



FINAL REPORT OF THE HEARING OFFICER¹

CASE M.8228 – FACEBOOK / WHATSAPP

- (1) The present report concerns a draft decision (the ‘Draft Decision’) for adoption under Article 14(1)(a) and (b) of Council Regulation (EC) No 139/2004² (the ‘Merger Regulation’). The Draft Decision concludes in essence that, by supplying ‘at least negligently’, in the context of Case M.7217 – *Facebook/WhatsApp*, incorrect or misleading information in (i) the notification of a proposed concentration pursuant to Article 4 of the Merger Regulation (the ‘Notification’) and (ii) a response to a request for information under Article 11(2) of that regulation, Facebook Inc. infringed, in particular, Article 14(1)(a) and (b) respectively of the Merger Regulation. The Draft Decision is addressed to Facebook Inc. and Facebook Ireland Limited (together, ‘Facebook’).
- (2) Case M.7217 – *Facebook/WhatsApp* concerned a proposed concentration (the ‘Transaction’) whereby Facebook Inc. would acquire sole control over WhatsApp Inc. (‘WhatsApp’). By decision dated 3 October 2014, the Commission authorised this transaction pursuant to Article 6(1)(b) of the Merger Regulation. The Transaction was closed on 6 October 2014.
- (3) On 30 June 2016, Facebook Inc. submitted to the Commission a paper that referred to certain planned product improvements stated to rely ‘on a form of user matching between Facebook and WhatsApp that was not widely available in 2014’.
- (4) On 28 July 2016, the Commission requested information from Facebook and WhatsApp by way of decision pursuant to Article 11(3) of the Merger Regulation. Among other things, the recitals to this decision indicated that the Commission was concerned that Facebook Inc. might have supplied, intentionally or negligently, incorrect or misleading information in the Notification and in response to a request for information, dated 18 September 2014, regarding the possibilities of user matching between Facebook and WhatsApp. Facebook responded to this request for information by letter dated 3 August 2016, supplemented by the provision of internal documents on 8 and 12 August 2016.
- (5) On 11 August 2016, the Commission addressed to Facebook a second request for information pursuant to Article 11(2) of the Merger Regulation, to which Facebook responded on 16 August 2016.

¹ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 (‘Decision 2011/695/EU’).

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

- (6) On 7 September 2016, Facebook submitted a paper to the Commission that summarised Facebook's previous submissions and set out Facebook's position on whether it had provided misleading information to the Commission.
- (7) Facebook responded on 19 and 24 October 2016 to a third request for information, dated 3 October 2016.
- (8) By means of a letter dated 29 September 2016 and a state-of-play meeting held on 15 December 2016, the Directorate-General for Competition ('DG Competition') kept Facebook informed of its ongoing investigation, for which a new case file (M.8228) had been created, containing correspondence in the context of Case M.7217 between (i) the Commission's services and (ii) Facebook and/or WhatsApp.
- (9) On 20 December 2016, the Commission addressed a statement of objections to Facebook (the 'SO'). In the SO, the Commission expressed its preliminary assessment that in Case M.7217 – *Facebook/WhatsApp*, Facebook Inc. intentionally or at least negligently supplied incorrect or misleading information in (i) its notification submitted pursuant to Article 4 of the Merger Regulation and (ii) a response dated 23 September 2014 to a request for information made on 18 September 2014 pursuant to Article 11(2) of the Merger Regulation. The SO also expressed the Commission's preliminary view that fines ought to be imposed on Facebook Inc. in accordance with Article 14(1)(a) and (b) of the Merger Regulation.
- (10) At Facebook's request, DG Competition twice extended the period for responding to the SO.
- (11) On 14 March 2017, Facebook submitted its written comments on the SO. These comments were submitted in the context of a cooperation process and contingent upon certain conditions set out in the comments themselves. In its written comments, Facebook acknowledged that it had, in the course of Case M.7217, provided to the Commission information that was incorrect or misleading and that its conduct was negligent. In its written comments, Facebook also indicated its intention not to seek an oral hearing or access to the Commission's file.
- (12) The Draft Decision indicates, among other things, that the cooperative behaviour shown by Facebook in the course of Case M.8228 can be considered as a mitigating factor in the determination of the amount of fines.
- (13) I have not received any request or complaint in relation to this procedure.
- (14) In accordance with Article 16 of Decision 2011/695/EU, I have examined whether the Draft Decision deals only with objections in respect of which Facebook has been afforded the opportunity of making known its views. I conclude that it does.
- (15) Overall, I consider that the effective exercise of procedural rights has been respected in this case.

Brussels, 12 May 2017

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