference to restaurant chains, all

183 Moreover, nothing prevents restaurant chains from supporting franchisees in managing their delivery relationships.

delivery platforms accept that restaurant chains play an important role for any platform's success and sustainability as they bring in order volumes and revenue.¹⁸⁴ Lack of access to restaurant chains adversely affect the disadvantaged competing platforms in various ways, including:¹⁸⁵

120.1. The platform becomes less-attractive to customers: the refusal by restaurant chains to contract with smaller and locally-based platforms is a major barrier to entry and expansion for local start-ups. Without reasonable access to restaurant chains, smaller platforms cannot compete on equal footing with established platforms as their customer offering is skewed, insufficient and unattractive to customers – this in turn, affects their revenue generation capacity and growth potential.¹⁸⁶ As noted by Mr D Food, customers usually go where there is variety of restaurants (i.e., restaurant chains and independent restaurants) and this variety is vital to the existence of the platform.¹⁸⁷ Similarly, WeDash and Bolt Food stated that lack of variety (as a result of restaurant chains refusal to contract) affects the platform's credibility and offers customers limited options. Ultimately, customers end-up moving and being attracted to the platform that has variety of restaurants.¹⁸⁸

120.2. Potential loss of order volume and revenue: as submitted by various platforms during the public hearing, restaurant chains are prominent and well-known in South Africa. For instance, Bolt Food has indicated that if it is able to secure some restaurants chains (about 3 or 4) it will cover a significant 30 to 50% of total spend on the platforms.¹⁸⁹ Dryvar and WeDash have also provided evidence to the effect that not having

restaurant chains negatively affects their revenue generation potential and ability to grow sales.¹⁹⁰ Whilst it is difficult to equate and measure the revenue lost by smaller platforms in Rand value, it can be observed from the established platforms' management accounts that restaurant chains account for a sizeable number of orders and food value generated by platforms – this suggests that not having these chains on a platform has significant adverse effects on the revenue and order generating capabilities of any platform. If scale is important, as the established platforms argue, then eliminating more than half the potential orders inevitably harms revenue and scale.

121. It is evident from the above analysis that the restaurant chains' refusal to onboard smaller delivery platforms (including new entrants) limit the smaller platforms' ability to generate the network effects. In fact, the conduct of these restaurant chains raises barriers to entry and expansion for smaller delivery platforms (including new entrants) whilst reinforcing the market position of established platforms. In this regard, the inability of smaller delivery platforms (including new entrants) to onboard restaurant chains makes their platforms less-attractive to customers as they offer a limited range of restaurant options – thus, making it extremely difficult for such platforms to successfully build the consumer side of market. In turn, lack of consumers affects the order volume and revenue potential that a delivery platform can generate. It is this phenomenon that concerns the Inquiry as it creates a conducive environment for

184 See Public Hearing Transcript for several platforms such as Mr D Food, Uber Eats, Dryvar, Paarl Eats and WeDash.

185 See Chapter 6 of the Provisional Report (food delivery), page 76 – 78.

186 See Dryvar submissions dated 4 October 2021.

187 Mr D Food (Mr Reid) Public Hearing Transcript dated 12 November 2021.

188 We Dash (Mr Zondi) Public Hearing Transcript dated 12 November 2021 and Bolt Food (Mr Townsend-Rose) Public Hearing Transcript dated 18 November 2021.

189 See Bolt Food (Mr Townsend-Rose) Public Hearing Transcript dated 18 November 2021.

190 We Dash (Mr Zondi) Public Hearing Transcript dated 12 November 2021.

'market tipping' in favour of the established platforms.¹⁹¹

122. Ultimately the aforesaid conduct (especially by restaurant chains) perpetuates exclusion from the economy by HDPs as most of the local delivery platforms are HDP entrepreneurs looking to provide a service to their communities which has not been prioritised by the national delivery platforms. The practice also denies those communities the choice of food delivery.

4.8. Conclusion on lack of access to restaurant chain

123. The Inquiry finds that partnerships with and/or access to restaurant chains is important for any platform that competes in the food delivery market, including established platforms and smaller platforms. Thus, any conduct, whether deliberate or inadvertent, that renders it unreasonably difficult for any platform to gain access to restaurant chains is likely to raise competition concerns. What worsens the situation is that smaller platforms are prevented from accessing restaurant chains even in geographic areas where the established platforms have no presence. This is due to the unfair criteria used by restaurant chains that does not only stifle competition between established platforms and smaller platforms but also denies franchise stores the opportunity to increase sales and generate more revenue. Thus, the conduct of restaurant chains that actively prevent franchisees from contracting with competing

national or local delivery platforms that are not approved, limiting them to the leading platforms only, has adverse effects on platform competition.

Price Parity Clauses

4.9. Findings from the Provisional Report

124. The Inquiry found that price parity clauses in the existing contracts of Uber Eats may result in self-enforcement by restaurants, which impede competition from other platforms on the basis of commission fees and lower menu prices.

4.10. Stakeholder submissions: views on price parity clauses

125. Uber Eats disagrees with the Inquiry's assessment and findings on price parity clauses. In particular, Uber Eats argues that:¹⁹²
- 125.1. All contracts (including historical) do not contain any price parity clauses.¹⁹³
- 125.2. Price parity clauses were never enforced.
- 125.3. The historical price parity clauses did not give rise to any adverse effects on competition.¹⁹⁴
126. Bolt Food notes and acknowledges the Inquiry's findings on price parity clauses. Furthermore, Bolt Food advised the Inquiry that [REDACTED]
[REDACTED]
[REDACTED] - notwithstanding the fact that

191 For instance, See Organisation for Economic Co-operation and Development (OECD) 2022 "The Evolving Concept of Market Power in the Digital Economy - Note by Germany". Available on: <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf>. In Particular, paragraph where it is noted that "Accordingly, the risk of 'market tipping' is related to the occurrence of network effects".

192 Uber Eats submissions dated 10 September 2022 and Uber Eats submissions dated 13 June 2023.

193 Uber Eats states and maintains its public hearings position that (i) the old contract template was amended to remove the price parity clause [REDACTED], and (ii) Uber Eats carried out a review of historic contracts that had been rolling over to ensure that, going forward, the old contracts would be replaced with the new contracts. Accordingly, old/historical contracts have been replaced with the new contract (i.e. without the price parity clause).

194 Uber Eats submits that it would require compelling evidence for the Inquiry to establish that such price parity clauses gave rise to an adverse effect on competition. According to Uber Eats, the need to produce sufficiently precise and consistent evidence in order to establish an appreciable adverse effect on competition as a result of price parity clauses has been highlighted in the recent decision of the United Kingdom Competition Appeal Tribunal [BGL (Holdings) Limited & Others v Competition and Markets Authority [2022] CAT 36].

the Inquiry's provisional findings are limited to established platforms.¹⁹⁵ One restaurant chain also indicated that it welcomes the Inquiry's finding(s) and recommendation(s) that contracts between restaurants and platforms should not contain price parity clauses.¹⁹⁶

4.11. Response by the Inquiry to stakeholder submissions on price parity clauses

127. The Provisional Report noted that Uber Eats and Bolt Food include pricing parity clauses in their contracts with restaurants. These platforms' contracts with restaurants contain(ed) wide parity pricing clauses – i.e., clauses that seek to ensure that meals sold through these platforms are not priced higher than similar meals (i) sold directly by the restaurants themselves (or through the restaurant's app/website) and (ii) sold by or through other competing food delivery platforms.

128. The Inquiry also noted that the narrow element and/or aspect of the clause may not be enforced – the dynamics in food delivery have resulted in the narrow aspect often being non-enforced.¹⁹⁷ This is because several restaurants have indicated that they cannot absorb the high commission fees and therefore want to charge higher menu prices than in-restaurant or takeaway where these costs are not present.¹⁹⁸

129. The Inquiry welcomes the following developments with respect to platforms that include price parity clauses in their contracts:

129.1. Uber Eats has clarified and confirmed that all contracts (including historic contracts) do not contain any price parity clauses.¹⁹⁹ In this regard, Uber Eats has confirmed that (i) all new contracts [REDACTED] [REDACTED] use the new template that does not contain any price parity clause, and (ii) historic contracts²⁰⁰ [REDACTED] [REDACTED] have been reviewed and replaced with new contracts (i.e. contracts without the price parity clause).²⁰¹

129.2. Bolt Food has indicated that [REDACTED] [REDACTED] [REDACTED].²⁰²

130. Notwithstanding the above, the Inquiry will respond to aspects that relate to Uber Eats' assertions, in particular aspects on (i) the enforceability of price parity clauses and (ii) the adverse effects on competition caused by price parity clauses.

4.11.1. Price parity clauses, particularly, platform parity are self-enforced (by restaurants)

131. Uber Eats maintains (it's public hearing position) that it did not enforce the price parity clause and did not take any action against the restaurants which did not comply with the clause, including terminating any restaurant's access to the platform for failure

195 Bolt Food submissions dated 6 September 2022.

196 [REDACTED]

197 Chapter 6 of the Provisional Report (food delivery) page 79 and 80, paragraph 202 and 205.

198 See several public articles in public domain where restaurants explain to the public why they charge different prices for in-store and platform menus. These articles are also referenced below under self-enforcement and price discrimination.

199 As indicated above and in line with the public hearings oral evidence, Uber Eats states that (i) the old contract template was amended to remove the price parity clause in [REDACTED], and (ii) Uber Eats carried out a review of historic contracts that had been rolling over to ensure that, going forward, the old contracts would be replaced with the new contracts. Accordingly, old/historical contracts have been replaced with the new contract (i.e. without the price parity clause).

200 These are contracts that ordinarily will automatically renew annual under the same terms and conditions.

201 The Inquiry understand from Uber Eats submissions dated 10 September 2022 that there were some restaurants whose historical contracts automatically renewed under the old terms (price parity terms) at the time Uber Eats made submissions to the Commission in December 2020 – this might be the period where the review process was in progress. The review process has been completed (as per the Public Hearing evidence) and it can be confirmed that all historical contracts have been replaced with the new contracts (i.e. without the price parity clause).

202 Bolt Food submissions dated 6 September 2022.

to comply with the pricing parity clause. To support this assertion, Uber Eats has relied on the 2019 Business Insider article

which reflects the in-store menu pricing and platform menu pricing of various restaurants.²⁰³

Table 1: Comparison of Mr D Food, Uber Eats and In-store menu prices for several restaurants in Johannesburg for the year 2019 period

Names	RocoMamas bacon cheese guac burger	Mochachos jalapeno cheese beef burger	KFC double crunch burger	Spur burger combo	Croft & Co breakfast bun	Café Picobella Trattoria bolognaise pasta
Mr D Food	R85.00	R56.90	R54.90	R99.00	R60.00	R162.00
Uber Eats	R85.00	R56.90	R54.90	R99.00	R60.00	R162.00
In-store price	R74.00	R49.90	R49.90	R89.90	R50.00	R125.00

Source: Compiled using In-store and platform menu pricing from Business Insider 2019 article that was submitted by Uber Eats on 11 December 2020.

132. Uber Eats submits that the above table shows that restaurants do not comply with price parity clauses and it has not taken any actions against such restaurants. To the contrary, the Inquiry is of the view that the above table is consistent with its findings insofar as they relate to parity of platform pricing. In this regard, the following are worth noting from the above table:

- 132.1. There is generally self-enforcement of price parity clauses with respect to platform pricing. Despite Uber Eats and Mr D Food charging the above restaurants different commission fees, the restaurants have self-enforced price parity amongst established platforms.²⁰⁴ Thus, restaurants seem to be complying with a contractual clause that prohibits them from pricing similar meals lower on competing platforms.
- 132.2. As already indicated, several restaurants have publicly indicated that they cannot absorb the high commission fees and therefore menu prices for platforms are higher compared to in-store. In other

words, these restaurants are urging Uber Eats to reduce commission fees to enable them to bring some level of similarity between the platform and in-store menu prices.

- 132.3. There is no incentive for Uber Eats to enforce parity between in-store and platform menu pricing, however, there is an incentive to enforce price parity between competing platforms. As already stated, (under market delineation and competitive dynamics), Uber Eats' 'main' and 'closest' competitor(s) is Mr D Food and potentially Bolt Food. Uber Eats is not threatened nor constrained by restaurants, thus it may not be that concerned about their in-store pricing. However, the same cannot be said about Mr D Food, which is evidently its main competitor and, consequently, its pricing behaviour may have an impact on Uber Eats' business.
- 132.4. Importantly, the fight for market share and market leadership is between themselves [Uber Eats and Mr D Food] and potentially Bolt Food. This implies that the difference

²⁰³ The Inquiry notes that the 2019 period provides the most accurate results since price parity clauses were in place for most restaurants and not completely phased-out by the new contracts (without price parity) introduced in Oct-2019.

²⁰⁴ Table 7 of the Inquiry's Provisional Report provides confidential commission fees charged by Uber Eats and Mr D Food to the restaurants referred to in the table. It is apparent from the confidential commission fee table that the established platforms charged majority of these restaurant different commission fees.

between in-store and platform menu price does not significantly affect Uber Eats' bottom-line or market contestability (hence the non-enforceability), whereas lack of compliance with platform parity could have been enforced by Uber Eats at the time [REDACTED] considering its potential ramifications on its operations.²⁰⁵

133. The Inquiry maintains that whilst Uber Eats argues that it does not enforce price parity clauses, this does not mean that there is non-compliance amongst all restaurants, especially in respect of platform parity pricing (as supported by evidence on the table above). The only non-compliance reported is in the form of pricing above the in-restaurant menu prices, there has been no evidence of non-compliance on different pricing across food delivery platforms which would impact on platform competition.

134. Furthermore, as observed in the Provisional Report, some of the large restaurant chains insisted in the past on having the wording of the price parity clause changed and/or removed rather than leave the clause in the contracts and rely on Uber Eats' non-enforcement principle.²⁰⁶ This shows that these restaurant chains were aware of the risk and the fact that Uber Eats could legally enforce these clauses. The Inquiry is also of the view that smaller independent restaurants with higher levels of dependency are even more likely to self-

censure and comply unless the terms are explicitly removed and communicated. As observed in the Provisional Report, Uber Eats' unwillingness to communicate changes to every restaurant²⁰⁷ (that the price parity clause had been removed or at least was non-enforceable) indicates that it may be relying on restaurants to self-enforce.²⁰⁸

4.11.2. There are no valid justifications and/or rationale for the inclusion of price parity clauses

135. The Inquiry maintains that there is no reason to have price parity in food delivery platforms except to limit competition. The rationale provided for including price parity clauses in contracts has nothing to do with possible efficiencies. For example, none of the food delivery platforms has raised any free-riding argument (which is the common rationale or argument raised for price parity in platform markets) as a justification for using such clauses.²⁰⁹ The Inquiry also notes that none of the platforms has submitted any additional evidence²¹⁰ that attempts to justify and/or rationalise the need for price parity clauses in food delivery platforms.

4.11.3. Price parity clauses have adverse effects on competition

136. As already indicated, there are no valid justifications for price parity clauses in food delivery platform. Therefore, there is no

205 Lack of parity clauses could have provided the restaurant with the freedom to offer similar meals at a lower price on competing platforms such as Mr D Food or any new entrant, particularly, if these competing platforms charged competitive or lower commission fees. This in turn would encourage competition and potentially affect platforms with high commission fee negatively.

206 Chapter 6 of the Provisional Report (food delivery) page 83, paragraph 216. In the confidential footnote the Inquiry provides examples of these restaurants chains.

207 Particularly those with historic contracts.

208 As noted in the Provisional Report (page 81, paragraph 211), Uber Eats has not communicated with the restaurants, particularly, those that concluded the contract prior to October 2019, that the parity pricing clauses are no longer applicable and/or enforceable. Lack of communication to the restaurants on the removal of these pricing parity clauses reinforces self-enforcement by restaurant to the benefit of Uber Eats. Further, there are no valid reasons why restaurants have not being informed of changes on contract terms involving pricing parity clauses.

209 As noted in the Provisional Report, Uber Eats has submitted to the Inquiry that the clauses were included in their contracts as standard provisions, and that these clauses are common in delivery and online platform contracts. However, even this line of argument lack credibility given that one of the leading food delivery platforms (Mr D Food) does not apply price parity clauses.

210 In response to the Provisional Report.

reason to have these clauses (in particular wide clauses), except to prevent rigorous competition - i.e., competing platforms from under-cutting pricing, thus removing an important competitive variable that may be used by challengers (e.g., new and emerging entrants). There are several ways in which parity pricing clauses adversely affected competition the food delivery platform market:²¹¹

- 136.1. Limit multi-homing and the ability of rivals to acquire customers: price parity clauses have resulted in restaurants charging uniform prices for the same meal across different platforms regardless of the commission fee each platform charges. Thus, at the time when the Uber Eats price parity was self-enforced by restaurants, the smaller platforms'²¹² lower commission fees could not be translated into lower platform menu pricing. This results in consumers being conditioned to multi-home less given that they consistently find that the established platforms are never more expensive than the alternatives that exist in the market. In other words, consumers do not find any reasons or incentive to use smaller platforms, especially if from the platforms' menu pricing perspective, they consistently find that smaller platforms' meals are not cheaper than the well-known established platforms. With platform uniform menu pricing in place, as a result of parity pricing clauses, the smaller platforms' only strategy and/or attempt to attract customers is to offer promotions.
- 136.2. Limit rigorous price competition between established platforms: limited price competition between Uber Eats and Mr D Food. Pricing parity clauses ensure that restaurants do not charge different menu prices for similar meals based on

the commission fees charged by each established platform. In essence, this eliminates price competition between established platforms based on commission fees. Absent these clauses, the market would have been characterised by rigorous competition whereby a platform that charges a lower commission fee is able to benefit from lower menu prices and possibly attract more order volumes. In turn, this forces the other platform to respond by lowering commission fees. Thus, commission fees become central in competing for market share.

- 136.3. Encourage platforms to compete on promotions which favours platforms with deep pockets to the detriment of smaller platforms: Uniform pricing also has significant implications on smaller platforms in that if there is uniform menu pricing across platforms, then it appears that eater promotions are the only means to compete rather than through commission fee levels, which may encourage excessive promotions. Competition based on promotions only favours the established platforms with deep pockets to the exclusion of smaller platforms. Accordingly, pricing parity clauses remove the ability of smaller platforms to use commission fees as an effective competitive strategy to capture customers.
- 136.4. Overall they discourage price competition and allows incumbent to expand at the expense of smaller platforms: smaller platforms that sought to penetrate the market by charging lower commission fees (relative to Uber Eats) with the aim that restaurants will pass-on lower commission fees to consumers by way of lower menu pricing were prevented from using this strategy to compete effectively for customer attraction.²¹³ Smaller that existed

211 Chapter 6 of the Provisional Report (food delivery) page 84 - 87. These are the market outcome as a result of parity price clause at the time it was still in place - even after their removal insofar as some restaurants were not aware of the removal of the clauses from historical contracts as these changes were not communicated.

212 Or even competing established platform which charges lower commission fee relative to the other.

213 This is because even if a smaller platform offered a restaurant a significantly lower commission fee, the clause effectively prevented the restaurant from offering this smaller platform better menu pricing than Uber Eats.

such as Delivery Xtreme and OrderIn, were effectively prevented from responding to Uber Eats' competitive strategy by charging lower commission fees that can be translated into lower platform menu pricing. Consequently, these platforms may have been forced to compete on promotions rather than commission fees to attract customers – a strategy that is likely to have favoured Uber Eats.

- 136.5. Absent these clauses, restaurants would potentially price differently and in line with the commission fee that each platform charges.

4.12. Conclusion

137. The Inquiry maintains that the price parity clauses contained in contracts concluded between platforms and restaurants harm competition. While platforms may submit that they do not actively enforce these clauses, restaurants may self-enforce the clauses and this may restrict competition from other platforms, on the basis of commission fees and lower menu prices. Whilst Bolt Food as a newer entrant may have less impact on market-wide competition, it should be able to use other means, such as lower commissions, to incentivise restaurants not to price higher on its platform relative to other platforms.

138. The Inquiry welcomes Uber Eats confirmation that [REDACTED] and Bolt Food's [REDACTED] [REDACTED] Even from Bolt Food perspective, the removal of parity pricing clauses is crucial in encouraging platforms to compete on commission fees and ensuring that restaurants are free to menu price on different platforms taking into account the level of commission fee charged – with the Bolt Food price parity clause in place, restaurants (i) might resort

to charging the same menu prices for Bolt Food, Mr D Food and Uber Eats regardless of the commission fees charged (as it was the case with Uber Eats and Mr D Food despite Mr D Food not having such a clause), thus harm competition, (ii) might resort to charging the same menu prices for Bolt Food and other smaller platforms regardless of the commission fees charged.

139. Given the adverse competitive effects associated with price parity clauses, the Inquiry is of the view that no agreement between established delivery platforms and restaurants should contain such clauses. The current clauses should be removed and not be invoked in future. After removing these clauses, the implicated platforms must clearly communicate such changes to the restaurants. The Inquiry notes that it is important for platforms to communicate such changes with restaurants since failure to communicate such changes may result in some (not all) restaurants not being aware of the changes and thus continue to self-enforce.

Transparency in Menu Surcharge

4.13. Findings from the Provisional Report

140. The Inquiry's analysis in the summary Provisional Report noted the importance of greater transparency in menu surcharge to the consumers and highlighted that lack of transparency in menu surcharge has adverse effects on competition, particularly, in the local food delivery platform markets.²¹⁴

4.14. Submissions from stakeholders on transparency in menu surcharge

141. The established platforms disagree with the Inquiry's assessment on lack of transparency in menu surcharge. In particular, Mr D Food argues that:²¹⁵

²¹⁴ Provisional summary report page 51, paragraph 138.

²¹⁵ Mr D Food submissions dated 16 September 2022.

141.1. There are no tangible benefits arising from transparency in menu surcharge. The purported benefits by the Inquiry are speculative and vague – i.e., they are not supported by any analysis and/or evidence.

141.2. The Inquiry has not provided evidence and/or analysis on the effects of such transparency on consumer behaviour. Further, the Inquiry has not provided any evidence that demonstrates that lack of transparency has adverse effect on competition.

141.3. There is no reason to expect that consumers are unaware that restaurants pay platforms commission fees. Further, consumers do not make choices based on what the restaurant must pay the platform – they simply make a value judgment of the total order price versus the food that they are receiving.

142. Bolt Food notes and acknowledges the Inquiry's analysis with respect to transparency in menu surcharge. Furthermore, Bolt Food notes [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].²¹⁶ Thus, if consumers become aware that [smaller platform]²¹⁷ charges lower commission fees that can translate into lower platform menu prices, they may be inclined to consider [smaller platform] and/or at the very least compare the [smaller platform] menu prices with that of the established platforms.

143. One restaurant chain also acknowledges the Inquiry's analysis and welcomes the concept of better transparency on the platform in relation to restaurant rankings and the various costings, such as commission fees, delivery

fees, etc., that the customer ultimately pays for when using the food delivery platform.²¹⁸

4.15. Response by the Inquiry to stakeholder submissions on transparency in menu surcharge

144. The menu surcharge referred to in the Provisional Report means the difference between (i) the food delivery platform menu price and (ii) a restaurant's take-away and/or dine-in menu price. This difference is largely driven by the fact that restaurants are charged commission fees by platforms and charge higher platform menu prices as they cannot fully absorb the commission fee costs. In competitive local markets where platforms also compete on commission fees, a platform(s) that charges restaurants lower commission fees should have lower platform menu prices for the same restaurant and similar meal. The Inquiry observes that, because of lack of transparency, customers are generally unaware of the menu surcharge and the fact that local delivery platforms' menu prices may be lower than the established platforms' menu prices.

145. In this section the Inquiry assesses, *inter alia*, customers total costs for using delivery platform's, the role of commission fees in driving customer costs and how lack of transparency impacts on customer choice and competition.

4.15.1. Total cost per order for consumers and lack of transparency on platform menu surcharge

146. The overall cost per order for a consumer has different elements depending on the platform. The key costs element include: (i) platform menu pricing, (ii) delivery fee, (iii) service fee and (iv) promotions.

216 Bolt Food submissions dated 6 September 2022.

217 [REDACTED]

218 [REDACTED].

Diagram 2: Example of Mr D Food and Uber Eats customer costs per order on the platform

Regular Meal	R116,90	Subtotal	R 99,90
Regular Coke 500ml	R2,90	Fees ⓘ	
— 1 +	R119,80	Service	R 5,00
+ Add more items		Delivery	R 7,00
Add exclusions & allergy notes > e.g. No mushrooms please		Total Payment	R 111,90
Subtotal	R119,80		
Delivery fee	R15,00		
Total	R134,80		

Source: (A) Mr D Food and (B) Uber Eats app (accessed on 19 February 2023)

Notes! Mr D Food customer costs is based on Mc Donald’s PTA East – Woodlands price for Mc Feast Burger Regular meal whilst Uber Eats is based on Chilli Cheese Double Large Meal.

147. With respect to the above table, the Inquiry notes the following:

147.1. Promotions: the costs presented in the table above do not include promotions which ordinarily reduce the overall costs for qualifying customers. For instance, if a promotion is free delivery, a customer will pay the total cost less delivery fee. Promotions are an important component of customer costs. As already indicated, consumer choice and/or the use of a particular platform is also influenced by promotions. These promotions, which are often communicated through daily e-mails and other forms of communication, appear to be valuable to consumers.

147.2. Platform menu price: the subtotal presented in the above table represents the platform menu price per order. The platform menu price is an important cost component for customer costs. As already indicated, the platform menu price is different to a restaurant’s take-away and/ or dine-in menu price. The main driver of this difference is commission fees and, therefore, these fees are an important determinant of platform menu prices and, by extension, overall customer costs. Thus, in a competitive market,²¹⁹ higher commission fees should translate into higher platform menu prices for consumers, thus raising the overall consumer costs.²²⁰ Whilst platforms are transparent to

219 The Inquiry reference to platform competitive markets includes the state of competition that allows competition between platforms on commission fees as opposed to the market circumstance referred to previously under (i) price parity clauses where platform uses unfair contract clauses to limit price (commission fee) competition and (ii) below-cost / loss making strategies driven by promotions that are aimed at sacrificing profits with serious ramification on smaller/local platforms.

220 As noted during the public hearing and various articles presented, restaurants that are charged higher commission fee mark-up up a higher percentage on the platform menu price, and verse versa.

consumers about the promotional offers, they are less transparent about menu surcharges. Consumers are not aware that the 'subtotal' presented by the platform on the app is higher than the in-store menu price and that this difference is largely explained by the commission fees they charge restaurants listed on the platform.

148. As noted in the provisional summary report, established platforms rely on a consumer framing bias whereby promotions are considered to hold more value and the consumer is ignorant to the fact that the menu surcharge is ultimately paying for that, and hence they should be considering the total cost including menu surcharge. For example:

148.1. For established platforms: an independent restaurant with the in-store meal order value of R200 that is charged 30% commission fee and fully pass-down this commission fee, will be 30% more expensive on the established platform's menu price (R260).^{221,222} From the R260 - the restaurant will get R200 whilst the platform gets R60.

148.2. For local smaller platforms: an independent restaurant with the in-store meal order value of R200 that is charged

15%²²³ commission fee and fully pass-down this commission fee, will be 15% more expensive on the smaller platform's menu price (R230).^{224,225} From the R230 - the restaurant will get R200 whilst the local platform gets R30.

149. The main observation to draw from the above illustration is that:

149.1. Because consumers are not aware that higher commission fees result in higher platform menu pricing and higher revenue level on per order basis for the platform;

149.2. The additional revenue earned from high commission fees by established platforms can be utilised to offer and fund promotions. Thus, these promotions are actually paid for by consumers via high commission fee. In the illustration above, a local delivery platform can have a platform menu price of R230 and charge a delivery fee (which can be up to R35) whilst an established platforms can have a menu pricing of R260 and run a promotion of free delivery. The free delivery promotion does not mean that the established platform's total cost for a consumer is lower (as the higher menu price would have paid for it) or the local delivery platform is less-cost effective on a total consumer costs basis.

221 The Inquiry uses R200 for illustrative purpose. As shown in the Provisional Report the order value per meal can range between R100 - R200 (using the broad ranges) with independent restaurant having the highest order value per meal relative to other restaurants segments. Also the Inquiry notes that in most instances (especially for repeating eaters) promotions are usually activated and triggers when a customer has a large order value - e.g., order food over R 200 and get a free delivery and /or discount.

222 This example is line with the article published by Business Insider SA (2021) and noted in the Provisional Report. The article stated the following in relation to 30% commission fee charged to independent restaurants by established platforms and how they menu price on the platform "small, independent restaurants say they have little choice but to pass these costs on to the consumer to make a profit, and as a result, they typically charge the full mark-up amount - which is usually around the 30% mark".

223 Paarl Eats (Mr Petersen & Ms Erasmus) Public Hearing Transcript dated 22 November 2021 - on the competitive edge to win restaurants in the market via commission fee % stated that there is no joining fees involved and they charge restaurants 15% commission fee.

224 The Inquiry uses R200 for illustrative purpose. As shown in the Provisional Report the order value per meal can range between R100 - R200 (using the broad ranges) with independent restaurant having the highest order value per meal relative to other restaurants segments. Also the Inquiry notes that in most instances (especially for repeating eaters) promotions are usually activated and triggers when a customer has a large order value - e.g., order food over R 200 and get a free delivery and /or discount.

225 This example is line with the article published by Business Insider SA (2021) and noted in the Provisional Report. The article stated the following in relation to 30% commission fee charged to independent restaurants by established platforms and how they menu price on the platform "small, independent restaurants say they have little choice but to pass these costs on to the consumer to make a profit, and as a result, they typically charge the full mark-up amount - which is usually around the 30% mark".

149.3. As explained above, the consumer framing bias (promotions considered to hold more value) and lack of transparency on menu surcharge means that the consumer is unaware that local delivery platforms may actually be cost-effective. At the very least, consumers should be aware of this phenomenon to encourage comparison of food delivery costs across different competing platforms in their locality.

4.15.2. Local delivery platforms that charge low commission fees have lower platform menu prices

150. The Inquiry conducted a comparison of platform menu price on the Paarl Eats and Uber Eats platforms for the same (i) restaurants by location and (ii) meals that are listed on both apps. As already indicated, Uber Eats charges commission fees of up to 30% whilst Paarl Eats' commission fee is around 15%.

Table 2: Platform menu pricing comparison for Paarl Eats and Uber Eats

Restaurants & Meals	Food Delivery Platforms		Percentage difference
Restaurant Chains			
Rocomamas	Paarl Eats	Uber Eats	Percentage difference
Double Cheese Burger	R114,00	R114,00	0%
Wings 8	R112,00	R112,00	0%
Romans Pizza	Paarl Eats	Uber Eats	Percentage difference
Large Pepperoni Deluxe Pizza	R111,90	R118,90	6%
Large Chick 'n Mayo (Bacon)	R140,90	R149,90	6%
Spur	Paarl Eats	Uber Eats	Percentage difference
Apache Combo	R251,90	R251,90	0%
Hake & Calamari Strips	R192,90	R192,90	0%
Pizza Perfect	Paarl Eats	Uber Eats	Percentage difference
30cm Mexicana Pizza	R151,00	R168,00	10%
30cm Mince Nachos	R179,00	R199,00	11%
Independent Restaurants			
Gold Leaf	Paarl Eats	Uber Eats	Percentage difference
Sushi Combos (Combo 4: 11 pieces)	R126,50	R138,43	9%
Love Platter	R245,00	R265,43	8%
K1 Sushi	Paarl Eats	Uber Eats	Percentage difference
Spring Rolls (3 pieces): Prawn	R53,00	R76,05	43%
K1 Sushi Combos (Combo 1: 10 pieces)	R115,00	R148,72	29%
Moksh ²²⁶	Paarl Eats	Uber Eats	Percentage difference
Chicken Korma	R139,00	R166,80	20%
Chicken Tikka Masala	R135,00	R162,00	20%

Source: Uber Eats and Paarl Eats Apps (June 2023)

²²⁶ The Inquiry has observed that in some food item categories such as starters and vegetarian main course meals, this independent restaurant charges the customers the same menu prices for both Uber Eats and Paarl Eats.

151. The above table confirms that local platforms have lower platform menu prices due to lower commission fees. Based on this table, a local delivery platform's menu price for a similar meal can be 11% cheaper (restaurant chains category) and 40% cheaper (independent restaurant category) than the established platforms'. In the Inquiry's view, it is important for consumers to be aware of these dynamics as this enhances consumer choice and overall competition between platforms.

152. The Inquiry also observes from the above table that some of the restaurants have maintained some level of platform parity which discourages platform competition. This may be explained by the lack of communication from Uber Eats that price parity clauses are no longer applicable. As explained above, price parity clauses are detrimental to competition in this market and ought to be removed completely, and this change should be properly communicated to restaurants.

4.15.3. Importance of transparency in platform menu surcharge is also recognised internationally

153. The Inquiry notes that the importance of transparency in menu surcharge is recognized internationally as well, in particular by the Attorney General ("AG") in Pennsylvania and Washington, D.C. In June 2021, Uber Eats reached an agreement with AG in the two states in terms of which it agreed to disclose to consumers in these two markets (Pennsylvania and Washington, D.C.) that menu pricing on its platform may be higher than purchases made directly from restaurants. The two parties agreed that this disclosure would be posted on the Uber Eats app in Pennsylvania and Washington, D.C.

154. In the statement released by the AG announcing these developments, it noted that:

"Online food delivery platforms can be very convenient, but hidden fees have driven up costs for consumers and hurt struggling neighborhood restaurants at the worst time. You deserve to know where your money is going and I'm pleased that by working

*together Uber Eats made their pricing more transparent,"*²²⁷(Own Emphasis)

155. The AG also notes that as more consumers use food delivery platforms such as Uber Eats, it is critical that these platforms are 'transparent about their pricing' and the fact that getting food directly from a restaurant is often cheaper. According to the AG, "consumers deserve clear information so they can make informed decisions that work best for them". The AG also encouraged other delivery platforms to follow in Uber

Eats' footsteps (to avoid the risk of being investigated and scrutinised by the AG offices).²²⁸

156. In addition to the above, the AG was specific that it wants consumers to be aware of, *inter alia*,:

"Fees are charged by delivery apps: Consumers should be aware of fees and charges related to any orders made on a delivery app, in addition to any applicable taxes...Restaurants pay commissions to the delivery apps: Restaurants pay a percentage of each order in commission to the delivery apps, in addition to the fees that customers pay to the delivery apps. Consumers who want all of their payment to be paid to the restaurant can order and pick up directly from the restaurant". (AG's Own emphasis).

227 Statement by the Office of the Attorney General for the District of Columbia (22 June 2021) article titled "AGs Racine & Shapiro Announce Uber Eats To Provide New In-App Transparency Disclosures on its Prices" accessible on their website: <https://oag.dc.gov/release/ags-racine-shapiro-announce-uber-eats-provide-new>.

228 Statement by the Office of the Attorney General for the District of Columbia (22 June 2021) article titled "AGs Racine & Shapiro Announce Uber Eats To Provide New In-App Transparency Disclosures on its Prices" accessible on their website: <https://oag.dc.gov/release/ags-racine-shapiro-announce-uber-eats-provide-new>.

4.16. Conclusion

157. The Inquiry maintains that greater transparency in menu surcharge to the consumers is necessary in enhancing competition. The lack of transparency in menu surcharge has adverse effects on consumer choice and competition, particularly in local food delivery platform markets. In line with the findings from the provisional summary report the Inquiry avers that:

157.1. The root problem in respect of the business model competition with local delivery is the lack of transparency to consumers on the surcharges on the menu pricing and the share that delivery platforms take.

157.2. This is because the national platforms rely on a consumer framing bias whereby promotions are considered to hold more value and the consumer is ignorant to the fact that the menu surcharge is ultimately paying for that, and hence they should be considering the total cost including menu surcharge.

157.3. If consumers did so, they may find that local delivery platforms are equally cost-effective. Consumers may also be less inclined to support a delivery platform which is exploiting their favourite local restaurant with high commission fees if they were aware, which would provide a basis for local delivery platforms to compete where they charge lower commissions. Hence some level of transparency on the split that the platform takes from the meal price would be beneficial to competition.²²⁹

229 Provisional summary report page 51, paragraph 138.

[5. Business user competition issues]

Discrimination and/or differentials in commission fees

5.1. Findings from the Provisional Report

158. The Inquiry found that the extreme commission fee discrimination of up to 60% higher for independent restaurants distorts relative pricing and restaurant competition on food delivery platforms as restaurants seek to pass on these commission fees in whole or part to consumers through higher menu prices.

5.2. Stakeholder submissions: views on commission fee discrimination and/or differentials

159. Uber Eats and Mr D Food disagree with the Inquiry's assessment and findings on commission fee differentials. In particular, these platforms argue that:²³⁰

159.1. The Inquiry has not conducted a robust assessment of the extent of price differentials. Thus, it is incorrect for the Inquiry to suggest that the extent of differentials is significant.²³¹

159.2. Commission fees charged to different restaurants are in many cases not comparable. There are numerous and considerable differences and a simple comparison of commission rates across different restaurants is likely to be misleading.²³²

159.3. The Inquiry has not presented robust evidence to support the assertion that the differentials in commission fees impede the ability of independent restaurants (that receive higher commission fees) to compete effectively.²³³

159.4. Restaurants earn only a small proportion of their revenues through food delivery platforms. Therefore, the ability of the commission fees charged by platforms to impact on the overall profitability of restaurants is materially limited.²³⁴

159.5. The commission fees are pro-competitive and in fact serve to improve the participation of small restaurants.²³⁵

159.6. The other justifications for differentials in commission fees include the critical role that restaurant chains play in the development and maintenance of a

230 Uber Eats submissions dated 10 September 2022, 13 June 2023 and Mr D Food submissions dated 16 September 2022 and 5 May 2023.

231 The established platforms submit that if a robust assessment was carried out, it would indicate that the extent of the differentials in commission fees charged is far smaller than suggested.

232 The established platforms submit that (i) different restaurants are located in different areas, and may attract a different set of consumers, themselves located in different areas. These consumers may order food at different times of day, (ii) it may take more time and cost on the part of established platforms to engage with some restaurants on the presentation of, and updates to menus, availability and pricing; and (iii) some restaurants may engage in substantial marketing and promotional efforts, either of their own brands, or specifically of their availability on the platform.

233 The Established platforms submit that the only evidence presented by the Inquiry is a comparison of the prices charged by eight selected restaurants on a single selected menu item – such evidence is inappropriate basis on which to draw a conclusion regarding the prices set by some 9 421 restaurants across a multitude of menu items. Even if there is a passing down of cost to consumers due to high commission fees no evidence has been provided that it has adverse effect on competition. In the main, it is argued that the Inquiry has not presented any compelling and/or reliable evidence to suggest that established platforms commission fee differentials have resulted in any adverse impact on competition.

234 Established platforms submit that there is no sound basis on which to conclude that differentials in the commission fees charged have any adverse impact on the ability of small and/or independent restaurants to compete effectively.

235 Established platforms submit that larger restaurants drive greater numbers of consumers to the food delivery platforms (this means that larger restaurants bring benefits to the platform overall by drawing in new customers and ensuring that existing customers return to the platform frequently). This, in turn benefits smaller restaurants on the platform, in the form of increased sales to the larger customer base generated by larger restaurants.

healthy and efficient online food delivery platform.²³⁶

extent of differentials in commission fees is warranted.²⁴⁰

160. One platform acknowledges the Inquiry's provisional findings and notes that the bargaining position of different restaurants differs. One platform is of the view that the extent of differentials in commission fees between restaurant chains and independent restaurants should be reasonable. [REDACTED]

[REDACTED].²³⁷

One restaurant chain indicates that it would welcome a reduction in commission fees for independent restaurants. However, such a reduction should not have a converse effect on restaurants chains. The restaurant chain further states that high commission fees generally have adversely effects on restaurants and consumers.²³⁸

5.3. Inquiry's response to third party submissions on price differentials

161. As already indicated under access to restaurant chains, the Inquiry accepts that price differentials may be necessary, however, this should be limited to a reasonable range. As noted in the Provisional Report, *"limiting the differential in commissions between small and large groups, rather than eliminating them altogether, allows platforms to offer some incremental incentives to larger business users but prevents exploitation of smaller ones by limited the gap"*.²³⁹ The Inquiry notes that the established platforms have not attempted to rationalise why the actual

162. The Inquiry maintains that the balanced approach is necessary in determining whether commission fee differentials are necessary and the reasonable differential range. In this regard, the approach adopted by the established platforms is biased as it focuses on the importance and value of restaurant chains whilst paying little or no attention to the value brought by independent restaurants. Moreover, the established platforms (in their justifications of commission fee differentials) do not seem to acknowledge other relevant factors²⁴¹ that drive customer acquisitions and traffic to the platform. When all these factors are properly considered and taken as a whole, it becomes apparent that the extent of differentials in commission fees is unwarranted and unfair to independent restaurants.

5.3.1. The extent of price differential is significant

163. The Provisional Report noted that independent restaurants are on average paying anywhere from 30% to 60% higher commission fees than the largest restaurant chains on average. Furthermore, when one considers the commission fees charged to restaurants falling within different restaurant segments on an individual store or restaurant basis (rather than average of all restaurants in the same segment), the extent of differentials is larger than the 30% to 60% range for some of the independent restaurants.²⁴²

²³⁶ Established platforms state that restaurant chains bring value into the platforms in terms of (i) attracting consumers to the platform; (ii) driving order volumes on the platform; and (iii) creating sound economics for the delivery side of the platform. It is also submitted that commission fees are justifiable and fair as they are based on the value the platform offers different segments of restaurants in exchange for commission fee.

²³⁷ [REDACTED]

²³⁸ [REDACTED]

²³⁹ See Chapter 9 of the Provisional Report (findings and recommendations) page 18, paragraph 42.

²⁴⁰ Instead, the established platforms have repeated the same previous arguments and justifications for the difference in commission fees without presenting any new evidence. The Inquiry's Provisional Report had highlighted significant shortcomings and challenged some of the these justifications. The Inquiry is not convinced by established platforms submissions that the extent of differentials is warranted.

²⁴¹ Over and above restaurant chains factors such as promotions attract traffic.

²⁴² The Inquiry's Provisional Report chapter 6 (food delivery), page 90 and 91.

164. Based on recently submitted information (from mid-2022), the extent of differentials ranges between 30-45% based on the average per category, slightly lower than the 30-60% range reported in the provisional report, but with many independent restaurants still being charged 50-60% higher.²⁴³

165. Furthermore, evidence indicates that independent restaurants do not have much negotiation scope and, as a result, are usually placed on the highest commission fee by default. For instance, independent restaurants (i) do not have large volume of store numbers to commit contractually in exchange for lower commission fees, and (ii) are not offered the option to make marketing commitments in exchange for lower commission fees. This lack of scope for negotiation has resulted in established platforms charging independent restaurants commission fees of up to 30% whilst restaurants chains are charged significantly lower commission fees.²⁴⁴

5.3.2. Other platforms (i.e., non-established platforms) do not differentiate to the same extent

166. The Inquiry's provisional report noted there are various pricing regimes in the delivery platform market and these include a flat commission fee structure (non-discriminatory),²⁴⁵ the non-discriminatory pricing model for independent restaurants²⁴⁶ and the discriminatory pricing model for

independent restaurants.²⁴⁷ Similar to the established platforms, Bolt Food also charges differential commission fees for independent restaurants and restaurant chains. However, the extent of differentials in commission fees for Bolt Food falls within the 0-15% range. Thus, Bolt Food appears to be recognising and taking into account the value that independent restaurants bring²⁴⁸ – importantly it seems to appreciate the fact that the extent of differentials in commission fees must be reasonable and not exploitative or extreme in nature.

167. The Inquiry also notes that there is a material difference in the extent of differentials between the two established platforms. This at the very least indicates that the platform with the most extensive differentials is unlikely to have any valid justification since its closest competitor pursuing the same business model has far lower levels of differentials.

5.3.3. The extent of differentials in commission fees is unjustifiable: lack of adequate justifications to warrant the extent of commission fee differentials

168. In their response to the Provisional Report, the established platforms have repeated the same justifications (as per the previous submissions) for the difference in commission fees. In this regard, these justifications are summarised in Uber Eats' submission below:²⁴⁹

243 See several submissions for specifics and actual figures from (i) Mr D Food dated 10 September 2021, Annexure B1, (ii) Uber Eats dated 13 September 2021, Annexure D, (iii) Uber Eats dated 10 September 2022 – updated financials and (iv) Mr D Food dated 30 November 2022 – updated financials.

244 The Inquiry's Provisional Report noted a publicly available information which indicated that a certain restaurant chain with multiple brands receive a commission fee of 20% - this implies that this chain pay established platform 50% less than what an independent restaurant chain pays at 30% commission fee.

245 This pricing model includes a flat commission fee with no differentiation across restaurant segments – Quench favours this model.

246 This pricing model includes restaurant chains paying higher commission fees than independent restaurants – WeDash favours this model.

247 This pricing model includes larger restaurants with various stores (e.g., restaurants chains) paying lower commission fees than independent restaurants – Uber Eats, Mr D Food and Bolt Food favour this model.

248 Similar to the established platforms, Bolt Food must also get restaurant chains on board and thus use favourable commission fee to attract the chains.

249 Uber Eats submissions dated 10 September 2022.

“Finally, the Inquiry argues that Uber Eats has not sought to measure the benefit that SMBs [Independent restaurants] bring to the platform in terms of variety. As already outlined above, while variety is an important factor that platforms consider, this by no means diminishes or even offsets the importance of the value brought to the platform by chains in terms of:

- *Attracting consumers to the platform;*
- *Driving order volumes on the platform; and*
- *Creating sound economics for the delivery side of the platform.*

Any benefits of variety through the on-boarding of SMBs [Independent restaurants] is built over time and would not be possible without the scale and other benefits that chains contribute to creating a stable and attractive platform”.

169. It is worth noting that the value that independent restaurants bring to the platform is not limited to variety as Uber Eats seems to suggest in the above extracts. As noted in the provisional report, independent restaurants bring value to the platforms in several ways, such as (i) variety, (ii) customer attraction and retention and (iii) basket size, revenue and profitability.²⁵⁰ The foregoing is undisputed – it was accepted and noted by the established platforms during the public hearings. For instance, Mr Molewa [Uber Eats] accepted that there are independent restaurants that bring the same attributes brought by restaurant chains to the platform – Mr Molewa indicated that these independents are local favourites/

heroes and drive traffic and basket size to the platform.²⁵¹

170. The Inquiry notes that none of the established platforms has provided any evidence to challenge its analysis on the value the independent restaurants bring to the platform in terms of revenue and profitability. In this regard, the Inquiry noted that:²⁵²

170.1. On the platform revenue side, the independent restaurants have higher basket size (i.e., order value) than restaurant chains – ranging from around 30% to 60% higher.²⁵³ Having higher order value and paying the highest commission fee implies that platforms generally derive higher value (in the form of revenue) from independent restaurants on per order basis.

170.2. On the platform profitability side, the costs are not materially different for independent restaurants and restaurant chains. The result is that the profit per order from independent restaurants is also substantially higher than for the restaurant chains. The Inquiry further noted instances where some platforms were loss-making on some restaurant chains segment whilst being profitable on the independent chain segment.

171. The Inquiry also notes that the benefits that a platform enjoys in terms of, *inter alia*, customer attraction²⁵⁴ and retention and driving order volume cannot be solely attributed to the restaurant chains. As pointed out in the Provisional Report, the established platforms' justifications for

250 See Chapter 6 of the Provisional Report (food delivery) page 100 – 105.

251 Uber Eats (Mr Molewa) Public Hearing Transcript dated 11 November 2021. The relevant extract is referenced in the Provisional Report chapter 6 (food delivery), page 100.

252 See Chapter 6 of the Provisional Report (food delivery) page 104 – 105.

253 This implies that the absolute commission earned, or revenue for the platform, can be 30% to 60% higher even if independents paid the same commission rate. However, as noted independent restaurants are subjected to high levels of commission fee.

254 This also includes first-time eaters.

extreme price differentials have significant shortcomings:²⁵⁵

171.1. Customer attraction to the platform and the credibility of the platform: the Inquiry is of the view that customer attraction to the platform cannot be solely attributed to restaurant chains (as some established platforms seem to have suggested). There are various factors that attract customers to the platforms. Established platforms spend millions of rands annually on marketing (in a form of brand awareness and promotions) to drive customer acquisition or traffic to the platform.

171.2. Furthermore, the established platforms conceded during the public hearings that the signing of independent restaurants and promotional discounting are important in attracting customers to the platform.²⁵⁶ This is consistent with the survey conducted by one of the established platforms which indicates that variety and customer selection are important factors for both consumer acquisition and retention - this established platform concedes that a critical part of this selection and variety comes from local independent restaurants.²⁵⁷ Thus, independent restaurants also bring value into the platform by way of customer attraction.

171.3. Majority of platform users and first-time eaters: the argument by established platforms that restaurant chains attract the majority of users and first-time eaters is inconsistent with the platforms' own internal documents and reports. For instance, promotions are one of the main tools used to attract and retain the majority of customers.²⁵⁸ Therefore, customer use (either as first-time eater or existing) of established platforms is largely dependent on, among other things, these platforms' promotional offers.

171.4. First-time eater joining the platform due to strategic restaurant chains (and subsequently benefiting independents):²⁵⁹ no solid evidence has been provided to support this assertion. There are several reasons that make this argument unconvincing, including (i) the only evidence put forward to support this assertion by one of the established platforms is inconsistent with the platform's internal documents, in particular how the platform records and reports on restaurants internally,²⁶⁰ (ii) no actual evidence of causality has been provided to show that new eaters joined the platform for the sole reason of ordering from a specific strategic restaurant, but

255 See the Provisional Report chapter 6 (food delivery), page 100 - 105. The Inquiry notes that it challenged the extent of price discrimination and noted that the reasons, evidence or analysis provided to justify the extreme differentials are insufficient and in some circumstances lack substance. In this regard, the Inquiry maintains that the established platforms have failed to provide adequate justification on the extent of price discrimination.

256 See both Uber Eats (Mr Molewa) and Mr D Food (Mr Reid) - Public Hearing Transcript dated 11 & 12 November 2021. The relevant extract is referenced in the Provisional Report chapter 6 (food delivery), page 99 and 100.

257 See Provisional Report chapter 6 (food delivery), page 99 and 100 in particular confidential footnotes that reveals the details (extracts and analysis) of the internal documents of established platforms.

258 The Inquiry's Provisional Report (page 99, paragraph 259) noted evidence that revealed that promotions can increase a platform's customer acquisitions rate by a percentage point significantly above 50% and that majority of customers i.e., significantly above 50% used/ordered from platforms due to promotions.

259 This argument was made during the public and in-camera confidential sessions with the established platforms it was also challenged and rebutted in the Provisional Report. The established platforms have repeated the same argument without providing any new and/or solid evidence. As previously noted, the established platforms' theoretical argument on the unique value that chains brings can be summarised as follows: (i) the majority of new eaters join the delivery platform to order from the strategic chain restaurants (ii) this is a unique value brought by the chain because those eaters then order from all other restaurants, including independents (iii) those independent restaurants orders represent the benefit derived from the strategic restaurant chains, (iv) thus, the differentials does not harm independent restaurants since they are beneficiaries of the low commission fees that bring chains onto the platform.

260 The Inquiry's Provisional Report (page 100, paragraph 262) noted that the platform deviated from its own internal records and reports to fit a particular narrative on strategic restaurant chains. For instance, in the analysis a subset of national chains from another category that seemed to fit the narrative put forward were simply added (included) to the actual strategic category for the purposes of the analysis (even though internally such restaurants were not categorised as strategic by the platform).

rather causality is assumed²⁶¹ (iii) larger restaurants chains also benefiting from the presence of independent restaurants on the platform as they assist in customer retention,²⁶² which customers then also order from the larger chains.

172. The Inquiry is also not persuaded by the assertion that the commission fees for different restaurants are 'in many cases not comparable' due to, *inter alia*, different restaurants being located in different areas, attracting a different set of customers in different areas, taking platforms more time and costs to service some restaurants, etc. This assertion is not persuasive for several reasons:

172.1. The established platform relying on this assertion has not provided evidence to support this claim – for instance, evidence on (i) different restaurant attracting different sets of customers (ii) platforms taking more time and costs to service some restaurants e.g., independent restaurants.

172.2. Some of the factors listed in arguing that different restaurants are not comparable are inconsistent with the platform's own business practices. For instance, if different restaurants are not comparable due to factors such as location and customer profile in different areas, then this suggests that even a restaurant chain should be charged different commission fees based on the location of the store and the profile of the customer in that location.

172.3. There are no costs justifications for the difference in commission fees.

173. The Inquiry is of the view that the differentials in commission fees is likely due to the

difference in bargaining power, rather than the value that restaurants bring to the platform – the established platforms face no countervailing power or constraint from most of independent restaurants and this has led to their exploitation. As noted in the provisional report, the exploitation of independent restaurants drives the profitability of the platform and enables it to engage in marketing and subsidisation strategies which contribute to eater growth that is benefiting the largest restaurant chains because their customers are often the ones that are paying below even variable costs for the service.

174. The extent of differentials in commission fees cannot be justified on costs basis. Evidence from the internal accounts indicates that there is no material difference in costs for variable costs (transaction processing, delivery, and promotional spend) nor on a fully allocated cost basis (i.e. including an allocation of common costs) – there is no material difference in the variable costs for independent restaurants relative to chains that could justify the difference in commission fees.

5.3.4. There is sufficient evidence on the adverse effects of commission fees on business user competition

175. The Inquiry's provisional report noted that the high commission fees faced by independent restaurants have an adverse effect on these restaurants and consequently their ability to effectively compete and participate in the market. Some of the factors considered by the Inquiry to determine that the price differentials and high commission fees faced

²⁶¹ The Inquiry's Provisional Report (page 100, paragraph 262) noted that both established platforms disproportionately fund larger chains with restaurant-specific promotions, often reducing commissions in exchange for marketing commitments but also co-funding weekly food category deals. This means that new eaters are also more likely to be confronted with promotions on the larger chains, which also appear first in the ranking. This suggests that the observed trend on new eater choice is explained by other factors for which there is evidence unlike the assumptions put forward by the established platform.

²⁶² Variety is important factor for consumers in their use (including retention) of food delivery platforms and independent restaurants offers variety.

by independent restaurants have adverse effects on competition include:²⁶³

- 175.1. Higher commission fees results in higher platform menu prices for independent restaurants: the extent of differentials does distort competition between restaurants on the platform. The Inquiry's business user survey found that around 70% of restaurants surveyed passed on some or all the commission charged by platforms to consumers in the form of higher menu prices.²⁶⁴ Higher commission fees force independent restaurants to mark-up their prices higher on platforms' menu pricing whilst restaurant chains are able to mark-up their prices at a lower rate than independent restaurants due to favorable commission fees. The Provisional Report presented evidence indicating that independent restaurants that are usually charged a 30% commission fee fully pass-down this commission fee by increasing (mark-up) their platform menu pricing by about 30% whereas restaurant chains that received favourable commission fees usually mark-up by 10-15%. .
- 175.2. The Inquiry has expanded its analysis and evidence on the effects of commission fees on platform menu pricing by including a detailed analysis that considers (see Appendix 1: A sample of pricing): a comparison of several independent and chain restaurants in-store menu pricing with platform menu pricing - the comparison focuses on meals that are regarded as popular by the platforms. The analysis also includes the menu price comparison of established platforms and restaurant chains own app. The results of the analysis and evidence confirmed that independent restaurants mark-up their menu prices by a higher percentage on the platform than restaurant chains.

- 175.3. A sampling of pricing on the platforms relative to in-restaurant menus also confirmed that most of the restaurant chains and independent restaurants tend to add a menu surcharge roughly in line with the commission fees. There are some restaurants that adopt different strategies, but this is more often adding an even higher surcharge on low price items, with less incidence of lower surcharges than commission fees. This has negatively affected the relative pricing of independent restaurants to chains on the platforms, making their menu relatively less attractive to consumers and impacting on their competitiveness.
- 175.4. What is also evident is that the higher commission fee on one platform may drive higher prices across all platforms if the restaurant seeks to adopt a uniform pricing policy. As such, discrimination on any one platform can have market-wide effects.
- 175.5. Harm from the differentials in commission fees is that independent restaurants' meals on the platform are priced relatively higher than other restaurant segments' meals. In turn, this adversely affects independent restaurants' level of competitiveness and business performance (sale and volumes on the platform) as they are no longer price competitive.
- 175.6. High commission fees, customer choice and margin: One restaurant chain (that indicated that it welcomes a reduction in commission for independent restaurants) has also stated that high commission fees not only adversely impact on restaurants but ultimately the greatest impact is felt by the consumer. Moreover, since some of the restaurants business operations are based on low costs model for customers, high commissions negatively impact on these restaurants profitability - which runs on thin margins.²⁶⁵ High commission fees impact

263 The Inquiry's Provisional Report chapter 6 (food delivery), page 92 and 97.

264 See the Inquiry's Business User Survey results conducted in 2021. Available on the website.

265

on consumer choice and represent a form of harm to consumers – i.e., customers of independent restaurants that are faced with high platform menu prices. These customers might end-up switching to other competing meals of restaurant segment that are charged lower commission fees on the platform.

175.7. High commission fees and value added services: The unfair price differentials have a direct impact on the ability of independent restaurants to benefit and tap into the opportunities associated with paid for ranking and promotional offers. High commission fees increase costs and reduce the profitability of independent restaurants, thus adversely affecting their ability to purchase value added services, such as paid for ranking position, sponsored listing and promotional offers. Furthermore, independent restaurants are not offered the opportunity to negotiate for marketing commitments – marketing commitments ensure that restaurants obtain a lower commission fee in exchange for committing marketing initiatives (e.g., promotions) on the platform.²⁶⁶

176. The Inquiry is of the view that the above factors and evidence presented (when taken as a whole) is sufficient to prove that the established platforms' conduct whereby independent restaurants are charged significantly higher commission fees relative to restaurant chains has adverse effects on business user competition.

177. The Inquiry notes that the established platforms have downplayed the effects of the price differentials by stating that restaurants earn only a small proportion of their revenues through food delivery platforms. Therefore, the impact of the commission fees charged

by platforms on the overall profitability of restaurants is materially limited. The Inquiry notes that food delivery platforms remain an important sales channel for restaurants. The level of customer adoption has increased significantly overtime (with platform enjoying increase in order volumes of more than 100%). As correctly pointed by Famous Brands during the public hearings, it is important for restaurants to be listed on the established platforms to be able to contest and compete for customers that order their meals via these platforms. Therefore, any practice that affects the ability of restaurants to effectively compete and/or contest for customers on the platform has direct and significant implications on the restaurant performance (i.e., ability to grow and expand).

5.4. Conclusions on price differentials

178. The Inquiry maintains its findings (as per the Provisional Report) that:

178.1. The extreme commission fee differentials of up to 60% (at the time the Provisional Report was published and more recently up to 45%) higher for independent restaurants distort relative pricing and restaurant competition on food delivery platforms as restaurants seek to pass on commission fees in whole or part to consumers through higher menu prices.

179. The Inquiry is of the view that the extent of differentials in commission fees between restaurant chains and independent restaurants is significant. The established platforms have not furnished compelling evidence to justify the extent of differentials in commission fees. Furthermore, the Inquiry has presented sufficient evidence

²⁶⁶ As noted in the Provisional Report, the marketing commitment is only offered to restaurant chains to the exclusion of independent restaurants. The marketing initiatives under marketing commitments are aimed at benefiting restaurants by, among other things, increasing order volume and revenue. Restaurant chains are given the opportunity to make marketing commitments in exchange for lower commission fees, which means that they get the benefit of promotion on the platform and are more able to afford that through lower commission fees. The Inquiry also found that the platform-funded promotions on one platform were higher for the largest restaurant chains relative to independents.

to show that high commission fees faced by independent restaurants distort competition and adversely impact on independent restaurants by (i) making them less price competitive, (ii) reducing their profit margin and profitability and (iii) reducing their ability to purchase value added services on platforms (e.g., sponsored listing, premium ranking and promotional offers).

Promotional Spend and Marketing Commitments

5.5. Findings from the Provisional Report

180. The Inquiry found that greater platform promotional spend on restaurant chains relative to independent restaurants, and the ability to reduce commission fees in exchange for marketing commitments, distorts competition on the platform through distorting relative pricing and visibility.

5.6. Submissions from stakeholders on promotional spend and marketing commitment

181. Uber Eats and Mr D Food disagree with the Inquiry's assessment and findings on promotional spend and marketing commitment practices. In particular, these platforms argue that:²⁶⁷

181.1. Platforms spend a significant portion of promotions on independent restaurants – thus independent restaurants also reap the benefits associated with platform promotions on the platform.

181.2. The Inquiry has not provided any evidence to suggest that marketing commitments (that are provided to restaurant chains) result in any exclusion and/or participation of independent restaurants in promotional activities. One of the established platforms

asserts that in most instances independent restaurants benefit from its funded promotions whilst restaurant chains have to typically fund some promotions from their marketing commitments.²⁶⁸

5.7. Response to stakeholder submissions on promotional spend and marketing commitment

182. Platforms use promotions to generate demand, acquire new customers and retain existing customers. The effect of this is that it increases sales and order volumes – as noted in the Provisional Report, evidence indicates that the use of promotions can increase restaurants customer acquisition rate and order volumes by more than 70% on the platform.²⁶⁹ Thus, it is apparent that platform promotional practices that favour restaurant chains over independent restaurants have a direct impact on business user competition – i.e., the ability of different restaurant segments to effectively compete against each other on the platform.

183. The Inquiry accepts that platforms allocate promotions across all different restaurant segments including independent restaurants. However, the question in this regard, is not whether platforms fund promotions for independent restaurant or not. Rather, the question is whether the established delivery platforms give all restaurant segments an equitable opportunity to participate in platform funded promotional campaigns and whether there is no biasness in the allocation of platform funded promotions as this has direct implications on business user competition. For instance, when a platform ties the promotion to a restaurant or group of restaurants (e.g. burger week – free delivery and/or R50 off the order) and other

²⁶⁷ Uber Eats submissions dated 10 September 2022 and Mr D Food submissions dated 16 September 2022.

²⁶⁸ Uber Eats states the following regarding the nature of restaurant funded promotions and the benefits for independent restaurant: [REDACTED]

²⁶⁹ Chapter 6 of the Provisional Report (food delivery) page 116 and confidential footnote 306.

restaurant segment(s) that provide burgers are excluded from the promotion, customers will gravitate towards the pizza restaurant that has the promotional offer, thus limiting the ability of the other restaurant to compete effectively on the platform.²⁷⁰

184. The issue of equitable opportunities and its implications on business user competition also extends to marketing commitments – this is because platforms effectively fund the promotions by agreeing to reduce commissions for restaurant chains in exchange for marketing commitments.

5.7.1. Biasness in allocation of promotions across restaurant segments and marketing commitment opportunities

185. The Provisional Report noted that there can be biasness in the allocation of promotions by established platforms across various restaurants segments towards large, international restaurant chains, with upwards of 15% in greater spend relative to independents and even national chains.²⁷¹ This appears to be in part the greater partnerships in promotional campaigns. Further, the Inquiry also observed that where the promotion is neutral, for instance with new eater promotions, then independent restaurants seem to do better than chains insofar as their average promo per order is higher. According to the more recent evidence, there is less bias in Mr D Food but UberEats continues to self-fund the international chains at twice Rand per order as national chains and independent restaurants.
186. The Inquiry notes that at least one of the established platforms disagrees with the Inquiry's assertion of biasness in the allocation of promotional spend across restaurant

segments. In particular, it is argued that the Inquiry's analysis does not account for the fact that some of the restaurant chains fund some of the promotions through marketing commitments whilst the platform has to fund independent restaurant promotions – thus some of the promotions linked to restaurant chains are restaurant-funded. The Inquiry is not persuaded by this argument as the marketing commitments referred to by the platform reinforce the biasness in favour of restaurant chains:²⁷²

- 186.1. Marketing commitment arrangements are not offered or negotiated with independent restaurants. Thus, independent restaurants are excluded from participating in these arrangements – the established platforms appear to be unwilling to negotiate marketing commitment terms with independent restaurants (including local heroes in that one of the established platforms' observation 'have the same attributes as chains').
- 186.2. Marketing commitments are typically made in exchange for a lower commission fee; the evidence before the Inquiry is that an explicit trade-off is made during negotiations to reduce commissions if commitments are made. Thus, the argument above does not account for the lower commission fees benefit and the fact that favourable commission fee essentially frees up funding that can be utilised on value added services. Further, a lower commission fee implies that the restaurant chain can have more flexibility in platform menu pricing (in terms of the percentage to mark-up and margin to derive on the platform).
- 186.3. There is flexibility and collaboration on the use of marketing commitment funds. The funds are not only used for promotions but other activities that benefit the restaurant

²⁷⁰ The Inquiry is of the view that independent restaurants are disadvantaged in this instance. They already face high commission fees which they pass-down in a form of higher menu pricing, thus by not being part (in terms of skewed/biased allocation) of the same platform funded promotional offers enjoyed by restaurant chains their overall meal costs for consumer is further increased relative to the chain.

²⁷¹ Chapter 6 of the Provisional Report (food delivery) page 117 and confidential footnote 295 for specific details.

²⁷² Chapter 6 of the Provisional Report (food delivery) page 118-119 describing marketing commitment.

(e.g., brand awareness campaigns). Therefore, if one has to account for marketing commitment as a restaurant cost for promotions only, the funds that are spent on particular promotional activities must be accounted for rather than the total spend/fund of the commitment.

187. Whilst one of the established platforms attempts to present marketing commitments as some cost carried by international restaurant chains that justifies some level of biasness in the allocation of promotions, the Inquiry is of the view that a balanced approach is required whereby the benefits and opportunities associated with these commitments are also taken into account. Overall, marketing commitments are beneficial to restaurants. Some of the benefits associated with marketing commitments includes:

187.1. The ability to negotiate lower commission fees. Favourable commission fees assist a restaurant to pass-down lower mark-up to consumers in a form of platform menu pricing. They also free up funding that can be utilised on value added services.

187.2. Funds from marketing commitments are utilised in various ways that benefits restaurant performance such as promotions, brand awareness and enhancing campaigns. This in turn impacts positively on the restaurant's sales and order volumes.

188. In essence, the lower commission fees negotiated on the back of marketing commitments enable restaurant chains to use that saving to do promotions that they benefit from, otherwise they would not make the commitment. What this arrangement exposes is that higher commission fees make promotions on the platform more costly and less likely, another way in which independent restaurants are harmed. Promotions already play a material role in driving traffic on the food delivery platforms. As such, either the same

benefit must be extended to independent restaurants or this must be factored into the commission rate discrimination as marketing commitments cannot be used as a reason for such differences. This is because it is the higher commission that means they must forego marketing spend on the platform. A lower difference in commission fees therefore provides the basis to address the marketing issue too.

5.7.2. Adverse effects through relative pricing relative pricing and visibility

189. As indicated above, independent restaurants are not benefiting equitably from promotions compared to other restaurant segments. Furthermore, for some of the platforms, promotions are one of the parameters that influence ranking on the platform. Thus, other restaurant segments that are benefiting more from the allocation of promotions (either through potential bias or marketing commitments) are likely to achieve high levels of visibility and discoverability relative to independent restaurants. In turn, higher discoverability and visibility have the propensity to positively impact on a restaurant's performance on the platform.

190. Similarly, the practice by established platforms whereby they reduce commission fees for restaurants chains in exchange for marketing commitments distorts competition in various ways, including:

190.1. High platform menu pricing for independent restaurants: as indicated under the price differential assessment, lower restaurant commission fees result in lower levels of mark-ups in platform menu pricing. Therefore, restaurant chains that are offered lower commission fees in exchange for marketing commitments are able or flexible in how they mark-up meals on the platform whereas independent restaurants that are not offered the same marketing commitment opportunities are

faced with high commission fees and levels of mark-up. This coupled with promotions biasness implies that the overall platform consumer costs for independent restaurants is raised.

- 190.2. The high commission fees faced by independent restaurants (as a result of lack of commitment opportunities) seem to adversely affect their level of participation in purchasing value added services (such as pay for position or sponsored listings as discussed in detail in the next section). This consequently, affects the independent restaurants' ability to compete with restaurants chains on the established platforms' apps.

5.8. Conclusion

191. The Inquiry maintains that there is a slight bias on platform-funded promotional spend towards international chains relative to independent restaurants, and on restaurant-funded promotional spend the ability to reduce commission fees in exchange for marketing commitments by chains distorts competition on the platform through distorting relative pricing and visibility.

Lack of transparency, participation and spending patterns of business users in pay-for-position

5.9. Provisional Report findings

192. The Inquiry found that lack of transparency over pay-for-position or sponsored ranking distorts consumer choice and ultimately promotes excessive pricing and the sale of sponsored ranking, which in turn distorts business user competition as larger

users outspend smaller ones. The lack of transparency includes the lack of adequate distinction such as a small 'Ad' in the corner, or the use of terms that consumers would not associate with adverts (such as 'featured', 'premium', 'preferred') and which may actively mislead consumers.

5.10. Submissions from stakeholders on transparency and pay-for-position

193. Uber Eats and Mr D Food have made the following submissions with respect to the findings on lack of transparency and spending patterns of different restaurant segments:

- 193.1. Uber Eats' states that its sponsored listings are clearly marked and transparent to customers. In terms of the participation and spending patterns of restaurant segments on sponsored listings, Uber Eats submits that the main beneficiaries of this feature are independent restaurants.
- 193.2. Uber Eats further states that the Inquiry has failed to take into account several factors in its assertion that the structure of Uber Eats' auction and bid process may adversely affect or prevent independent restaurants participation in future – thus the Inquiry's assertion is incorrect.²⁷³
- 193.3. Mr D Food disagrees with the Inquiry's findings on independent restaurants limited participation and spending on premium ranking and its adverse effects on business user competition. In this regard, Mr D Food states that there are several ways in which independent restaurants can gain prominence and visibility on the platform (in addition to and/or other than) premium

273 Uber Eats submits that the Inquiry's assertion in this regard fails to take into account the following evidence on the nature of the sponsored listings feature

[REDACTED]

rankings.²⁷⁴ Further, Mr D Food states that independent restaurants account for significant portion of all promotions run on the platform – this indicates that independent restaurants can and do make use of promotions to gain visibility and prominence on Mr D Food platform – thus, the independent restaurants' limited use of premium ranking is explained by other factors such as independent restaurants use of other packages to gain visibility and prominence and not lack of affordability as suggested by the Inquiry.²⁷⁵

194. One of the restaurant chains submits that it acknowledges the Inquiry's findings and welcomes the concept of better transparency on the platform in relation to restaurant rankings.

5.11. Response to stakeholder submissions on transparency and pay-for-position

195. Lack of advert identification is problematic as ranking influences consumer choice and so the consumer should be aware of whether the higher restaurant position on the platform is attained through payment and/or relevance. It is only when pay-for-ranking position is transparent and clearly marked that consumers can make better and well-informed decisions on whether to click on the higher ranked restaurant that has paid for that position. As highlighted in the Provisional Report, the effects of platform ranking (including pay-for-position) on

consumer choice have been highlighted by the European Commission.²⁷⁶

196. Furthermore, Uber Eats has also confirmed that ranking affects consumer choice, restaurant choice and independent delivery person (this is because the independent delivery person who is near the restaurant is the one that gets chosen to go and deliver that meal).²⁷⁷ The platform also accepts that transparency helps consumers to make better and well-informed decisions.

197. The Inquiry notes that, overall, platforms have not challenged the Inquiry's findings on the importance of transparency and its effects on consumer choice. However, the established platforms seem to disagree with the Inquiry's assertion that lack of transparency promotes excessive pricing and sale of sponsored ranking and business user competition as larger users outspend smaller ones. In this regard, the Inquiry's response focuses on these elements.

5.11.1. The benefits of pay-for-ranking and how it can promote excessive pricing and sale

198. The Inquiry notes that its findings on transparency and pay-for-position forms part of the cross-cutting findings. In this regard, the Inquiry has found that in some platform markets (such as classifieds) pay-for-position as a revenue model is well-matured and there has been excessive sale and pricing of these kind of value-added-services with

274 Mr D Food states that these several ways includes: (i) featured collections, which comprise "swimlanes"/categories of specific restaurant or food types (e.g. "new additions" or "Pizza restaurants"). When clicking on the featured collection, the user is taken to a list of outlets contained within this featured collection, ordered randomly, (ii) D'Luxe Banner is a static banner below the featured collections with a similar functionality and (iii) eater promotions can be used for the restaurant to gain visibility, e.g. "spend R150 and get R50 off". Mr D Food states that such promotions are highlighted to the consumer across the restaurant running the promotion, and Mr D Food will also highlight restaurants that are running promotions.

275 In this regard, Mr D Food submits that (i) in 2021, independent restaurants accounted for around [REDACTED] of all promotions run on the platform, and (ii) in addition, amongst independent restaurants, small restaurants promote more extensively than larger restaurants. In particular, the [REDACTED] of the promotions run by independent restaurants through the Mr D Food platform. In terms of independent restaurants limited participation on premium ranking opportunities, Mr D Food argues that it is far more likely that this is because there are alternative ways in which independent restaurants can increase sales on food delivery platforms.

276 See for instance, Guidelines pursuant to the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. See Official Journal of the European Union C424/1.

277 Uber Eats Public Hearing Transcript dated 11 November 2021.

larger business users outspending smaller ones. With respect to the platform food delivery market, the Inquiry notes that the pay-for-position as a revenue model and a package is maturing and not at the level of classifieds platforms.

199. However, as noted in the Provisional Report, there has been an uptake in pay-for-position packages offered by the established food delivery platforms. These packages (in particular, premium ranking and sponsored listing) allow restaurants to achieve benefits such as (i) gain brand exposure which can later be converted into sales and (ii) increase order volumes and sales.²⁷⁸ These benefits are also acknowledged in the established platforms' internal documents, such as post-campaign reports, advertising programmes and presentations. Therefore, it follows that as restaurants continue using these packages and experience the associated benefits, demand for these packages will increase significantly – as it has already been the case in terms of the increase in the number of restaurants using these packages. As these packages gain prominence from business users, a platform can easily exploit their position (e.g., by raising prices or introducing more packages) – in a manner that favours larger business users with financial muscles.

5.11.2. Restaurant chains are outspending smaller business users in premium ranking package

200. The Inquiry's Provisional Report noted that premium ranking is predominantly purchased by restaurants chains. Moreover, in very few instances where independent restaurant bought premium ranking, they spent far less (e.g., in 2020 the spending was in the range of R5 000 - R30 000) and

advertised for a limited period, compared to restaurant chains that bought premium ranking in large numbers, spent more money and advertised for longer periods.²⁷⁹

201. Mr D Food argues that the independent restaurants limited use of premium ranking is explained by the fact that they make use of other packages (e.g., D'Luxe Banner) to gain visibility and prominence – consequently, increase sales. In Mr D Food's view, independent restaurants limited use of premium ranking cannot be attributed to the high price of the premium ranking package and/or independent restaurants lack of affordability. The Inquiry disagrees with Mr D Food's assertion for the following reasons:

201.1. Premium ranking packages have their own unique benefits that independent restaurants would want to tap into. This explains why restaurant chains purchase premium ranking in addition to making use of other visibility and discoverability packages such as D'Luxe Banner. Some of these benefits include (i) premium ranking guarantees restaurants position one and two ranking on the app for a long period [REDACTED] (ii) Mr D Food internal documents reveal that the purchase of premium ranking results in substantial increase in restaurants' customer views, click through rates, orders volume, food sold etc. – the increase in uplift of orders as a result of premium ranking can be as high as over [significant %] [REDACTED].²⁸⁰

201.2. Any restaurant would want to tap into the benefits associated with premium ranking – however, independent restaurants are denied this opportunity because of various factors, including (i) the pricing of the package results in lack of affordability (ii)

278 Chapter 6 of the Provisional Report (food delivery) page 108 and 109 describing benefits associated with pay-for-position packages.

279 Chapter 6 of the Provisional Report (food delivery) page 109 (paragraph 287) noted that independent restaurants spending (collectively) for a full year can be less than 30 000 whilst one restaurant chain spending for six months can be more than R100 000.

280 See Mr D Food submissions dated 10 September 2021 – in particular post-campaign report on premium ranking.

[illegible]

205. The Inquiry notes Uber Eats' assertions. Further, on current evidence it appears that independent restaurants are participating in sponsored listing and deriving the associated benefits. It is only when the uptake in sponsored listing by restaurants chains increases significantly that the outcome and the effects on independent restaurants may be observed. Notwithstanding Uber Eats submissions and affirmations, the Inquiry is still of the view that the bidding and auction process by nature is susceptible to dominance by bidding players with financial resources as seen in markets with more extensive use of ranking.

206. It is important to emphasise that the auction and bidding process is somehow dependent on the financial resources of a restaurant. There are [REDACTED] inputs that go into determining if a restaurant 'wins' the auction and appears as a sponsored listing to the user - these inputs are [REDACTED]. Based on these factors, it is evident that the restaurant's financial resources are critical to its participation in the auction. In particular, factors such as the restaurant's [REDACTED] budget towards participating and the ability to set the [REDACTED] cost per click bid are crucial in winning the auction.

207. Using Mr D Food's premium ranking as a benchmark, it is evident that once restaurant chains see value in utilising pay-for-position products, they increase uptake and are willing to spend hundreds of thousands of rands to attain top position whilst on

COMPETITION COMMISSION | 467

the other hand Uber Eats' database shows that most of the independent restaurants fall within the R1000 - R10 000 spending brackets on pay-for-position.²⁸² This phenomenon explains the Inquiry's concerns with the future participation of independent restaurants on pay-for-position, especially once the restaurant chains' uptake increases.

5.11.4. Lack of independent restaurants participation and being outspend on premium ranking distort competition

208. As demonstrated above, the participation of independent restaurants on premium ranking is extremely limited; this feature is predominantly used by restaurant chains. Therefore, independent restaurants do not tap into the opportunities and benefits associated with premium ranking. It appears that the lack of effective participation by independent restaurants is as a result of the high costs associated with premium ranking packages. Moreover, high commission fees charged by established platforms on independent restaurants²⁸³ may also have adverse effects on their ability to effectively participate on paid for ranking packages such as premium packages.

5.12. Conclusion

209. the Inquiry maintains that some established platforms are not transparent on restaurants that have attained prominent ranking through the purchasing of ranking packages. This has a negative impact on, among other things, customer choice. The Inquiry also maintains that lack of participation in pay-for-position by independent restaurants (driven by, *inter alia*, high commission fee or cost of the package) or instances where larger users outspend smaller ones similarly distort business user competition.

282 See Chapter 6 of the Provisional Report (food delivery) page 111 (paragraph 291).

283 The Inquiry refers to the high commission fees charged to small independent restaurants relative to what established platforms charge national restaurants chains - the price discrimination assessment revealed that the price differentials are large and extremely significant.

[6. Remedial actions]

6.1. Remedial actions from the Provisional Report

210. The Inquiry's provisional proposed several remedial actions to address food delivery (i) platform competition issues, (ii) business user competition issues and (iii) participation of HDPs. These remedial actions were largely applicable to leading platforms, namely, Uber Eats and Mr D Food. The Inquiry called for submission from relevant stakeholders on the following remedial actions:

Platform competition

211. The proposed remedial actions to address platform competition issues are as follows:

- 211.1. Leading food delivery platforms may not contract with national restaurant chains in a manner that incentivises them to limit multi-homing and direct restaurant numbers and volumes to the leading delivery platforms only.
- 211.2. International and national restaurant chains may not restrict their franchisees' choice of local food delivery platform, and must communicate the lack of restrictions to franchisees.
- 211.3. Removal of price parity clauses from contracts and communication to all restaurants that they are free to price their menu differently across delivery platforms and their own direct channels.
- 211.4. Remedial action to end predatory conduct at a local / regional area level or individual restaurant chain on a temporary or ongoing basis, or alternative the Commission to consider investigation and prosecution of predatory conduct as a suitable deterrent.
- 211.5. Greater transparency to the consumer of either the menu surcharge for each restaurant on the platform relative to

their take-away or dine-in menu, and/or the share of meal payment accruing to the delivery platform as opposed to the restaurant.

Business user competition

212. The proposed remedial actions to address business user competition issues are as follows:

- 212.1. Implement a standardised rate card that complies with a maximum cap on fee differentiation between the average low volume user category and the average high volume user categories, including both listing and promotional fees.²⁸⁴
- 212.2. A standardised and equitably rate card offer on the exchange of commission fees for marketing commitments across all restaurants on the platform.

Cross cutting remedies: visibility and transparency

213. The proposed remedial actions to address competition issues are as follows:

- 213.1. Paid results (i.e. results in whole or part based on payments including increased commission fees) integrated into the search results are required to be clearly distinguishable as advertising including (i) both prominent shading and border, (ii) a large, bold and unambiguous 'ADVERT' label in the middle above the impression; and/or
- 213.2. The top (or first) search results screen may only have organic (or natural) search results and any paid results can only appear once the consumer has scrolled down (i.e. paid results may not appear until after the 'fold' on a desktop and the scroll point on a mobile search results page); and

²⁸⁴ The Inquiry noted that it was of the view that the extent of discrimination needs to be limited and the provisional view was that a limit within the range of 10-15% would allow for differences in relative value whilst not harming SMEs and HDPs.

213.3. Register with the Advertising Regulatory Board (ARB) to subject their practices to the current Code of Advertising and develop an online intermediation platform specific Annexure of good practices.

Participation of HDPs

214. The proposed remedial actions to address the participation of HDPs at the online platform and business user levels are as follows:

215. At platform level:

215.1. Government to make funding available to support HDP entrepreneurs in digital markets using the fund mandate model whereby venture capital firms are given a mandate to disburse the funds only to HDP entrepreneurs and with a proportion allocated to seed funding (or incubators and accelerators), and to achieve certain transformation targets of their own.

215.2. Commitments from leading financial institutions and large tech companies to also impose mandates on a portion of venture capital funding and demand transformation of the VC funds.

216. At business user level:

216.1. Leading platforms are required to institute an HDP programme targeted at overcoming barriers to participation, that should include the following minimum components:

216.1.1 Personalised assistance with platform onboarding;

216.1.2 Waiver of onboarding costs or fees;

216.1.3 Fees that are no higher than the best placed business users;

216.1.4 Credits for platform promotional activity; and

216.1.5 Identification and discoverability on the platform by HDP designation if authorised by the HDP business user.

6.2. Leading platforms submissions to the Inquiry's provisional remedies

217. As already indicated, leading platforms largely do not agree with the Inquiry's findings. Similarly, in their response or comments to the Inquiry's Provisional Report these leading platforms indicated that they also do not agree with the provisional remedial actions. Some of the reasons provided for not agreeing with the remedies include:²⁸⁵

Platform competition:

218. Contracting with national chains and incentives offered remedy: established platforms states that it is unclear which contract incentives and/or loyalty inducements the Inquiry is concerned of and/or tries to remedy – it should be made clear which particular clauses are of concern.²⁸⁶

219. Menu surcharge and transparency: the established platforms submits that the remedy is subject to significant practical difficulties and unintended adverse effects on competition and the participation of restaurants.²⁸⁷

285 Many of the reasons are similar to the one provided under findings – for instance reasons on predatory pricing. The Inquiry highlights few reasons for completeness.

286 Uber Eats submits that in the absence of further guidance as to what features of Uber Eats' contractual arrangements or negotiations with chains are incentivising such conduct, it is unclear how Uber Eats would go about implementing this remedial action.

287 Mr D Food submits amongst others that (i) it would be inappropriate to require it to reveal confidential information and competitively sensitive information in the form of the actual prices it has agreed with each particular restaurant to every customer who uses its app. This may amount to a breach of duties of confidentiality in the first place (ii) the publication of the commission fees charged by each of the leading food delivery platforms would also serve to reduce the bargaining power of all restaurants in negotiations with food delivery platforms, since the food delivery platform would have increased knowledge of the outside options of the restaurant in question. This can naturally be expected to increase the commission fees charged by all food delivery platforms to restaurants – to the detriment of restaurant participation, competition, and consumer welfare. These outcomes are not justified by the stated intention of giving consumers transparency and (iii) It is simply not possible for Mr D Food to specify what the restaurant menu price difference is between the menu listed on Mr D Food and the menu listed on other platforms or in-store. This is because Mr D Food has no knowledge of that information.

220. Pricing parity: Uber Eats does not consider that it is necessary to address a communication to restaurants using its platform which clarifies that price parity clauses do not form part of their contracts and that there is no restriction on them pricing their menu differently across delivery platforms and their own direct channels.

Business user competition:

221. Price discrimination and marketing commitment remedy: established platforms argues that the remedy will have negative effects on established platforms business operations – in particular long-term sustainability of the platform.²⁸⁸

Cross-cutting remedies

222. With respect to the second cross cutting remedy²⁸⁹ it is submitted that it has unintended adverse consequences for business users and consumers. Furthermore, the financial impact of the remedy on the platform would be significant.²⁹⁰

223. With respect to the third cross cutting remedy,²⁹¹ it is submitted that it is untoward to seek to oblige any particular retailer to join

the Advertising Regulatory Board (“ARB”) and to pay its annual subscription fees.

Participation of HDPs

224. Established platforms submits that they are aligned with the Inquiry and share the goal of creating an inclusive economy – they aim to play an active part in creating an environment where HDPs and small business can flourish.²⁹²

225. As discussed below, although established platforms did not agree with the findings and remedies, they engaged with the Inquiry through a series of meetings and written submissions. During this process, established platforms tendered some commitments and alternative remedies to address the Inquiry’s concerns. For instance, Uber Eats agreed and/or committed to sending restaurants communication that parity pricing was no longer in place, applicable and/or enforceable. Thus, the Inquiry has taken into account these engagements in formulating final remedies and recommendations.

288 Mr D Food submits the following with respect to price discrimination (i) it is not yet profitable and would therefore be required to increase the fees that it charges to consumers in order to offset a reduction in commission fees charged to smaller restaurants (ii) if delivery fees or other fees charged to consumers are increased this will likely result in fewer sales being made through the platform, and the growth of the platform being impeded, particularly given that consumers are highly contestable and face a range of alternatives to food delivery platforms (iii) this means that the Mr D Food platform would be unable to benefit from economies of scale that are likely to be crucial in ensuring its long-term sustainability and would thereby undermine the benefits that the platform is able to generate for smaller restaurants going forward in the form of an additional sales channel. Uber Eats argues that the (i) generalised reference to a differential of 10% to 15% would result in an extremely narrow fee range and limited ability for the fees to reflect the value-add that different categories of restaurant bring to the platform (ii) price regulation would constrain Uber Eats’ ability to respond to changing market circumstances and competition on the merits in the context of a highly dynamic three-sided marketplace where prices on all three sides of the marketplace are interdependent and (iii) the proposed remedial action is likely to have significant detrimental consequences that outweigh any potential benefits.

289 The remedy that the top (or first) search results screen may only have organic (or natural) search results and any paid results can only appear once the consumer has scrolled down (i.e. paid results may not appear until after the ‘fold’ on a desktop and the scroll point on a mobile search results page).

290 Mr D Food submits that this remedy would also impede the ability of small marketplace sellers to have their products discovered and all of them would have to rely entirely on organic rankings. This would limit the exposure of new products with no sales history for both big brand suppliers and marketplace sellers. It would also remove the ability of sellers to drive customers towards their particular products.

291 Register with the Advertising Regulatory Board (ARB) to subject their practices to the current Code of Advertising and develop an online intermediation platform specific Annexure of good practices.

292 For instance, (i) Mr D Food through Takealot.com indicates that it aims to implement meaningful initiatives for HDPs in the form of curated onboarding support, launching a support programme that provides mentorship and skills development, and initiating a HDPs needs analysis to ensure that the barriers to entry for HDPs are accurately identified and mitigated and (ii) Uber Eats submits that it recognises the importance of the policy objectives that the Inquiry is seeking to promote through this remedial action and supports the principle of inclusive growth in South Africa. Furthermore, Uber Eats believes that it operates a platform which can be, and is, used to increase the effective participation of SMBs in South Africa, a number of which are owned by HDPs.

6.3. Other stakeholders submission to the Inquiry’s provisional remedies

226. As noted in the previous sections:

- 226.1. Bolt Food largely agrees with the Inquiry’s findings – it has also indicated that it agrees with the proposed provisional remedies. Further, [REDACTED]
- 226.2. Smaller platforms: smaller restaurants chains have indicated the importance of funding to compete against established platforms aggressive marketing and promotional tactics (Dryvar and Buzz Delivery) – thus the remedy on funding it is welcomed. Similar, to Bolt Food, Paarl Eats noted the importance of remedy on restaurant chains and franchisees appointing their own delivery partner.
- 226.3. Restaurant chains: the results from the restaurant chains (on access to restaurant chains) are mixed as discussed under platform competition issues section. Some chains indicated that they are already in compliant with the remedy whilst other chains do not agree with the findings and the proposed remedy.

6.4. Inquiries response to stakeholder submissions and final remedial actions

- 227. The Inquiry notes that it has engaged extensively with amongst others restaurant chains and established platforms before finalising its remedial actions. Some of these engagements occurred subsequent to the publication of the Provisional Report and comments on the Provisional Report by stakeholders. The main aim of engagements that occurred subsequent to the comments on the Provisional Report by stakeholders was to (i) discuss their submissions (i.e., comments to the Provisional Report) in details (ii) understand whether there are any alternative remedies to address the Inquiry’s concerns and (iii) provide an update on how the Inquiry’s thinking was evolving overtime after engaging various stakeholders.²⁹³
- 228. The Inquiry notes that, *albeit*, not agreeing with the findings, some platforms presented alternative remedies and/or commitments to address some of the Inquiry’s findings – thus, in determining the final remedies, the Inquiry has taken into account all the submissions (including extensive engagements by way of meetings and written submissions on remedies). The final remedies are provided in the final report and decision.

293 For instance, the Inquiry would provide an update in terms of certain remedial actions it was planning to amend in line with stakeholder submissions (e.g., see discussions below on menu-surcharge) and subsequent to the engagement with the relevant stakeholder request a written submissions in terms of the planned amendments.

APPENDIX 1: MENU PRICING COMPARISON - COMPILED IN NOVEMBER 2022

Restaurant chains

National Chains	Type of Meal	In-Store Menu Prices	Own App Menu Prices	Third Party App Menu Prices		Mark-up on Prices (%)			Commission Fee (%)	
				Uber Eats	Mr D Food	In-Store vs Own App	In-Store vs 3rd Party App (Uber)	In-Store vs 3rd Party App (MrD)	Uber Eats	Mr D Food
YUM! BRANDS INC: NEWYORK STOCK EXCHANGE LISTED										
KFC	Steer wise 2	34,90	34,90	41,90	41,90	0,00%	20,06%	20,06%	Confidential	
	10 Zinger wings	69,90	69,90	84,90	84,90	0,00%	21,46%	21,46%		
Pizza Hut	untoppable double large	149,90	149,90	179,88	179,88	0,00%	20,00%	20,00%		
	hutdouble large pizzas	199,90	199,90	239,88	239,88	0,00%	20,00%	20,00%		
McDONALD's CORPORATION: NEWYORK STOCK OF EXCHANGE LISTED										
McDonald	Big Mac Medium Meal	66,90	78,00	84,80	87,00	16,59%	26,76%	30,04%	Confidential	
	McFeastMedium	99,90	118,30	126,50	129,90	18,42%	26,63%	30,03%		
	Veggie Burger	62,00	74,00	78,60	80,90	19,35%	26,77%	30,48%		
FAMOUS BRANDS: JOHANNESBURG STOCK EXCHANGE LISTED										
Debonairs	Something Meaty Medium	81,90	81,90	94,90	94,90	0,00%	15,87%	15,87%	Confidential	
	Hawaiian Medium	64,90	64,90	71,90	71,90	0,00%	10,79%	10,79%		
	Original Veggie	64,90	64,90	71,90	71,90	0,00%	10,79%	10,79%		
Steers	on&Cheese Chicken Burger M	69,90	69,90	94,90	89,90	0,00%	35,77%	28,61%		
	Single Pork Rib Meal	129,90	129,90	159,90	159,90	0,00%	23,09%	23,09%		
	Original Ribster Burger Meal	54,90	54,90	74,90	74,90	0,00%	36,43%	36,43%		
Wimpy	familyburger meal	139,90	139,90	169,90	169,90	0,00%	21,44%	21,44%		
	Ultimate meaty feast	189,90	189,90	209,90	209,90	0,00%	10,53%	10,53%		
	chicken wings	109,90	109,90	129,90	129,90	0,00%	18,20%	18,20%		
FishAways	Trio Familymeal	179,90	179,90	230,90	230,90	0,00%	28,35%	28,35%		
	family platter	259,90	259,90	329,90	329,90	0,00%	26,93%	26,93%		
	Hake and prawn platter	189,90	189,90	230,90	230,90	0,00%	21,59%	21,59%		
Mugg & Bean	Classic Breakfast	75,00	75,00	99,00	99,00	0,00%	32,00%	32,00%		
	south african fam	119,00	119,00	140,00	140,00	0,00%	17,65%	17,65%		
	South African Benedict	89,00	89,00	129,00	129,00	0,00%	44,94%	44,94%		
SPUR CORPORATION										
Spur	Buffalo Mighty Combo	199,90	199,90	239,90	239,90	0,00%	20,01%	20,01%	Confidential	
	Single Cheese Burger	96,90	96,90	115,90	115,90	0,00%	19,61%	19,61%		
	Lamb Chops	239,90	239,90	287,90	287,90	0,00%	20,01%	20,01%		
	Full chicken Schnitzels	134,90	134,90	161,90	161,90	0,00%	20,01%	20,01%		
	12 Buffalo wings	114,90	114,90	137,90	137,90	0,00%	20,02%	20,02%		
RocoMamas	Bacon Cheese Guac Burger	92,00		120,00	120,00		30,43%	30,43%		
	Mushroom Swizz Burger	86,00		112,00	112,00		30,23%	30,23%		
	Old Skool Burger	57,00		74,00	74,00		29,82%	29,82%		
Panarottis	Chicken Chopped Salad	109,90	109,90	131,90	131,90	0,00%	20,02%	20,02%		
	Peper Steak Sub	69,90	69,90	83,90	83,90	0,00%	20,03%	20,03%		
	Hawaiian Pizza	104,90	104,90	125,90	125,90	0,00%	20,02%	20,02%		
OTHER CHAINS										
Mochado's	Chicken Burger	49,90	39,90	59,90	59,90	-20,04%	20,04%	20,04%	Confidential	
	Chicken strips ,Chips and Di	59,90	49,90	69,90	69,90	-16,69%	16,69%	16,69%		
	familyVariety	199,99	169,90	234,90	234,90	-15,05%	17,46%	17,46%		
	Chicken Shawarma	64,90	52,90	74,90	74,90	-18,49%	15,41%	15,41%		
Nando's	Full chicken + 1 sharing side	209,00		261,00	261,00		24,88%	24,88%		
	Grilled Chicken Salad	72,00	72,00	90,00	90,00	0,00%	25,00%	25,00%		
	1/4 Chicken + Single side	53,00	53,00	66,00	66,00	0,00%	24,53%	24,53%		
Chicken Licken	LunchMeal	64,00		88,00	88,00		37,50%	37,50%		
	12 hotwings	73,00		95,00	95,00		30,14%	30,14%		
	Big john (Top Deluxe)	64,90		83,00	83,00		27,89%	27,89%		

Independent Restaurants

Independent Restaurants	Type of Meal	Location	Meal Type	In-Store Menu Prices	Third Party App Menu Prices		Mark-up on Prices (%)		Commission Fee (%)	
					UberEats	Mr D Food	In-Store vs 3rd Party App (Uber)	In-Store vs 3rd Party App (MrD)	Uber Eats	Mr D Food
Vito's Pizza & Supermarket	1/4 Chicken	Pretoria , North	Various: Pizza, Chicken, Kota, Burger, etc	24,90	37,90	37,90	52%	52%	Confidential	
	1/2 Kg Ribs	Pretoria , North	Various: Pizza, Chicken, Kota, Burger, etc	74,90	124,90	124,90	67%	67%		
	Chicken burger	Pretoria , North	Various: Pizza, Chicken, Kota, Burger, etc	25,90	38,90	38,90	50%	50%		
	Gusheshe	Pretoria , North	Various: Pizza, Chicken, Kota, Burger, etc	31,90	47,90	47,90	50%	50%		
	Three meats	Pretoria , North	Various: Pizza, Chicken, Kota, Burger, etc	99,90	149,90	144,90	50%	45%		
Braai Block	Braaishare 4	Pretoria, Sunny side	Shisanyama: braai & grill meat, chicken, etc	185,00	244,20	234,95	32%	27%		
	Braai Brisket	Pretoria, Sunny side	Shisanyama: braai & grill meat, chicken, etc	54,50	71,94	69,22	32%	27%		
	Braai Fish	Pretoria, Sunny side	Shisanyama: braai & grill meat, chicken, etc	71,99	95,03	91,43	32%	27%		
	Braai Lamb	Pretoria, Sunny side	Shisanyama: braai & grill meat, chicken, etc	72,50	95,70	92,08	32%	27%		
	Braai Chicken	Pretoria, Sunny side	Shisanyama: braai & grill meat, chicken, etc	67,50	89,10	85,73	32%	27%		
Kota King	King Licious Kota	Pretoria, Sunny side	Kota	35,00	52,00	52,00	49%	49%		
	chicken O'nice Kota	Pretoria, Sunny side	Kota	55,00	72,00	72,00	31%	31%		
	King Single	Pretoria, Sunny side	Kota	40,00	57,00	57,00	43%	43%		
	After School	Pretoria, Sunny side	Kota	30,00	35,70	42,00	19%	40%		
	King Double	Pretoria, Sunny side	Kota	70,00	87,00	87,00	24%	24%		
Pappa G's Wood Fired Pizzas and Kota Kings, Waterkloof Glen	Margharita Plain	Pretoria, Waterkloof Glen	Various: Pizza, Chicken, Kota, Burger, etc	70,00	90,00		29%			
	Regina	Pretoria, Waterkloof Glen	Various: Pizza, Chicken, Kota, Burger, etc	85,00	110,00		29%			
	Spae rib	Pretoria, Waterkloof Glen	Various: Pizza, Chicken, Kota, Burger, etc	95,00	125,00		32%			
	Hot dog	Pretoria, Waterkloof Glen	Various: Pizza, Chicken, Kota, Burger, etc	95,00	120,00		26%			
	SloppyG	Pretoria, Waterkloof Glen	Various: Pizza, Chicken, Kota, Burger, etc	105,00	135,00		29%			
Toni's FullyFurnished Pizza Co.	Focaccia	Pretoria, Riefontein	Various: Pizza, Pasta, Salads, etc	48,00	60,00	60,00	25%	25%		
	Inferno	Pretoria, Riefontein	Various: Pizza, Pasta, Salads, etc	115,00	143,00	143,00	24%	24%		
	Toni's Regina	Pretoria, Riefontein	Various: Pizza, Pasta, Salads, etc	105,00	124,00	124,00	18%	18%		
	Mediterranean	Pretoria, Riefontein	Various: Pizza, Pasta, Salads, etc	145,00	167,00	167,00	15%	15%		
	Mexican	Pretoria, Riefontein	Various: Pizza, Pasta, Salads, etc	129,00	155,00	155,00	20%	20%		
Burger Box	Roadhouse burger	Pretoria, Roadhouse	Burger, Pizza, chicken, etc	49,90	64,90	64,90	30%	30%		
	Cheese burger	Pretoria, Roadhouse	Burger, Pizza, chicken, etc	56,90	72,90	73,90	28%	30%		
	pine burger	Pretoria, Roadhouse	Burger, Pizza, chicken, etc	54,90	71,90	71,90	31%	31%		
	egg Burger	Pretoria, Roadhouse	Burger, Pizza, chicken, etc	56,90	72,90	73,90	28%	30%		
	Bacon Burger	Pretoria, Roadhouse	Burger, Pizza, chicken, etc	62,90	76,90	81,90	22%	30%		
Ciao Pizza	Margharita Pizza	Cape town, Long Street	Pizza, Burger, etc	110,00	135,00	135,00	23%	23%		
	Pchicken Special Pizza	Cape town, Long Street	Pizza, Burger, etc	150,00	185,00	185,00	23%	23%		
	Salami Special	Cape town, Long Street	Pizza, Burger, etc	140,00	175,00	175,00	25%	25%		
	Bianco Pizza	Cape town, Long Street	Pizza, Burger, etc	110,00	135,00	135,00	23%	23%		
	The Mediterranean	Cape town, Long Street	Pizza, Burger, etc	168,00	199,00	199,00	18%	18%		

Restaurant chains (2023)²⁹⁴

National Chains	Type of Meal	In-Store Menu Prices	Own App Menu Prices	Third Party App Menu Prices		Mark-up on Prices (%)			Commission Fee (%)	
				Uber Eats	MrD Food	In-Store vs Own App	In-Store vs 3rd Party App (Uber)	In-Store vs 3rd Party App (MrD)	Uber Eats	MrD Food
YUM! BRANDS INC: NEWYORK STOCK EXCHANGE LISTED										
KFC	Steer wise 2	39.90	39.90	47.90	47.90	0.00%	20.85%	20.85%	Confidential	
	10 Zinger wings	72.90	72.90	87.90	87.90	0.00%	20.58%	20.58%		
Pizza Hut	untoppable double large	159.90	159.90	183.90	183.90	0.00%	15.01%	15.01%		
	hutdouble large pizzas	209.90	209.90	241.40	241.40	0.00%	15.01%	15.01%		
McDONALD'S CORPORATION: NEWYORK STOCK OF EXCHANGE LISTED										
McDonald	Big Mac Medium Meal	66.90	78.00	93.00	93.00	16.89%	39.76%	39.76%	Confidential	
	Mc Feast Medium	99.90	118.30	140.90	140.30	18.42%	41.04%	40.44%		
	Veggie Burger	62.00	74.00	81.90	81.90	19.35%	32.99%	32.10%		
FAMOUS BRANDS: JOHANNESBURG STOCK EXCHANGE LISTED										
Debonairs	Something Meaty Medium	89.90	89.90	105.90	105.90	0.00%	17.80%	17.80%	Confidential	
	Hawaiian Medium	73.90	73.90	85.90	85.90	0.00%	16.24%	16.24%		
	Original Veggie	73.90	73.90	85.90	85.90	0.00%	16.24%	16.24%		
Steers	on & Cheese Chicken Burger M	79.90	79.90	94.90	94.90	0.00%	18.77%	18.77%		
	Pork loin Ribs & 1/4 chicken	289.90	289.90	329.90	329.90	0.00%	13.80%	13.80%		
	Original Ribster Burger Meal	54.90	54.90	79.90	79.90	0.00%	45.54%	45.54%		
Wimpy	Big champion	119.90	119.90	184.90	119.90	0.00%	54.21%	0.00%		
	Ultimate meaty feast	209.90	209.90	229.90	229.90	0.00%	9.53%	9.53%		
	thrill of the grill	87.90	87.90	106.90	106.90	0.00%	21.62%	21.62%		
FishAways	Trio Familymeal	189.90	189.90	242.90	242.90	0.00%	27.91%	27.91%		
	family platter	299.90	299.90	348.90	348.90	0.00%	15.67%	15.67%		
	Take and go in platter	199.90	199.90	242.00	242.00	0.00%	21.06%	21.06%		
Mugg & Bean	Classic Breakfast	99.00	99.00	110.00	110.00	0.00%	11.11%	11.11%		
	south african fam	129.00	129.00	155.00	155.00	0.00%	20.16%	20.16%		
	South African Benedict	112.00	112.00	140.00	140.00	0.00%	25.00%	25.00%		
SPUR CORPORATION										
Spur	Ribs & Buffalo Wigs Combo	244.90	244.90	300.90	300.90	0.00%	22.87%	22.87%	Confidential	
	Single Cheese Burger	112.90	112.90	138.90	138.90	0.00%	23.03%	23.03%		
	Lamb Chops	269.90	269.90	331.90	331.90	0.00%	22.97%	22.97%		
	Full chicken Schnitzels	149.90	149.90	183.90	183.90	0.00%	22.68%	22.68%		
	10 Buffalo wings	184.90	184.90	226.90	226.90	0.00%	22.71%	22.71%		
RocoMamas	Bacon Cheese Gato Burger	95.00		117.00	117.00		23.16%	23.16%		
	Multroom Swiss Burger	89.00		109.00	109.00		22.47%	22.47%		
	Old Skool Burger	59.00		73.00	73.00		23.73%	23.73%		
Panaroti's	Chicken Caesar Salad	134.90	134.90	166.90	166.90	0.00%	23.72%	23.72%		
	Peper Steak pizza	149.90	149.90	184.90	184.90	0.00%	23.35%	23.35%		
	Hawaiian Pizza	112.90	112.90	138.90	138.90	0.00%	23.03%	23.03%		
OTHER CHAINS										
Mochado's	Chicken Burger	49.90	39.90	59.90	59.90	-20.04%	20.04%	20.04%	Confidential	
	Chicken strips ,Chips and Dr	59.90	49.90	69.90	69.90	-16.69%	16.69%	16.69%		
	family Variety	199.99	169.99	234.90	234.90	-15.05%	17.46%	17.46%		
	Chicken Shawarma	64.90	52.90	74.90	74.90	-18.49%	15.41%	15.41%		
Nando's	Full chicken + 1 sharing side	219.00		274.00	274.00		25.11%	25.11%		
	Grilled Chicken Salad	79.00	79.00	99.00	99.00	0.00%	25.32%	25.32%		
	1/4 Chicken + Single side	57.00	57.00	71.00	71.00	0.00%	24.56%	24.56%		
Chicken Licken	Lunch Meal	69.00		95.00	95.00		37.68%	37.68%		
	24 hotwings	160.00		208.00	208.00		30.00%	30.00%		
	Big John (Top Deluxe)	68.00		88.00	88.00		29.41%	29.41%		

294 This is the most recent data (May 2023) on restaurant chains compiled by the Inquiry.

APPENDIX A: STAKEHOLDER ENGAGEMENTS

List of all stakeholder engagements after the publication of the Provisional Report: submissions and meetings (In-Camera):

Submissions

Submission made by	Stakeholder type	Submission date
Uber Eats	Platform	10-Sep-2022
Uber Eats	Platform	30-Sep-2022
Uber Eats	Platform	27-Oct-2022
Uber Eats	Platform	11-Nov-2023
Uber Eats	Platform	28-Nov-2022
Uber Eats	Platform	5-Dec-2022
Uber Eats	Platform	9-Dec-2022
Uber Eats	Platform	23-Jan-2023
Uber Eats	Platform	27-Jan-2023
Uber Eats	Platform	28-Feb-2023
Uber Eats	Platform	13-Jun-2023
Uber Eats	Platform	15-Jun-2023
Uber Eats	Platform	27-Jun-2023
Uber Eats	Platform	4-Jul-2023
Uber Eats	Platform	21-Jul-2023
Mr D Food	Platform	16-Sep-2022
Mr D Food	Platform	6-Oct-2022
Mr D Food	Platform	30-Nov-2022
Mr D Food	Platform	14-Dec-2022
Mr D Food	Platform	14-Apr-2023
Mr D Food	Platform	5-May-2023
Mr D Food	Platform	12-May-2023
Mr D Food	Platform	17-May-2023
Mr D Food	Platform	23-May-2023
Mr D Food	Platform	25-May-2023
Mr D Food	Platform	15-Jun-2023
Mr D Food	Platform	3-Jul-2023
Mr D Food	Platform	20-Jul-2023
Bolt Food	Platform	6-Sep-2022
Bolt Food	Platform	4-Oct-2022

[illegible]

Meetings (In-Camera)

Meeting held with	Stakeholder type	Meeting date
Paarl Eats	Platform	26-Aug-2022
WeDash	Platform	29-Aug-2022
Uber Eats	Platform	29-Nov-2022 / 16 May-2023 / 20-Jun-2023
Mr D Food	Platform	26-Sep-2022 / 30-Nov-2022 / 11 May-2023 / 29-May-2023 / 26-Jun-2023 / 10-Jul-2023
Bolt Food	Platform	28-Oct-2022 / 16-May-2023