

ECIS' input on the European Commission's ("EC") public consultation on the "Evaluation of procedural and jurisdictional aspects of EU Merger Control"

1. Introduction

Issues about data – for example customer lists and purchase histories – have been relevant to competition authorities for decades. But various technological developments have led to rather revolutionary changes in the amount and kinds of data that can be gathered and the ways in which that data can be analysed and used. So the era of so-called Big Data is likely to present new competition law issues. But we are fairly close to the beginning of the road of assessing how Big Data may raise competition concerns. Having massive quantities of data and even achieving a great advantage in data scale does not inherently yield dominance or give rise to incentives to preserve that dominance through anti-competitive conduct. Nor would the acquisition of a "data rich company" necessarily lead to dominance or significantly impede competition.

2. Merger control and data

There is a need to distinguish between two issues: (i) whether the existing Merger Regulation thresholds should be modified to require notification of data-driven acquisitions that are currently not subject to review by the EC, and (ii) the assessment of potential harm to competition in cases that are subject to merger control (either under the existing thresholds or some new ones meant to capture more data-related deals).

At the beginning of October the EC launched a public consultation on the possibility of changing the existing Merger Regulation's purely turnover-based notification thresholds. Some have suggested that the purely turnover-based thresholds do not necessarily capture some transactions that could raise serious competition concerns. For example, an innovative target with little or no income could be a tempting acquisition, especially if the acquirer can combine the target's assets with its existing assets – perhaps including data – in a way that yields a competitive advantage – or, if by acquiring the target, an existing large market player can avoid disruption of the market by an innovative new competitor.

Potentially, the acquisition by an existing large player of another company with little current revenue but large quantities of unique data that is not easily replicable could establish barriers to entry and establish or maintain a dominant position.

In theory, acquiring a company with these kinds of assets might result in "*a significant impediment of effective competition*" even though the company's turnover might not be high enough to meet the Merger Regulation thresholds. Nevertheless, one should be cautious about making changes to the merger notification thresholds. It is important to

find the right balance in order only to cover mergers that could have potentially negative effects on competition without making life harder for innovative startups.

One key question is whether there really is any evidence that potentially anti-competitive transactions are falling through the cracks. Some suggest that Facebook's acquisition of WhatsApp in 2014 presented an example of a gap in the Merger Regulation. Facebook paid USD 19 billion for a company with 600 million customers, but the merger did not need to be notified to the EC, because WhatsApp's turnover was too low. Other than *Facebook/WhatsApp*, which is not necessarily the best example of a case proving a need to change the EU thresholds, because the case was ultimately referred to the EC by the national competition authorities of three Member States, there seem to have been no cases suggesting there is such a need. As such, there does not seem to be any concrete experience demonstrating that the jurisdictional rules should be changed in order to look beyond turnover as a means to identify whether or not a merger should be notified.

3. Conclusion

Many data-related antitrust questions and interesting debates are still to come. Some instances might arise where data and scale will give rise to competition problems, but every situation will have to be addressed on its own facts. There is at this point no evidence that supports the case for merger thresholds to be changed at EU level and this actually may impede innovation for start-ups and acquirers if introduced.