

Supplemental Position Paper

Consultation – Evaluation of procedural and jurisdictional aspects of EU merger control

Brussels, 13 January 2017

INTRODUCTION

DIGITALEUROPE as the voice of the digital technology industry in Europe welcomes the opportunity to answer the European Commission's public consultation on whether certain aspects of the EU merger control rules need to be adapted. DIGITALEUROPE strongly supports the European Commission's 'Better Regulation' principle, which stresses that consultation is at the heart of producing better regulation for better results¹ and DG COMP's on-going effort to cut red-tape by simplifying EU merger control rules.

When considering changes to EU merger control rules, particularly concerning additional value-of-transaction notification thresholds, DIGITALEUROPE encourages the European Commission to carefully assess whether there is sufficient and robust evidence to justify the increase in regulatory burden that may result from introducing such additional requirements. The European Commission should seek to continue to create a policy environment where innovative and dynamic industries such as the digital technology sector can thrive with more legal certainty and better predictability. A value-based notification requirement poses complex challenges in many aspects. Importantly, additional regulatory burdens caused by such requirements may make transactions involving European start-ups and SMEs more difficult, less predictable, and more costly. This could have an undesired negative impact on the European economy. We wish to note that many European companies struggle to grow at a pace equivalent to similar sized companies found in other regions of the globe. This is often due to difficulty in obtaining venture capital. As a consequence, the ambition of many European start-ups is to be acquired, so that their investments are rewarded and their innovative ideas are brought to market. We therefore caution the European Commission against creating additional barriers for start-ups to reach these goals.

¹ European Commission Press Release – [Better Regulation: Commission offers new opportunities for stakeholders to participate in the law-making process](#) – 1 July 2016

OVERALL VIEWS

DIGITALEUROPE questions the precise problem and perceived ‘enforcement gap’ which the European Commission is seeking to address. DIGITALEUROPE is not aware of any recent transactions that had a significant impact on competition in the EU, but fell outside the scope of the European Commission’s review.

DIGITALEUROPE is of the opinion that the introduction of additional notification thresholds, and in particular when based on the ‘value of a transaction’, would result in a significant expansion of the scope of EU merger control, and impose large additional burdens on companies, both from a timing as well as financial perspective.

Furthermore, introducing additional thresholds will also have an impact on other regions and enforcement authorities around the globe, who may want to ‘copy’ some of the proposals, potentially in a less balanced manner, further multiplying any of the already existing burdens. The international dimension of the European Commission’s decisions is, as such, an important point to be taken into account before any expansions are decided upon.

QUESTIONS TO BE ASSESSED

1. Does an enforcement gap exist?

Is there an ‘enforcement gap’, and, if so, would introducing a ‘value-of-transaction’ notification threshold be required to narrow such a gap? In the view of DIGITALEUROPE, we are unaware of any transactions in relation to which the European Commission would have wanted to intervene to address significant harm to competition in the European Economic Area (“EEA”) (i.e. by blocking or imposing remedies), but was unable to do so due to limitations of EU merger rules.

We believe that the often cited Facebook and WhatsApp transaction shows that an enforcement gap does *not* exist, but that in fact the current system works. While the transaction did fall outside of the jurisdiction of the European Commission, it was eventually referred to the European Commission via Article 4(5) of the EU Merger Regulation (“EUMR”).

This example supports the view of DIGITALEUROPE that the Member State referral system is functioning well. While some transactions may fall outside of the European Commission’s merger control regime, they may be captured by the competence of Member State competition authorities if they are deemed to have a ‘significant’ impact on competition in that Member State (and hence trigger the national merger notification requirements). Where relevant and/or necessary due to its impact on competition beyond the national borders, the transaction may be referred to the European Commission for review.

For our members active in the highly disruptive digital technology sector, legal certainty, clarity, and speed is of the utmost importance. The European Commission must therefore carefully assess the impact any expansion of the EUMR may have on what is one of the most dynamic industries in Europe. The goal of a transaction is often to acquire a competitive advantage in order to bring a product or service to market before a competing entity does. Therefore, any delay that may be caused by a merger approval process, in particular where there are no competitive concerns, may have a significant impact on M&A activities, on innovation, and eventually on jobs and growth in the EU.

Lastly, we would like to remind the European Commission that EU merger control legislation cannot intend to capture *all* transactions that could potentially have an impact on competition in Europe. Instead, the focus should

be on whether an efficient system is in place that strikes the right balance between the protection of legitimate objectives of the EUMR and the burdens for companies and enforcement agencies that result from compliance with such rules. In our view, the right balance has been struck in today's EUMR, and introducing an additional value-based notification threshold would greatly jeopardise such an outcome.

2. If proven, how to address any enforcement gap?

Were the European Commission to consider having clear empirical evidence that an enforcement gap does exist, and consider addressing such a gap by introducing a value-of-transaction notification threshold, we strongly urge the European Commission to consider a number of important factors.

In particular, any 'value' threshold should be set at a level that is sufficiently high to only capture those transactions that have an impact on competition in the EEA. Of utmost importance will also be the requirement of a clear local nexus, a clear definition to assess such a nexus, as well as clarity around the method of how to calculate the 'value' of a transaction. Assessing the value of a highly innovative company can be a complex, dynamic and volatile exercise. Introducing additional notification thresholds may also impact the valuation of highly innovative European start-ups, in order to avoid legal uncertainty, regulatory burden and delays caused by the potentially required merger review.

While we do not consider it relevant at this stage to comment on these detailed implementation aspects of a hypothetical value-of-transaction notification threshold, were the European Commission to decide to pursue introducing such a threshold, DIGITALEUROPE would greatly appreciate the opportunity to review the proposed measures, and provide comments.

In the meantime, we again thank the European Commission for reaching out to European businesses to learn about their views and gather the relevant facts. We trust that the European Commission will make an objective judgment of the empirical evidence and responses provided during the consultation, and not target any specific industry sectors without showing the need to do so in order to maintain competitiveness in Europe.

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ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 62 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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