

New Competition Tool | Position Paper

Delivery Hero welcomes the opportunity to provide its observations in response to the proposal by the European Commission for a New Competition Tool (“NCT”). This submission presents an overview of Delivery Hero’s observations on selected areas of the NCT.

Delivery Hero provides online and food delivery services and currently has operations in 43 countries, across four main geographical regions: Europe, the Middle East and North Africa, Asia and the Americas. Delivery Hero was founded in 2011 and is headquartered in Berlin, Germany. Delivery Hero’s subsidiaries operate platforms in the local markets, connecting consumers with vendors. Delivery is carried out either through the “marketplace” model, where vendors carry out the delivery, or the “own delivery” model, where the Delivery Hero platform carries out the delivery.

The food delivery sector is highly competitive and dynamic, for a number of reasons. Delivery Hero competes not only with other food delivery platforms, but also with restaurants themselves that offer direct ordering on the phone, online, or in person. The barriers to entry and expansion are low; there is no one prescribed route to entry or growth, and there are numerous business propositions that companies can adopt in order to penetrate, including expanding an existing tech or e-commerce business or restaurants developing their own website or app. Furthermore, the amount of initial capital required is low, in part due to the fact that new entrants can start at a local level (e.g. one city, or certain areas within a city) and expand.

As regards in particular the need to adopt the NCT, Delivery Hero believes that there is no “enforcement gap” in the current EU competition regime. The NCT identifies two types of “structural” competition problems that the existing enforcement toolkit cannot supposedly not address: (i) “Structural risks for competition” where certain market characteristics and the conduct of the companies operating in the markets create a threat for competition and (ii) “Structural market failure”, where a market is displaying systemic failures going beyond the conduct of a particular company with market power and oligopolistic market structures with an increased risk for tacit collusion. To the contrary, we believe that Article 101 TFEU and Article 102 TFEU are both flexible enough to allow the European Commission to address these

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issues and any new competition theory of harm, including in relation to the digital sector, as the European Commission's and EU Courts' more recent decisional practice has demonstrated.

Delivery Hero is particularly concerned about the level of regulatory burden and legal uncertainty that the NCT would create, as it will ultimately put brakes on innovation and competition. Setting restrictions or imposing commitments absent proven harm will not re-enforce competition but rather dampen it, and ultimately harm consumers. Any tool granting the European Commission such discretionary powers to set restrictions where there is no proven harm must in any event be counterbalanced by robust safeguards such that rights of defence and principles of checks and balances are maintained.

In addition, based on the current proposals the NCT appears to be substantially similar to the platform-specific ex ante regulation included in the Digital Services Act, since both appear at least partially to target companies "acting as gatekeepers". In addition, we understand that the enforcement of both tools will be led by two different Directorates-General (CNECT and COMP, respectively). We believe that these overlapping initiatives present the risk of a lack of clarity regarding the competences between the Directorates-General and subsequently of the consistency of enforcement. Further, such overlapping initiatives increase the burden for the companies to identify the relevant scope of application and may thus ultimately create legal uncertainty for them.

Finally, we note that the proposal for the NCT also overlaps with legislative initiatives in certain Member States, and it is unclear from the current proposal how the competencies between the European Commission and the Member States will operate in relation to these. In order to avoid enforcement inconsistencies between the Member States and the European Commission as well as the ultimate regulatory burden and subsequent risk of legal uncertainty for companies active in various Member States, this must be adequately addressed.