Response by Adobe, Cisco and Oracle

to the European Commission's

evaluation of procedural and jurisdictional aspects

of EU merger control

13 January 2017

Introduction

1. Adobe, Cisco and Oracle (the "Tech Group") are grateful for the opportunity to respond to the European Commission's proposals to amend the EU Merger Regulation ("EUMR"). The Tech Group's member companies are among the most dynamic and innovative companies globally, and represent a total R&D spending of approximately US$ 12,5 billion, worldwide revenues of more than US$ 90 billion and with a combined workforce of more than 215,000 employees. All member companies have a substantial presence in the European Union. Our remarks are confined to the proposed transaction value threshold (Part IV.2 "Jurisdictional thresholds").

Summary

2. Introducing a value-based threshold to the EUMR would have the effect of requiring notification of technology investments at an early stage of development, before all parties have significant presence in the EEA. It would require notification of acquisitions made at a stage when the technology is most fragile, i.e. when a collection of creative engineers and ideas get together and need capital to transform innovative potential into ground-breaking new products or services. At this nascent stage, speed and certainty of execution is essential. If merger review is appropriate at all, it must be timely, efficient and legally certain, and undertaken by the regulator best placed to review.

3. The proposed EUMR threshold does not meet these requirements. It is unnecessary and burdensome, displacing the carefully balanced comity between international and member state regulators:

    a. First, there is no evidence that the current thresholds have caused the European Commission or EU national authorities to be denied the opportunity to review transactions that have harmed competition in the single market.

    b. Second, the proposed threshold would distort the clear separation of competences between the Commission and the national competition authorities.

    c. Third, the introduction of such a threshold imposes a requirement to notify transactions that are entirely or largely extraterritorial in effect.

    d. Fourth, none of the tests proposed by the consultation articulate a meaningful local EU nexus. None have the precision and clarity of the revenue test. Any non-revenue-related test for deals which, by definition, have no meaningful local EU presence, will be vague, uncertain and complex to apply - and would thus contravene ICN recommended practices.

4. Finally, the introduction of a threshold based on transaction value has the potential to signal an extraterritorial arms race globally. Other authorities may reciprocate by seeking to take jurisdiction over EU to EU deals on the basis of little or no territorial nexus. This would be detrimental to European companies and other global enterprises and contrary to the principles of comity reflected in the ICN best practice.[1]

Jurisdictional Thresholds (Questions 14-22)

5. The Tech Group urges the Commission not to pursue a value-based EUMR threshold. In the alternative, the Commission should undertake a robust empirical analysis as to whether such

[1] See http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf, Part I "Nexus to Reviewing Jurisdiction".

an additional threshold is at all warranted before legislating. We lay out our arguments in more detail below.

6. **No evidence that a value-based EUMR threshold is required**: The Commission does not put forward any evidence that a value-based EUMR threshold would be required to capture transactions that are harmful to competition and currently do not fall within the Commission's scope of review. The acquisition of WhatsApp by Facebook, which is mentioned as a case that fell outside the EU merger thresholds, is not an example that suggests the need for a significant change to the EUMR: that transaction satisfied the referral mechanism in Article 4(5) EUMR by being subject to merger control within at least three jurisdictions in the EU and was referred up to the Commission. Rather it confirms that merger control works efficiently in the EU. Even if the case had not been referred to the Commission, it would have undergone substantive review at national level. In addition, it was cleared in the first phase without remedies and is therefore not an example of a transaction that would have required intervention. The other transaction that is invoked by the Commission, the acquisition of Pharmacyclics by Abbvie, was in fact cleared by the U.S. FTC without remedies. Given that the focus of Pharmacyclics was in the U.S., this case does not seem to be a credible example for asserting an enforcement gap either. In addition, the Tech Group is not aware of any unnotified matter in their respective corporate histories that would have triggered substantive competition problems. They fear, however, that numerous acquisitions they may do in the future will face the substantial burden and costs of EU merger control even if there are no substantive issues.

7. **Distortion of balance between the Commission and the NCAs**: Unlike the national thresholds in the EU Member States (Austria and Germany) or the U.S., the introduction of a value-based threshold at EU level would potentially cut into the competence of the Member States. This might undermine a well-modulated balance of responsibilities and lead to a case-allocation which may be arbitrary. Reforms in Austria and Germany will likely catch a number of additional cases per year (and also increase the number of candidates for upward referral to the Commission). In addition, depending on the specific criteria in the threshold, it might lead to uncertainties where a filing has to be undertaken. The Tech Group therefore urges the Commission to coordinate their potential legislative proposal closely with the Member States. The Commission should continue to promote convergence and alignment in merger review and not distort this overriding goal with a reform that further hinders the successful and seamless case allocation under the current EUMR.

8. In that same vein, the Tech Group is concerned that the introduction of a value-based EUMR threshold would lead to a requirement to notify transactions that are entirely or largely **extraterritorial** in effect and capture transactions that have little if any EU impact. Deals whose focus is Asia or Latin America will be subject to EU review. The delays already entailed in notifying no-impact JVs caught by parental revenue thresholds will be extended to a raft of similar no-impact transactions. Challenges of obtaining information or market testing with entities far outside the Commission's enforcement jurisdiction will arise. There will be far better placed regulators to review such deals, if a review at all is appropriate. It is fundamental to public international law that "the application of EU law presupposes an adequate link to the EU territory."[2] Territorial nexus is a central tenet of ICN best practice.[3]

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[2] Case C‑413/14 P Intel Corporation Inc. v Commission ECLI:EU:C:2016:788. Advocate General Wahl, paras. 283-284 ("[M]utual regard to the spheres of jurisdiction both of the European Union and of concerned third States, or comity, suggests that restraint is called for in asserting extraterritorial jurisdiction. Unsurprisingly, the European Union itself opposes the extraterritorial application of the laws of third States when it considers doing so to be unlawful. That having been said, a

But none is apparent from this proposal. Rather it risks an arms race of extraterritorial overreach as third state authorities arrogate to themselves jurisdiction to review EU to EU deals. Any revision to the EUMR must accordingly require the notification only of transactions with a **very clear nexus to the EU** in order to justify Commission review. Any nexus requirements must be based on straightforward and objective criteria to ensure legal certainty. It is unclear how the Commission would solve this as it seems difficult to articulate an appropriate local nexus for targets that do "not yet generate any or only little turnover". The criteria suggested by the Commission for consideration (Question 22) do not solve these problems. None identify a local nexus that would justify EU review:

a. A focus on worldwide turnover - whether in aggregate or just one of the parties - simply exposes large acquirers to merger control for any acquisition, whether or not it has any meaningful EU nexus.

b. A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned would arbitrarily expose acquirers with substantial revenues in the EU to merger control with any acquisition.

c. A maximum target revenue test is similarly arbitrary. That the target has sales in Asia or Latin America says nothing about its EU presence.

d. A ratio between transaction value and target worldwide turnover is equally meaningless. If the transaction's value relates to assets for example in Vietnam, Israel or Brazil, why should the EU be engaged?

As a consequence, the Tech Group fears that a value-based EUMR threshold would capture many potential acquisitions but would not constitute a reliable means to target cases that require intervention by the Commission.

9. **Difficulties in determining the threshold value:** As US experience shows, calculating transaction value can be difficult. For companies targeted by this proposal - those with little or no turnover - consideration is often in stock and involves consideration elements that may (or may not) be paid depending on performance in time periods that may end years after the transaction closes. Requiring notifications based on unknown and unknowable future events would contravene recommended ICN practices as notification thresholds should be based on information that is readily accessible to the merging parties.[4] In addition, the value of publicly traded companies is volatile and exposed to market circumstances and therefore a less reliable proxy for market impact than turnover thresholds. Valuations are highly subjective and prices paid may be driven by externalities that are not related directly to the target. And they will by no means indicate whether the transaction in question will have an impact on any markets in the European Union.

10. **Negative impact on investment and innovation**: The Commission should recognize that the incentive for innovation may be motivated by the prospect of respective yields. An increased regulatory burden in the form of a fully-fledged merger control procedure based on the Form

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survey of the case-law of the Court reveals that the application of EU law presupposes an adequate link to the EU territory. That way, the basic principle of territoriality under public international law is observed.").

[3] See http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf, Part I "Nexus to Reviewing Jurisdiction".

[4] See http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf, Part II. "Notification Thresholds" under C.

CO, with its time-consuming and burdensome information requests, may have a chilling effect on such investments and hamper the development of technological innovation in the European Union. At the very least, the Commission should fully assess the impact of a potential new threshold on such innovation - as well as M&A activity in general in the tech sector.

Conclusion

11. The Tech Group welcomes the Consultation and the opportunity to join the debate. A robust empirical assessment is needed before reform can take place on the issue of a new EUMR threshold.

12. The Tech Group would welcome another consultation by the Commission in case the Commission decides to make more specific suggestions to amend the EUMR thresholds.