



Malaysia Competition Commission

Case No.700/1/3/2/2019

Competition Act 2010 [Act 712]

The Decision of the Competition Commission

Non-infringement of Section 10(1) of the Competition Act 2010

Competition Commission

v.

Delivery Hero (Malaysia) Sdn. Bhd.

Finding of Non-infringement under Section 39 of the Competition Act
2010

DATED: 11 SEPTEMBER 2023

NON-INFRINGEMENT DECISION

This Decision was deliberated and unanimously decided by the following Members of the Commission:

- (i) Dato' Seri Mohd Hishamudin Bin Md Yunus (Chairman);
- (ii) Dr. Nor Mazny Binti Abdul Majid;
- (iii) Dato' Ir. Haji Mohd Jamal Bin Sulaiman;
- (iv) Dr. Nasarudin Bin Abdul Rahman;
- (v) Encik Arunan A/L K.Kumaran;
- (vi) Encik Wan Mohd Rosdi Bin Wan Dolah;
- (vii) Ir. Rusman Bin Abu Samah; and
- (viii) Encik Surya Putra Bin Dato Mohamed Taulan

DATED: 11 SEPTEMBER 2023

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EXECUTIVE SUMMARY

1. This Decision (“the Decision”) concludes that Delivery Hero (Malaysia) Sdn. Bhd. has not infringed section 10(1) of the Competition Act 2010 [Act 712] (“the Act”).
2. This Decision is issued pursuant to section 39 of the Act which provides that –

39. Finding of non-infringement.

Where the Commission has made a decision that there is no infringement of a prohibition under Part II, the Commission shall, without delay, give notice of the decision to any person who is affected by the decision stating the facts on which the Commission bases the decision and the Commission’s reason for making the decision.

3. The investigation was conducted pursuant to a ministerial direction dated 21.10.2019 issued by the Ministry of Domestic Trade and Consumer Affairs¹ (“KPDNHEP”) pursuant to section 14(2) of the Act.

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¹ As of the date of the issuance of this Decision, the Ministry of Domestic Trade and Consumer Affairs has been renamed to the Ministry of Domestic Trade and Cost of Living.

4. Section 14(2) of the Act provides –

14. Investigation by the Commission.

(1) ...

(2) The Commission shall, on the direction of the Minister, investigate any suspected infringement of any of the prohibition or commission of an offence under this Act.

5. The Commission identifies the alleged conduct, which is the subject matter of the investigation, as the imposition of an exclusivity clause in the agreement between Foodpanda and its merchants² in an arrangement known as the ‘Preferred Partnership Category’. Such an arrangement has the likelihood to exclude its competitors as the conduct may induce merchants to subscribe to the Preferred Partnership Category to obtain a lower commission rate, thereby resulting in the distortion of the competition process.
6. The suspected infringement involved the imposition of an exclusivity clause by Foodpanda on its merchants in the Preferred Partnership Category in the intermediary online platform market matching customers, merchants, and delivery partners for the provision of online food ordering and delivery services from the year 2018 to 2021 in Malaysia. The closing date of the Commission’s investigation of the present case was 9.5.2023.

² The word “merchants” refers to restaurants in the following context.

7. The Commission, having investigated the suspected infringement, concludes that Foodpanda has not infringed section 10(1) of the Act.

8. After the conclusion of the investigation, the Commission has collaborated closely with KPDNHEP to proactively address the challenges within the food delivery services industry. The details of the measures are outlined in the **Appendix** to tackle the identified issues and foster positive change.

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PART 1: THE FACTS

A. THE ENTERPRISE CONCERNED

9. The enterprise under investigation popularly known as “Foodpanda”, is formally known as Delivery Hero Malaysia Sdn. Bhd. (Company Registration Number: 989567-W)³. On 28.7.2020, Foodpanda changed its name from Foodpanda (Malaysia) Sdn. Bhd. to Delivery Hero Malaysia Sdn. Bhd.⁴
10. Despite the change of name, Delivery Hero Malaysia Sdn. Bhd is still commercially known as “Foodpanda”. For the purpose of this Decision, Delivery Hero Malaysia Sdn. Bhd. shall be referred to as “Foodpanda”.
11. Foodpanda is a private limited company that was registered on 7.5.2012 and is engaged in the provision of an online platform service that facilitates transactions between third-party sellers and buyers. Foodpanda is also engaged in the food delivery business.⁵
12. Foodpanda’s registered address is Unit No. 17-2, Level 17, Wisma UOA II, No. 21 Jalan Pinang, Kuala Lumpur, Malaysia. Foodpanda operates in over 60 cities across Malaysia and has over 60,000 merchants and 30,000 delivery partners. There are four types of businesses under the Foodpanda brand, namely, the online food

³ Companies Commission of Malaysia search on Delivery Hero Malaysia Sdn Bhd dated 16.6.2021.

⁴ Certificate of incorporation on Change of Name.

⁵ Companies Commission of Malaysia search on Delivery Hero Malaysia Sdn Bhd dated 16.6.2021.

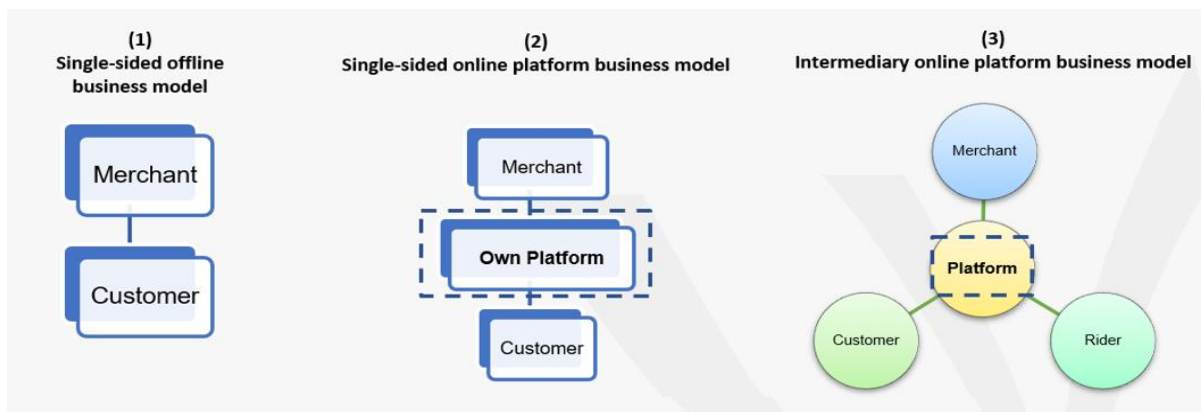
delivery platform, cloud kitchen⁶, on-demand delivery service that helps to send items, and a one-stop shop designed for grocery delivery.

B. BUSINESS AND INDUSTRY LANDSCAPE

B.1 Food Ordering and Delivery Industry in Malaysia

13. There are three types of business models in the food ordering and delivery industry in Malaysia as illustrated in **Figure 1**.

Figure 1: Business Models in the Food Ordering and Delivery Industry



14. In this regard, businesses that have adopted a single-sided or intermediary online platform business model operate online for food ordering and delivery purposes. Based on the Commission's observation, there are at least three (3) different business models that have been adopted by suppliers operating in both the single-sided online platform business model and the intermediary online platform business model as elaborated in the paragraphs below.

⁶ A cloud kitchen refers to an outfitted kitchen that operates for the purpose of delivery.

(a) *Direct delivery of food by the restaurant⁷*

Some food-ordering restaurant chains, which are commonly franchise restaurants, have developed the necessary technology to enable their customers to order food online, either through the restaurant's website and/or mobile application, thus enabling the restaurant chain to deliver food directly to the customers. These restaurants are responsible for the order management, preparation, and delivery of the food;

(b) *Delivery of food by cloud kitchens in which the individuals are hired by the enterprise*

This business model utilises an outfitted kitchen that operates for the purpose of delivery. Customers place orders through the cloud kitchen's website and/or mobile application. Subsequently, the cloud kitchens prepare and deliver the food order directly to the customers; and

(c) *Delivery of food via an intermediary online platform*

An online platform, such as the platform operated by Foodpanda, provides customers with access to multiple restaurants and cloud kitchens. This business model provides restaurants with access to multiple consumers on a single online platform. Under this business model, the platform's website allows customers to place orders from their preferred restaurant and the supplier then carries out delivery of the order via its delivery partners for the restaurant. This model is discussed in further detail in the paragraphs below.

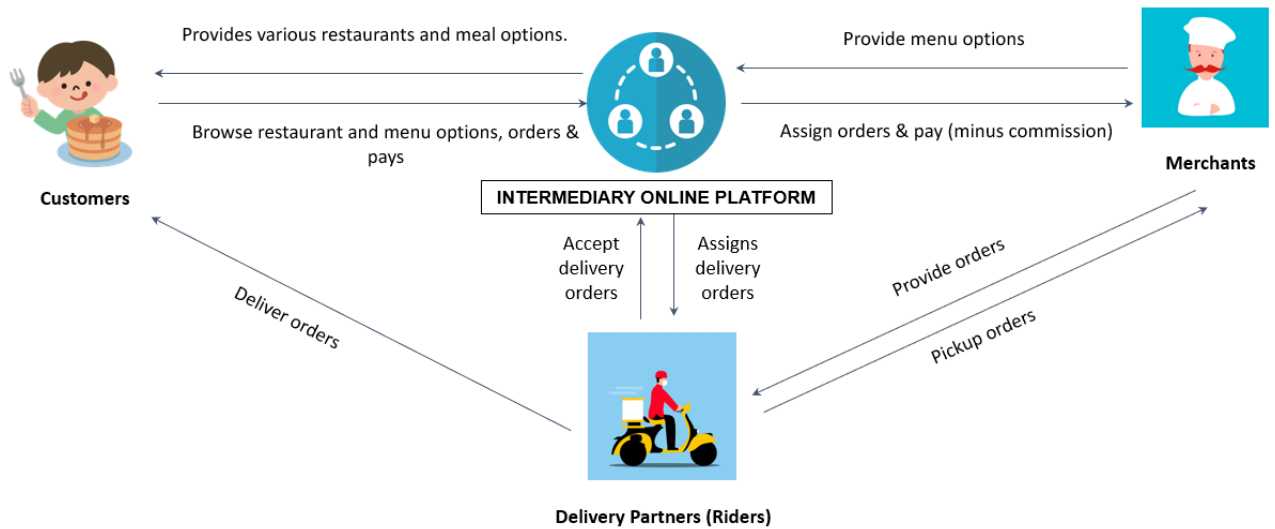
⁷ This category of restaurants also refers to vertically-integrated restaurants.

B.2 Intermediary Online Platform Business Model

15. Under the intermediary online platform business model, an online platform generates revenue primarily by on-boarding restaurants or cloud kitchens which are listed as merchants under the platform. This process is typically done through a vendor registration form which confers onto the platform the ability to act as an intermediary for these merchants.
16. This type of platform provides a marketplace in which customers can select from a variety of on-boarded merchants' menus that are available for pick-up and delivery. The platform's website or mobile application is where customers usually place an order with their preferred merchant. Upon receiving an order notification from the platform, the merchant will prepare the order which will then be picked up and delivered by the platform's delivery partners.
17. An intermediary platform creates value by connecting two (2) or more interdependent groups of users. In this model, pricing mechanisms and indirect network effects are critical factors in the interdependent relationship between the different user groups. The illustration of the interaction between the different sides of such platforms is illustrated in **Figure 2** below.

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Figure 2: Interaction of the Different Sides of the Intermediary Online Platform



18. Pertinent to this investigation, the Commission identifies Foodpanda as an intermediary online platform. Since 2012, Foodpanda has been actively operating in Malaysia as an intermediary online food delivery platform, with an estimated 5 million users across the country in 2020.

19. The Commission acknowledges that during the period of investigation there are other intermediary online platforms that are operating in the food ordering and delivery industry in Malaysia, such as [REDACTED]⁸, [REDACTED]⁹ and [REDACTED]¹⁰.

20. It has been found during the investigation that there are no licensing requirements or regulatory guidelines that are relevant to the online intermediary food ordering and food delivery platform industry. The

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

only requirement for food ordering and delivery intermediary platform providers is that the platform operator must register their business with the Companies Commission of Malaysia (SSM) in order to establish and operate an online intermediary platform food ordering and food delivery business.

C. THE ALLEGED CONDUCT

21. It is the finding of the Commission that Foodpanda segregates the commission rates imposed on its merchants into the following two categories:

(a) Preferred Partnership Category — This category is applicable to merchants that only utilise Foodpanda as the exclusive intermediary online platform that performs delivery; and

(b) Non-preferred Partnership Category — This category is applicable to merchants that engage delivery services from multiple intermediary online platforms including Foodpanda.

22. During the course of the investigation, the Commission retrieved the *Vendor Registration Form/Agreement* which contained an exclusivity clause. The excerpt of the exclusivity clause¹¹ is reproduced below:

“[redacted].”

¹¹ Information provided by Foodpanda dated 5.1.2021 pursuant to the section 18 Notice issued by the Commission dated 19.11.2020.

23. Pursuant to a ministerial direction received by the Commission on 21.10.2019, on 29.10.2019 the Commission commenced a formal investigation under section 14(2) of the Act to investigate whether Foodpanda has infringed section 10 of the Act by imposing an exclusivity clause in the agreement between Foodpanda and its merchants in the Preferred Partnership Category; in relation to the intermediary online platform market matching customers, merchants and delivery partners for the provision of food ordering and delivery services.

C.1 Theory of Harm

24. The Commission identifies the alleged conduct in the investigation as the imposition of an exclusivity clause in the agreement between Foodpanda and its merchants in the Preferred Partnership Category.
25. On the supposition that Foodpanda is dominant in the market, such a clause has the likelihood to harm healthy competition with its competitors as it may induce merchants to subscribe to the Preferred Partnership Category in order to obtain a lower commission rate. As a result, the exclusivity arrangement will likely create lock-in effects for the merchants as they are disincentivised to partner with other food delivery platforms. As a consequence, it will likely prevent the new platform entrants or current competitors from partnering with the merchants; thereby, resulting in the distortion of the competition process.

PART 2: LEGAL AND ECONOMIC ASSESSMENT

A. THE SECTION 10 PROHIBITION

26. Section 10 (1) of the Act provides –

Abuse of dominant position is prohibited

10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

27. Section 10(1) of the Act outlines two stages of assessment to satisfy the elements of an abuse of dominant position, namely -

(a) whether Foodpanda is dominant in the relevant market in Malaysia; and

(b) in the event Foodpanda is found dominant, whether Foodpanda has abused or is abusing its dominant position.

28. In order to establish limb (a) of paragraph 27, the Commission will assess whether Foodpanda has significant market power in the relevant market, as set out in **Parts 2B** and **2C**.

29. On the supposition that it is established that Foodpanda is dominant in the relevant market, the next step will be to assess the effect of the imposition of the exclusivity clause on merchants in the Preferred Partnership Category.

B. MARKET DEFINITION

30. The Commission will first consider the product market definition in the assessment for the present case before ascertaining the geographic market definition.

Relevant Product Market

31. In order to establish the boundaries of the relevant market, the Commission will first identify the focal product.
32. The relevant product market is defined by the focal product and its closest substitutes. The identification of the focal product is carried out by referring to the Terms and Conditions¹² on Foodpanda's website as provided below:

“Through our Platforms, foodpanda links you to the vendors (“Vendors”) for you to order a variety of goods including prepared meals, non-prepared food and miscellaneous non-food items (hereinafter collectively referred to as “Goods”) to be delivered to you. When you place an order for Goods from our Vendors (“Order”), foodpanda acts as an agent on behalf of that Vendor to facilitate, process and conclude the order and subsequently for either us or the Vendor to deliver your Order to you. Vendors may be owned and operated by third-party vendors, our affiliate companies, or us”. (emphasis added)

33. In addition, the Commission also refers to [REDACTED]¹³, as follows:

“[REDACTED].”

¹² Terms and Conditions provided by Foodpanda via its website, <https://www.foodpanda.my/contents/terms-and-conditions.htm>, published 2020 retrieved on 25.6.2021.

¹³ Information provided by Foodpanda dated 5.1.2021 pursuant to the section 18 Notice issued by the Commission dated 19.11.2020.

34. An excerpt of [REDACTED]¹⁴ stipulates the following:

“[REDACTED].”

35. In accordance with the aforementioned Terms and Conditions, an interdependent correlation exists among the merchants, customers, and delivery partners enlisted by Foodpanda. Consequently, the focal product market under scrutiny pertains to the “**online platforms that matches customers, merchants and delivery partners for the provision of food ordering and delivery services**”. Within this framework, the platform serves as an intermediary, enabling the delivery of the merchant’s food items by its delivery partners to the customers.

36. Based on the above, the Commission considers the “intermediary online platforms matching customers, merchants and delivery partners for the provision of food ordering and delivery services” as the focal product.

37. As illustrated in **Figure 2**, Foodpanda provides its services to three distinct but interdependent groups of users, namely, customers, merchants, and delivery partners. The decision of merchants to enrol on the platform is substantially influenced by the active involvement of customers on the platform and the quantity of delivery partners engaged by the platform, and the converse.

¹⁴ Copy of [REDACTED], retrieved via complaint and received on 9.10.2019.

38. Hence, the platform operator acts as an intermediary between the customers, merchants, and delivery partners for provision of food ordering and food delivery services.
39. The Commission acknowledges that Foodpanda perceives other intermediary online platforms such as [X], [X], [X], and [X] as its closest competitors. Nevertheless, for the purpose of defining the market, the Commission observes that [X] does not fall within the market of “intermediary online platforms matching customers, merchants, and delivery partners”. This is due to the fact that, at the material time, [X] did not engage in the activity of matching customers and merchants.
40. The Commission is satisfied that the relevant product market is the “intermediary online platforms market matching customers, merchants and delivery partners for the provision of food ordering and delivery services” market.
41. The Commission begins its assessment of dominance based on the focal product as a starting point for the purpose of the analysis before proceeding to expand the market further. In the event that the assessment determines that Foodpanda is not dominant in the focal product market, it would be unnecessary for the Commission to widen the scope of the relevant market.¹⁵

¹⁵ The Commission’s assessment is based on the conceptual approach outlined under the Hypothetical Monopolist Test and provided in paragraph 2.2 of the Commission’s Guidelines on Market Definition, published 2.5.2012.

Relevant Geographical Market

42. The relevant geographic market shall be delineated based on the location where the focal product is provided and its closest substitutes.
43. The Commission observes that Foodpanda has a nationwide presence in Malaysia. This indicates that the relevant geographic market is Malaysia.
44. The Commission finds that intermediary online platforms for food ordering and delivery services are striving to expand their coverage areas to cater to a growing customer base. Given their growth trajectory, it is conceivable that these platforms may increase their coverage to target customers in all states across Malaysia.
45. The Commission defines the relevant geographical market for the “intermediary online platform that matches customers, merchants, and delivery partners for the provision of food ordering and delivery services” market to be national in scope which is the whole of Malaysia. Therefore, the relevant market in the present case is defined as the intermediary online platform market that matches customers, merchants, and delivery partners for the provision of food ordering and delivery services in Malaysia.

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C. DOMINANCE

46. Under section 2 of the Act, “dominant position” is defined as a situation in which one or more enterprises possesses such a significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.
47. Dominance, in the present context, shall be assessed in terms of Foodpanda’s ability to adjust prices or outputs or trading terms without effective constraints from other competitors in the provision of food ordering and delivery services on an intermediary online platform in Malaysia.
48. In this regard, the Commission determines an enterprise to possess dominance when it commands a market share of 60%. Nevertheless, if an enterprise acquires 100% market share, it is considered as a dominant enterprise that simultaneously holds a monopoly¹⁶ in the market.
49. The most common indicator of the existence of a dominant position is the enterprise’s market share. However, the market share shall not by itself be regarded as conclusive of dominance.

¹⁶ Paragraph 2.6 of the Commission’s 2012 Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position provides the following on the definition of a monopolist: “Even if there is only one enterprise in a market – a monopolist – that by definition has no competitors, this situation would be considered as dominant position for competition law purposes.”

50. The Commission assesses whether or not an enterprise is dominant in the relevant market based on an assessment of several constraints as prescribed by the Commission's *Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position*¹⁷ (hereinafter referred to as "the Commission's Guidelines") which include as follows:
- (a) market share of the relevant enterprises;
 - (b) potential barriers to new entry into the relevant market by a new entrant; and
 - (c) competitive constraints imposed as a result of buyer power.

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¹⁷ Paragraphs 2.10 and 2.20 of the Commission's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position, published 26.7.2012.

C.1 Market Share

51. In assessing the market share held by Foodpanda in the relevant market, the Commission has identified the existing competitors of Foodpanda based on [§<].¹⁸ It identified that [Competitor 1], [Competitor 2], [Competitor 3] and [Competitor 4] are Foodpanda's closest competitors.
52. Firstly, the Commission begins the assessment of Foodpanda's market share by identifying existing competitors and analysing their respective annual reports¹⁹ to derive their revenue earned in the relevant market. This analysis will then be used to compare Foodpanda's market share with that of its competitors. The result of the market share based on this variable from 2018 to 2021 is shown in **Table 1** below: -

Table 1: Overview of Market Share of Foodpanda and its Closest Competitors

COMPANY	2018	2019	2020	2021
FOODPANDA MALAYSIA SDN BHD	84.87%	44.23%	69.42%	76.14%
[Competitor 2]	7.09%	1.87%	0.94%	0.42%
[Competitor 1]	5.57%	48.78%	27.58%	22.10%
[Competitor 3]	2.48%	5.13%	2.06%	1.34%
TOTAL MARKET SHARE	100%	100%	100%	100%

¹⁸ Information provided by Foodpanda dated 5.1.2021 pursuant to the section 18 Notice issued by the Commission dated 19.11.2020.

¹⁹ Annual Reports of Delivery Hero Malaysia Sdn Bhd (Foodpanda), [Competitor 1], [Competitor 2], [Competitor 3] for the period of 2018 to 2021.

53. Foodpanda's significant market share in 2018, approximately 84.8% underwent a substantial reduction in 2019, plummeting to 44.23% when it faced a formidable challenge from the prominent player, [Competitor 1]. Moreover, the Commission discovers that [Competitor 1] exhibited a surge in its marketing and promotional expenses in 2019 as opposed to 2018.²⁰
54. During the preliminary stage of the investigation, Foodpanda's market share remained below the dominance threshold of 60% of the total market share, as outlined in the Commission's Guidelines.
55. The Commission observes that the Movement Control Order ("MCO"), in the years 2020 and 2021 caused a significant shift in consumer and merchant behaviour in the relevant market. It resulted in an increased reliance on online food delivery platforms as the primary means of food ordering and food delivery. This shift is evident in the substantial revenue growth experienced by Foodpanda in the years 2020 and 2021.
56. In addition to the Commission's assessment on the revenue of Foodpanda and its identified competitors, the Commission also uses Gross Merchandise Value ("GMV") as a metric to estimate Foodpanda's market share in the online food delivery platform market. Specifically, the Commission compared the GMV of Foodpanda's platform against its closest competitor, [Competitor X], during the period of 2020 and 2021.

²⁰ Excel spreadsheet detailing [REDACTED] Marketing and Promotional Expenses from the year 2018 to the year 2021.

57. It is worth noting that there are some differences between using GMV and revenue as indicators of a platform's market share. While revenue figures that are derived from the annual reports are based on the actual commission earned from merchants that are registered with the online food platform operator, GMV includes all orders made on the platform regardless whether they were successful or refunded. Therefore, GMV provides a more comprehensive view of the total value of transactions processed on the platform, whereas revenue is a more accurate representation of the platform's commission earnings.
58. The 2023 report titled *Food Delivery Platforms in Southeast Asia (SEA)* by Momentum Works²¹, presents the market share of Foodpanda compared to [Competitor X] for the period of 2020 to 2022, as depicted in **Table 2**.

Table 2: Market Share of Foodpanda and [Competitor X] based on GMV Figures

Platform	Market Share in % (GMV)		
	2020	2021	2022
Foodpanda	48	49	38
[Competitor X]	52	48	60
Total Combined Market Share	100	97	98

59. Based on the GMV figures, Foodpanda's market share falls below the 60% threshold stipulated in the Commission's Guidelines. Moreover, it was found that Foodpanda's closest competitor, [Competitor X], has gained a significant market share of 60% in the

²¹ Momentum Works, "*Food Delivery Platforms in Southeast Asia (SEA)*", published in years January 2021, 2022, and 2023.

online food delivery market, which is almost twice the size of Foodpanda.

60. After considering both revenue and GMV metrics, the Commission is unable to ascertain that, in all probability, Foodpanda enjoys a dominant position in the market.
61. The Commission recognises that Foodpanda has a significant market revenue. However, its relatively low GMV compared to [Competitor X] suggests that Foodpanda's market power may be vulnerable. Accordingly, the Commission cannot establish with certainty that Foodpanda enjoys a dominant position in the relevant market. The Commission will delve into the assessment of barriers to entry in the following discussion.

C.2 Assessment on Barriers to Entry in relation to the Relevant Market

62. In determining the potential barriers to entry into the relevant market by a potential competitor, the Commission assesses the following indicators:
 - (a) regulated entry; and
 - (b) network effects.

Regulated Entry

63. At this juncture, the Commission discovers no specific regulatory obligations specifically applicable to new entrants in the food delivery industry. Consequently, the market entry process is relatively uncomplicated, facilitating ease of entry for new players.

Network Effects

64. While Foodpanda is an incumbent in the relevant market, such position does not automatically confer an advantage in creating network effects in the relevant market. The Commission's analysis suggests that Foodpanda's network effects in the relevant market to be relatively weak, particularly when being challenged by [Competitor X], which has been able to leverage its strong direct network effects from its primary market, the e-hailing market, to gain traction in the online food delivery market.
65. The Commission notes that there have been new entrants into the relevant market during the period of the MCO, including [X], in 2020 and [X], in 2021. [X] and [X] are formidable players in their respective industries, [X]. Despite being newcomers to the online food delivery market, they have gained market share in the online food delivery market in a relatively short period of time.

66. [X] strategic acquisition of [X] in 2021 may allow them to leverage [X] network effects and expertise in the online food delivery market, potentially giving them a competitive edge over Foodpanda.²²
67. Foodpanda faces stiff competition not only from [Competitor X], a long-standing competitor in the market, but also from new entrants such as [X] and [X]. The latter players have an established user base in their respective core markets and are using this advantage to gain a foothold in the relevant market.
68. Indirect network effects are prevalent in the relevant market, where the growth of one group of users leads to a positive impact on the other groups. In particular, the Commission has identified that the number of merchants, customers, and delivery partners on Foodpanda's platform have a mutually reinforcing effect, contributing to the platform's overall indirect network effects. The value of the platform to one group is influenced by the size and activity of the other two groups.
69. The Commission evaluates the strength of Foodpanda's indirect network effects by analysing the growth of its merchants, customers, and delivery partners on its platform from 2018 to 2020. The Commission observes a steady increase in the number of merchants, customers, and delivery partners on Foodpanda's platform every year.

²² [X]

70. The Commission acknowledges that the indirect effects may be challenged and are not necessarily insurmountable.

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Regulatory Barriers

71. Based on its assessment, the Commission finds that there are no significant regulatory barriers to entry in the relevant market, indicating a relatively low-regulated entry into the relevant market.

C.3 Assessment on Other Competitive Constraints

Buyer Power

72. The Commission examines the constraints imposed as a result of buyer power as one of several potential competitive constraints when assessing the market. The Commission has considered whether merchants possess a sufficient amount of buyer power to offset the market power of Foodpanda.
73. In this regard, the Commission ascertains that Foodpanda applies varying commission rates to merchants depending on their classification as either a franchised restaurant or an independent restaurant.²³ The Commission selected a subset of franchised restaurants²⁴ to include in **Table 3** below, given the extensive number of merchants in the database.

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²³ Information provided by Foodpanda dated 5.1.2021 pursuant to the section 18 Notice issued by the Commission dated 19.11.2020.

²⁴ Information provided by Foodpanda dated 5.1.2021 pursuant to the section 18 Notice issued by the Commission dated 19.11.2020.

Table 3: *Variation on Commission Rates Imposed by Foodpanda onto Merchants*

NO.	COMPANIES	COMMISSION RATE
1.	[REDACTED]	[1% - 5%]
2.	[REDACTED]	[10% - 25%]
3.	[REDACTED]	[15% - 20%]
4.	[REDACTED]	[15% - 25%]
5.	[REDACTED]	[15% - 25%]

74. Based on its observations, the Commission finds that Foodpanda imposes higher commission rates on independent restaurants than on franchised restaurants due to a disparity in bargaining power between the two (2) categories of restaurants.
75. The Commission's assessment indicates that franchised restaurants have considerable bargaining power, thereby limiting Foodpanda's ability to charge them higher commission rates than independent restaurants. It is evident that Foodpanda's market power is curbed by the buyer power of franchised restaurants, which prevents Foodpanda from exerting and/or expanding its market power.
76. In addition to buyer power, the Commission also considers high sunk costs²⁵ as a factor in assessing competitive constraints as a barrier to entry into the relevant market. However, the Commission does not find it to be a significant factor in the assessment of the present case.

²⁵ Paragraph 2.20 of the Commission's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position, published 26.7.2012.

C.4 Conclusion on the Commission’s Assessment of Foodpanda’s Market Power

77. Based on the assessment of the evidence before it, the Commission, on a balance of probability, is unable to make a positive finding that Foodpanda enjoys a dominant position due to the competitive constraints exerted onto Foodpanda in the relevant market. Foodpanda lacks significant market power to adjust prices, outputs, or trading terms without effective constraints from competitors or potential competitors in the relevant market.

D. ABUSE

78. Based on the assessment of the evidence and facts in the foregoing paragraphs, the Commission finds that there is insufficient evidence to support a finding that Foodpanda is a dominant player in the relevant market.

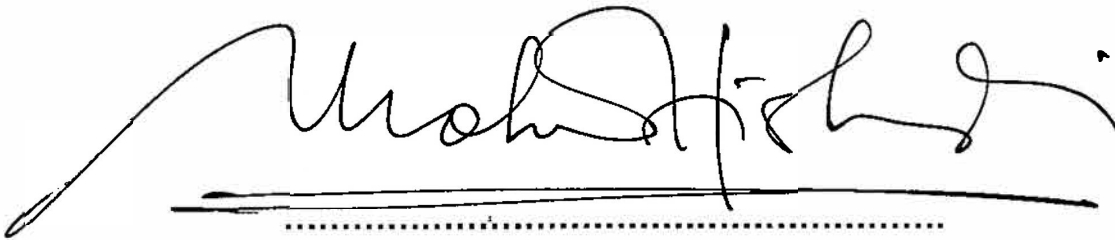
79. Due to Foodpanda’s absence of dominance in the relevant market, the Commission is not legally obligated to conduct an additional assessment of the potential anti-competitive effect resulting from Foodpanda’s imposition of an exclusivity clause to its merchants in the Preferred Partnership Category in the “intermediary online platform matching the customers, merchants, and delivery partners for the provision of food ordering and delivery services in Malaysia”.

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E. THE COMMISSION'S FINDINGS

80. Having conducted a legal and economic assessment of the evidence gathered throughout the investigation, the Commission concludes that Foodpanda has not infringed section 10(1) of the Act.

DATED: 11 September 2023

A handwritten signature in black ink, appearing to read 'Mohd Hishamudin Yunus', is written over a solid horizontal line. Below the solid line is a dotted horizontal line.

CHAIRMAN

**DATO' SERI MOHD HISHAMUDIN
YUNUS**

APPENDIX

POST-INVESTIGATION ENGAGEMENT WITH KPDNHEP

1. In order to tackle the rising number of complaints raised by members of the public, KPDNHEP invited the Commission to participate in a series of engagements with food delivery platform operators, including Foodpanda, between 10.2.2021 and 17.12.2021. The objective was to tackle consumer issues arising from challenges encountered by merchants and consumers during the pandemic period.

2. KPDNHEP advanced several proposals and sought clarification from Foodpanda concerning the raised issues. In response, Foodpanda offered its clarification on the issues and detailed its ongoing initiatives in addressing the matter at hand. After conducting further analysis, KPDNHEP proffered its counter-proposals aimed at enhancing the quality of services provided by Foodpanda. The counter-proposals are as follows:

[REDACTED]

3. It is observed, at that juncture, that Foodpanda had, in principle, acknowledged the counter-proposals presented. Nonetheless, certain aspects of the proposal lacked explicit commitments from Foodpanda.

4. [REDACTED]

5. The Commission is mindful that the issues raised primarily pertain to consumer matters and are inconsequential to the Commission's investigation.
6. The Commission asserts that throughout the series of engagements with KPDNHEP, the Commission has consistently adhered to the strict confidentiality of all evidence gathered in the aforementioned investigation.
7. The Commission takes the view that the issues stemming from the complaints against Foodpanda primarily are largely consumer issues. Be that as it may, if left unaddressed, these concerns may potentially escalate into competition issues in the future.
8. The Commission endorses the counter-proposals put forth by KDPN (formerly KPDNHEP) as referred to in paragraph 2 above ("the counter-proposals").
9. Therefore, the Commission recommends that, notwithstanding the decision issued under section 39 of the Act, Foodpanda takes prompt action to implement the counter-proposals and report the progress to the Commission. In accordance with Section 16(h) and Section 17(i) of the Competition Commission Act 2010 [Act 713], Foodpanda is to furnish the said progress report to the Commission within 3 months from the date of this Decision. Additionally, the Commission will monitor the market independently, with specific focus on addressing any competition-related concerns.