

TRANSLATION

ONLY THE SWEDISH TEXT IS AUTHENTIC

Apphero Sweden AB  
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## **Disputed competition restriction – online platform for food delivery.**

### **Decision by the Swedish Competition Authority**

The Authority will not investigate the case any further.

#### **The Case**

##### *The complaint*

On 9 October 2015, the Swedish Competition Authority received a formal complaint from Apphero Sweden AB (Pizzahero), stating that a rival company, Onlinepizza Norden AB (Onlinepizza) had issued an ultimatum to restaurants affiliated with both companies' services. Restaurants were to choose whether to be affiliated with either Pizzahero or Onlinepizza. According to Pizzahero, this resulted in the restaurants choosing to no longer be affiliated with Pizzahero.

##### *Background*

Onlinepizza offers an online food ordering platform to restaurants in Sweden that wants to reach consumers with offers of takeaway and home delivery food. Pizzahero conducts similar activities, focusing on the region of Dalarna.

Onlinepizza have applied a clause to their standard agreement with the affiliated restaurants (Section 4.6 of the "Partner agreement"), which reads as follows:

"It is not forbidden to collaborate with a competitor of OnlinePizza Norden AB. If You enter into collaboration with competing organisations, OnlinePizza Norden AB reserves the right to terminate cooperation with You, on account of the risk of increased costs and misunderstandings that We may incur.

The Competition Authority has previously received complaints that Onlinepizza has terminated agreements with restaurants that have chosen to collaborate with other companies offering online food ordering platforms.<sup>1</sup>

*The companies*

Pizzahero was founded in 2014 due to local demand in Falun for an alternative to the established operator Onlinepizza. Pizzahero offers an online ordering platform from which associated restaurants can sell food for takeaway or home delivery. At its peak, Pizzahero was linked to 20 restaurants, all of which were located in Dalarna County. In December 2015, Pizzahero was linked to 7 restaurants.

Onlinepizza established their operations in 2007 and offer an online ordering platform for restaurants in Sweden. Since 2012, Onlinepizza has been part of the Delivery Hero group, for which Delivery Hero Holding GmbH is the parent company. Onlinepizza has agreements with approximately 1,200 restaurants.

*Onlinepizza has primarily stated the following*

Since 2007, Onlinepizza has expanded its customer base consisting of end consumers who choose to order takeaway food using Onlinepizza's services.

Pizzahero has, in principle, established agreements exclusively with restaurants that already have an agreement with Onlinepizza. Pizzahero's business method has been based on forcefully marketing their services to the affiliated restaurants' customers. All the customers who have ordered food via Onlinepizza have been met by the company's name, "Pizzahero" in a way that is detrimental to Onlinepizza's operations.

Pizzahero has marketed itself using advertisements on the cars of the restaurants' cars, shirts with the Pizzahero logo on them worn by those delivering the pizza to the customer and flyers for the restaurants' customers. This form of advertising, which is directly aimed at Onlinepizza's customers and often occurs in connection with the customer receiving a delivery they have ordered via Onlinepizza, is detrimental to Onlinepizza.

These business methods are unacceptable and therefore Onlinepizza has opted to terminate agreements with restaurants affiliated with ordering platforms that use these types of business methods.

Onlinepizza have not previously had any objections to multiple platform affiliation beyond this matter with Pizzahero and the previous cases investigated by the Competition Authority. There are many of examples of restaurants that are affiliated with multiple ordering platforms.

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<sup>1</sup> Pizza 24 Nordic AB (ref. 341/2013) and Sydsvenska Dagbladet (ref. 677/2010)

Onlinepizza's restaurant network does not give rise to any exclusionary effects. There are approximately 26,500 restaurants in Sweden and Onlinepizza has agreements with approximately 1,200 of these. The corresponding figures for Dalarna are approximately 450 restaurants, of which 26 are affiliated with Onlinepizza. Competing ordering platforms such as Pizzahero can generate traffic by connecting other restaurants that offer the same type of food that Onlinepizza offer to their final customers. The market is further influenced by what is known as Onlinepizza's "churn rate" – i.e. customers leaving. Each year, approximately 200 restaurants leave Onlinepizza and these restaurants can be assumed to communicate their offers in other ways, e.g., by using another ordering platform or their own website.

#### *The Competition Authority's investigation*

In its investigation, the Competition Authority has asked questions and obtained information from Pizzahero, Onlinepizza and Gastronomy AB – owners of the Pizza24.se brand.

#### *Changes to terms in the Partner Agreement*

During this investigation, Onlinepizza has chosen to clarify Section 4.6 of the Partner Agreement, so that the contractual terms correspond with actual practice. Once these changes have been implemented, Section 4.6 shall be worded as follows:

"You are not obligated to collaborate exclusively with Us. If you choose to collaborate with another ordering platform supplier, OnlinePizza Norden AB does however reserve the right to cancel this agreement with immediate effect, should there be objective justification to do so, such as You conducting improper marketing activities aiming to recruit customers to another ordering platform than that provided by OnlinePizza Norden AB."

Onlinepizza has stated that the company has informed all of its restaurants with agreements of the changes to the contractual terms of Section 4.6. The new contractual terms will enter into force on 1 May 2016.

#### **Reasons for the decision**

In the assessment of whether a reported matter should be further reviewed, the Competition Authority considers how serious the problem is and how important it is to have an indicative decision. The Competition Authority's ability to effectively investigate and intervene in the problem is another important factor. The Competition Authority makes an assessment in each individual case of whether the reported matter is to be further reviewed.

Agreements between companies in different parts of the distribution chain ("vertical agreements") that limit competition, or the exercise of pressure, can lead to exclusionary effects for existing or potential competitors. Under certain

circumstances, such agreements or pressures can violate the prohibition stipulated in Chapter 2, Article 1 of the Swedish Competition Act (2008:579), KL, regarding anti-competitive cooperation between undertakings, or the prohibition stated in Chapter 2, Article 7 of KL regarding the abuse of a dominant position.

Even if an agreement does not contain any explicit exclusivity terms, it may be problematic from a competition perspective if it is implemented in practice as an exclusivity agreement.

If, in practice, a conduct makes it difficult for customers or suppliers to be affiliated with competing platforms in parallel, anti-competitive effects may arise. This can lead to the exclusion of competing platforms and may also counteract the entry of new platforms. These effects are influenced by factors such as the degree of market power of each platform and the share of relevant customers or suppliers that are affected by the conduct. The effects are also influenced by the incentives more generally of customers or suppliers to cooperate with multiple platforms in parallel.

The Onlinepizza Partner Agreement does not include any explicit clause in which restaurants commit to being exclusively affiliated with Onlinepizza. However, as stated above, there was a clause in which Onlinepizza reserved the right to terminate cooperation, should the affiliated restaurant choose to also cooperate with a competitor. Until this point, the investigation has not established that Onlinepizza has applied the agreement as an exclusivity agreement in practice. During the investigation of the case, Onlinepizza have furthermore chosen to clarify the contractual terms of the clause in question.

Based on what has emerged during the investigation, as well as the changes to Onlinepizza's agreement terms, the Competition Authority find no grounds to investigate the matter further. The Competition Authority therefore closes the investigation.

The Competition Authority's decision not to investigate the matter further does not indicate a standpoint on whether Onlinepizza's previous or current parity regulations are in breach of the competition rules.

### **Special plea**

The Swedish Competition Authority's decision not to investigate the reported competition problem any further cannot be appealed. This is pursuant to Chapter 7, Article 1 of the Swedish Competition Act (2008:579) KL.

The companies affected by the decision may, however, bring an action before a court to have the case tried under Chapter 3, Section 2 KL.

DECISION

14/04/2016 Ref 658/2015 5 (5)

A separate action for a prohibition of anti-competitive cooperation between undertakings, in accordance with Chapter 2, Article 1 of the Swedish Competition Act, or abuse of a dominant position as per Chapter 2, Article 7 or Article 101 and 102 respectively of the Treaty on the Functioning of the European Union, is brought through a summons application to the Market Court.

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This decision was made by Head of Unit Martin Mandorff. The case was reported by Competition Counsellor Erik Westerström

Martin Mandorff

Erik Westerström

This decision has been published on the Swedish Competition Authority's website

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Onlinepizza Norden AB