NSR Tech Policy: Amazon's Grubhub deal: a challenge from regulators is unlikely

By Matt Perault | July 8, 2022

In a note published earlier this week, by our partners covering tech infrastructure companies (LINK), Amazon plans to take an equity stake in Grubhub. The size of the stake could be as high as 15%, if certain performance targets are met. As part of the agreement, Amazon Prime members in the United States will be granted free access to one year of Grubhub+. The note emphasized that the deal is an indication of Grubhub's struggles, and that Uber and Grab are the best names to play in food delivery.

This brief note follows on the tech team's overview to outline the key regulatory implications of the deal:

- **First**, we think the equity stake is likely too low to create serious regulatory risk for Amazon. The stake may be as low as 2%, which is unlikely to be viewed as sufficiently meaningful to trigger regulatory intervention. Even if it hits the performance targets and rises to the maximum 15%, it is unlikely to face a strong challenge from regulators. When Amazon acquired a 16% stake in Deliveroo, the UK's antitrust authority (the Competition Markets Authority, or CMA) investigated the deal. After extensive review, it ultimately found that the deal would not substantially lessen competition, but indicated that if Amazon acquired a higher stake in the future, the CMA might change its view. In the review process, Amazon argued that its 16% stake did not result in it acquiring "material influence" over Deliveroo. It would likely make the same argument here, and its position would be stronger since the equity stake is lower.

- **Second**, even if regulators were interested in challenging the deal, it would be difficult for them to make the case that it will "substantially lessen" competition. As our partners described in yesterday's note, Grubhub is struggling relative to its competitors. Regulators might consider whether the combination of the Grubhub and Deliveroo investments would heighten the risk to competition in the market, but even then, the relatively small stakes in each company make that argument difficult.

- **Third**, we have stated numerous times (LINK) that FTC Chair Lina Khan will likely look for a fact pattern that will enable her to make her mark on antitrust policy, but this isn't it. Although, in theory, an Amazon merger could be a desirable one for her given her prominent work on that topic, she's looking for a stronger case than this one.

- **Finally**, it is noteworthy that Amazon sought to acquire an equity stake rather than to make an outright acquisition. While there may be many business reasons for their decision to pursue that course, the regulatory risk of an acquisition might have been one factor in the decision. If that's the case, and if sizable minority equity stakes give Big Tech firms some of the competitive advantages they are seeking without the regulatory headaches of an acquisition, more Big Tech companies may pursue this strategy.

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