

## How Much Is That Food Delivery Really Worth? Antitrust, Mergers and COVID-19

Mergers can be an attractive proposition under normal circumstances, but could become even more intriguing as the markets change to keep up and adapt with the new normal.

By Carl W. Hittinger and Jeanne-Michele Mariani

With the global COVID-19 pandemic short circuiting the traditional business model and wreaking havoc on local and large businesses alike, companies are looking for relief from the hurt. Not surprisingly, ailing businesses are exploring mergers and acquisitions as a possible panacea to increase sales, market share and profits. Mergers can be an attractive proposition under normal circumstances, but could become even more intriguing as the markets change to keep up and adapt with the new normal.

One of the areas, arguably hardest hit by this historic pandemic is the retail food industry. With restaurants forced to close dining rooms and bars in favor of take-out and pick-up services, it has created a boon for delivery service companies. According to recent statistics, delivery sales due to COVID-19 are [up over 70%](#). However, despite the uptick in business, delivery companies are still struggling to be profitable during these tough times. Part of the reason is that delivery companies are doing more to help keep their restaurant customers in business. Each of the platforms is cutting delivery fees, particularly for small restaurants. And despite overall industry growth, the battle for customers has intensified since [few diners are ever loyal to one delivery service](#). Instead, of sticking with one delivery company, customers often search multiple platforms looking for lower delivery fees, faster delivery and restaurant specials. Not surprisingly, this means that the biggest meal delivery services are also the most likely to share the same customers. More than a quarter of each delivery company's diners also [ordered food from their top competitor](#) in the first quarter of 2020. It is a real dog-eat-dog marketplace.

Due to the difficulties of the market dynamics in the industry, it can drive competitor companies to look for ways to increase market share while working together. Enter the most recent potential merger acquisition: UberEats and Grubhub. If the acquisition of Grubhub were to be successful, the combined delivery platform would not only enjoy the largest portion of market share between

all competitors companies, but it would also help Uber stave off any profit losses it has felt from a decrease [in its rideshare](#) business due to the stay-at-home orders in effect across the country. And while many worry about the effect such a large merger may have on the market, Uber's CEO Dara Khosrowshahi, has [defended the possible merger](#), stating that "this market is much broader than some people are presenting it to be ... restaurants deliver directly ... grocery is delivered directly including hot food, so I think that I would disagree with the definition of market [being used here]. This market just got bigger ... I think that this delivery of food and essentials to homes is an enormous market, and I don't see any one or any two having 90% of that market. It's way too big a market." Khosrowshahi added, "The thing is, no one's really making money in this business ... so the business itself has to be sustainable, and it has to be sustainable in a way that works for restaurants, works for couriers, and works for people who are ordering the food and it works for business, as well. So things are going to change. And we'll definitely listen to the opinions of regulators."

The 90% market share that Khosrowshahi is referring to is a recent percentage showing up in reports discussing the merger, arguing that Uber, if merged with Grubhub, would substantially control much of the food delivery market. However, some experts argue that such a number is probably a bit overblown. Depending on which estimates one reads, the merger could cause the merged Uber-Grubhub to command upwards of 50% of the U.S. market, but most estimates fall short of the 90% figure. Still, as reports of the merger talks began to leak last month, pushback came swiftly from some Democratic lawmakers who called the potential move "[pandemic profiteering](#)" and urged federal regulators to scrutinize any forthcoming deal. Chairman of the House Judiciary Committee's antitrust subcommittee [David Cicilline](#), as well as Rep. Alexandra Ocasio-Cortez both pushed for a general moratorium on all mergers until the pandemic ends. Other lawmakers, including

[Sen. Elizabeth Warren](#) (D-Mass.) have proposed legislation that would impose a large merger moratorium until the FTC “determines that small businesses, workers and consumers are no longer under severe financial distress.”

Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect “may be substantially to lessen competition, or to tend to create a monopoly.” The key question the FTC or DOJ’s Antitrust Division asks is whether the proposed merger is likely to create or enhance market power or facilitate its exercise. The greatest antitrust concern arises with proposed mergers between direct competitors – like here involving two delivery companies often fighting for the same customers in the same geographic market.

Yet, mergers can also bring more efficiency to the market, more sophisticated technology, and a larger and better trained workforce that can offer goods or services to areas of the country that before were unable to partake due to market constraints. Whether this particular food delivery merger will have a positive or negative effect on the relevant market is a question that the agencies will have to sort out, whether it is the FTC or the DOJ, and likely the states Attorneys’ General.

The merger is still fluid as Grubhub has [rebuffed](#) Uber’s latest deal. If the merger does go through it will be a big deal impacting millions of Americans that are still dependent on food service companies to eat good food and maintain their sanity during these trying times. So how much is that pizza, hoagie, or four-course dinner really worth? Stay tuned.

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