

Consultation by the European Commission

Evaluation of procedural and jurisdictional aspects of EU Merger Control

Submission by [REDACTED]

[REDACTED] is an international communications and technology company, headquartered in Amsterdam and traded on the Nasdaq. [REDACTED] provides more than 200 million customers with voice, fixed broadband, data and digital services. [REDACTED] offers services to customers in 14 markets.

In October 2016, the European Commission launched a Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control. The Consultation covers three topics: simplified merger control review, EU merger control thresholds, and referral procedures.

GSMA, a global association of mobile operators, of which [REDACTED] is a member, will submit comments on this Consultation. [REDACTED] agrees with GSMA's comments on simplified merger control review and on referrals. However, [REDACTED] disagrees with GSMA's position on EU merger control thresholds.

In its Consultation the Commission inquires whether it would be appropriate to introduce a complementary merger control threshold based on the value of the transaction ("**deal size threshold**") that would capture transactions in the digital economy and in the pharmaceutical industry. [REDACTED] is opposed to the introduction of a deal size threshold for the reasons outlined below. These comments are limited to the digital economy as [REDACTED] is not involved in the pharmaceutical industry.

1. There is no enforcement gap

Current EU thresholds combined with the referral mechanisms enable the European Commission to review all material transactions, including the transactions relating to digital economy:

- Transactions involving large digital economy players usually exceed EU filing thresholds. For example, several recent acquisitions by Microsoft met EU thresholds and were notified to and reviewed by the European Commission.¹
- The *Facebook/WhatsApp* precedent shows that the referral system allows the Commission to capture large deals that fall below EU thresholds but may have an impact on competition in the digital sector.

The Commission has not identified any material transactions in the digital sector which it failed to review. While GSMA has identified several recent acquisitions by Google that fell beyond EU thresholds, as far as [REDACTED] is aware these deals did not raise any competition concerns. Therefore, there is no evidence of an enforcement gap.

¹ Microsoft/Yahoo! (2010), Microsoft/Skype (2011), Microsoft/LinkedIn (2016).

In any event, deals that do not meet EU thresholds are often reportable to national authorities, e.g. in Germany (where filing thresholds are particularly low) and/or in the Member States which have implemented market share based thresholds. For example, the acquisition of Instagram by Facebook in 2012 was reviewed and cleared by the UK's Office of Fair Trading.² It is inherent in the EU system that smaller deals are reviewed by national authorities rather than by the European Commission.

2. A new filing threshold would reduce legal certainty

Current EU filing thresholds are clear and predictable. This is due to the fact that the thresholds are universal (rather than sector-specific), are based on the parties' revenues, and have been clarified by extensive case law and guidelines.

A new threshold would compromise this status quo. While value based thresholds exist in the U.S., they are alien to EU merger control system. Existing guidelines and case law would not apply to the new threshold and it would take the European Commission a significant amount of time to clarify the requirements. Moreover, a sector-specific threshold would lead to further uncertainty.

3. Digital economy is not well suited for ex ante merger control scrutiny

Digital economy is a rapidly developing sector. It is characterised by disruptive innovation, low barriers to entry, frequent new entries, and consumer switching/multi-sourcing. The Commission is well aware of these market features. For example, in *Facebook/WhatsApp* the Commission stated that "the consumer communications sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral".³

Rapidly developing sectors are not well suited for merger control scrutiny:

- Firstly, it is not notoriously difficult to conduct an *ex ante* prospective analysis of a merger between companies active in a rapidly developing sector. This is because it is extremely difficult to anticipate how the sector and the parties will develop either following the merger or in the counterfactual (in the absence of the merger);
- Secondly, rapidly developing sectors are generally highly competitive and mergers between market players generally do not raise serious competition concerns.

Digital economy is a good example of a dynamic and highly competitive industry where a laissez-faire approach is more appropriate than aggressive antitrust enforcement.

In conclusion, [REDACTED] considers that EU merger control thresholds should remain unchanged.

² http://www.offt.gov.uk/shared_offt/mergers_ea02/2012/facebook.pdf

³ Commission decision of 3 Oct. 2014, *Facebook/WhatsApp*, Case COMP/M.7217, para. 99. See also Commission decision of 7 Oct. 2011, *Microsoft/Skype*, Case COMP/M.6281, paras 69 et seq.