

European Commission Fines Facebook €10 Million for Providing Misleading Information

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On May 18, 2017, the European Commission (the “Commission”) fined Facebook €10 million for providing incorrect or misleading information during its 2014 investigation of its acquisition of WhatsApp.¹ The magnitude of the fine dwarfs the few penalties the Commission has imposed in the past for similar infractions and, as Commissioner Vestager made clear, “*sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information.*”

I. The EU Merger Regulation

The EU Merger Regulation empowers the Commission to fine companies for providing incorrect or misleading information.² That power has been used only rarely since the entry into force of the EU Merger Regulation in 1990.³ Prior to the Facebook decision, the largest fine imposed by the Commission for providing incorrect and misleading information amounted to only €50,000. In 2004, the EU Merger Regulation was revised, *inter alia*, to increase the level of fines that could be imposed from a maximum of €50,000 to 1% of a company’s global revenues. Until the Facebook decision, the Commission had not fined a company under the 2004 EU Merger Regulation.

¹ Commission Press Release IP/17/1369 of May 18, 2017.

² Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, January 29, 2004. Article 14(1) empowers the Commission to impose fines of up to 1% of an undertaking’s aggregate turnover where that undertaking intentionally or negligently supplies incorrect or misleading information.

³ See *Sanofi/Synthelabo*, Case COMP/M.1543, Commission decision of July 28, 1999 (Commission fined Sanofi €50,000); *Deutsche Post/trans-o-flex*, Case COMP/M.1610, Commission decision of December 14, 1999 (Commission imposed two fines of €50,000 each on Deutsche Post); *KLM/Martinair III*, Case COMP/M.1608, Commission decision of December 14, 1999 (Commission fined KLM €40,000); *Anheuser-Busch Incorporated - Scottish & Newcastle*, Case COMP/IV.34237, Commission decision of December 14, 1999 (Commission fined Anheuser-Busch and Scottish & Newcastle €3,000); and *Mitsubishi Heavy Industries*, Case COMP/M.1634, Commission decision of July 14, 2000 (Commission fined Mitsubishi, a third party, in relation to the *Ahlström/ Kvaerner* transaction, Case COMP/M.1431, Commission decision of September 7, 1999).

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II. Facebook/WhatsApp

In August 2014, Facebook notified its then-proposed acquisition of WhatsApp under the EU Merger Regulation. (Because the transaction did not meet the EU Merger Regulation's jurisdictional thresholds, but was instead reportable at the national level in three EU countries, Facebook had successfully petitioned the Commission and Europe's national competition agencies to cede jurisdiction to the Commission.)

One of the questions under investigation by the Commission was whether the combination of Facebook users' accounts with WhatsApp users' accounts would "*shield the merged entity from competition from new and existing consumer communications apps.*"⁴ In addressing that question, Facebook was asked whether it could automatically match its users' accounts with WhatsApp users' accounts. In its Form CO notification, and subsequently in response to a Commission information request, Facebook told the Commission that automatic user matching was not possible.⁵ The Commission subsequently approved the transaction unconditionally in November 2014.⁶

In August 2016, following the implementation of the transaction, WhatsApp announced updates to its terms of service and privacy policy, including the possibility to link WhatsApp users' phone numbers with Facebook users' identities. The Commission subsequently opened an investigation and determined that Facebook had been aware of the possibility to merge user accounts at the time of the 2014 investigation. Facebook's statements during that investigation about the impossibility of automatically matching user accounts had therefore been incorrect or misleading and, in these circumstances, the Commission determined that Facebook had been "*at least negligent*" in making incorrect statements on a matter relevant to the Commission's investigation.

The fine imposed by the Commission is striking, not only because of its magnitude (Commissioner

⁴ *Facebook/WhatsApp*, Case COMP/M.7217, Commission decision of October 3, 2014, paragraph 135.

⁵ Commission Press Release IP/17/1369 of May 18, 2017.

⁶ *Facebook/WhatsApp*, Case COMP/M.7217, Commission decision of October 3, 2014.

Vestager described it as "*proportionate and a deterrent*"⁷), but also because the Commission recognized that the incorrect statements made by Facebook had not impacted the outcome of its 2014 investigation (as the Commission had carried out an "even if" assessment that assumed the possibility of user matching). Also, Facebook acknowledged during the infringement proceedings that it had provided misleading information in the initial investigation, and the Commission was therefore able to conduct its investigation more efficiently. The Commission took account of that cooperation in setting the level of the fine and decided against revoking the 2014 clearance decision and conducting a new review, as it could have done under the EU Merger Regulation.⁸

III. Implications

The fine imposed on Facebook is significant. It underlines the Commission's increasing determination to enforce its procedural rules vigorously and to discipline companies that do not observe those rules. A number of other cases concerning alleged "gun jumping" and other procedural infractions are under investigation by the Commission.⁹ General Electric is reportedly under scrutiny for allegedly providing incorrect information in connection with its recent acquisition of LM Wind Power¹⁰ and, on May 19, 2017, the Commission sent Allice a statement of objections alleging "gun jumping" in connection with its 2015 acquisition of PT Portugal.¹¹

In light of the Commission's increased readiness to enforce its procedural rules and to impose significant fines for infractions of those rules, merging parties will need to take even greater care to ensure that

⁷ Commission Press Release IP/17/1369 of May 18, 2017.

⁸ Article 8(6)(a), EU Merger Regulation.

⁹ See: "EU's competition watchdog says a few merger candidates may have misled," March 27, 2017, at <http://www.euronews.com/2017/03/27/eus-competition-watchdog-says-a-few-merger-candidates-may-have-misled>.

¹⁰ See: "GE Faces Probe for Misleading EU Over \$1.7 Billion Deal," at

<https://www.bloomberg.com/news/articles/2017-05-22/ge-said-to-face-probe-for-misleading-eu-over-1-7-billion-deal>.

¹¹ Commission Press Release IP/17/1368 of May 18, 2017.

information and explanations provided to the Commission under the EU Merger Regulation are correct and complete. This will be particularly challenging in those increasingly common cases where the Commission send lengthy information requests or requires the production of large volumes of internal documents under tight deadlines.

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