

The Consumer Voice in Europe

EU MERGER CONTROL

BEUC's comments on jurisdictional thresholds



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Why it matters to consumers

Consumer welfare in the Single Market depends on the existence of competitive markets. Market concentration resulting from mergers could restrict choice and lead to higher prices. Therefore, the European Commission and competition authorities must be equipped with the necessary tools to assess possible anticompetitive effects of corporate reorganisations. The current EU rules based on turnover thresholds are insufficient to allow the European Commission (DG Competition) to assess important mergers between companies whose assets are based on consumer data. This has the potential to harm consumers who are not only greatly exposed to unfair business practices based on the use of these large amounts of data but also lead to fewer choices among digital services since data concentration could raise barriers to new companies to innovate and enter markets already dominated by few online players.

Summary

BEUC welcomes the European Commission's consultation on procedural and jurisdictional aspects of EU merger control.

The current system based on turnover thresholds does not cover situations of corporate reorganisation that could affect competition in the Single Market due to the transfer of high-value assets (such as Intellectual Property Rights or consumers' data).

Additionally, the current rules have proved to be insufficient to scrutinise mergers in two-sided markets e.g. payment card schemes, social networks or auction sites. This is especially true for mergers between companies providing digital services which do not meet the turnover threshold but would nevertheless impact competition due to the number of consumers affected.

Therefore, BEUC suggests to add two new criteria to the jurisdictional rules of the EU Merger Regulation, namely:

- The transfer of value given by the amount of the operation and,
- The number of consumers directly impacted by the operation in two-sided markets.

These two new criteria would provide the necessary flexibility to scrutinise mergers which could impact competition in the Single Market as well as prevent that the concentration of data by few companies is used unfairly against consumers.

Finally if the European Commission decides to introduce new rules for jurisdictional threshold, BEUC recommends that there is a mid-term evaluation about the number of mergers that have been scrutinised under each jurisdictional threshold.

1. Introduction

Merger control plays a fundamental role to ensure that corporate reorganisation does not lead to market concentration restricting consumer choice and boosting prices.

During the last decade, an increasing number of acquisitions by internet giants has raised serious competition concerns.

For example, Apple has acquired over 80 companies (many of them US-based companies) but only one merger was scrutinised by DG Competition¹. Similarly, during the last two decades Google (today Alphabet) bought almost 200 companies and only 3 operations were scrutinised by DG Competition. It is worth noting that in the Google/DoubleClick case² DG Competition assessed the merger not because of its Union dimension (based on turnover thresholds) but because the concentration qualified for review under the national competition laws of at least three Member States (point 7). This is the same situation as with the acquisition of WhatsApp by Facebook³.

It is worrisome that due to the current jurisdictional thresholds of Article 1 of the EU Merger Regulation some of these merger operations did escape the oversight of DG Competition despite their eventual anti-competitive effects.

Against this background, merger control as an ex-ante measure is essential to anticipate problems arising from market concentration that would impact directly consumers who could see less choices available in the market and higher prices. In the so-called “zero price” markets, there is a risk that mergers involving lots of consumer data could lead to less consumer choice or lower quality products. For examples this would happen if the merged company would no longer need to differentiate themselves from competing businesses based on the security or privacy features of their services or products.

Additionally, data concentration increases the risks that companies will unfairly use consumers’ data and eventually breach data protection and consumer laws as seen in the recent cases brought by BEUC members UFC-Que Choisir (France)⁴ and Verbraucherzentrale Bundesverband (Germany)⁵.

2. Why the single criterion of turnover is problematic?

If a merger has a Union dimension the concerned party has the obligation to notify it to DG Competition to be cleared before implementation.

For the time being the only criterion under EU law to define the “Union dimension” is the turnover of the merging companies according to article 1 of the EU Merger Regulation⁶.

The turnover threshold criterion has been useful to scrutinise operations between companies with an important presence in the Single Market. However, it has failed to address corporate reorganisations of companies acquiring high-value assets in the form

¹ M7290 Apple / Beats

² M4731 Google / Doubleclick

³ M7217 Facebook / WhatsApp

⁴ Ref.: <https://www.quechoisir.org/action-ufc-que-choisir-donnees-personnelles-l-ufc-que-choisir-attaque-les-reseaux-sociaux-et-appelle-les-consommateurs-a-garder-la-main-sur-leurs-donnees-n11951/>

⁵ Ref.: <http://www.vzbv.de/pressemitteilung/vzbv-verklagt-whatsapp-verbraucher-muessen-hoheit-ueber-daten-behalten>

⁶ Council Regulation (EC) No 139/2004

of Intellectual Property Rights or involving the transfer of a client base which do not (immediately) translate into an increased market turnover⁷.

This situation poses problems from a consumer perspective. There is no assessment of the potential negative effects on competition if a company acquires such high-value assets or a database of customers' information.

In the network economy, platforms are essential for the functioning of the market but their turnover can easily be below the EU thresholds. Payment cards are a classic example. In this case, the role of the platform is to organise a transfer of funds of the payment from the payer to the payee. Card payments represent a huge market in value, but the platform as such i.e. the card scheme receives only a very small fraction of the amount of the transactions. Thus, the turnover corresponding to the platform facility is usually very low.

For example, in the nineties 3 international payment schemes existed in the EU: Visa, MasterCard and Eurocard. In 1992, MasterCard bought Eurocard, the only European scheme. DG Competition was not able to assess this merger due to the lack of competence based on the undertakings' turnover. As a result, only two payment networks remain active in Europe leading to a number of competition problems reflected in the increase of multilateral interchange fees or abusive terms imposed on retailers by the payment providers.

Two-sided markets⁸ are not a new issue in competition policy. But this concept has gained importance due to the development of digital services which are based on intermediary platforms. There are various examples across different sectors including auction platforms, transportation services, etc. Platforms often ask a fee from their users for providing the intermediation service but sometimes these fees are paid by one category of users (e.g. a third party providing a service) and not by the other (e.g. a consumer).

Therefore, the low level of turnover is not representative of the company's activities in the platform economy. Mergers falling in this category could easily escape the European Commission's scrutiny. For example, under the current EU rules DG Competition would not have had competence to look into the Facebook/WhatsApp acquisition if not because of the voluntary notification by Facebook under article 4(5) of the EU Merger Regulation⁹.

The merger was notified to the European Commission based on the fact that the operation was capable of being reviewed under the national competition law of three member states (point 10 of the decision). The two companies decided to ask to the European Commission to deal with the case and the concerned Member States did not oppose to it (point 12). This file became an EU investigation only due to the decision of the parties.

The case of Facebook/WhatsApp is a very good example of how big data can have significant effects on a two-sided market. By aggregating the huge amount of data handled by WhatsApp, the merger gives a competitive advantage to Facebook. Even if there is some duplication between Messenger and WhatsApp activities, it is in the other features of Facebook (such as advertising and social networking) where consumers' data

⁷ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, paragraph 24

⁸ Defined as markets where firms have to compete simultaneously for two groups of customers. For example, in auctions sites like eBay it would be sellers and customers and in transportation services like uber it would be drivers and customers.

⁹ As indicated in the public version of the decision by the European Commission, this merger does not have a Union dimension within the meaning of article 1(2) and 1 (3) of the EU Merger Regulation (point 9) because the WhatsApp turnover was too low.

could strengthen the position of Facebook vis-à-vis competitors and other online service providers.

Big data in itself cannot be an objective criterion for determining EU competence. However, data has a very crucial role in the digital economy. It is a very valuable asset. Even if services are presented as “free” to consumers, their data is being monetised for example by means of behavioural advertising. Therefore, it is important to find a way by which companies benefiting of these new resources could be captured by the EU control on mergers.

3. New criteria: value of the transaction and number of consumers affected by the merger

BEUC suggests to add two new criteria to the jurisdiction rules on merger control based on the value of the transaction and the number of end-consumers which are directly impacted by the merger.

3.1. Value of the transaction

Certain mergers consist in the transfer of high-value assets such as Intellectual Property Rights and client data bases. Under certain conditions, these mergers should be scrutinised under the EU rules even if they do not meet the EU turnover thresholds.

In Germany a proposal for a reform of the jurisdictional rules of the German merger control (Section 35 of the Act Against Restraints on Competition¹⁰) follows this logic and introduces a threshold of 400 million EUR for the value of the operation combined with an additional requirement based on the companies’ turnover in Germany¹¹. This is an innovative solution that would allow to scrutinise mergers involving companies with low annual turnovers which could raise competition concerns. This is an important element to take into account in corporate restructuration across sectors and is not exclusively relevant for digital markets.

A similar concept could be introduced in EU Law in order to capture high-value transactions between companies that would not meet the requirements of the turnover thresholds but could nevertheless risk distorting competition in the Single Market.

The transfer of value could be set up in the region of [1,000 million EUR – 2,000 million] EUR of the transaction. This figure could be estimated by using as a variable the average European Union GDP.

The use of the GDP as a base to approximate the value threshold of the EU could an adequate first approach as it uses the proportion of the Economic activity as base for its estimation.

For example, the 400 million EUR value threshold for the German market could be used as a basis for calculating an adequate value threshold. Our suggestion employs the relation of the GDP of EU 28 and Germany for estimating an adequate value threshold for the EU. In simplified terms the logic of the calculation looks like:

¹⁰ *Gesetz gegen Wettbewerbsbeschränkungen* - “GWB”

¹¹ The additional requirement is that the combined worldwide turnover of all companies is above 500 million EUR and in Germany at least one company has a turnover of 25 million Euros.

$$EU \text{ transfer value threshold} = National \text{ transfer value threshold} \times \frac{EU \ 28 \ GDP}{National \ GDP}$$

To avoid bias due to yearly fluctuations in the GDP we employ the average relation of the GDP of the EU 28 and the GDP of Germany over the past five years. The average relation between the GDP of the EU 28 and Germany over the past five years (4.83) is multiplied with the proposed 400 million EUR value threshold of Germany (compare Figure 1). As a result, the proposed value threshold for the EU would be 1.9 billion EUR.

Figure 1
Estimation value threshold for Merger Regulation of the European Union

UNIT	Current prices, million euro					
NA_ITEM	Gross domestic product at market prices					
GEO/TIME	2011	2012	2013	2014	2015	Average 2011-2015
European Union (28 countries)	13.192.520,4	13.448.619,5	13.558.617,4	14.001.004,1	14.710.625,9	
Germany (until 1990 former territory of the FRG)	2.703.120,0	2.758.260,0	2.826.240,0	2.923.930,0	3.032.820,0	
Relation GDP EU28/DE	4,880479	4,87576207	4,79740482	4,78841973	4,85047774	4,838508673

DE_Value Threshold (in million EUR as proposed by draft law in Germany)	400
Suggested EU28 Value Threshold (in million EUR) = 400m EUR + 4,838508673	1935,40

Source: Own calculation, Eurostat, main tables:
<http://ec.europa.eu/eurostat/web/national-accounts/data/main-tables>

3.2. Number of consumers affected

In two-sided markets the value of transfer criterion might not be the only and most suitable approach to cover transactions with a Union dimension.

This is because in two-sided markets the margins are often very low except for big companies in a dominant position. Hence the transaction value even if reflecting the market power could be below the EU threshold.

Additionally, in a two-sided market, the purchasing company might decide on an acquisition because of the other company's position in *one* side of the market, e.g. the consumer side, and this might not necessarily be reflected in the value of the transaction. Consequently, BEUC suggests to introduce a criterion applicable to mergers in two-sided markets based on the number of EU consumers directly impacted by the operation.

This criterion would kick-in when the previous conditions, namely the value of the transaction and the companies EU turnover threshold, are not met. However, the merger would nevertheless need to be approved by the European Commission due to the number of EU consumers affected.

These directly impacted customers would be those that have a direct or indirect contract with one of the companies at a certain date. This contract could be of different nature including subscriptions to services and tacit agreements based on the use of the service e.g. search engines. In the case of a two-sided market with several layers such as in the payment sector, the platform has no direct contract with the consumers but an indirect contract through the bank for the use of the platform.

This criterion could follow the same logic as article 1(3) of the EU Merger Regulation and includes two figures: one for the combined merger and one for each company. In this sense, the figures for the combined merger could be established according to the EU population e.g. between 5 and 10%. The figure for each country could be one quarter of the previous, as in the article 1(3).

This criterion is objective and not related to the market share which is based on more subjective criteria because there is a need for an agreement on the definition of the market.

It is also necessary to draw a distinction between consumers directly impacted (e.g. in Facebook / WhatsApp) and mergers where the impact is indirect because they occur in upstream markets. In the latter case (for example when a food producer purchases one of its providers) there is no link between the consumer and the producer even if at the end of the process the consumer will purchase the product. Thus, this criterion might not be always applicable.

Finally, if the European Commission decided to introduce new jurisdictional thresholds, we suggest to include a mid-term evaluation of the number of mergers that have been thrusted under each jurisdictional threshold – and which have not been scrutinised – to better assess the effectiveness of the new systems.

BEUC's recommendation

The EU Merger Regulation should include in its rules on jurisdiction two additional criteria based on the value of transfer and, in case of two-sided markets, on the number of consumers affected by the operation. This would allow DG Competition to consider mergers between companies that do not reach the turnover thresholds but nevertheless have the potential to disrupt competition due to the number of consumers that will be aggregated by the purchasing company.



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